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Civil Partnership: Your Questions Answered - A Comprehensive Analysis of the Civil Partnership Bill

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Civil Partnership:

Your Questions Answered

A comprehensive analysis of the Civil Partnership Bill



Dr. Fergus Ryan

Head, Department of Law, Dublin Institute of Technology

Notes

This paper addresses the likely consequences of the Civil Partnership Bill 2009 once it is enacted into law. It addresses, furthermore, the Bill as 'initiated', in other words, before either Dáil or Seanad Éireann have considered its measures. Specific provisions of the Bill may be changed during the passage of the Bill through either House.

While every effort has been made to ensure the accuracy of this paper, the author disclaims any responsibility for any errors or misstatements.

Where views are expressed in this paper, they are solely those of the author, and should not necessarily be attributed to any other person or organisation.

I welcome feedback, comments and suggestions at fergus.ryan@dit.ie

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Foreword

I would like to thank Dr. Fergus Ryan for producing such a thorough and detailed analysis of the Civil Partnership Bill. We are sure that this professional and expert analysis will make an important contribution to clarifying the scope and provisions of what is a complex and lengthy piece of legislation.

We hope that it will be useful to lesbian and gay people in understanding the scope of the Bill and the extent of the rights and responsibilities proposed.

Kieran Rose, Chair of GLEN,

August 2009

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1. Introduction and Context

1.1 Overview and Purpose of this Paper

The Civil Partnership Bill 2009 was published June 26, 2009. While it is not yet law, its implementation will make profound changes to the law as it affects same-sex couples. It will also make other significant changes to the law applying to unmarried, unregistered cohabiting couples, both of the same sex and of the opposite sex (though these reforms will be more limited than those applying to civil partners).¹

The provisions of the Civil Partnership Bill 2009 are significant and extensive, particularly when compared to the current state of Irish Family Law. Arguably, the Bill represents the most far-reaching reform of family law in a generation.

The Bill proposes to reshape considerably the landscape of Irish family law. Irish family law as currently constituted is significantly out-of-step with the reality of family life in modern Ireland. In particular, the current law makes minimal provision for the increasing number of families not based on the institution of marriage, and makes next to no provision for families led by same-sex couples.

The provisions of the Bill are complex and intricate. The Bill as initiated is 118 pages long, and contains 206 separate sections and a detailed Schedule with five

¹ Reform of this area of the law has been recommended in a number of reports. These include the Equality Authority, *Implementing Equality for Lesbians, Gays and Bisexuals*, (Dublin, 2002) www.equality.ie, Ronayne and Mee, *Partnership Rights of Same-Sex Couples*, (Dublin, Equality Authority 2000) www.equality.ie, Law Reform Commission, *Consultation Paper on the Rights and Duties of Cohabitees*, LRC-32-2004 (Dublin: LRC, 2004) www.lawreform.ie and the *The Rights and Duties of Cohabitants*, LRC-82-2006, (Dublin: Law Reform Commission, 2006), Ó Cinnéide, Equality Authority/Equality Commission for Northern Ireland, *Equivalence in Promoting Equality*, (Dublin/Belfast, 2005) www.equality.ie, Walsh and Ryan, *The Rights of De Facto Couples*, (Dublin: IHRC, 2006), Irish Council for Civil Liberties, *Equality for all Families* (Dublin: ICCL, 2006) and the Working Group on Domestic Partnership, *Options Paper*, (Dublin: Department of Justice, Equality and Law Reform, 2006). The All-Party Oireachtas Committee on the Constitution, *Tenth Progress Report: The Family*, (Dublin: The Stationery Office, 2006) also recommended a limited form of a civil partnership.

separate parts. The Bill, moreover, seeks to amend over 130 separate (and often complex) pieces of legislation that confer rights or place obligations on spouses. The broad effect of these amendments is to provide equivalent protection for civil partners, and to a lesser extent to provide for cohabitants.

This paper aims to clarify the main points of the legislation, addressing the rights, duties, immunities and powers of those who enter into a civil partnership. It addresses, in particular, the legal consequences of civil partnership. It also, separately, deals with the consequences for cohabitants who are not eligible for, or choose not to enter into a civil partnership.

1.2 When will this Bill become law?

A Bill is a proposal for legislation. It may be introduced in either Dáil Éireann or Seanad Éireann, the two Houses of the Oireachtas (National Parliament). Any member of the Oireachtas may introduce a Bill. In the specific case of the Civil Partnership Bill 2009, the Bill has been introduced by the Minister for Justice, Equality and Law Reform, a member of the Government.

Until a Bill is passed by both Houses of the Oireachtas² and signed by the President, it remains a proposal for legislation, and does not have legal effect. Once the President signs the Bill, the Bill comes into force on such day or days as will be designated by the Minister for Justice, Equality and Law Reform. It is possible that different provisions in the Bill will come into force on different dates. Some delay may be necessary in order to allow various state agencies (such as the Civil Registration Office and the Courts Service) to put in place measures to facilitate the celebration and recognition of civil partnerships, as well as civil partnership dissolutions.

² In the alternative, it may be deemed to have been passed under Article 23 of the Constitution, where it is passed by the Dáil but opposed by the Seanad. In such a case, the Dáil may deem the measure to have been passed by both Houses, after a 90 day delay, notwithstanding the Seanad's objections.

While a Bill can take several months and sometimes years to pass through both Houses of the Oireachtas, the Government has indicated that it hopes the Bill will be tabled in the Autumn of 2009, and that it will be passed by December 2009.

It is worth bearing in mind that the Bill is based on a detailed Scheme published in June 2008. Some considerable work has already been undertaken in drawing up the original Scheme for the Bill and in converting the Scheme into a Bill over the course of the intervening year. This being the case, it is evident that the Bill has been well prepared for a relatively prompt passage through the Oireachtas, though clearly this will depend on the extent to which the Government prioritises the Bill.

1.3. Broadly, what does the Bill propose?

The Bill proposes the introduction of *two separate schemes*:

- (a) A civil partnership registration scheme confined to same-sex couples
- (b) A 'presumptive'³ cohabitation scheme for unmarried, unregistered cohabitants, whether of the same sex or the opposite sex (provided they are not close relatives).

These two schemes are quite distinct and should not be confused. The first applies only to same-sex couples who register their civil partnership under the Bill. By contrast, the second applies to unregistered, unmarried couples, both of the same sex and of the opposite sex. Both schemes, however, share an important feature: the parties must not otherwise be closely related to each other. Brothers and sisters, for instance, or uncles and nieces cannot become either civil partners or cohabitants under the legislation.

Civil partnership, therefore, is entirely separate from the cohabitation scheme also proposed by the 2009 Bill. While civil partnership applies only to people of

³ 'Presumptive' in this context means that the law presumes something to be the case, based on the circumstances of the parties rather than their express agreement. In this case, the law is conferring certain rights and obligations on parties whether or not they have agreed to these rights and obligations.

the same sex (who are not close relatives) who register their relationship, the cohabitation scheme introduced in Part 15 of the Bill applies to all cohabitants whether of the same sex or of the opposite sex (provided they are not already married to each other or registered as each other's civil partners, and provided they are not close relatives).

While the first of these schemes – civil partnership itself – is the more significant in terms of the rights and obligations conferred, potentially it is the second 'presumptive scheme' that will impact on the greater number of people. The 2006 census estimated that there are over 120,000 cohabiting couples in the State, about one-third of whom have dependent children residing with them. Thus while the Bill has profound implications for same-sex couples who choose to enter into a civil partnership, it is also of importance to a significant constituency of families not based on marriage.

1.4 Generally, what is the current state of the law as it applies to unmarried and same-sex couples?

As the law currently stands (i.e. in the absence of civil partnerships and cohabitant recognition proposed in this Bill) couples who are not married to each other have minimal rights, privileges and obligations. This remains the case regardless of the length of their relationship. Put at its simplest, a couple who are not married to each other are largely treated as strangers in law. In fact, the legal rights and obligations of a non-marital couple differ only marginally from those that would be conferred on flatmates not cohabiting in an intimate relationship.

Thus, at the moment, legal recognition of non-marital relationships is largely non-existent. Although some specific rights and entitlements have been extended to unmarried couples, these entitlements are confined to very specific and limited areas such as domestic violence and wrongful death. Even where such reforms have been enacted in favour of non-marital couples, they have often been worded with the intention of extending such rights and obligations only to opposite-sex couples, thus apparently excluding same-sex couples. (This is the

case, for instance, with the right to succeed to a residential tenancy, which is extended to opposite-sex but not same-sex couples).⁴

This lack of legal recognition is felt most acutely in the most stressful of times – when a relationship breaks down and/or when a partner is incapacitated or dies. In such cases, unmarried partners currently enjoy little or no legal protection. For instance, as the law currently stands, if an unmarried partner dies without making a will, the survivor can make no claim against the deceased's estate. If their relationship breaks down, the partners cannot seek maintenance from each other (though a child can always seek maintenance against a parent, even if his parents are not married to each other). A person who has lived in the house of a partner without making any contributions towards its purchase will have no claims against the property, and will not be able to block any sale, mortgage or lease in respect of the property.

1.5 Generally, how will the introduction of the Bill change the law for civil partners?

The proposals in this Bill will, if enacted, change the law profoundly. Civil partners will be entitled to seek maintenance (financial support) from each other during the currency of their relationship. As is the case with married couples, the shared home of the couple cannot ordinarily be sold, leased or mortgaged by one civil partner without the consent of the other civil partner. On the legal dissolution of a civil partnership, the former civil partners will be entitled to seek orders relating (amongst other things) to financial support and the ownership of property, as well as various important remedies relating to succession and pension entitlements. On the death of either partner, the surviving civil partner will be entitled to claim from the estate of the deceased in a manner similar to the entitlements enjoyed by widows and widowers.

⁴ Walsh and Ryan, *The Rights of De Facto Couples*, (Dublin: IHRC, 2006) point out that such discrimination infringes the European Convention on Human Rights – while the law may distinguish between married and unmarried couples, it cannot treat unmarried opposite-sex couples differently from unmarried same-sex couples.

Civil partners will be entitled to seek relief for domestic violence and wrongful death of a civil partner in the same manner as spouses. An employer as well as a provider of goods or services will not be permitted to discriminate against a person because they are or were a civil partner. For the purpose of determining eligibility for a pension, moreover, civil partners will be treated in a manner identical to the treatment of a husband and wife of the holder of pension entitlements.

For the purpose of determining whether a person has a conflict of interest or must disclose certain financial or other interests, a person with a civil partner will be treated the same as a married person. Similarly, the Bill amends over 130 pieces of legislation in such a way as to require civil partners to be treated, for the purposes of those Acts in a manner identical to spouses.

1.6 How does civil partnership differ from marriage?

The rights and obligations conferred by civil partnership are in most cases the same as or very similar to those rights and obligations that apply to married couples. Indeed, the Civil Partnership Bill is modelled on (and is in most cases identical to) several pieces of legislation that apply only to married couples, for instance, legislation relating to maintenance, succession, the family home and divorce.

Some critical differences do, however, arise. These relate mainly to the relationship between a civil partner and her partner's children, a relationship which is not generally acknowledged for the purpose of the Bill. There are some key differences also in the grounds for dissolution and annulment of a civil partnership when compared with those grounds applying to marriage. These matters are discussed in further detail below.

1.7 Generally, how will the introduction of the Bill change the law for cohabitants?

The rights and obligations of unregistered cohabitants, though more limited than those of civil partners, are significant. A 'cohabitant' is a person living in an "intimate and committed relationship" with a person who is not that person's spouse or civil partner. Cohabitants may be of the same sex as each other or of the opposite sex, though they may not be close relatives. Cohabitants generally will be recognised for a variety of purposes, including domestic violence legislation, wrongful death and succession to residential tenancies.

Special rules apply to couples who are deemed to be 'qualified cohabitants', that is, where they have lived together for at least three years, or two years if they have had a child or children together. A qualified cohabitant who is financially dependent on his or her cohabiting partner may seek a variety of remedies if their relationship ends or if one of the partners dies. These include orders for compensatory maintenance (financial support), for property adjustment and for the adjustment of pension entitlements. A qualified cohabitant may also seek provision from the estate of a deceased partner, provided certain conditions are met. The right of a qualified cohabitant to seek maintenance or a property or pension adjustment order may be waived (given up) by written agreement between the cohabitants.

1.8 Conclusion

Full equality undoubtedly demands equal access to civil marriage. This Bill, however, represents a robust and comprehensive step in the right direction. Both practically and symbolically, these measures will (if implemented) represent real and substantial progress in the recognition and protection of non-traditional families. This is not to underestimate, however, the drawbacks in the Bill, most notably the apparent reluctance to tackle the rights and responsibilities of same-sex couples who co-parent children. While some improvements could certainly be made (and have been suggested here and elsewhere), the Bill is undoubtedly significant and substantial.

2. Eligibility for Civil Partnership

2.1 Am I eligible for Civil Partnership?

In order to enter into a Civil Partnership, the two parties must be aged 18 or over. They must be of the same sex, though it is not necessary that the parties be gay or bisexual. Neither person may be a party to an already existing civil partnership or marriage. Furthermore, the parties may not be closely related. For instance, a man may not enter into a civil partnership with his father, uncle or grandfather (amongst others). With the exception of the requirements as to the sex of the parties, these requirements are largely identical to those applicable in the case of marriage.

2.2 We are opposite-sex partners. Can we enter into a civil partnership in preference to marriage?

It is important to note that civil partnership is confined to couples of the **same sex**. While it is not necessary that the civil partners be gay or bisexual, the partners must be of the same sex. Opposite sex couples may, of course, marry (provided they are not already closely related or in another subsisting marriage or civil partnership with other people). They may also be recognised as cohabitants and qualified cohabitants for the purpose of Part 15 of the Bill.

2.3. I am a transgendered person. Can I enter into a civil partnership?

A person who is transgendered, whether pre-operative or post-operative, may enter into a civil partnership with a person of the same legal sex.

Correspondingly, a transgendered person may marry a person of the opposite legal sex.

'Legal sex' for this purpose generally is taken to mean the sex of the person as designated at the time of that person's birth. Unfortunately, as Irish law currently stands, a person's transgendered status is not yet recognised in law. Effectively, the law looks to the biological sex of the person *when they were born*. If a person when born had the anatomical, chromosomal and gonadal (i.e. testes or ovaries) features of one sex, a subsequent reassignment of anatomical gender will not currently be recognised as legally changing the gender of the person for the purpose of marriage or civil partnership.

This non-recognition has been deemed by the Irish High Court to be in breach of the European Convention on Human Rights.⁵ Nonetheless, while the State now recognises gender reassignment for certain purposes (including the issuing of passports⁶), it is not recognised for the purpose of determining eligibility to marry. While the Bill is silent on this point, it is likely that a person will currently be recognised as being of the anatomical sex to which they were born.

This means, for instance, that a transgendered person who has transitioned from male to female ('MTF') may marry a person born biologically a female. Similarly, a person who has anatomically transitioned from male to female, will be able to enter into a civil partnership (but not a marriage) with a person born biologically male. In both cases, the anatomical transition is not legally recognised, and the person remains of the legal sex to which they were born.

The Bill does not address the consequences of an anatomical reassignment subsequent to entering into civil partnership. It is likely, though not certain, that such reassignment would not invalidate the civil partnership. This issue and others strengthen the case for the speedy adoption of comprehensive legislation providing for gender recognition, as has occurred in the United Kingdom (and indeed in virtually every other Council of Europe state).

⁵ See *Foy v. An tArd-Chláraitheoir & Ors.*, Unreported, High Court, 19th October 2007, [2007] IEHC 470 which followed the decision of the European Court of Human Rights in *Goodwin v. United Kingdom* (2002) 35 EHRR 18. In *Foy*, McKechnie J. handed down a declaration to the effect that the non-recognition of gender reassignment in respect of Dr. Lydia Foy, a male to female transgendered person, was in breach of the European Convention on Human Rights. Nonetheless, pending legislative amendment, the law still does not generally recognise gender reassignment for the purpose of determining legal sex in respect of marriage.

⁶ Passports Act 2008, section 11.

2.4 Is it possible for close relatives or siblings to enter into a civil partnership?

As with marriage, it is not possible for people who are already closely related to each other within prescribed 'prohibited degrees' to enter into a civil partnership. For instance, a woman may not enter into a civil partnership with her grandmother, mother, sister, aunt or grandaunt, niece or grandniece, daughter or granddaughter. (Similar provisions apply to men.) Relationships in the half-blood (e.g. where the parties share one parent in common rather than two) are treated in the same manner as full-blood relationships (where the parties share both parents in common). Likewise, adopted children are treated in much the same way as biological children, such that a man cannot enter into a civil partnership with his adoptive father.⁷ As with marriage, however, there appear to be no restrictions on civil partnership where one of the parties was a foster-child of the other party, or of the other party's biological parents. Nor are first cousins prevented from entering into either a marriage or a civil partnership with each other.

The prohibited degrees for civil partnership are in most (though not all) cases similar to those applying to married couples. While a person may marry a grandparent's brother or sister, or a grandnephew or niece, a civil partnership is not possible where such relationships exist. Both the Law Reform Commission⁸

⁷ It is evident that the Civil Partnership Bill 2009 is somewhat clearer on this point than analogous legislation applying to marriage. The Bill states that "...all the relationships [set out in the table of prohibited degrees for civil partnership] include relationships and former relationships through adoption." (Emphasis added). This appears to treat people related through adoption in a manner similar to those related by blood. In relation to marriage, the situation is less clear and probably deficient. The Adoption Act 1952, Section 24, stipulates that on adoption, the adopted child "...shall be considered with regard to the rights and duties of parents and children in relation to each other as the child of an adopter or adopters, born to him, her or them in lawful wedlock". Shatter, (in *Family Law*, (Dublin: Butterworth's 1997) at 4.06, p. 156) suggests that this section affects only the legal relationship of the child and adoptive parent and not that between the child and other members of the adoptive parent's family. Therefore, while an adopted child could not marry an adoptive parent, he contends that it is "doubtful" whether the law prohibits the marriage of an adopted child and the natural child of his or her adoptive parents. Both the Law Reform Commission (LRC-9-1984) and the Inter-Departmental Committee on Reform of Marriage Law (Discussion Paper No. 5, September 2004) have recommended that, for marriage, a statutory ban on marriage should be introduced between a child adopted by a parent and the parent's natural child. It has also been recommended that such a ban should subsist even where an Adoption Order no longer has legal effect.

⁸ LRC-9-1984

and the Inter-Departmental Committee on the Reform of Marriage Law⁹ have recommended that a person should not be allowed to marry a grandparent's brother or sister, a grandnephew or a grandniece, though as the law stands at the moment there is no legal prohibition on such marriages. It is unclear why this restriction should be extended to civil partnerships and not to marriages.

2.4.1 Can I enter into a civil partnership with my former wife's father?

It is not immediately clear from the legislation whether relationships between people formed through prior marriages (or indeed prior civil partnerships) are also within the prohibited degrees for the purposes of civil partnership. The analogous rules relating to marriage prohibit marriage not only between parties who are related by blood (these are called relationships of 'consanguinity') but also between parties who are related by a prior marriage (these are called relationships of 'affinity'). The Marriage Act 1835, section 2, renders a marriage void when it is contracted between persons within both the prohibited degrees of consanguinity *and* those based on affinity.¹⁰ Thus, for instance, a man may not marry his former wife's daughter or mother, (though he may marry her sister, even after divorce¹¹).

The Civil Partnership Bill is silent on this point. Absent a specific provision, it is very unlikely that a prior civil partnership would create a relationship of affinity so as to prevent a subsequent marriage. Where the parties are already related through marriage, on the other hand, the position is less clear, though it seems that people already related by marriage are not prevented from entering into a civil partnership. On its face, the table of prohibited relationships for civil partnership makes no mention of people related through marriage. This contrasts with similar tables for marriage that do specifically make such reference.¹²

⁹ Discussion Paper No. 5, September 2004

¹⁰ Notably, the 1835 Act does not itself set out the prohibited degrees, which are detailed in the Marriage Act 1537 (as amended). These proscriptions are in turn based on biblical proscriptions set out in the Book of Leviticus. See Lev. 18:6 and 18: 16-18.

¹¹ See the Deceased Wife's Sister's Marriage Act 1907 (a man may marry his deceased wife's sister) and the Deceased Brother's Widow's Marriage Act 1921 (a woman may marry her deceased husband's brother). In *Maura and Michael O'Shea v Ireland*, *Irish Times Law Reports*, unreported, High Court, November 6, 2006, Laffoy J. ruled that the former legal restriction on a woman marrying her divorced husband's brother was unconstitutional.

¹² See for instance the tables outlined in the report of the Inter-Departmental Committee on Reform of Marriage Law, *Discussion Paper No. 5*, (September 2004) pp. 13-15.

Likewise, the Bill makes no reference to legislation that has amended the prohibited degrees of marriage as they relate to affinity (e.g. allowing a man to marry his deceased brother's wife). This appears to suggest that the drafters of the Bill did not intend to transpose into civil partnership law the rules of affinity relating to marriage.

It is arguable that the rationale for preventing the marriage of people related through marriage (namely the avoidance of intra-familial discord), applies equally to civil partnership and people related through civil partnership. That said, both the Law Reform Commission¹³ and the Law Reform Committee of the Law Society of Ireland¹⁴ have recommended that restrictions on marriage founded on affinity should be abolished. Additionally, in the United Kingdom many of the restrictions on marriage between people already related through another marriage have been abolished (though restrictions still apply in the UK where the parties have previously lived together and one party has been *in loco parentis* in respect of the other party.)

In other words, the general trend is to move away from the prohibitions based on affinity. In this regard, the Civil Partnerships Bill may be more in step with current best practice than the law relating to marriage.

2.5 Can I be a party to marriage and a civil partnership at the same time?

A person who is already married to one person cannot simultaneously enter into a civil partnership with another person. Likewise, a person who is a civil partner cannot marry or enter into another civil partnership with a third party. A person may, however, enter into a new civil partnership or marriage where a previous marriage or civil partnership has previously been annulled or dissolved by a court.

¹³ Law Reform Commission, *Report on Nullity of Marriage*, (LRC 9-1984) (October 1984)

¹⁴ Law Society of Ireland, *Nullity of Marriage: the Case for Reform*, (Dublin: Law Society of Ireland, 2001)

2.6. Is there a residence requirement for civil partnership?

There is currently, in the Bill, no residence requirement for civil partnership. Provided the parties meet the relevant notice requirements (see 3.1 below), it is not necessary that they live in Ireland or any part of Ireland. In particular, there is nothing preventing holidaymakers from coming to Ireland in order to contract a civil partnership (though to fulfil the notice requirements, either a long holiday or multiple visits will be required).

There is, however, a proposal in the Immigration, Residence and Protection Bill 2008 seeking to place restrictions on the marriage of certain non-EU nationals in Ireland. Section 126 of the Immigration Bill would prevent a marriage from being validly contracted in such a case unless (a) three months' notice of the marriage has been given to the Minister for Justice, Equality and Law Reform and (b) the non-EU national has received ministerial permission to enter Ireland in order to marry, or otherwise holds a residence permission.¹⁵ The General Scheme of the Civil Partnership Bill suggested that these restrictions would apply also to civil partnerships, though there is no mention of this matter in the Civil Partnership Bill itself.

¹⁵ These restrictions would not apply to a person who has established a right to be in Ireland under the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006), the European Communities (Aliens) Regulations 1977 (S.I. No. 393 of 1977) or the European Communities (Right of Residence for Non- Economically Active Persons) Regulations 1997 (S.I. No. 57 of 1997). This would apparently include a person who is already married to or in a durable relationship with an EU national.

3. Procedures for entering into a Civil Partnership

The procedures for entering into a civil partnership are substantially the same as those that apply to marriage. The main difference is that while either a marriage registrar or a religious minister may ‘solemnise’ a marriage, civil partnerships may only be celebrated in the presence of a civil registrar, namely a registrar of marriages and civil partnerships.

3.1 What must we do prior to entering a civil partnership?

First, the couple must give at least three months’ written notice of their intention to enter into a civil partnership. Both intending civil partners must deliver this notice, in person, to any registrar of marriages and civil partnerships. Effectively, this is the same official who celebrates civil marriages. Furthermore, at least five days prior to the ceremony, the intending civil partners must attend at the office of the same registrar and make a declaration to the effect that there is no legal impediment to the registration of their civil partnership. These notice requirements are identical to those that apply to parties wishing to marry. Failure to give advance notice, as required, will render the civil partnership invalid and of no legal effect.

In exceptional cases, the Circuit or High Court can lift the requirement for three months’ notice, allowing the parties to enter into a civil partnership without giving three months’ notice. As with marriage, the notice requirement may only be waived (i.e. lifted) where there are “serious reasons for the exemption” and where the court considers that the exemption is in the interests of the intending couple. Such reasons may include the fact that either party or a close relative is seriously

ill, and may not survive three months, or where a party is due to be posted abroad for an extended period of time, e.g. as a UN peacekeeper.

Once these preliminaries are completed, the registrar will issue a 'civil partnership registration form'. This is valid for six months from the date of issue.

3.2 Once notice is given, and we receive our civil partnership registration form, what must we do in order to give effect to the civil partnership?

In order for the civil partnership to come into effect, the parties must sign the registration form and make certain declarations. Ordinarily this must occur in public, before a registrar and at least two witnesses. In order for the civil partnership to be formalised, the parties must sign the civil partnership registration form in the presence of the registrar and two witnesses aged 18 or over. The parties must also each make a declaration stating that:

- a. He or she knows of no impediment to the civil partnership registration,
- b. He or she intends to live with and support his or her partner, and
- c. That he or she accepts the other partner as a civil partner in accordance with the law.

These declarations are similar to those made by married persons, although the second declaration ((b) above) is novel and is not currently required of marrying couples. Little turns on this distinction – married couples are in law required to support each other, and unless legally separated are generally required to cohabit.¹⁶

It is not immediately clear from the legislation whether the declarations must be made orally, or whether the parties may make the declarations in writing, by signing a document to the effect that they accept the declarations. Section 59D(5) appears to imply that the oral reading of declarations is optional, though the point is unclear.

¹⁶ That said, while married couples are theoretically obliged to live together, this obligation is effectively unenforceable. It is likely that the like provision relating to civil partners will also be unenforceable.

3.3 Will there be a ceremony?

The registration form must be signed and the declarations must be made in a public place, in the presence of the registrar and at least two witnesses. Otherwise, it is not strictly necessary that there be any formal ceremony. In theory, the parties could simply sign the register, make the required declarations and do nothing else. It is necessary, however, that the parties sign the register and make the declarations **in public**, usually at a registry office though other approved venues may be used. The only exception to the requirement of a public registration is where one of the parties is too ill to attend a public venue.

The Bill does, however, make provision for a ceremony, if the parties so choose. The Bill indicates that the parties may, before signing the registration form, take part in a public ceremony (though this is optional). Such a ceremony would include the parties orally making the above-mentioned declarations. The form of ceremony must be approved by an tArd-Chláraitheoir (the Head of the Civil Registration Service), and if it takes place, must take place in public in the presence of the registrar and the parties' two witnesses.

3.4 Where does the ceremony take place?

Ordinarily, the ceremony must take place in public (though an exception may be made if one of the parties is too ill to do so). While the ceremony may take place in a marriage registry office, the parties are free to choose alternative venues, subject to the approval of the Health Service Executive. It is likely that such venues will be the same as or similar to those which are approved for the celebration of a marriage. (Though see the point below regarding churches as venues).

3.5 Can we celebrate our civil partnership in a church?

A civil partnership may only be celebrated in the presence of a civil registrar. There is no provision in the Bill for registration in the presence of a religious minister.

It is important to note that the Bill makes provision only for a *civil* ceremony. While the ceremony may take place in any approved venue, it is unclear whether a church would be approved for such a purpose. It is likely that the State would be reluctant to approve religious venues, given the civil nature of the ceremony. It is unlikely that it would be considered appropriate for a civil ceremony to be celebrated in a religious venue. There is, however, nothing in the Bill or in law precluding a separate church ceremony or blessing for the partners (though, likewise, there is nothing in the Bill that would *require* a church to facilitate such a ceremony).

3.6 When can the ceremony take place?

As discussed above, at least three months' notice must be given to the civil registrar. Additionally, the ceremony must take place within six months of the issuing of the civil partnership registration form. Otherwise, there are no specified restrictions on the timing of the ceremony, though this must be agreed in advance with the registrar.

3.7 Can someone (e.g. my mother or ex-boyfriend) object to the civil partnership?

Any person may lodge a written objection to a pending civil partnership, though only on the ground that there is a legal impediment to the registration, and not otherwise. In other words, the objection must be based on a claim that the civil partnership would not be legally valid because the legal requirements for civil partnership have not been met. The objection must be raised before the civil partnership is contracted.

Where an objection is lodged, An tArd-Chláraitheoir (the Head of the Civil Registration Service) will investigate the objection. Pending his or her determination, the civil partnership cannot proceed. If it is discovered that there

is a legal impediment, the civil partnership cannot proceed. If, on the other hand, the objection is not upheld, the civil partnership can proceed as normal.

In all cases, the intending civil partners have the right to be notified of the objection. An objection that is upheld may be appealed to the Circuit Court.

3.8 My partner does not speak English. Can we enter into a civil partnership?

Provision is made for the translation of the registration documents and declarations so that an intending civil partner who does not speak English will be able to understand these documents and declarations.

3.9 Can we keep our civil partnership a secret?

While provision is made for a civil partnership to be registered otherwise than in public, this may only occur with the approval of an tArd-Chláráitheoir (the General Registrar) or of a superintendent registrar for marriages and only where a party's illness prevents the celebration from taking place in public. The civil partnership will also be recorded in an official register to which the State and the public will ordinarily have access. The Bill also proposes that notice of intention to enter into a civil partnership may be publicised in a prescribed manner. (Provision is made, however, to ensure that the PPS numbers of the partners are not made available to the public.)

Symbolically, the celebration of a civil partnership in public is significant. Given the traditional culture of silence and scorn in relation to issues of homosexuality and bisexuality, and the closeted situation of many gay and bisexual people, now and in the past, it is clearly of great symbolic importance that ceremonies of civil partnership are publicly accessible and publicly acknowledged.

3.10 My same-sex partner and I got married in Spain. Will our marriage be recognised in Ireland?

It is likely that a Spanish same-sex marriage will be recognised as a *civil partnership* in Ireland. The married couple will have the same legal rights and obligations as Irish civil partners. Pending the recognition of same-sex marriage in Ireland, however, it is unlikely that the couple would be recognised as legally married in Ireland. The High Court in *Zappone and Gilligan v. Revenue Commissioners*¹⁷ ruled that a foreign same-sex marriage would not be recognised as a marriage in Ireland, though this decision is currently on appeal to the Supreme Court.

Section 5 of the Bill allows the Minister for Justice, Equality and Law Reform to designate certain classes of legal relationships between same-sex couples recognised by a foreign state, requiring that the parties to such relationships be treated as civil partners under Irish law. It is for the Minister to determine precisely what those classes of legal relationships will be. That said, the Bill requires that any recognised class of legal relationship must:

- (a) Be exclusive
- (b) Be permanent (unless dissolved by a court)
- (c) Be between persons who are not closely related (i.e. within the prohibited degrees discussed above at 2.4)
- (d) Be registered in line with the legal requirements set out by the law of the state where the legal relationship is contracted, and
- (e) Confer rights and obligations that are sufficiently similar to those conferred on civil partners in Ireland, such that the relationship would be treated comparably to an Irish civil partnership.

Considering these criteria, it is more than likely that a same-sex marriage celebrated (for instance) in Spain, the Netherlands, Belgium, Norway, Sweden, Canada, Iowa, Massachusetts, Connecticut, Vermont or South Africa will be

¹⁷ High Court, Dunne J, 14 December, 2006

designated as conferring on the married couple the rights of civil partners. Similarly, it is more than likely that a UK civil partnership will be recognised.

It is important to note that no class of legal relationship will *automatically* be recognised. Formal legal recognition will depend instead on the passing by the Minister of secondary legislation in the form of a statutory instrument designating the classes of legal relationship to be recognised. It is also important to note that even where the foreign legal relationship is not confined to same-sex couples, the parties will only be treated as civil partners in Ireland if they are of the same sex.

3.10.1 Which classes of foreign legal relationships are likely to be recognised?

In the United Kingdom, similar legislative provisions allow for the recognition of overseas relationships. Currently, the following classes of legal relationship are explicitly recognised as having the same effect as a civil partnership (see figure overleaf):

Fig. 1, Schedule 20, Civil Partnership Act 2004 (UK) (as amended)

Andorra	Unió Estable de Parella
Australia: Tasmania	Significant Relationship
Belgium	Cohabitation Légale (statutory cohabitation)
Belgium	Marriage
Canada	Marriage
Canada: Nova Scotia	Domestic Partnership
Canada: Quebec	Civil Union
Denmark	Registret Partnerskab (registered partnership)
Finland	Rekisteröity Parisuhde (registered partnership)
France	Pacte Civile de Solidarité (PACS/civil solidarity pact)
Germany	Lebenspartnerschaft (life partnership)
Iceland	Staðfesta Samvist (confirmed cohabitation)
Luxembourg	Partenariat Enregistré or Eingetragene Partnerschaft
Netherlands	Geregistreerde Partnerschap (registered partnership)
Netherlands	Marriage
New Zealand	Civil Union
Norway	Registret Partnerskap (registered partnership)
Spain	Marriage
Sweden	Registret Partnerskap (registered partnership)
USA: California	Domestic Partnership
USA: Connecticut	Civil Union
USA: Maine	Domestic Partnership
USA: Massachusetts	Marriage
USA: New Jersey	Domestic Partnership
USA: Vermont	Civil Union

Even if they are not explicitly recognised, other legal relationships may be recognised in UK law, on a case-by-case basis, provided they meet the general

conditions set out in Part 5, Chapter 2 of the Civil Partnership Act 2004.¹⁸ Since the latest amendment of Schedule 20 (the list set out above) same-sex civil marriage has been introduced in Connecticut, Iowa, Vermont, Norway, Sweden and South Africa, while various civil partnership/civil union registration schemes have been introduced in (for instance) the Czech Republic, Slovenia, Switzerland, and Uruguay, as well as several other US States and Australian territories.

Schedule 20 of the UK Act (as amended) may be useful as a guide to the type of legal relationship that may also be recognised in Ireland. Nonetheless, UK law provides no guarantee as to the classes of legal relationship that will be recognised in Ireland. It is also important to note that UK law allows a non-designated relationship (i.e. a class of legal relationship that has not been specifically recognised in legislation) to be treated as a civil partnership regardless of the lack of formal designation (though conditions do apply). In Ireland, by contrast, it appears that a relationship will only be treated as a civil partnership if it has been *explicitly* designated for recognition in a statutory instrument enacted by the Minister. It is arguable that the extraordinary pace of change worldwide militates in favour of a general provision for recognition of civil partnerships and marriage, as is the case in the UK.

3.10.2 My same-sex partner and I entered into a civil partnership in Denmark in 2003. Will my civil partnership be recognised as valid with effect from 2003?

A foreign legal relationship will only be recognised with effect from (at the earliest) 21 days after the Minister designates the class of legal relationship in question. If the parties enter into a legal relationship later than this date, their relationship will only be recognised from the date their actual legal relationship is contracted.

Therefore, even if the parties entered into a Danish civil partnership in 2003, it will only be recognised for the purposes of Irish law from a date 21 days after the

¹⁸ These conditions are similar to those set out in section 5 of the Bill for the recognition by the Minister of foreign relationships.

Minister recognises Danish civil partnerships generally i.e. prospectively and not retrospectively.

It does not appear to be possible to give retrospective effect to the foreign registration. It will only be treated as a civil partnership with effect from, at the earliest, 21 days after the Ministerial order providing for recognition. For instance, a couple who enter into a civil partnership in Northern Ireland in 2005 will only be recognised as civil partners with effect from the a date 21 days after the Minister provides for recognition of UK civil partnerships.

3.10.3 I entered into a Danish civil partnership in 2002, but my civil partner sadly passed away in 2004. Am I entitled to be treated as a civil partner for the purpose of, say, the widow's pension?

Unfortunately, the Bill is unclear on this point. Section 5 appears to indicate that a person who has entered into a civil partnership abroad will only be regarded as a civil partner prospectively and not retrospectively. This means that, looking at the example above, it would not be possible to claim that the parties were legally entitled to be treated as civil partner at the specific time of death.

This may prove problematic in a number of cases. If a piece of legislation is amended to confer a right or entitlement on a surviving civil partner, it is possible that, absent clarification, that entitlement will only be conferred where the person would have been recognised as a civil partner or former civil partner at the time of death.

The Social Welfare (Consolidation) Act 2005, for instance, does not define a widow or widower except to say that these terms include divorced spouses as well as those still married at the time of the spouse's death. Thus, it is unclear whether that Act requires that the person be recognised as married person or divorced at the time of death. The issue simply does not arise, though presumably if the marriage had been void, the survivor would probably not be entitled to any pension.

If the widow's/widower's pension and like entitlements are extended to civil partners, it would thus be important to define a surviving civil partner in such a way as to ensure that a person whose legal relationship would have been recognised had both partners survived, will also be entitled to claim the pension and other entitlements. If such provision is made, however, it is unclear whether the entitlement would be backdated. In other words, would the surviving civil partner be entitled to relief from the date of death or only from the date on which the class of foreign legal partnership is first recognised by the Minister? The greater likelihood is that the effect of any such recognition would be prospective only.

3.11 If I enter into a civil partnership in Ireland, when does it take effect?

A civil partnership celebrated in Ireland is deemed to take effect from the point in time when the parties have made the required declarations and the parties, the registrar and their witnesses have signed the civil partnership registration form. Once these formalities have been complied with, the parties will be deemed to have all the rights and obligations of civil partnership.

This is slightly different from the point at which a marriage takes effect, though the difference is arguably of theoretical relevance only. The parties to a marriage are deemed to be married to each other when both of them have made the required declaration in the presence of each other, the registered solemniser and the two witnesses that they accept each other as husband and wife.

4. The rights and obligations of civil partners.

Once a civil partnership is celebrated, the civil partners will enjoy a substantial range of legal rights and entitlements. It is important in this regard to stress that the civil partners will also have significant legal *obligations* to each other that heretofore have not been recognised in Irish law. It would be wise to make oneself aware of these right and obligations prior to entering into a civil partnership, as they can have significant implications for the civil partners, particularly in cases of death and relationship breakdown.

4.1 The Shared Home

The dwelling in which civil partners reside is termed the 'shared home'. The Civil Partnership Bill will prevent a civil partner from agreeing a unilateral conveyance (e.g. a sale, lease or mortgage) of the shared home without the prior written consent of the other civil partner.

4.1.1 What kind of dwelling qualifies as a shared home?

The definition of a 'dwelling' for this purpose includes a building or part of a building (e.g. an apartment). Also included are vehicles such as a mobile home, as well as a vessel such as a barge or a boat, in which the civil partners cohabit. Notably, a dwelling will be treated as a shared home if the civil partner who is not a party to the relevant conveyance formerly resided in the property before leaving the other civil partner. In other words, if the civil partners are separated, the dwelling will be a shared home if the civil partner whose consent is required lived there at some point in the past.

The definition of a shared home is also deemed to embrace a garden or yard, if any, attached to the home. The definition also includes any other land occupied with the building, that is subsidiary or ancillary to it and required for its amenity or convenience. Land used primarily for commercial purposes, however, such as a farm or a business premises, will generally not be deemed part of the shared home.

4.1.2 What happens if my civil partner sells the shared home against my wishes?

The measures relating to a shared home mirror those of the Family Home Protection Act 1976, which applies to the family home of spouses. Basically, a civil partner cannot sell, lease, mortgage or otherwise convey a dwelling (or a part of a dwelling) that is his and his partner's shared home, without obtaining the prior written consent of his civil partner. Any conveyance of a part or all of the shared home made without the prior written consent of the other civil partner will generally be void, i.e. of no legal effect. These rules apply whether or not the civil partner who is not involved in the conveyance of the shared home has a legal or beneficial interest in that property. In other words, the party whose consent is required does not need to own the property, provided he or she lives there or has lived there in the past.

4.1.3 Is my consent required in all cases?

Consent will not be required, however, where the transaction is a joint transaction entered into by both civil partners (e.g. where they are joint owners). Additionally, a court will be able to dispense with consent where it is established that consent is being unreasonably withheld. Before it does so, however, the court will have to be satisfied that suitable alternative accommodation is available to the civil partner whose consent is normally required.

4.1.4 I have a child. Will her needs be considered in determining whether to dispense with consent?

As discussed above, a civil partner cannot dispose of an interest in the shared home without the consent of the other civil partner. A court may dispense with

such consent. In determining whether to dispense with the consent of the non-disposing partner for this purpose, the court is required to have regard to “the respective needs and resources of the civil partners”. Where alternative accommodation is offered, the court may have regard to the suitability of that accommodation having regard to the respective degrees of security of tenure in the shared home and in the alternative accommodation.

By contrast with the Family Home Protection Act 1976, however, no reference is made to the needs of any children of the non-disposing partner, or indeed of either civil partner. Theoretically this means, for instance, that the court might deem alternative accommodation available to the non-disposing partner as suitable for the civil partner alone even if it is not suitable for the accommodation of a parent with children. In other words, the section theoretically permits the court to make a determination independent of the context of parenthood and child-rearing responsibilities.

The omission of any express mention of the children of either or both parties may mean that the court’s determination could technically ignore the presence of these children. Theoretically, this could mean that a court could make a determination to dispense with the consent of the non-disposing partner where alternative accommodation is suitable for a civil partner living on her own, but not for a civil partner with children. For instance, a one-bedroom apartment in a city-centre location may be suitable as alternative accommodation for a childless civil partner, but may not be suitable for a civil partner rearing young children.

Arguably, when assessing the needs of the non-disposing civil partner, a pragmatic court should take into account the context in which that civil partner finds herself. This would include whether he or she is raising children. Nonetheless, the Bill as framed ring-fences the civil partners such that considerations relating to persons other than the partners technically do not feature.

A pragmatic interpretation of ‘needs’ of each civil partner could, of course, include an assessment of the context of the partner’s living arrangements, including that he or she is raising children. That said, the Family Home Protection Act 1976

makes explicit mention of the requirement to consider the needs of children in this context. The omission of a similar provision in relation to a shared home in the Civil Partnership Bill will possibly result in serious detriment to children being reared by civil partners.

4.1.5 My civil partner has removed all of the furniture from our house and refuses to pay the bills. What can I do?

It will be possible for a court to restrain a civil partner who is behaving in a manner likely to cause the loss of the home, or to make it uninhabitable. This may arise, for instance, where a civil partner refuses to pay the mortgage or utility bills. Where a civil partner has behaved in such a manner, a court may take action to restrain the partner in order to protect the shared home. In extreme cases, such action may include transferring the property to the other civil partner. A court may also take action to prevent the disposal of household goods, where such disposal will render the shared home substantially uninhabitable. For instance, a civil partner may be restrained from removing furniture, bedding, washing machines, cookers and other white goods from a home, if this removal makes the shared home uninhabitable.

4.2 Maintenance

4.2.1 What is Maintenance?

‘Maintenance’ is another word for financial support for a spouse,¹⁹ civil partner or biological child. Husbands and wives are generally required to support each other financially. An identical obligation will be placed on civil partners.

As the law stands at the moment, husbands and wives may be required by a court to pay a sum or sums of money to support each other financially. Likewise, a child (whether or not its parents are married to each other) is entitled to seek financial support from each of its parents until he or she reaches the age of 18 (or 23, if still in full-time education).²⁰

¹⁹ Readers may be more familiar with the US term ‘alimony’ meaning financial support for a child.

²⁰ A maintenance obligation of indefinite duration applies to parents where a child is 23 or over and disabled to a point where he or she is unable to live an independent life.

This does not necessarily mean that a spouse or child is automatically entitled to a sum of money. It is unlikely, for instance, that a person with independent income equivalent to that of her spouse will be granted maintenance.

Nonetheless, if one spouse is in need and the other spouse has sufficient resources to meet that need, it is likely that a court will order maintenance in favour of the spouse in need.

4.2.2 In what circumstances will civil partners be entitled to Maintenance?

Under the Bill, it is proposed that a similar obligation will be placed on civil partners, such that civil partners may be ordered by a court to maintain each other financially. Such an order may be made even while the couple continues to cohabit – it is not necessary that the couple have first separated.

In order to receive court-ordered maintenance, the recipient must show that his civil partner has failed to provide such sums of maintenance as the court considers proper in the circumstances. A maintenance order typically takes the form of an instruction requiring periodical payments to be made to the recipient. This means that the intended recipient will be entitled to receive sums of money at periodic intervals, e.g. once a week or month. There is no set or standard amount of maintenance. The exact amount awarded and the specific arrangements for payment will depend on the respective needs and resources of the parties.

Technically, a maintenance order is never deemed to be final or permanent. In particular, an order may subsequently be varied or discharged, in particular if the circumstances of the parties change.

4.2.3 What factors will the court consider in deciding whether I receive maintenance, and how much?

In determining whether to make a maintenance order, and how much to award, the court has to take account of the income and resources of both civil partners, as well as their individual needs. The court must also have regard to the financial

and other responsibilities of both partners including each partner's obligations to any former spouse or civil partner.

Although the legislation does not require a person to maintain the biological child of his civil partner, the court is also required to take into account the financial responsibilities of a civil partner to his or her own biological child. In other words, while the Bill does not allow a court to order a person to maintain a child who is not his or her biological child, the court is required, in setting maintenance for a civil partner, to have regard to the responsibilities of that civil partner towards his or her biological child.

4.2.4 My civil partner has been ordered to pay maintenance, but so far I've received nothing. What can I do?

Enforcement is often a key problem in cases where maintenance is ordered. The legislation provides, however, for the 'attachment' of the earnings of the person against whom the order is made. This allows the court to draw the maintenance direct from the wages or salary of the person who is required to pay maintenance. It is then paid through a District Court clerk to the intended recipient. This can only happen, however, where the person required to pay maintenance is an employee and not where he or she is self-employed. An attachment of earnings order, moreover, will be made subject to a 'protected earnings rate' below which maintenance cannot be deducted from the maintenance payer's salary. (This is designed to provide a minimum level of income to the maintenance payer net of maintenance.)

The Bill does not, however, provide for periodical payments to be secured, or for lump sum payments to be ordered instead of periodical maintenance. Legislation relating to married couples and children does provide such remedies. (Sections 41 and 42 of the Family Law Act 1995) These are particularly useful remedies where the maintenance debtor (the person who is required to pay maintenance) is dragging his or her feet, and not paying maintenance on time. There is clearly every good reason to extend these mechanisms to civil partners, with a view to ensuring greater compliance with maintenance orders.

4.2.5 Can we simply agree on our own maintenance arrangements?

Subject to an important caveat, there is nothing in the Bill preventing two civil partners from making their own maintenance arrangements. In particular, it is reasonably common in a marital separation agreement to make provision for the maintenance of one of the spouses.

Indeed, the Bill expressly provides for the possibility of making agreed maintenance arrangements a 'rule of court'. This allows an agreement as to maintenance to be treated as if it were a court order, thus making it easier to enforce such an agreement.²¹ This would suggest that generally agreements may be made providing for maintenance to one or other civil partner.

4.2.6 Can we agree to opt out of the maintenance requirements in the Bill?

It is *not* possible, however, to waive or give away one's right to seek a court order for maintenance. As is the case with married couples, a provision in any agreement between civil partners that seeks to exclude or limit the right to seek court-ordered maintenance will be void and of no legal effect. Such voidness, however, only affects the specific provision seeking to oust the right to seek court-ordered maintenance. The remainder of any such agreement will not be affected and will remain legally operative (though only to the extent that it does not attempt to exclude the right to seek a maintenance order).

4.3 Rights on the death of a partner

One of the most tragic features of the law as it currently stands is that, unless a person makes a will, their non-marital partner has no right to claim from his estate. As such, it should be the priority of every non-marital partner to make a will.

²¹ See section 47 of the Bill. The Court must, however, be satisfied that the agreement adequately protects the interests of both civil partners. In practice, this has been taken to mean (in the case of spouses) that the maintenance arrangements must be considered fair and reasonable. In particular, the court will typically expect to see a provision allowing for future variations in the amounts of maintenance, for instance, to take account of inflation and other changed circumstances.

Once civil partnership is enacted, however, civil partners will enjoy automatic legal protection on the death of a partner. The rights of the surviving partner are (in the main) identical to those of a widow or widower.

4.3.1 What happens if my civil partner dies without making a will?

Where a person dies without making a will, his or her surviving civil partner will have a legal entitlement to claim a portion of the deceased's estate.

If the deceased died without leaving any children, the surviving civil partner will be entitled to the entirety of the deceased's estate.

If the deceased had surviving children of any age, the surviving civil partner will be entitled to two-thirds of the deceased's estate, the remaining one-third being divided equally between the deceased's children.²² Nonetheless, the Bill allows a child of the deceased civil partner to apply to court seeking further provision from the estate of the deceased, even if this reduces the surviving civil partner's share. The court may grant such provision if it believes, in all the circumstances, that it would be unjust not to do so. In making such an order, the court must have regard to the extent to which the child has been provided for during the deceased's lifetime, the child's age and reasonable financial requirements, the financial situation of the deceased and the deceased's obligations towards the surviving civil partner. Regardless of the decision of the court, the child cannot receive less than the amount to which he or she would have been entitled if no court order had been made. Nor will the child be entitled to receive more than he or she would have received had the deceased died leaving neither a spouse nor civil partner.

While it appears to be envisaged that such orders would be exceptional, (they will only be made if the court considers it unjust not to do so), clearly this provision allows a court to eat into the two-thirds portion of the estate to which the civil partner is legally entitled. This provision is notable in that it only applies where a deceased person leaves a surviving civil partner and *not* where the deceased

²² If the deceased's child is already dead, that portion that the child would otherwise have received will be divided equally between the deceased child's surviving children, i.e. '*per stirpes*'.

was married at the time of death. In other words, the child may apply where his parent was a civil partner, but not where the parent was married.

This measure clearly provides important protection to children living with civil partners, and in this regard is to be welcomed in its own right. It is possible that the measure is designed to ensure that children of formerly married parents are not unfairly prejudiced by the fact that one of the parents subsequently enters into a civil partnership. Nonetheless, it is unclear why the law is not being amended in a similar manner so as to offer a similar facility to children in respect of the estate of their formerly *married* parents where one of the parents remarries. The measure appears, in other words, to place the children of civil partners at an advantage relative to the children of married couples.

4.3.2 My civil partner has made a will but has left me nothing but his CD collection. What can I do?

Even where a deceased person makes a will, his or her surviving civil partner is legally entitled to a minimum share in the estate. This minimum share or 'legal right' is identical to that enjoyed by spouses, namely one-half if the deceased had no children, and one-third if he or she had children. As part of that minimum share, the civil partner may (subject to certain conditions) earmark the shared home of the partners.

4.3.3. Are there circumstances in which I can lose my succession rights?

In general, any person who has been convicted of certain offences serious against the deceased is precluded from taking *any* share in the estate of the deceased. Specifically, where the survivor has been convicted of the murder, attempted murder or manslaughter of the deceased (unless the deceased made his or her will after the offence of attempted murder was committed), the survivor is prevented from taking any share in the estate, whether conferred by will or under the Succession Act 1965, as amended.

Additionally, there are a number of circumstances in which spouses and civil partners can lose the right to succeed on the death of a spouse or civil partner (though they may still succeed if named in the deceased's will). These include:

- Where the surviving civil partner has been in desertion of his or her civil partner for at least two years prior to the latter's death, the survivor cannot claim as of legal right or on intestacy (i.e. where the deceased died without a will) (though if they are named in the will, they may take the share stipulated in the will)
- Where the surviving civil partner has engaged in conduct which justified the deceased in separating and living apart from the survivor ('constructive desertion'), the survivor cannot claim as of legal right or on intestacy (though if they are named in the will, they may take the share stipulated in the will)
- Where the surviving civil partner has been found guilty of an offence against the deceased civil partner attracting a prison sentence of two or more years, the survivor cannot claim a share in the estate as of legal right (though if they are named in the will, they may take the share stipulated in the will, and may also succeed on intestacy)
- Where the parties have, in writing, renounced their legal right to succeed either before or after the civil partnership is created, the parties will not be able to claim from the estate as of legal right (though if they are named in the will, they may take the share stipulated in the will, and may also succeed on intestacy). A surviving civil partnership may also disclaim his or her right to succeed on intestacy.
- Where the parties have waived their rights under the Succession Act 1965 in a written separation agreement, the parties will not be able to claim as of legal right and, if the agreement so provides, on intestacy (though if they are named in the will, they may take the share stipulated in the will)
- Where the parties' civil partnership has been dissolved, the parties will not be able to claim as of legal right or on intestacy (though if they are named in the will, they may take the share stipulated in the will).

4.3.4 My deceased civil partner, who left a will, has surviving children. What are their rights on her death?

If the deceased died without making a will, her children (regardless of their age) are entitled to one-third of her estate, to be divided equally between them. The civil partner is entitled to the remaining two-thirds (subject to the right of a child to seek additional provision, as discussed above).

While children have no automatic legal right to be provided for in the will of their parents, it is possible for a child to seek provision from the estate of a deceased parent. This can be achieved if it can be shown that the parent has failed in her moral duty to provide for her child. Section 117 of the Succession Act 1965 allows a child of the deceased to claim that he or she was not properly provided for either in the will or during the lifetime of the deceased. If the court accepts this argument, it may grant the child an interest in the deceased's estate as it thinks proper. In making its decision, the court takes the stance of a 'just and prudent parent'.

4.3.5 Is it possible for the children to claim a portion of the estate which includes property in respect of which a civil partner has a legal right?

Ordinarily, an order made under section 117 of the Succession Act 1965 cannot affect the legal right of a civil partner. In other words, *generally* the court cannot eat into the portion of the estate to which the civil partner is legally entitled.

Nonetheless, the Civil Partnership Bill creates an exception allowing the court to apportion to the child of the deceased a part of the estate that would otherwise be the civil partner's by legal right. This may only be done if the court believes that it would be unjust not to make such an order. Before the court does so, it must consider all the circumstances, including the deceased's financial circumstances and his or her obligations towards the surviving civil partner.

This exception arguably protects the interests of children and thus is generally to be welcomed. It is notable, however, that in the case of married couples no such exception exists. A section 117 order made in favour of a child cannot affect the

legal right of a spouse *in any circumstances*. The measure appears, in other words, to place the children of civil partners at an advantage relative to the children of married couples.

It is unclear why the court should be allowed to make exceptions in respect of the children of a civil partner and not in a case where the child's parent is married. This seems to discriminate in favour of the children of civil partners, for reasons that are unclear. It is arguable that a similar exception should apply in respect of the children of married parents.

4.3.6 I already have a will, but am entering into a civil partnership. What will happen to my will?

A will made by a party before entering into a civil partnership will be 'revoked' (invalidated) by the party's subsequent civil partnership. In other words, an existing will becomes invalid if the testator (the person who made the will) subsequently becomes a civil partner. The will is not invalid, however, if made in contemplation of the subsequent civil partnership. (The same principles apply to marriage).

4.4 Recognition in equality legislation²³

Equality legislation will be amended to prevent discrimination against civil partners. It will thus become illegal to discriminate between people on the basis of their civil status, namely the fact that they are married, a party to a civil partnership, divorced, widowed, separated, single, or a party to a dissolved civil partnership. In particular, it will not be possible to discriminate against a person in employment or in the provision of goods and services on grounds that the person is or was a party to a civil partnership.

Notably, the Bill extends the definition of a 'member of the family' of a person for the purposes of the Employment Equality Act 1998-2004 so as to include the civil partner of a person as well as the child of his or her civil partner. Other relatives

²³ On which see Ryan, "Sexual Orientation Discrimination" in Cotter (ed.), *Discrimination Law*, (Dublin: Law Society, 2005).

of a person's civil partner are also deemed to be included. (By contrast, the definition of 'near relative' in the Equal Status Acts will include a civil partner but not the child of one's civil partner).

4.4.1 My civil partner is very ill in hospital and the nurse at reception won't let me see her. What can I do?

There are a number of important contexts in which it will not be possible to discriminate. A hospital that provides treatment to a patient will not be permitted to differentiate between spouses and civil partners, for instance, in relation to visiting entitlements and consultation where a civil partner or spouse is mentally incompetent to make decisions. Hotels and caterers will not be permitted to treat marrying couples differently from intending civil partners in making arrangements for a post-registration reception. Employers who give special leave or make special arrangements for newly-weds will also be required to make similar provision for new civil partners. Any benefit of employment that is extended to the spouses of employees will also have to be extended to employees' civil partners.

4.5 Domestic Violence

In relation to acts of domestic violence, a civil partner will be in the same legal position as a spouse. In particular, a civil partner will be entitled to seek a barring order, safety order, protection order or interim barring order on the same basis as if the parties were married to each other. Domestic violence includes not only acts of physical violence, but also any conduct that undermines the safety or welfare of a civil partner.

The Criminal Damage Act 1991 is also amended. This Act creates a variety of offences relating to deliberate damage to property. In general, it is a defence to such a charge to show that the property belongs to the defendant (unless the property is damaged with intent to endanger the life of another or to defraud another). The Act (as amended) ensures that this defence will not, however, be available where the accused has damaged property that he or she owns, if that

property is a family home from which he or she has been excluded under a domestic violence order. The Civil Partnership Bill will extend this rule to a civil partner or former civil partner who has been legally excluded from the shared home as a result of domestic violence. In other words, a civil partner who has been excluded from the shared home by reason of a domestic violence order will not be able to claim that the home is his or her own home in defending himself against a charge of criminal damage to the shared home.

Notably, a civil partner will be able to apply for an order under the Domestic Violence Acts with a view to protecting the dependent child of either civil partner, if the child is under the age of 18 or, in the alternative, disabled to such an extent as to prevent the child living an independent life. The applicant must either be the biological or adoptive parent of the child, or alternatively a person *in loco parentis* in relation to the child. Theoretically, this would allow a person to seek a barring order against his or her civil partner to protect either the applicant's biological child or that of the civil partner against whom the order is being sought.

4.6. Wrongful Death

The right to sue for wrongful death in respect of a deceased civil partner will also be conferred on the surviving civil partner. This allows a person to sue in respect of the wrongful death of that person's civil partner, where the death was caused by the negligence or wrongdoing of another person and has resulted in injury or mental distress to the applicant. Notably, while the child and step-child of the deceased may apply for relief, no provision is made for the child of the deceased's civil partner.

4.7. Refugees

A person may already seek asylum in Ireland on the basis that he or she fears persecution if returned to their country of nationality on the basis (amongst other things) of their sexual orientation. Currently, once he or she is granted refugee status, a refugee has a legal right to be joined in Ireland by his or her spouse and

dependent children.²⁴ This right of reunification will, under the Bill, be extended to the civil partner of a refugee.

4.8 Pensions

The Bill requires that where a pension scheme provides a benefit for the spouse of a person, that pension scheme will be deemed to provide equally for the civil partner of a person. In other words, in assessing pension entitlements, civil partners will be treated as if they were spouses.

In addition to setting out a general principle of equality, the Schedule to the Bill amends at least 17 separate pieces of pensions legislation so as to ensure equal treatment in specific cases.

4.9 Conflicts of Interest

A number of pieces of legislation require that a person must declare certain financial and other interests that they have with a view to identifying and avoiding potential conflicts of interest. (See for instance the Ethics in Public Office Act 1995). For this purpose, legislation typically requires also that the person must identify the financial interests of their spouses and other connected relatives, such as the children of that person. The purpose of this legislation is to avoid a situation where a person is entrusted with making a decision that may affect the their own financial interests or those of their spouse or other connected relative, and thus act to the advantage of that spouse or relative.

Legislation also precludes certain people from serving in positions in relation to a company or other organisation, where an officer of that company or body is a spouse or other relative of the person. For instance, section 187 of Companies Act 1990 prevents the appointment as auditor to a company of a person who is a spouse, parent, sibling or child of one of the company's officers.

²⁴ Refugee Act 1996, section 18.

The Civil Partnership Bill generally requires that where any legislation dealing with ethics and conflicts of interest makes reference to a 'connected person' or 'connected relative' of a decision maker, such reference will be deemed also to refer to the decision maker's civil partner. Where the person's civil partner has a child who ordinarily lives with the couple, that child will also be deemed to be a connected relative or connected person for the purposes of any legislation. Ironically this requires the civil partner in his commercial and/or civic behaviour to avoid a conflict of interest arising from a relationship that the law otherwise does not recognise.

Similarly, any declaration of interests that a person must make in respect of the interests of their spouse must also be made in respect of that person's civil partner (though not, strangely, in respect of the child of the person's civil partner). What this means is that, as a general rule, where a person has a civil partner, the person will be required to declare any interests of that civil partner on the same basis as applies to a married spouse.

4.9.1 Specific Amendments to Ethics Legislation.

In addition to the general requirement of equal treatment, the Bill specifically proposes to amend 27 Acts, updating their conflict of interest provisions so as to include civil partners. These include, for instance, the Ethics in Public Office Act 1995, and the Companies Act 1990.

In some, but not all of these specific cases, the relevant amendments recognise the relationship between a person and the child of that person's civil partner. For instance, section 13 of the Ethics in Public Office Act 1995 requires all holders of high political office to reveal the interests of their spouses and children, as well as the children of their spouses. The Civil Partnership Bill will require similar declarations to be made in respect of the civil partners of the office holder, as well as the children of the office holder's civil partner.

Nonetheless, several other provisions of the Ethics in Public Office Act 1995 that are currently applied to the child of a spouse will not, it appears, be extended to the child of a person's civil partner. For instance, Section 15 of the 1995 Act

requires a holder of high political office to declare certain gifts made to him or his spouse or child, as well as to the child of his spouse. The Civil Partnership Bill proposes to extend these provisions to civil partners, but not to the children of the civil partner of the office holder.

Similarly, the Building Societies Act 1989, section 52 will (if amended by the Bill) regard the civil partner, spouse and child of a director of a Building Society as a person connected to that director for the purpose of that Act. The 1989 Act expressly defines a child as meaning a child or 'step-child' of the director, 'step-child' ordinarily meaning the child of a spouse. No explicit amendment is made to recognise the child of one's civil partner.

The general provisions of the Bill do provide for recognition of the child as a 'connected person'. Nonetheless, there appears to be some general equivocation as to whether the specific conflicts of interest provisions amended in Part 1 of the Schedule to the Bill will apply in respect of a person to the children of that person's civil partner. For the sake of consistency, it is suggested that such inconsistencies should be explicitly addressed. Where the child is or has lived with the civil partner of a parent, there is every likelihood that the civil partner will in substance treat the child as if the child were his own biological child. As such, the risk of a conflict of interest is arguably as great as if the child were his own biological child, and thus every good reason to extend the conflicts of interest measure explicitly.

4.10. Mental Health

The Bill amends the Mental Health Act 2001 so as to ensure that, for the purpose of that Act, civil partners are treated the same as spouses. In particular, a civil partner will be included in the category of persons who may seek to apply for the involuntary admission to a psychiatric institution of a mentally ill civil partner (provided the parties are not separated and provided the applicant has not been the subject of an application under the Domestic Violence Acts).

4.11 Enduring Powers of Attorney

An enduring power of attorney allows a person (the 'donor') to nominate an 'attorney' who will be allowed to act on that person's behalf where the person subsequently becomes mentally incapacitated. Where the power has been conferred, the attorney will ordinarily be permitted to make decisions relating to the business and financial affairs of the incapacitated person. It may also allow the attorney to make certain personal care decisions on behalf of the incapacitated person.

Subject to certain exceptions, a person generally may nominate any other adult to act as his or her attorney. This may include a spouse or civil partner. That said, unless the power of attorney provides otherwise, a power of attorney will be invalid if made in favour of a civil partner from whom the donor is separated, or where the parties' civil partnership has been dissolved or annulled. Similarly, if a person grants a power of attorney to his or her civil partner, this will ordinarily be terminated if the parties subsequently separate or if the civil partnership is dissolved or annulled. Ordinarily a power of attorney will also be invalid or will end if any orders are or have been made against the attorney, at the donor's request, under the Domestic Violence Acts.

Where a person other than the civil partner is appointed as an attorney, that person is required to consult with the civil partner of the donor in relation to the care of the donor. Likewise the Bill provides that where an attorney seeks to register the power of attorney under the Act, the attorney must give notice to the civil partner of the donor.

An enduring power of attorney cannot be created in favour of the owner of a nursing home in which the donor resides. A similar restriction applies to a person who resides with the owner, and to agents and employees of the owner. These exclusions, however, do not apply if the person appointed as attorney is the spouse, parent, child or sibling of the donor. Under the Bill, this exclusion will also not apply if the attorney is the civil partner of the donor.

4.12 Succession to Protected Tenancies

Various pieces of legislation confer protection on tenants in respect of certain types of private rented property. The Housing (Private Rented Dwellings) Act 1982 offers security of tenure and restricts rent increases in respect of certain rent-controlled dwellings. Likewise the Residential Tenancies Act 2004 offers statutory protection to tenants, including security of tenure, provided certain conditions as to the duration of the tenancy have been met.

Both Acts provide a right to succeed to the protected tenancy, which is conferred on specified persons (including spouses and children) who were legitimately residing in the dwelling at the time of the tenant's death. In the case of each Act, the Bill extends this right to the civil partner of the deceased tenant.

4.12.1 Inconsistencies relating to children.

Both Acts already extend rights to members of the family of a deceased tenant, living with the tenant at the time of his death, to succeed to a protected tenancy. Notably, any person may, for the purpose of the Housing (Private Rented Dwellings) Act 1982, be deemed to be a member of the tenant's family, provided certain conditions as to residence are met and provided the tenant was *in loco parentis* in respect of the child. Theoretically, this may include a child of a deceased tenant's civil partner. (The child must have lived in the property, however, for at least six year's before the tenant's death.

By contrast, the Residential Tenancies Act 2004 does not recognise the child of the deceased's civil partner as a member of the deceased's family. Although the Act does recognise a step-child of the tenant, this presumably includes only a child of a spouse, rather than the child of a civil partner.

4.12.2 Housing (Private Rented Dwellings) Act 1982.

This Act relates specifically to rent-controlled private dwellings. The Bill amends section 9(2) of the Act so as to permit a civil partner as well as a spouse of a tenant to succeed to such a tenancy on the death of the original tenant. The

spouse or civil partner must have been residing in the property at the time of the original tenant's death. Section 9(3) of the Act allows a member of the family of the original tenant to succeed to the tenancy, though if the tenant's spouse is entitled to succeed to the tenancy, the family member will only retain possession as tenant on the death of the spouse. Arguably, for the sake of equality and consistency, section 9(3) should be amended to read "spouse or civil partner". Section 9(3) clearly gives priority in respect of the right to succeed to the spouse. A civil partner, by contrast, may be required to share the tenancy with other members of the original tenant's family.

4.12.3 I live in local authority housing rented to my civil partner. Am I entitled to succeed to the property if she pre-deceases me?

The Bill amends a number of provisions relating to public housing.²⁵ In general, however, it is for local authorities and housing associations to determine to whom public housing will be allocated and how succession arrangements will operate. Usually, local authorities recognise spouses and often recognise the partners of tenants for this purpose. The position of civil partners wishing to succeed to such a tenancy is, as yet, unclear. It is recommended, however, that a general clause should be included in the Civil Partnership Bill to require a local authority to treat spouses and civil partners equally for this purpose.

4.13 What can I do to clarify my legal status as a civil partner?

Any person who is or was a civil partner (or any other person with a sufficient interest in the matter) may seek a court order clarifying the status of their relationship. This may include an order confirming that the civil partnership was valid when created or that it existed on specific date. It is also possible to seek an order to the effect that the civil partnership did not exist on a specific date, for instance because it had been dissolved. If a civil partner believes the civil

²⁵ Though it is apparent that some statutory instruments will need to be altered to recognise civil partners. See for instance S.I. No. 296/1980, Housing Regulations 1980 and S.I. No. 188/1995, Housing (Sale of Houses) Regulations 1995.

partnership is void, he or she may also seek a decree of nullity, though this will be granted only on very limited grounds. (See below at 5.10).

4.14 My civil partner and I have separated and my partner now claims she owns our home and that I have no rights in relation to the home. What can I do?

Section 104 of the Bill allows a civil partner to seek clarification from the courts regarding the ownership of disputed property. This may include clarification in relation to money, shares or other items, as well as in respect of interests in land. The court in offering such clarification may only decide to what property the parties are legally entitled – the court cannot *change* the legal entitlements of the parties.

It is important to note that where one person is named as sole legal owner of a property, another person may acquire a beneficial interest in that property if they have made contributions either directly or indirectly towards its purchase. This may include a contribution towards the purchase price or mortgage, as well as contributions made to the household while the mortgage is being paid off. Payments made, however, for the improvement of property belonging to another, and contributions in the form of home-making or child-raising, regrettably, will not be treated as contributions for the purpose of acquiring a beneficial interest in property legally owned by another.

Section 104 does not seem to apply to civil partners whose relationship has been dissolved, though it does apply to the parties to a void civil partnership.²⁶ It is also possible for the personal representative of a deceased civil partner to seek a

²⁶ Section 104 of the Bill is similar to section 36 of the Family Law Act 1995 (which applies to married couples) though there are some important differences:

While section 36(7) of the Family Law Act 1995 allows a divorced person to seek an order, section 104 does not appear to apply to civil partners whose relationship has been dissolved. It is unclear why this distinction is made.

Section 36(7) prevents an application from being made if the spouses have divorced or had their marriage annulled and more than 3 years have passed since the divorce or annulment was granted. Similarly the parties to a void marriage that has not yet been declared void, but who have separated, cannot seek a declaration under section 36 more than 3 years after they have separated. While Section 104 does allow the parties to a void civil partnership to seek relief (whether or not a decree of nullity has been granted in respect of the void civil partnership). There is, however, no time limit on such an application.

section 104 order. Notably, the child of a deceased person who was a civil partner before death may also seek such an order.

5. Relationship Breakdown: Annuling and dissolving a civil partnership

Regrettably, relationships sometimes come to an end. In the case of marital breakdown one of the primary purposes of family law is to allow for the orderly separation of the parties. In particular, the provisions of family law aim generally to ensure that married couples will be properly supported on separation and divorce.

5.1. My civil partnership has broken down. Can we separate?

Although the matter is not dealt with explicitly, there appears to be nothing, in the Bill or in the law generally, preventing civil partners from living separate and apart. Although the parties must make a declaration on civil partnership that they will live with each other, there appears to be no legal mechanism to enforce this promise. (Nor is there any legal mechanism in respect of spousal cohabitation). That said, while the parties may choose informally to go their separate ways, it is usually advisable for separating parties to enter into a legally binding separation agreement.

5.1.1. What is a separation agreement?

Under a separation agreement, the parties agree to live separate and apart. Such an agreement may envisage, in particular, that while the parties will remain as civil partners, they will live separate lives free from the control and intervention of the other. In the case of separated spouses, a separation agreement typically also provides for such matters as the maintenance (financial support) that will be

provided by one spouse to the other, the treatment of property belonging to the spouses or either of them (including the family home), and the custody of children (as well as access arrangements in respect of the non-residential parent).

Usually, a separation agreement will also provide for the extinguishment of succession rights, relieving the parties of any legal succession rights they may have when a spouse dies. It is likely that similar provisions would feature in the separation agreements of civil partners (though it is important to note that absent an agreement to extinguish the succession rights of separated civil partners or spouses, these legal rights are *not* terminated by separation alone).

One particular advantage of a separation agreement is that it formally records the date on which the parties begin to 'live apart', which is important if they wish subsequently to obtain a dissolution on the basis of two years of having lived apart from each other.

5.1.2 Are such agreements enforceable?

Although the courts have proved reluctant to enforce an agreement that contemplates the possibility of a *future* separation, an agreement providing for immediate separation of married parties is typically enforceable, subject to the normal contractual defences. There is no reason to believe that a court would not enforce such an agreement between civil partners. In particular, there are no obvious public policy grounds for the non-enforcement of such an agreement. Indeed, section 127(3) of the Bill expressly refers to such agreements, requiring the court to have regard to separation agreements in considering the making of post-dissolution orders under the Bill. Similarly, section 47 of the Bill allows the maintenance provisions of such an agreement to be adopted as a rule of court (in much the same way as the maintenance provisions of a spousal separation agreement may be treated under section 8 of the Family Law (Maintenance of Spouses and Children) Act 1976). This allows the provisions of the agreement relating to maintenance to be enforced as if they were orders made by the court itself.

While a court is required to have regard to any separation agreement when considering whether to grant remedies on dissolution, it is not bound by the terms of the agreement. In particular, the court may make orders on dissolution that effectively change the agreement. That said, increasingly the courts tend to uphold the terms of separation agreements unless particular injustice would be done to either party.

5.1.3 Am I totally free once I get a separation agreement?

It is important to note that while civil partners who enter into a separation agreement are free to lead separate lives, they may not marry or enter into a new civil partnership unless they obtain a court-ordered dissolution (see 5.2 below).

5.1.4 I am contemplating entering into a civil partnership, but I want to make sure that my new civil partner will not be able claim an interest in my farm if the relationship breaks up. Can I make a 'pre-nuptial' agreement?

The position of a pre-nuptial agreement in Irish law is somewhat unclear. An agreement made in contemplation of marriage that provides for the possibility of a future separation has traditionally been regarded as void for public policy reasons. Nonetheless, the 2007 *Report of the Study Group on Pre-nuptial Agreements*²⁷ concluded, by contrast, that such agreements were enforceable in Irish law.

The position of a pre-registration contract between civil partners is not dealt with directly in the Bill, and the position of any such agreement is unclear. Indeed even if an agreement between civil partners regarding property is recognised, a court may vary the agreement on dissolution. The court can, in granting a property adjustment order, vary a pre-registration or post-registration settlement made by the civil partners (including by means of a will, codicil or trust) in favour of one of the civil partners. A court would, however, more than likely be reluctant

²⁷ <http://www.justice.ie/en/JELR/PrenupRpt.pdf/Files/PrenupRpt.pdf>

to subdivide a farm or business, or to transfer such a farm or business if owned by a partner whose main livelihood is derived from the farm or business. In *C.C. v. C.J.*²⁸ the High Court refused to make an order in relation to business premises owned by the husband, the wife having had “no connection” with the business.

5.2 Dissolution of a Civil Partnership

The Civil Partnership Bill also provides a mechanism for the ordered break-up of a civil partnership. This mechanism, called dissolution¹, is largely similar to a divorce on the break-up of a marriage, though some notable differences arise. Such dissolutions may only be granted by a court, subject to certain conditions.

5.2.1 What are the grounds for the dissolution of a civil partnership?

A civil partner may seek to dissolve his or her civil partnership where certain conditions are met. These are that the partners must have been living apart for periods amounting in total to at least two years out of the previous three years. The period of living apart need not be continuous, but it must amount in total to at least two years of living apart during the three years preceding the application. This is considerably shorter than the constitutionally mandated living apart period for divorce, which requires that the parties live apart for at least four of the previous five years.

A court will also only be entitled to grant the dissolution where it is satisfied that proper provision (e.g. the provision of financial support and appropriate accommodation) has been or will be made for both civil partners. This is similar to the requirement that applies in the case of divorce; subject to the exception that the court must also be satisfied in granting a divorce that proper provision has been made for any dependent children of the family. Notably, the requirement relating to proper provision for the dependent children of spouses or either of them does *not* apply where a civil partnership is being dissolved.

²⁸ [1994] 1 Fam. L.J. 22

5.2.2 What is meant by 'living apart'?

For two parties to be deemed to be living apart, the parties must be leading separate lives. It is not enough, however, that the parties are not physically present in the same place. Living apart requires both a physical element and a mental element. Take, for instance, an otherwise happy couple one of whom lives in Ireland while the other has been posted abroad to work (e.g. as a diplomat, on an oil rig or in the armed forces). The couple will not be regarded as 'living apart' unless at least one of them has the necessary mental element, namely that he or she regards the civil partnership as over.

The quality of living apart is thus as much a state of mind as it is a physical state of separation. Correspondingly, the law applying to married couples recognises that a couple may be living apart from each other even if they are sharing the same house or premises.²⁹ While the parties may ostensibly be living in the same house, if the evidence establishes that they are effectively leading separate lives, they may be deemed to be living apart. For this purpose, the court will look to all household arrangements.

5.2.3 My civil partner wants a dissolution, but I think we can patch things up. Will she be granted the dissolution?

Unlike divorce, there is no requirement that the parties seeking a dissolution of a civil partnership demonstrate that there is no chance of reconciliation between them. By contrast, a divorce (in relation to a marriage) will only be granted where it can be established that there is no reasonable prospect of reconciliation. Proceedings for divorce, moreover, may only be commenced where both of the parties' solicitors certify that they have advised their clients regarding all of the alternatives to divorce, including mediation, separation and counselling with a view to reconciliation. In short, legislative policy dictates that every possible alternative avenue should be explored before a divorce is granted. Divorce, the legislation suggests, should only be granted as a last resort, when all other options have been considered.

²⁹ *M. McA. v. X.McA.* [2000] 2 I.L.R.M. 48, and the comments of William Binchy in (2000) 22 *D.U.L.J.* 21.

The Civil Partnership Bill makes provision to adjourn dissolution proceedings to allow the parties to discuss the possibility of reconciliation or agreement, if the parties so wish. There is, nonetheless, no overriding requirement that steps be taken to ensure that all alternatives to the dissolution of a civil partnership have been explored.

It is unclear why a reconciliation requirement similar to that in place for divorce should not also apply to civil partners. The fact that the period of living apart is much shorter for dissolution of a civil partnership than for divorce arguably militates strongly in favour of ensuring that the civil partners are indeed irreconcilable.

It is probably fair to say that the very fact that the parties have been living apart for two years strongly suggests that their relationship is well and truly over. That said, it is contended that a mechanism should be included to ensure that the dissolution will only be granted where the parties are unlikely to be reconciled. Given the consequences of the dissolution of a civil partnership, it would appear prudent to avoid such dissolution unless there is no other option but to do so.

5.3 Remedies available to the parties on dissolution.

The remedies available to both parties on the dissolution of civil partnership are extensive. Once the dissolution is granted, and as a general rule *at any time* after dissolution, either party may seek one or more of a number of remedies provided by the Bill. These remedies (sometimes called 'ancillary orders') are generally identical to those available to divorced spouses.

5.3.1 Maintenance and lump sum orders.

The remedies include a right to seek maintenance. This may comprise periodical payments, or may be paid in a lump sum or lump sums, at the discretion of the court. The court may also order that such payments be secured. Additionally, on the granting of a maintenance order in favour of either former civil partner the court may direct that the maintenance be drawn directly from the salary or wages

of the other former civil partner. This is done by means of an 'attachment of earnings' order.

5.3.2 Property Adjustment Orders.

The court may also make extensive orders in relation to any property owned by either former civil partner. In a nutshell, the court may, at its discretion, take any property owned by either or both former civil partners and redistribute the ownership of such property between the civil partners as the court considers appropriate. Property for this purpose includes not only land and houses, but also personal property such as furniture, household appliances, money, shares and even family pets. The court may, in relation to such property, make a variety of property adjustment orders. These orders can be used to transfer ownership of a property or an interest in property from one former civil partner to the other or otherwise to alter the property interests of one former civil partner to the benefit of the other. Existing settlements of property made by the partners in each other's favour may also be varied.

A property adjustment order cannot be made under the Bill in respect of property which is now the shared home or family home of one of the former civil partners and his or her new civil partner or spouse.

5.3.3 Shared home.

Specific provisions relate to the shared home of the former civil partners. The court may, on dissolution, make an order conferring a right of residence in the shared home, either for life or for some defined period, to the exclusion of the other former civil partner. This allows a former civil partner to continue occupying the home. The court may also make an order under the Domestic Violence Acts 1996-2002, for instance, a barring order excluding one of the former civil partners from the shared home. It may, in the alternative, order the sale of the home, and the distribution of the proceeds of sale.

An order in respect of the shared home cannot be made under the Bill in respect of property which is now the shared home or family home of one of the former civil partners and his or her new civil partner or spouse.

5.3.4 Sale of Property of Civil Partners.

The court is also empowered to order the sale of any property of the former civil partners, under certain conditions (namely, that the court has also made a secured periodical payment order, a lump sum order or a property adjustment order). The main purpose of such a sale appears to be to allow periodical payments or lump sums to be made to either party, though the proceeds may also be used to purchase new property for either civil partner.

An order for the sale of property cannot be made under the Bill in respect of property which is now the shared home or family home of one of the former civil partners and his or her new civil partner or spouse. Likewise, a court making an order for the sale of property under the Bill cannot affect any order made by the court granting a former civil partner the right to occupy the shared home (see 5.3.3 above). (Though see the discussion below at 5.6.2 relating to orders following *divorce*).

5.3.5 Financial Compensation Order.

The court may also order a former civil partner to set up a life insurance policy for the benefit of the other former civil partner, or to assign an existing policy to the latter. The purpose of so doing is to ensure the financial security of the beneficiary of the policy.

5.3.6. Allocation of Pension Entitlements.

The Bill also permits the court to grant a pension adjustment order. A pension adjustment order allows the court to direct that the pension entitlements of a former civil partner be allocated (either now or at some point in the future) between the former civil partners, as the court considers appropriate. This means that a former civil partner will be able to benefit from the pension of his or her partner, once the pension becomes payable.

5.3.7 Termination of succession rights.

As with divorce, dissolution of a civil partnership will terminate the succession rights of the former civil partners. This means that on dissolution, the various legal rights discussed above at 4.3 (both in relation to wills and where a civil partner dies without making a will) will be extinguished. The now former civil partners will not be entitled to succeed at all if one or other dies without a will. Additionally, the surviving former civil partner will also no longer be able to claim a minimum portion of his former partner's estate, should the latter die.

It is still possible, of course, for a person to provide for his former civil partner by will, though he or she is not obliged to do so where the civil partnership has been dissolved.

Nonetheless, the Bill (as is the case on divorce) allows a former civil partner to seek provision from the estate of a deceased former partner if certain conditions are met. A court may grant the surviving former civil partner a share in the deceased's estate if the court is satisfied that proper provision has not been made for the survivor during the deceased's lifetime. Such provision must be sought within 6 months of the granting of representation in respect of the estate. This right to seek provision may, however, be extinguished at any time after dissolution (as it may be on divorce) by order of the court.

5.4 On what basis does the court decide to make particular orders?

Section 127 sets out a variety of factors that the court must consider when deciding to grant the remedies discussed above after a civil partnership has been dissolved. There are at least twelve factors in total, and each of these must be taken into account by the court before deciding what remedies to award the parties:

- The income, earning capacity, property and other financial resources of each civil partner (e.g. is one partner considerably wealthier than the other?)

- The financial needs, obligations and responsibilities of each civil partner. (Theoretically, the court should have regard to the obligations and responsibilities of a civil partner to his or her biological child.)
- The standard of living enjoyed by each civil partner before they broke up
- The partners' ages and the duration of their civil partnership, as well as the length of time they have cohabited after their civil partnership. The court, in this context, is required only to have regard to time spent living together after the civil partnership is contracted.³⁰ It is suggested that the Bill should be amended to allow the court to have regard to the duration of the parties' relationship preceding as well as post-dating the civil partnership. After all, many couples who may become civil partners may have been living together long before the opportunity to enter into a civil partnership became an option.
- Do either of the civil partners have a mental or physical disability?
- The contributions made by each civil partner to the civil partnership, including their contribution to the income, earning capacity, property and financial resources of the other civil partner
- The contribution made by either or both civil partners by looking after the shared home
- The effect on each partner's earning capacity of taking on certain responsibilities while civil partners, in particular any impairment of the earning capacity of a civil partner arising from his or her relinquishing paid employment in order to look after the shared home
- Any income or benefits to which either partner is entitled by statute (e.g. social welfare entitlements)
- The conduct of the parties, but only if it would be unjust to ignore it (the courts for instance, generally ignore acts of infidelity between spouses)
- The accommodation needs of each civil partner
- The value of any benefit that either civil partner will lose or forfeit as a result of the dissolution (this may include the loss of succession or pension rights)
- The rights of a third party, including a new civil partner or spouse of either party, or any child to whom either partner owes an obligation of support.

³⁰ By contrast, on divorce a court must consider "...the length of time during which the spouses lived with one another". (See section 20(2)(d) of the Family Law (Divorce) Act 1996. This arguably may include time spent living together before the marriage.

When making an order the court is also required to have regard to any separation agreement entered into between the civil partners (though this does not preclude the court from effectively varying such an agreement). There is also an overriding requirement that a court may not make an order unless it is in the interests of justice to do so.

5.4.1 I have two young children who lived with my civil partner and I. Will the court take their interests into account when granting remedies on dissolution of the civil partnership?

Regrettably, the Civil Partnership Bill makes little provision on dissolution for the children of civil partners. The dissolution may be obtained, for instance, without having regard to whether proper provision has been made for any dependent child of either civil partner. By contrast, a divorce may only be granted where a court is satisfied that proper provision has been made for both spouses and any dependent members of the family.³¹ Theoretically, this means that a civil partnership may be dissolved in circumstances where a child of either party may be financially disadvantaged as a result.

Similarly, the various factors outlined above tend in the main to ignore the impact on children of making orders under the Bill after the dissolution is granted. No reference is made, for instance, to the contribution of a civil partner in rearing or caring for her own children or those of her civil partner. Nor is the court directed to have regard to the impact on the earning capacity of a civil partner who stays at home to care for any child or children who reside with the couple. The accommodation needs of children are also generally ignored.

Divorce legislation, by contrast, requires the court to have regard, in making any orders, to the contribution either spouse has made to the raising of children, and to their care. The Family Law (Divorce) Act 1996 also requires the court to take into account the effect on a spouse's earning capacity and income where he or she has given up work outside the home in order to raise children. Notably,

³¹ This includes a child of either spouse who the other spouse, knowing the child is not his biological child, has treated as a member of the family.

these factors are not referenced in the Civil Partnership Bill. Indeed, ironically, the Bill allows the court to take into account the contribution a civil partner has made to the shared home of the partners, and the effect such a contribution has made to his or her career, but not the contribution made to the raising of children.

This appears odd, given that the primary reason a spouse or civil partner would voluntarily give up a career outside the home would be to care for their children. The Bill strangely would recognise the contribution a civil partner makes by staying at home to cook for, clean and iron for the other civil partner, but not the more profound contribution made by helping to raise children.

Section 127(2)(l) may, however, may provide some relief for civil partners with children, though not directly for their children. This sub-clause requires a court, when granting remedies after a civil partnership has been dissolved, to have regard to the rights of any child to whom either of the civil partners owes an obligation of support. This does not place any obligation on a civil partner who is not the biological parent of a child. It does, however, require the court to take into account the rights of the child in making any order.

This may mean, for instance, that a court would grant remedies that take into account the fact that one of the former civil partners has a child or children. In other words, the remedies awarded to former civil partners may differ depending on whether either of them owes obligations to his or her biological child.

Section 127(4) may also be of significance in this context. It prevents a court from making an order on dissolution unless it would be in the interests of justice to do so. It is strongly arguable that the interests of justice would not be served if a child were to be disadvantaged as a result of such an order being made. This overriding requirement of justice may thus be used to ensure that the interests of any child of either former civil partner are upheld in making orders after dissolution.

5.5 Once an order is made can it be varied?

Most of the orders made by a court on the dissolution of a civil partnership or thereafter can be subsequently altered by the court. In general, however, an existing order can only be varied if the circumstances of the former civil partners have changed since the original order was made.

In particular, it is possible for a court to change an order for maintenance or periodical payments, a financial compensation order, certain property adjustment orders and orders in respect of the shared home as well as a pension adjustment order. The court may vary or suspend an existing order or revive a suspended order.

The general rule is that few orders made under the Bill will be valid for all time. Circumstances may change, and the courts will adapt orders to cater for these changes. For instance, a former civil partner may, at the time of dissolution, have no means of income and be granted maintenance. Five years down the line, if he or she is now in well-paid employment, the other former civil partner may be justified in seeking to terminate the original order. Similarly, maintenance may need to be altered if the person required to pay maintenance loses his or her job.

5.6 Is there a deadline for seeking remedies on dissolution? Are there any other restrictions on my right to seek remedies?

A former civil partner may ask the court to make any of the orders discussed above at the time of dissolution or *at any time* thereafter. Therefore, as is the case on the divorce of a married couple, there is no 'clean break' available on dissolution. There is no time limit on the right to seek remedies on dissolution. Theoretically, this means that either former civil partner may seek continuing support in the form of financial support, but may also seek fresh orders relating to property, pensions or other matters, five, ten, twenty or thirty years after the dissolution is granted. There is no guarantee, of course, that such orders will be made (the courts increasingly favour finality) but there is no deadline on their being sought.

Notably, this lack of finality also prevails after a divorce, where either divorced spouse may seek an order at any time after the divorce is granted.

Thus, generally speaking, a former civil partner may seek any of the above-mentioned remedies *at any time* after the civil partnership is dissolved. To this general rule, however, there are a number of important exceptions:

- With the exception of an order for provision from the estate of a deceased former civil partner, an order cannot be made where either party has died;
- A maintenance order and a financial compensation order will cease to have effect on the death of either former civil partner;
- A former civil partner who has married or entered into a new civil partnership will not be able to seek any new order for periodical payments (secured or otherwise), a lump sum, property adjustment, pension adjustment, financial compensation or provision from the estate of the deceased;
- A former civil partner who has married or entered into a new civil partnership will lose her rights to maintenance under any existing periodical payments or secured periodical payments order.

5.6.1 Recognition of Civil Partnership in Divorce legislation.

Similar provisions apply where a married couple divorce. Currently, a divorced person who remarries will not subsequently be able to seek various remedies under the Family Law (Divorce) Act 1996 and will lose any existing right to maintenance. The Civil Partnership Bill provides that a divorced person who enters into a subsequent civil partnership will also be precluded subsequently from obtaining the same remedies under the Family Law (Divorce) Act 1996 and will lose any existing right to maintenance from their former spouse. This means that a former spouse who enters into a civil partnership will be in no better position than a former spouse who remarries.

5.6.2. However, for certain purposes in the Divorce Act, a subsequent civil partnership is not recognised.

Section 15 of the Family Law (Divorce) Act 1996 allows a court to make an order for the conferral of a right of residence in the family home on either former

spouse, to the exclusion of the other spouse. It also allows for an order to be made for the sale of the family home of former spouses. Sub-section 15(3), however, prevents an order from being made where the property is now the family home of one of the former spouses and a new spouse.

Similarly under sub-section 14(7) of the 1996 Act (which relates to property adjustment orders on divorce) and under sub-section 19(6) of the 1996 Act (which relates to orders for the sale of property), an order may not be made in respect of the family home of one of the former spouses and a new spouse.

Other sections of the 1996 Act are amended by the Bill to prevent relief being granted to a person who has entered into a civil partnership after divorce. It appears, however, that the Bill *does not* amend sub-sections 14(7), 15(3) or 19(6). This means that while various property-related orders made under the Divorce Act cannot be made so as to affect the family home of a spouse or new spouses, no such protection is offered where the home is the shared home of a former spouse and a new *civil partner*. (A similar point relates to sub-sections 10(3) and 15(6) of the Family Law Act 1995, which relates to judicial separation.)

This appears to deny protection to new civil partners. In particular, the protection offered by the 1996 Act to the family home of new spouses will not be afforded to the shared home of new civil partners. For consistency, these sections should be amended also to prevent an order being made against the shared home of new civil partners.³²

5.6.3 What are the obligations of a person who enters into a new civil partnership or marriage?

It is important to note that a person who marries or enters into a new civil partnership cannot avoid having to *pay* maintenance to a former civil partner or former spouse, and cannot avoid orders being made in favour of his former civil partner or spouse. Technically, while a person is not entitled to *seek* support from more than former spouse/civil partner, he can be obliged to *support* more than

³² Though there may be constitutional difficulties in treating a new civil partner more favourably than a former spouse.

one person simultaneously (both a current spouse and former civil partner, for instance).

5.7 My civil partner is trying to avoid having to support me by giving away his property. What can I do?

Section 135 of the Civil Partnership Bill is designed to prevent a civil partner from disposing of property in such a manner as to avoid having orders made against him or her on dissolution of a civil partnership. It also applies where such a disposal is designed to reduce or limit the relief made available to the other former civil partner, or to frustrate the enforcement of any order made on dissolution.

Where the court is satisfied that property is being or has been disposed of with a view to avoiding a remedy being granted on the dissolution of a civil partnership, the court can set aside that disposition, effectively rendering it invalid. Where a transaction is made less than three years before the dissolution, and as had the consequence of defeating a claim for relief under the Bill, a presumption arises that this was the intention of the civil partner who made the transaction.

Put simply, a court will strike down any transaction that is designed to diminish the property of a civil partner, where the aim of such a transaction is to avoid an order in favour of the other civil partner on dissolution of the civil partnership.

5.8 We entered into a civil partnership abroad, which is recognised in Ireland. Can it be dissolved under the Bill?

If the foreign civil partnership or same-sex marriage is recognised in Ireland under section 5 of the Bill, the parties are deemed to be civil partners for the purpose of the Bill. Thus, if they meet the residence and other requirements for dissolution of a civil partnership in Ireland, it would appear that they are entitled to dissolve their civil partnership in Ireland in the same way as Irish civil partners may dissolve their civil partnership.

5.9 We entered into a civil partnership abroad, which has been dissolved abroad. Will the dissolution be recognised in Ireland?

Subsection 5(3) of the Bill deals with the situation where a foreign civil partnership or same-sex marriage, which is recognised in Ireland as equivalent to a civil partnership, is dissolved abroad. If the class of foreign legal relationship is recognised in Ireland as having the same effect as an Irish civil partnership (under section 5) and the dissolution is granted in the jurisdiction where the civil partnership was originally celebrated, it will be recognised as a dissolution for the purposes of Irish law. The foreign dissolution will also be recognised if the class of legal relationship is recognised in Ireland and the dissolution is granted by a jurisdiction the civil partnerships or same-sex marriages of which are also recognised in Ireland. This will be the case even if it is not the same jurisdiction that celebrated the original civil partnership.

Subsection 5(3) stipulates that such a dissolution will be treated as a dissolution under the Civil Partnership Bill, such that the parties will no longer be treated as civil partners in Ireland once their relationship is dissolved (or once an order is made under section 5 in respect of the particular class of legal relationship, whichever is the later). Effectively the civil partners will be treated as having dissolved their relationship for the purposes of Irish law.

5.9.1 What if my Irish civil partnership is dissolved abroad?

While subsection 5(3) of the Bill recognises a foreign dissolution of a foreign civil partnership, it is unclear what the situation would be if an Irish civil partnership were dissolved abroad. Subsection 5(3) refers to a “legal relationship” recognised under that section. This appears to confine its remit to the dissolution of foreign civil partnerships. It thus seems that the section does not apply to Irish civil partnerships dissolved abroad.

It is doubtful whether subsection 5(3) could be applied to an Irish civil partnership, as the reference to ‘legal relationship’ in the section appears to refer only to foreign legal relationships. Thus, the Bill is unclear as to the effect of a foreign dissolution on an Irish civil partnership. This may be important in some cases. A

civil partnership may be dissolved under the Bill if either of the parties is domiciled or ordinarily resident for at least a year in Ireland at the time proceedings are commenced. If the partners do not meet these residence requirements, their only option may be to seek a dissolution abroad, though it may not be recognised in Ireland.

In the case of marriages dissolved abroad, the Domicile and Recognition of Foreign Divorces Act 1986 applies, such that a foreign divorce will be recognised in Ireland if certain conditions are met. It is contended that, for the avoidance of any doubt, the Bill should expressly provide for the recognition of foreign dissolutions of Irish civil partnerships, provided certain conditions (e.g. as to residence) are met.

5.9.2 If I get my civil partnership dissolved abroad, can I subsequently seek court orders in Ireland?

The Family Law Act 1995 allows a person who has obtained a divorce or judicial separation abroad to seek certain post-separation/post-divorce remedies in the Irish courts. This is the case even though the judicial separation/divorce was not itself granted by the Irish courts, provided the divorce or judicial separation is recognised in Irish law.

It is not immediately clear what the position would be in relation to partners who have dissolved their civil partnership or same-sex marriage in a foreign country. Would they be able subsequently to seek the remedies that are available on dissolution in an Irish court? The position seems to be different depending on whether the civil partnership is an Irish civil partnership, or a foreign legal relationship recognised under the Bill. If a foreign legal relationship is dissolved abroad, and the dissolution is recognised under subsection 5(3), the dissolution will be deemed to be a civil partnership dissolution under section 108 of the Bill. This appears to allow the parties to seek in an Irish court the various orders available to civil partners who have their civil partnership dissolved in Ireland. As the foreign dissolution is deemed to be a dissolution under section 108 of the Act, this presumably means that the former civil partners have access to the same remedies. They will only be able to invoke the Bill, however, if at least one of the

partners is either domiciled in Ireland or ordinarily resident for one year preceding the application.

As subsection 5(3) appears to apply only to foreign legal relationships recognised in Ireland, it is unclear whether Irish civil partners would be able to obtain orders in Ireland when their civil partnership is dissolved abroad. More than likely it would not be possible for the Irish courts to grant post-dissolution remedies where the dissolution was obtained abroad in respect of an Irish civil partnership.

5.10 Annulments/Decrees of nullity

As with marriage, a civil partnership may be annulled for limited reasons by means of a 'decree of nullity'. A decree of nullity differs from the dissolution of a civil partnership in a number of important respects. Put simply, while dissolution deems the civil partnership to be at an end, a decree of nullity (or 'annulment') determines that because of some specific factor, the relationship of civil partnership *never came into being in the first place*. The civil partnership is thus null and void and of no effect – effectively, for legal purposes, it is deemed never to have existed.

5.10.1 Who may apply for a decree of nullity?

Either civil partner may apply for a decree of nullity in respect of their civil partnership. Likewise any person whom the court believes has sufficient standing to do so may apply.

5.10.2 What happens if I get a decree of nullity?

In short, dissolution ends an existing civil partnership. A decree of nullity, by contrast, means that (in law) the civil partnership never existed. The Bill provides that where a court grants a decree of nullity, each party is free to marry or enter into a new civil partnership. The decree does not prejudice, however, the rights of a person who relied on the existence of the civil partnership.

5.10.3 What are the grounds for annulment?

The grounds for annulment are laid out in section 105 of the Bill. They allow the civil partnership to be annulled for any of the following reasons:

- One or both of the parties was under the age of eighteen at the time of the civil partnership.
- One or both of the parties was still married at the time the civil partnership was entered into (the prior marriage not having been dissolved in advance)
- One or both of the parties was already a party to another civil partnership at the time of the ceremony (the earlier civil partnership not having been dissolved in advance).
- The 'formalities' (prescribed procedures) for civil partnership were not observed (e.g. the required notice was not given or the parties did not make the required declarations). (See 3.1 to 3.8 above)
- One or both of the parties did not give a free and informed consent to the civil partnership, for instance, because of duress or undue influence. By analogy with marriage, it is likely that the duress or undue influence need not emanate from the other party to the civil partnership, but may, for instance, be imposed or exercised by parents or other parties. Physical force or the threat of physical force is not necessary.
- One or both parties did not in fact intend to enter into a civil partnership with the other party. This may occur, for instance, if one of the parties was mistaken as to the nature of the ceremony.
- One or both of the parties was unable to give an informed consent to the civil partnership, as attested by a consultant psychiatrist (this provision is undoubtedly preferable to that applying to marriage, namely the Marriage of Lunatics Act 1811, which renders void any marriage contracted by a person who is insane).
- The parties were within the prohibited degrees of relationship (i.e. were too closely related.) (See 2.4 above)
- The parties were of the opposite sex. (See 2.2 and 2.3 above)

5.10.4 I've looked at these grounds and I think my civil partnership may be void. Do I need a court order?

While it may not be technically necessary to obtain a decree of nullity, it is inadvisable in the extreme to assume that a civil partnership is invalid in the absence of a court order to that effect. In particular, if a person wishes to marry or enter into a new civil partnership, it is *strongly* advisable to obtain a decree of nullity or dissolution before doing so.

5.10.5 Are these grounds the same as those that apply to marriage?

With some appropriate modifications, and some subtle differences, these grounds largely mirror those that apply for the annulment of a marriage.

Notably, the Bill contains much more comprehensive protection from duress and undue influence than the original General Scheme for the Civil Partnership Bill published in June 2008, as well as a broader requirement that the parties give a free and informed consent, similar to the requirements that apply to marriage.

The Bill does not allow a civil partnership to be avoided due to inability to consummate (impotence), which is a ground rendering a marriage voidable.³³ Nor does the Bill render a civil partnership voidable where one of the parties is unable to form and sustain a normal and caring relationship, which is also a ground for the avoidance of a marriage.

5.10.6 Impotence

This omission of the ground of impotence more than likely reflects the gendered requirements of consummation, which comprises a single act of heterosexual sexual intercourse.

It is difficult to envisage how this ground would be extended to same-sex couples. Indeed it is arguable that the extension of this widely criticised ground would be unhelpful in the context of civil partnership. The rationale for this ground is

³³ A voidable marriage is valid until such time as it is avoided by a spouse who has the right to avoid the marriage. Once avoided, a voidable marriage is deemed void, with retrospective effect.

dubious.³⁴ Indeed, law reform bodies in several jurisdictions have suggested its abolition in relation to marriage. It does not relate in any way to the fertility of the parties, nor does it require an ongoing sexual relationship. A single act of sexual intercourse, however brief, amounts to consummation. Consummation is complete even if the parties are infertile, or use contraception. The sexual fulfilment of the parties is irrelevant. The ground may, moreover, be deemed unavailable in circumstances where the parties have accepted the impotence and carried on with their marriage, knowing of their right to avoid it.

5.10.7 Capacity to form and sustain a normal and caring relationship.

The ground allowing a party to avoid a marriage on the basis that his or her spouse lacked the capacity to form a normal and caring marital relationship is arguably too vague, overly broad and too subjective to be usefully extended to civil partners.³⁵ This home-grown ground (which was effectively created by the courts in 1982) originally required some proof of psychiatric illness or disorder but even this limitation has been dropped. The purpose of this ground is arguably worthy. It is designed to allow a marriage to be avoided where one of the parties understands the purpose and nature of marriage, but by reason of some underlying condition³⁶ is unable to form a normal and caring relationship with his or her spouse. The purpose of this ground is to ensure that the parties have sufficient (if minimal) capacity to sustain a reasonable marriage relationship. The parameters of the ground are, nonetheless, much too vague. In particular, it is unclear what is meant by a 'normal' marriage relationship. Similarly, the extent to which a person should be incapable of caring behaviour is uncalibrated. Although the courts have refused to grant an annulment on the basis of mere temperamental incompatibility, the circumstances in which some annulments have been granted on this ground suggest that the threshold for getting an annulment can be quite low. It is arguable, in any case, that the appropriate remedy in such cases should be divorce rather than annulment.

³⁴ See Ryan "When Divorce is Away, Nullity's at Play: A New Ground of Annulment, its Dubious Past and its Uncertain Future", (1998) 1 *Trinity College Law Review* 15 where it is suggested that the consummation requirement is a relic of a time when consummation 'marked' a woman as the 'property' of her husband.

³⁵ See Ryan, *ibid.*

³⁶ Notably, this may include a homosexual orientation.

5.10.8 What are the consequences of a void civil partnership?

The consequences of a void civil partnership are identical to the consequences of a void marriage. Effectively, the civil partnership is deemed never to have existed, to be null and void and of no legal effect. Notably, the parties cannot seek any of the remedies that would be available on the dissolution of a civil partnership. They are deemed to be free to marry or enter into a new civil partnership (provided of course that the void civil partnership is not void owing to the existence of another civil partnership or marriage). The decree does not prejudice, however, the rights of a person who relied on the existence of the civil partnership.

6. Court Proceedings

6.1. If I take a case under the Bill, will it be heard in private?

Section 143 of the Bill requires that civil partnership law proceedings (like matrimonial proceedings) must be heard in private. This is in marked contrast to the current legal situation, where legal disputes between same-sex couples are generally aired in open court.

6.2 Conduct of Proceedings

Civil partnership court proceedings (like matrimonial proceedings) will be as informal as possible. In particular, the judge and lawyers in such cases will not be permitted to wear wigs or gowns. Additionally, legal proceedings involving a civil partnership will be heard in a different place or at different times from those on which normal Circuit Court proceedings are heard.

6.3 Who pays the costs of such proceedings?

The legal costs of a case will be awarded at the discretion of the court. If both parties have equal financial resources, it is likely (though not guaranteed) that each party will bear his or her own legal costs.

6.4 Jurisdiction

Generally speaking, as is the case with marriage, most disputes between civil partners, including proceedings for annulment and dissolution, will be heard in the Circuit Court. Usually, this will be the Circuit Court for the circuit in which at

least one of the civil partners resides or carries out his or her business, trade or profession.

A maintenance order may be sought in the District Court. Subject to certain restrictions, the District Court may also hear cases relating to the shared home protection provisions discussed in 4.1 above.

As is the case with married couples, it is likely that the High Court will only hear cases where the couple has very significant assets and resources.³⁷

The courts may, however, only hear a case where at least one of the parties is either domiciled in Ireland or has been ordinarily resident for at least a year before the case is taken.

³⁷ Though there is a slight technical anomaly in relation to the conditions under which a case will be referred to the High Court. In certain stipulated cases, section 138 of the Bill requires the Circuit Court to transfer proceedings to the High Court, if requested by one of the civil partners. The Circuit Court is required to transfer the proceedings if they concern land with a rateable valuation greater than €254. The analogous legislation relating to marriage, judicial separation and divorce originally contained similar provisions. Sections 50-52 of the Civil Liability and Court Act 2004, however, altered the legislation relating to marriage, judicial separation and divorce. The relevant legislation now requires the transfer of a case to the High Court where the market value of the land exceeds €3 million. This would appear to be a much simpler and more modern means of determining jurisdiction, and should arguably be adopted also in the case of civil partnership.

7. Cohabitation

Part 15 of the Civil Partnership Bill creates certain rules that apply to cohabitants and qualified cohabitants respectively, both couples of the opposite sex and of the same sex.³⁸ Although it is the civil partnership scheme that has received the most attention to date, the cohabitation scheme may in practice be of relevance to a much broader constituency. The cohabitation scheme has, in particular, the potential to provide vital rights to a legally vulnerable category of people, namely unmarried stay-at-home parents, who currently have few legal rights if their relationship breaks up.

Unlike the civil partnership scheme, the parties will not need to register their relationship. Recognition will be automatic provided certain conditions are met. The parties may, however, agree in writing that the redress provisions of the Scheme will not apply to them. The Bill also provides for the recognition of cohabitation agreements.

7.1 What is a 'cohabitant'

The Bill confers certain rights and obligations on cohabitants generally. These apply to any two persons in an intimate and committed relationship who are:

- (a) Not closely related to each other, and
- (b) Not married to each other, and
- (c) Not civil partners of each other.

Such cohabitants may be either of the opposite sex or of the same sex.

In deciding whether two people are cohabitants, a court may have regard to a number of factors including:

These measures are largely modelled on recommendations made by the Law Reform Commission, *The Rights and Duties of Cohabitants*, LRC-82-2006, (Dublin: Law Reform Commission, 2006). See also the Commission's earlier consultation paper, entitled *The Rights and Duties of Cohabitees*, LRC-32-2004 (Dublin: Law Reform Commission, 2004).

- How long have they been in this relationship?
- On what basis do they live together? (E.g. is one a lodger? Does one of the parties pay rent to the other?)
- Are they financially independent of each other or interdependent?
- Have they made any financial agreements with each other?
- Do they jointly own or rent property?
- Do they have any dependent children? If so, does one of the adults provide care for the children of the other?
- Do they present themselves in public as a couple?

Although the word 'intimate' appears to imply that the relationship was originally a sexual relationship, the parties may still be deemed to be cohabitants even if their relationship is no longer sexual in nature.

7.2 What is a 'qualified cohabitant'?

Part 15 of the Bill also allows a special category of qualified cohabitant to seek various remedies such as maintenance, property and pension adjustment orders, provided certain conditions are met. Qualified cohabitants may also claim provision from the estate of their deceased cohabitant, subject again to stated conditions.

Qualified cohabitants are cohabitants who meet the general definition of cohabitants (see 7.1 above) and additionally have lived together as a couple:

- For at least three years, or
- If they are the parents of one or more dependent children, for at least two years. For this purpose, both of the cohabitants must be parents of the dependent child or children.

7.3. Can we be cohabitants or qualified cohabitants if one or both of us is married to other people?

There is nothing preventing a couple one or other of whom are married to other people from being treated as cohabitants (though see below regarding qualified cohabitants).

Two people, however, cannot be treated as *qualified cohabitants* if either of them was, at any time during relationship, married to another person. An exception applies, however if, at the time the cohabiting relationship ends, the married cohabitant has lived apart from his or her spouse for at least four of the previous five years (the qualifying period for divorce.) Thus, if the married couple have been living apart for at least four years, the cohabitants may be treated as 'qualified cohabitants'.

Interestingly, there is nothing preventing a couple from being treated as either cohabitants or qualified cohabitants if either of them is a party to a civil partnership with another person.

7.4 Do we need to register to become cohabitants?

No registration is required. Part 15 creates what is called a 'presumptive scheme'. This means that the rights and obligations will be conferred on cohabitants and qualified cohabitants if they meet the definitions set out above.

7.5 What rights do I have as a 'cohabitant'?

Cohabitants will enjoy reasonably limited rights, many of which are already conferred on unmarried opposite-sex couples. These include:

- The right to sue for wrongful death in respect of a deceased cohabitant
- The right to succeed to a statutorily protected residential tenancy
- The right to various orders, including a barring order or safety order, under the Domestic Violence Acts.

7.5.1 Can we make our own cohabitation agreement?

The Bill also allows for the recognition of agreements between cohabitants providing for financial matters, and making provision for the possible ending of the relationship or the death of one of the parties. As the law currently stands, the legal validity of such agreements is unclear.³⁹ The Bill, however, stipulates that provided certain conditions are met, such an agreement is enforceable.

These conditions are that:

- The agreement is in writing and signed by both cohabitants **and**
- Each party has received independent legal advice before entering into the agreement **or**
- If the parties have received legal advice together, they have each waived in writing their right to independent legal advice **and**
- The general requirements of the law of contract have been complied with.

7.6 What rights do I have as a ‘qualified cohabitant’?

While all cohabitants will enjoy certain limited rights, particular legal remedies will be extended to a specific category of ‘qualified cohabitants’. In order to be deemed a qualified cohabitant, the couple must have resided together for at least 3 years, though the qualifying period drops to two years where the couple have had children together.⁴⁰ If the relationship ends, the Bill provides a number of vital financial and proprietary remedies to a qualified cohabitant. These apply however, only where qualified cohabitant seeking relief is economically dependent on the other cohabitant as a result of the relationship between them or as a result of its conclusion. These include various orders granting compensatory maintenance as well as orders conferring an interest in property and adjusting pension rights. The overall aim of these measures is to provide financial security to the economically dependent cohabitant. As with maintenance orders for spouses and civil partners, it is possible to attach the earnings of the person

³⁹ *Ennis v. Butterly* [1996] 1 IR 426 suggests that cohabitation agreements are void, as they are contrary to public policy, though this conclusion has been disputed.

⁴⁰ The General Scheme of the Bill originally allowed a court to exempt qualified cohabitants from the co-residence requirements in exceptional cases, but this facility appears to have been dropped from the Bill.

required to pay maintenance, to secure the periodical payments or to order payment of lump sums to the qualified cohabitant.

A qualified cohabitant will also be allowed, in specific cases, to make a claim from his or her deceased partner's estate in much the same way as a divorced spouse or former civil partner. (For this purpose, there is apparently no requirement that the qualified cohabitant be financially dependent on the deceased). This can be done if it can be established that proper provision has not been made for the qualified cohabitant during her lifetime. Notably, such provision cannot prejudice the legal right of a spouse of the cohabitant. No mention is made, however, of the legal right of a civil partner, which, it appears, *can* be affected by such an application.

7.7. How do the cohabitation provisions affect the rights of civil partners or spouses of cohabitants?

A couple may be deemed to be cohabitants even if one or both of them are married to, or are civil partners of other people. As discussed above, however, a couple cannot be treated as *qualified* cohabitants if either of them is married to another person, unless the married couple have lived apart for at least four of the previous five years.

Furthermore, a court cannot grant any order in respect of qualified cohabitants that would affect any right of a person to whom either cohabitant is or was married.

In short, the Bill always safeguards the interests of spouses and former spouses. Thus, a property adjustment order or pension adjustment order in favour of a qualified cohabitant cannot be made in such a way as to affect the rights of a spouse or former spouse. Likewise, an order for provision from the estate of a deceased qualified cohabitant cannot affect the legal right of a surviving spouse.

No such safeguards apply where either qualified cohabitant is or was a civil partner. In effect the court can make an order in favour of the qualified cohabitant even if these orders affect the entitlements of a civil partner.

7.8 Can we opt out of this scheme?

It is possible for two people to enter into a written agreement excluding the right to seek maintenance, a pension adjustment order or a property adjustment order. Such an agreement must be in writing and made after independent legal advice has been given to each party (or legal advice has been given to both parties together, if they each waive their right to independent legal advice.)

It is not possible, however, for cohabitants to opt out of the provisions relating to residential tenancies, wrongful death or domestic violence. It is also unclear whether the right to seek provision from the deceased cohabitant's estate can be waived by agreement.

8. The Rights of Children being raised by Civil Partners

The Bill as it applies to civil partners is arguably momentous. The rights and obligations conferred on civil partners are extensive. Nonetheless, in regard to the relationship between civil partners and the children that they raise together, the Bill is largely silent. Indeed the predominant tendency of the Bill is to proceed by reference to the civil partners as a self-contained unit, without significant regard to other relationships that the civil partners may have, particularly with their children.

8.1 Surely by definition, same-sex couples can't have children?

Child-rearing in modern Ireland is certainly not confined to married couples. Just under 12 per cent of all family units in the State comprise non-marital couples, approximately one-third of whom live with one or more children.⁴¹ Additionally, there are (according to the 2006 census) somewhere in the region of 190,000 one-parent families in the State (approximately 18 per cent of all family units in the State).

While it is currently difficult to discern with precision the numbers of lesbian and gay couples parenting children, it is clear from anecdotal evidence and the experience of various NGO organisations that the issue under discussion is far from a hypothetical one. The discussion of same-sex couples raising children is very often centred on the topic of adoption – should same-sex couples be allowed to adopt jointly? While this is a relevant question, the reality is that many same-sex couples already reside with children. This may happen in one of a number of diverse ways:

⁴¹ CSO, *Census 2006, Principal Demographic Results*, (Dublin: CSO, 2007) at p. 64. See www.cso.ie.

- *Children from a previous heterosexual relationship.* Possibly the most common scenario is where a person who has had children in a previous heterosexual relationship subsequently enters into a same-sex relationship. It is certainly possible and not all that uncommon for lesbians and gay men to transition to a same-sex relationship having previously been married or having been in an opposite-sex relationship. In many cases, the individuals involved will have become parents, and if they have custody of the child, may share parenting responsibilities with the new same-sex partner as well as with the other biological parent of the child. In many cases, the biological parents may have joint or shared parenting arrangements that involve both of the biological parents and, in practice, also involve the new same-sex partner.
- *Donor insemination.* It is possible for one or both partners in a lesbian couple to become pregnant through donor insemination. This may be arranged through an intermediary, though there is nothing to preclude a couple from making private arrangements with a known donor. Thus, while the donor may well be anonymous, it may equally be intended by all the parties that the father will be known to the child and will have some agreed involvement in the life of the child. Indeed, it may well be the case that a lesbian couple may make an arrangement with a gay male couple, sharing parenting arrangements as agreed. Although the law does not actively facilitate or promote this option, neither does it preclude donor insemination. The constitutional right to bear children has been confirmed in two cases concerning married couples,⁴² the courts affirming that under normal circumstances the State is precluded from regulating family size (though it may of course prevent the termination of a pregnancy)⁴³. While these decisions concerned married couples, it is very likely that an attempt to regulate the fertility of unmarried women and men would infringe the constitutional right to privacy, and if not, the privacy rights bestowed by Article 8 of the European Convention on Human Rights.
- *Surrogacy.* Though practically and legally more complex, it is possible for a couple to enter into a surrogacy arrangement, whereby a third party agrees to carry a child on the couple's behalf. From virtually every perspective, practical, ethical, emotional and legal, this is a difficult and challenging option.

⁴² *McGee v. Attorney General* [1974] I.R. 284, *Murray v. Ireland* [1985] I.R. 332, [1991] 1 I.L.R.M. 465.

⁴³ Constitution of Ireland 1937, Article 40.3.3, though see *Attorney General v. X.* [1992] 1 I.R. 1

The consequences are particularly complex and require deep ethical and legal consideration, as well as legal clarification.⁴⁴

- *Adoption by one of the partners.* It is possible in Ireland for an *individual* who is in a same-sex relationship to adopt a child.⁴⁵ Although the law does not preclude an individual from adopting, a couple may adopt jointly *only* if they are married to each other. It is important to note that there is no general right to adopt, even under the European Convention of Human Rights. However, once a state permits adoption by a person who is unmarried, it is precluded by the Convention from discriminating against a potential adopter on the grounds of sexual orientation, a point affirmed in the recent decision of the European Court of Human Rights in *E.B. v. France*.⁴⁶
- *Fostercare.* Although same-sex couples are not entitled jointly to adopt, there is nothing in law precluding a couple from fostering a child. In practice, in some cases same-sex couples already act as foster parents. The position of foster children is, however, legally precarious. If they have been voluntarily placed in care, they may be removed at any moment at the request of the child's parents. Even if placed in care at the behest of the HSE, they may still be moved or returned to their original family home. Under the Child Care (Amendment) Act 2007, however, foster carers can acquire rights and responsibilities equivalent to guardianship after the child has resided with them for 5 years.

The Minister for Children, Barry Andrews TD, has expressly acknowledged the value of such fostering arrangements and by implication has negated the view that the State disapproves of same-sex couples as parents:

"...Gay men and lesbians make very good parents. It must be made clear they always have and always will. We must also acknowledge that many same-sex couples foster children. They are entrusted to them by the State through the Health Service Executive proving the State does not have any set view on this

⁴⁴ See the *Report of the Commission on Assisted Human Reproduction* (Dublin; Department of Health and Children, 2005), which recommended (by a majority) legal recognition and regulation of surrogacy arrangements, provided certain strict conditions were met.

⁴⁵ Section 10, Adoption Act 1991.

⁴⁶ Application 43546/02, 22 January 2008.

matter. The argument that same-sex couples cannot be good parents is contrary to the case”.⁴⁷

Indeed, a number of important studies endorse the view that children being raised by same-sex couples are on average as well adjusted and as well cared for as children living with opposite-sex couples. In particular, in a policy statement from 2004, the American Psychiatric Association’s Council of Representatives stated their view that “...beliefs that lesbian and gay adults are not fit parents have no empirical foundation”.⁴⁸ There was no marked difference, they concluded, between lesbian women and straight women regarding their approach to child-rearing. In fact, in some cases, lesbian and gay parents were found to divide child-rearing tasks more equally than was the case with their opposite-sex counterparts.

By the same token they could find no evidence that the children of same-sex parents developed any less well than children residing with heterosexual parents, or had any greater propensity to personality disorder or difficulties with their sexual identity. In sum, they concluded that “...results of research suggest that the development, adjustment and well-being of children with lesbian and gay parents do not differ markedly from that of children with heterosexual parents”.⁴⁹ It thus called for an end to discrimination in the context of adoption, child custody and visitation foster care and reproductive health services.

In *Family Well-being – What Makes a Difference?* McKeown, Pratschke and Haase concluded that the type of family in which children are reared is generally less relevant to their well-being than is commonly assumed. The study indicated that:

“...the physical and psychological wellbeing of parents and children are shaped primarily by family process, particularly processes involving the ability to resolve

⁴⁷ In the Seanad, March 4,2009, discussing amendments to the Adoption Bill 2009 Seanad Debates, Vol. 194, No. 6. See:

<http://debates.oireachtas.ie/DDebate.aspx?F=SEN20090304.xml&Node=561#N561>

⁴⁸ See <http://www.apa.org/pi/lgbcpolicy/parents.html>

⁴⁹ Ibid.

conflicts and arguments, and by the personality traits of parents. The type of family in which one lives...has virtually no impact on wellbeing".⁵⁰

As they noted:

"...once we controlled for a range of explanatory variables, we found practically no statistically significant variation in the well being of children in the four family types, indicating that the parents' marital status and the presence of one or two parents in the household do not, of themselves, affect the child's well-being".⁵¹

It is thus, they suggest, the *quality* of family relationships, and in particular the quality of communication between family members rather than the particular structure of the family or type of family that matters most in relation to the rearing of children.⁵²

8.2 What rights (if any) will children have when they are being raised

by civil partners? As discussed above, many children already reside with a parent who is lesbian, gay or bisexual. In a growing number of cases the biological parent with custody of the child is living with a same-sex partner, who may in future, statutorily be recognised as a civil partner. While the latter may perform the *de facto* role of parent, currently there is no legal recognition of the child's relationship with that partner.

Insofar as it relates to adult relationships, the proposed Civil Partnership Bill is exceptionally comprehensive. In particular, it replicates in most respects the obligations and entitlements that are conferred by law on married spouses.

Insofar as children are concerned, however, the Bill as currently constituted would make very little change to the current legal situation of the child living with same-sex partners. Given the precarious legal position of such families, this is

⁵⁰ McKeown, Pratschke and Haase, *Family Well-being – What Makes a Difference?* (Shannon: Céifin Centre, 2003) at p. 12

⁵¹ *Ibid.* at p. 11

⁵² See also Golombok, *Parenting: What Really Counts?* (London: Routledge, 2000).

problematic, and arguably needs to be addressed squarely in any discussion of the proposals.

The Bill is not entirely silent in relation to children. Nonetheless, it largely proceeds by reference to the couple as a self-contained unit. There is relatively scant regard for any children who may reside with them. This appears to be deliberate – the Government, while content to acknowledge same-sex couples, seems reluctant to recognise the position of same-sex couples as parents. This is evident, in particular, in the continued reluctance to countenance civil partners jointly adopting children, even though a gay or lesbian person may do so as an individual.⁵³

While marriage legislation generally requires the courts to have regard to the children in a family unit as well as the adults, the equivalent provisions in this Bill generally do not generally address the position of children. For instance:

- Unlike the equivalent provisions of the Family Home Protection Act 1976, the protections afforded to civil partners in respect of the shared home make no reference to the accommodation needs of dependent children as a relevant criterion. This means, theoretically, that decisions may be made by a court that ignore or even prejudice the interests of children.
- The dissolution of a civil partnership may be obtained, moreover, without having regard to whether proper provision has been made for any dependent children. By contrast, a divorce may only be granted where a court is satisfied that proper provision has been made for both spouses *and* for any dependent children.
- Divorce legislation requires the court to have regard, in making any orders after divorce, to the contribution either spouse has made to the rearing of

⁵³ See section 10, Adoption Act 1991, which allows individuals to adopt, but only allows joint adoption where a couple is married. Notably, the Minister for Children in the Seanad debates on the Adoption Bill 2009 has indicated that the Government's continued reluctance to change the law to allow same-sex couples to adopt does not reflect a set policy against same-sex parenting. On the contrary, he stressed that "...[w]e do not want the message to go out from the House that with the route we are taking on adoption there is an adverse comment on sexual orientation. Through the fostering process, it is recognised that we have no problem with gay men and lesbians being parents or minding children." He suggested, however, that the matter would need to be considered further ("scoped...out clearly") before the law could be amended. In the Seanad, March 4, 2009, discussing amendments to the Adoption Bill 2009 Seanad Debates, Vol. 194, No. 6. See: <http://debates.oireachtas.ie/DDebate.aspx?F=SEN20090304.xml&Node=561#N561>

children, and to their care. The Family Law (Divorce) Act 1996 also requires the court to take into account the effect on a spouse's earning capacity and income where he or she has given up work outside the home in order to raise the spouses' children. These factors, by contrast, are not referenced in the Civil Partnership Bill. Indeed, ironically, the Bill allows the court to take into account the contribution a civil partner has made to the shared home of the partners. It may also have regard to the effect such a contribution has made to the other partner's career. The court may not, however, have regard to the contribution made to the care of children in the home.

- Additionally, no provision is made in the Bill for an order relating to custody or access to be made under section 11 of the Guardianship of Infants Act 1964 during proceedings for dissolution. A married couple may seek such an order as part of their divorce proceedings. The absence of a similar provision in this Bill means that separate proceedings will have to be instituted (at extra expense and with consequent delays) if the non-biological parent seeks access.

Theoretically, this means that a civil partnership may be dissolved in circumstances where a child of either party may be financially disadvantaged as a result. Similarly, in theory, a court could order the sale of a shared home of civil partners, without having regard to the impact of any sale on any resident dependent children. This is clearly at odds with the much-vaunted focus in Irish and international law on the best interests of the child.

8.3 Are the child's best interests being upheld by the Bill?

While legal discourse is often framed in terms of parental rights, it is clear that the proposed scheme also relieves one of the civil partners of obligations that might in fact be quite beneficial to the child and the State to recognise. Under the Bill, for instance, a child living with civil partners will not be able to claim maintenance from the civil partner who is not her biological parent. Nor will the child have any legal right to claim from that partner's estate on death (unless the latter made a will in the child's favour). Even with civil partnership, the couple will not be able to adopt jointly, while custody and guardianship rights, even with civil partnership,

will still be denied to the non-biological parent. Similarly, a child will not be entitled to a death benefit for orphans in respect of the non-biological parent's death. Likewise, he will not be treated as a child of the civil partner for the purpose of any death-in-service benefits conferred by legislation on a deceased employee's family.

The civil partner who is not the biological parent of a child, moreover, is not entitled to seek custody of the child, though she may be entitled to seek access if she has been involved at some point in the raising of the child. Although the non-biological parent may be nominated in the will of the biological parent as a guardian, the non-biological parent cannot acquire guardianship during the lifetime of the biological parents.

This non-recognition is all the more problematic given that the child may have been born as a result of an arrangement made by the civil partners as a couple. The child, in other words, may have been born to one civil partner, but in circumstances where the other party may have agreed to or even encouraged the pregnancy. The non-biological parent may indeed have persuaded the biological parent to become pregnant. In such circumstances it would appear unfair to relieve the non-biological parent of responsibility for an initiative in which she may have been a joint and willing partner, or even the prime mover.

From the child's point of view, such non-recognition is contrary the child's best interests, the touchstone of child policy, which both the Guardianship of Infants Act 1964 and the UN Convention on the Rights of the Child 1989 uphold as paramount.

8.4 Does the Bill make any reference to the children of civil partners?

In fairness, the Bill is not entirely oblivious to children:

- In maintenance and dissolution cases the courts must take into account a civil partner's obligations towards his or her own biological children. In deciding the amount of maintenance to be awarded to a civil partner or in considering the remedies sought after a dissolution is granted, the courts are required to

take into account these existing parental obligations. While this falls far short of requiring support for the child by the non-biological partner, it may indirectly lead to such an outcome. It means effectively that in determining the appropriate level of relief for each partner, the court will be obliged to consider that one of the partners has parental obligations, which may result in a greater diversion of resources to the biological parent.

- The overriding requirement that an order cannot be made on dissolution unless it would be in the interests of justice to do so arguably provides an important safeguard for children of civil partners. Clearly, a judge should not consider an order as being in the interests of justice if the best interests of a child of either party are prejudiced thereby.
- Notably, a civil partner will be able to apply for an order under the Domestic Violence Acts with a view to protecting the dependent child of either civil partner, if the child is under the age of 18 or, in the alternative, disabled to such an extent as to prevent the child living an independent life. The applicant must either be the biological or adoptive parent of the child, or alternatively a person *in loco parentis* in relation to the child. Theoretically, this would allow a person to seek a barring order against his or her civil partner to protect either the applicant's biological child or that of the civil partner against whom the order is being sought.
- The relationship between a person and her civil partner's child is recognised for certain conflicts of interest and other ethical provisions.
- Section 206 of the Bill generally requires that when making any order under the Bill, the court shall have regard to the rights of any other person with an interest in the matter. This may feasibly include the child of either civil partner.

8.5 What are the Succession Rights of Children?

A child has no right to claim from the estate of his or her parent's civil partner or spouse (unless the latter is also the child's parent), though they may always make a claim against the estate of a biological parent.

There is, however, one important context in which a civil partner's child is granted significant rights that are not in fact extended to the children of married couples.

As discussed above, any child may on the death of his or her parent, make a claim against the estate of the deceased parent. Such a claim cannot affect, however, either the legal right of a spouse or the portion of the estate to which the spouse will succeed if the deceased did not make a will. The Bill, however, does allow a court to grant the child a share in his late parent's estate, notwithstanding the fact that such provision eats into the portion of the estate to which a civil partner is otherwise entitled.

This differentiation appears to privilege spouses at the expense of their children. It also appears to confer stronger rights on the children of civil partners than apply to the children of married couples. The Bill, admittedly, generally operates to the detriment of the children of civil partners. It seems strange, however, that the Bill extends such rights to the children of civil partners and not to the children of spouses.

8.6 Conflicts of Interest involving the child of a person's civil partner.

The only context in which the Bill directly countenances a relationship between the child and the non-biological parent is for the purposes of ethics legislation. In this context, the relationship between a child and his parent's civil partner will generally be recognised, if the child is ordinarily resident with the civil partners. Ironically this requires the civil partner in his commercial and/or civic behaviour to avoid a conflict of interest arising from a relationship which the law otherwise does not recognise.

8.7 Adoption, Guardianship, Custody and Access.

While a civil partner may be able to adopt as an individual, the Bill does not permit joint adoption by civil partners. Only a married couple may adopt jointly.

A civil partner of the biological parent may only be conferred with a right of guardianship on the death of the child's parent. This does not occur automatically; though the right to succeed may be conferred by will of either biological parent or, in the alternative, by a court order on the death of a

guardian. A civil partner of a biological parent cannot otherwise acquire joint guardianship, even with the consent of the other guardians and/or biological parents. While guardianship in respect of a child will be conferred by adoption of that child, civil partners may not adopt a child together. A biological parent who wishes her civil partner to adopt the parent's child would have to give up her own rights and obligations in respect of the child in order to give effect to such adoption. The civil partners will not be permitted jointly to adopt a child.

It is possible for the non-marital father of a child to be conferred with guardianship, either by agreement with the mother or by court order. Such a facility only applies to the biological father of the child and not to any other person (including the new spouse or civil partner of a biological mother).

Without guardianship, a person who is not the child's biological parent cannot apply for custody of a child. As against all other people not having guardianship of the child, moreover, a guardian generally will be entitled to custody of a child. This does not, however, prevent a court from refusing to return custody of a child to a guardian where another person is caring for the child, if the interests of the child would be best served by leaving the child in the custody of that other person. Nonetheless, the circumstances in which a guardian would be refused custody as against a person who is not a guardian or other parent would likely be very rare indeed.

A child, however, has a right under international agreements binding on the State,⁵⁴ to have access to a parent from whom he or she is separated. Section 11B of the Guardianship of Infants Act 1964 also allows a relative of the child (e.g. a grandparent) or a person who is *in loco parentis* in respect of the child (i.e. in a position where he or she has acted as if he were a parent) to apply for access (visitation rights). Arguably the phrase *in loco parentis* would embrace a civil partner who has lived with the child. This would thus extend the child's right of access to a person who has jointly parented a child of their civil partner. For the avoidance of doubt, however, this should ideally be confirmed in legislation by

⁵⁴ UN Convention on the Rights of the Child 1989 and European Convention on Human Rights.

explicitly allowing a civil partner to seek access in respect of a child with whom he or she has lived.

8.8 A missed opportunity?

Even with civil partnership as currently proposed, the legal position of a growing number of children living with same-sex couples will remain especially problematic. Despite the golden opportunity to address this issue, the Bill as currently constituted does little to ameliorate the legal position of children living with same-sex couples. This is ironic – arguably the law has a much stronger claim (or perhaps even *duty*) to intervene in support of families with children than families without children.

It is fair to say that even for children living with heterosexual parents, the law has often proved to be outdated and ineffective. The basic principles of Irish child law date back to 1964, when the phenomena being discussed here were not in general contemplation (and were indeed perceived as contrary to public policy). The failure to update and modernize the law clearly causes great stress to partners raising a child. It is particularly invidious however when viewed from the perspective of the child, who is denied the stability of a relationship with both its *de facto* parents. In particular, the moral obligations and entitlements of the non-biological parent who is rearing that child, are not reflected in law: legally that person has little or no legal responsibility towards the child, a situation that places the child in a very awkward legal situation.

It is indeed ironic to say the least to assert (as some do) that a lesbian or gay household does not provide a stable environment when the law itself militates against such stability. These children are thus relegated to a second-class form of citizenship. As the American Academy of Paediatrics asserts "...[c]hildren

deserve to know that their relationships with both of their parents are stable and legally recognised".⁵⁵

8.9 Would the position be different if same-sex couples were entitled to marry?

It has sometimes been suggested that the best solution to the legal predicament of the child living with a same-sex couple, is to permit the couple to marry under the civil law. There is certainly considerable merit in the claim that same-sex couples should be afforded the right to marry. It is, however, not necessarily the case that the marriage of the partners would improve the legal situation in respect of the child or children of that family. In fact, absent significant legal reform, the introduction of same-sex marriage in and of itself would address only *some* of the issues raised in relation to the rights of children raised by same-sex couples. While the extension of marriage would facilitate, for instance, joint adoption by the couple, it would not in and of itself confer additional maintenance or succession rights on the child in respect of a spouse who is not his biological parent. Nor would the latter be entitled to guardianship by virtue of the marriage.

A husband and wife have joint and equal rights in respect of their children. In this respect, marriage considerably improves the position of the father relative to the position he would have been in had he not been married to the mother of his child. While an unmarried father has limited rights, (and in particular no automatic right to guardianship), a married father enjoys, by contrast, a co-equal right and responsibility to raise and care for his child.

The elevated position of the married father is attributable, however, not solely to his married state but also to the biological fact of fatherhood. This is illustrated by the fact that the legal position of a married man who is not the father of his wife's

55 AAP Policy Statement, "Coparent or Second-Parent Adoption by Same-Sex Parents", (Committee on Psychosocial Aspects of Child and Family Health), Pediatrics Vol. 109 No. 2 February 2002, pp. 339-340.

child is entirely more precarious than that of a married father. If it is established that he is not the father, he will not be entitled to guardianship, and may not be able to claim custody, though he may be required financially to support the child if, being aware of the child's true paternity, he treats the child as a child of his family.

Marriage does not of itself confer guardianship or custody rights on the new husband. In the normal course of events, he is not obliged to maintain the child unless, knowing he is not the father, he has agreed to treat the child as a child of his family. The child will not have any succession rights in respect of the new husband, though the step-relationship will be recognized for the purpose of Capital Acquisitions Tax, so that the aggregated tax exemption thresholds normally applied to transactions between biological parents and children also apply in respect of the husband and his step-child.

It is not possible to confer guardianship on the husband if he is not the father of a child otherwise than (1) by will, on the death of an existing guardian, (2) by court order, on the death of an existing guardian or (3) by adoption. The third option, which is probably the most feasible, is not straightforward. In order to effect an adoption, the biological parent must agree to give up her own child for adoption. The couple may then adopt the child jointly, though there are a number of reasons why this may not be possible in every case:

- Although unlikely, the Adoption Board may rule that the couple are not suitable to be made adopters as they fail to meet the standard suitability criteria set out in section 13 of the Adoption Act 1952;
- If the biological father of the child has been conferred with guardianship of the child, the biological father may veto the adoption, thus preventing it from occurring. (Any other guardians may also block the adoption);
- If the child is a child born to a husband and wife who were married, the adoption will only be possible where there has been complete abandonment of the child and the abdication of all duties in respect of the child, as required by the Adoption Act 1988. Thus, if the child is being cared for by its mother, it will

not be possible to adopt the child, even with her consent and that of the biological father.

The position, in practice, would be even more difficult in the case of the wife of a man who already has children. In such a case, the biological mother of the child has an automatic right of guardianship, regardless of whether the child was born inside or outside marriage. She thus would have an automatic veto over any adoption.

Similar principles would apply if same-sex couples were permitted to marry. The simple fact of marriage does not confer parental responsibilities and rights on the non-biological parent and the options in such a case are more limited than is sometimes supposed.

8.10 Possible Options for Recognition.

The path to reform thus requires change that is much more fundamental and far-reaching than the simple introduction of civil partnership or the extension of civil marriage to same-sex couples. Indeed, the great diversity of family life in Ireland today requires, arguably, a root and branch re-visitation of family law as it applies to children. In particular, such reform should not (indeed cannot legally) be confined to the legal position of the children of same-sex couples. It must take account of the growing prevalence of blended families (consisting of children from more than one relationship) as well step-parenting arrangements and relationships between unmarried opposite-sex couples and their children (particularly the rights of unmarried fathers).

A number of options for reform arise and are outlined, in summary, below. In setting out these options, it is the aim of the author to stimulate debate rather than to be prescriptive or definitive in relation to best path for reform. There is always, of course, as a first option, the option to do nothing, to leave things as they are. I hope, however, that it has become apparent that a failure to grasp this issue in a mature and considered fashion will result in considerable legal and financial uncertainty and injustice into the long term.

8.10.1 Guardianship by Agreement

Currently, section 2(4) of the Guardianship of Infants Act 1964 (as amended by the Children Act 1997) allows a mother and father who are not married to each other to agree that the father will – by means of a statutory declaration – be conferred with joint guardianship in respect of the child. The mother's right to guardianship is preserved.

Option: a similar provision could be adopted allowing the biological parents/existing guardians jointly to confer guardianship on a civil partner who is co-parenting. This could also be made to benefit the new (heterosexual) spouse of a biological parent.

Safeguards: the full, free and informed consent of all parties, including that of both biological parents, would be required, in writing. The biological parents' right to guardianship or to claim/acquire guardianship would be preserved.⁵⁶

8.10.2 Guardianship by Court Order

Section 6A of the Guardianship of Infants Act 1964 (as amended by the Children Act 1997) allows an unmarried father – by means of a court order - to be appointed a guardian jointly with the child's mother. The consent of the mother is not required, though the court must be satisfied that the father's appointment as joint guardian is in the best interests of the child.

Option: A similar provision might be introduced to allow a civil partner or new spouse to be conferred with joint guardianship by court order, if this is considered to be in the best interests of the child. This would effectively amount to a co-parenting or joint-parenting order, conferring on the civil partner or new spouse joint parenting rights and obligations to be shared with existing guardians.

⁵⁶ Notably, the conferral of guardianship on a person who is not a biological parent would not currently permit the child to claim from the estate of the new guardian (unless provided for in the guardian's will) or to claim an extra tax allowance in respect of property willed by that guardian. This means that the child is not placed at an unfair tax advantage vis-à-vis other children with only two guardians.

Safeguards: the court must be satisfied that this step is in the best interests of the child. The biological parents' rights to guardianship or to claim/acquire guardianship would be preserved. As a matter of natural justice, all parties (including the child and both of its biological parents) should be given the opportunity to be heard before a decision is made by the court.

8.10.3 Custody

Section 11(4) of the Guardianship of Infants Act 1964 allows an unmarried father, even if he is not a guardian, to apply for custody in respect of a child. This does not, of course, guarantee an order in favour of the father. The court must decide, in all the circumstances, what custody arrangements are in the best interests of the child.

Option: extend this right to a spouse or civil partner who has lived with the child as a member of his or her family for a minimum qualifying period.

Safeguards: The best interests of the child should be considered paramount. The biological parents' rights should in all cases preserved. As a matter of natural justice, all parties (including the child and both of its biological parents) should be given the opportunity to be heard before a decision is made by the court. As a matter of constitutional law, the Court would have to take into account the constitutional rights (if any) of the biological parents in making any decision that would be to their detriment. In particular, for constitutional purposes, it may be necessary to apply the presumption (which can be rebutted) that a child's best interests are served by remaining in the custody of its marriage-based family (if relevant).⁵⁷

8.10.4 Adoption

Currently, two persons cannot adopt jointly unless they are married to each other, though a person in a non-marital relationship may adopt as an individual.

⁵⁷ *Re J.H. (an Infant); K.C. and A.C. v. An Bord Uchtála*: [1985] I.R. 375, *N. v Health Service Executive* [2006] I.E.S.C 60.

Option: extend the right to apply for joint adoption to civil partners.

Safeguards: the full, free and informed consent of the mother and guardian(s) are generally required before an adoption can take place. The biological father of the child must generally be consulted in respect of the adoption, though if he is a guardian, his consent is always required. As is always the case, the prospective adoptive parents must be deemed suitable to act as parents.

8.10.5 Recognition of surrogacy/donor agreements

Provided that full, free and informed consent has been obtained from all interested parties (following independent legal advice, if necessary), parenting agreements with a donor or surrogate should be recognised and enforced. These may allow, for instance, the waiver of rights and release of obligations of the donor or surrogate. Such agreements might be overridden, however, where deemed not to be in the best interests of the child.

Such agreements should not be lightly entered into. The ethical, social, moral and legal consequences are serious and long lasting. It is arguable thus that a counselling requirement should also be built in, together with a requirement for a period of reflection for all concerned parties.

8.10.6 A final note on these options.

Any legal reforms made could not (and indeed should not) legally be confined to same-sex couples. As such, the proposals above represent a possible path forward not only for lesbian and gay families but also for many heterosexual families and, in particular, blended families, as discussed above. In short, any discussion of the legal position of children must take place in a context that avoids 'ghettoising' children in lesbian and gay families. It should instead recognise that the legal position of such children reflects a widespread malaise in family law that requires root and branch reform.

9. Taxation, Social Welfare and Immigration

For technical legal reasons, certain matters, though not dealt with in the Bill, are likely to be dealt with in other legislation. In particular, the Minister for Justice, Equality and Law Reform has expressly indicated that for the purpose of taxation, social welfare and immigration, civil partners will be treated the same as spouses.

9.1 Taxation and Social Welfare

Although the Bill makes no reference to taxation or social welfare reform in respect of civil partners, the Minister for Justice, Equality and Law Reform has indicated that civil partners will be treated the same as spouses in relation to these matters. These matters will be dealt with, the Minister has indicated, in a Finance Bill and Social Welfare Bill respectively:

“On registration of a civil partnership, the civil partners will be treated in the same way as spouses under the tax and social welfare codes. The necessary legislative provisions, to be provided for in Finance and Social Welfare Bills, will be brought into effect at the same time as the civil partnership registration scheme commences.”⁵⁸

The separate treatment of these matters is more than likely because legal measures relating to revenue and expenditure are constitutionally required to be passed as a part of a ‘Money Bill’. The constitutional procedure for passing a Money Bill is different from that applying to normal Bills. In particular, the role of the Seanad in passing a Money Bill is much more limited than applies to normal Bills.

⁵⁸ “Ahern publishes Civil Partnership Bill 2009”, Department of Justice website: <http://www.justice.ie/en/JELR/Pages/PR09000098> consulted July 31, 2009

9.1.1 What rights are likely to be conferred?

Married couples enjoy significant rights and exemptions in respect of taxation. In particular, they may share some tax credits and exemptions for the purpose of income tax. Certain additional tax credits are also extended to widows and widowers, as well as divorced people who meet specified criteria. Property transferred between spouses either by gift or on inheritance is not subject to Capital Acquisitions Tax, while property sold or otherwise transferred by one spouse to the other is not subject to either Capital Gains Tax or Stamp Duty.

The Department of Justice, Equality and Law Reform has indicated that these entitlements will also be extended on an equal basis to civil partners. This is to be welcomed. As the law stands at the moment, same-sex partners are liable to pay significant amounts of tax in respect of which spouses are typically exempt, particularly on the death of one of the partners.⁵⁹

9.1.2 What Social Welfare reforms are likely?

The Minister has indicated that social welfare laws will also be changed to recognise civil partners, again applying a benchmark of equality with marriage. This means, for instance, that the entitlement to widow or widower's pension and the widowed parent's grant should be extended to civil partners. If the latter is done, it is hoped that it will be done in a manner that recognises the *de facto* relationship between a child and the civil partner of the child's biological parent as well as the relationship between a biological parent and child.

Equality, of course, may in some cases mean that the civil partners will lose out on certain payments. For instance, recognition as civil partners may mean that in means-testing a potential social welfare recipient for certain benefits, the income of the potential recipient's civil partner will be considered. Likewise, it is possible that the law will be changed so as to preclude a person from obtaining the one parent family payment if they are living with a civil partner or same-sex cohabitant

⁵⁹ Though certain exemptions apply in relation to succession to a home that is the principal private residence of the deceased, provided certain conditions are met. See section 151 of the Finance Act 2000.

(currently, social welfare law only recognises spouses and opposite-sex cohabitants).

9.2 Immigration

Immigration is a crucial matter for civil partners one of whom is an Irish or EU/EEA⁶⁰ citizen and other of whom is a non-EU/EEA national.

While the Civil Partnership Bill is largely silent on the point,⁶¹ it is understood that civil partners will be treated the same as spouses for the purpose of immigration. GLEN quoted the Minister for Justice, Equality and Law Reform, in their press release on the publication of the Bill, as saying that:

“The General Scheme [of the Civil Partnership Bill] proposed that registered civil partners be treated in the same way as spouses for the purposes of the Immigration, Residence and Protection Bill. As this Bill has not been enacted, it is not yet possible to include the appropriate amendments in the Civil Partnership Bill. However, it is the Government's intention to implement the immigration proposals as published in the General Scheme by moving amendments to the Civil Partnership Bill at an appropriate time during its passage through the Oireachtas”⁶².

So while the Civil Partnership Bill *itself*, as initiated, does not currently make any significant alteration to immigration law, this is likely to change once the Immigration, Residence and Protection Bill 2008 is enacted into law. The Immigration, Residence and Protection Bill has not yet been passed by the Oireachtas. The logic may be that there is no point in referencing the currently applicable Immigration Acts in the Civil Partnership Bill if those Immigration Acts are due to be repealed by the 2008 Bill, once it is enacted. By the same token,

⁶⁰ The EEA includes the EU and Iceland, Liechtenstein and Norway.

⁶¹ Though civil partners of diplomats will be recognised for the purpose of the Aliens Act 1935, a move that is broadly indicative of goodwill in relation to this matter.

⁶² See GLEN press release of 26th June 2009 at <http://www.glen.ie/press/docs/Press%20Release%20on%20Publication%20of%20CP%2026th%20June%202009.doc>

referencing the proposed Immigration Bill may equally be problematic as the Immigration Bill may be amended during its passage through the Oireachtas. It is likely, thus that once the Immigration Bill is passed into law:

- The Civil Partnership Bill will be amended to make appropriate changes to the proposed new Immigration, Protection and Residence Act and/or
- Policies made under the proposed new Immigration Act will treat civil partners the same as spouses.

It is significant in this context to note the progress already made in recent years in recognising *de facto* relationships for the purpose of immigration, both at EU and national level. Where the partners are in a durable relationship, provision has in practice been made for their recognition for the purposes of immigration law.

9.3 What is the current position on immigration and same-sex couples?

The current state of the law (i.e. prior to the enactment of the Civil Partnership Bill) differs depending on the nationality of the parties. It is important always to recognise that for all non-EEA nationals, the State retains a broad discretion to refuse entry to the State. Even the spouses of Irish citizens do not enjoy an automatic right to residence in Ireland.

9.3.1. We are both EU Nationals.

Where the same-sex partners are both EU, EEA or Swiss nationals (for instance, one is Irish and one is Portuguese) both are entitled to reside in Ireland without restriction. The free movement provisions of EU law broadly entitle all EU citizens to move freely between states. As a result of various treaties, similar rights have been extended to EEA nationals (the EU, Iceland, Liechtenstein and Norway) as well as Swiss nationals.

9.3.2 I'm Irish and my same-sex partner is from Canada.

Although there is no legislative right in this regard, it appears that in practice same-sex partners are already being recognised for the purpose of immigration law.

Where one partner is an Irish citizen and the other party is a non-EU/EEA national the State in practice may recognise the relationship and grant the non-EU/EEA partner the right to reside in Ireland, provided certain conditions are met. The main condition is that the partners have been in a durable relationship for at least two years. The Irish Naturalisation and Immigration Service indicates that:

“Non EEA nationals who wish to remain [in] the State and are in a de facto relationship with an Irish National must be in a position to provide evidence of a durable attested relationship of at least 2 years.”⁶³

For this purpose, both partners must produce their passports and evidence of their relationship. The latter may include copies of tenancy agreements (e.g. where both are named as joint tenants) and other documents attesting to the existence of a cohabiting relationship. The parties will also be required to present evidence relating to their finances, such as bank statements, the concern presumably being that the non-EU/EEA national does not become a burden on the State. Additional documentation may be required.

If the partners are recognised, the non-EEA national may be allowed to live in Ireland. In certain cases, the non-EEA partner may be allowed to work in Ireland without obtaining a work permit.

9.3.3 I'm an EU national and my same-sex partner is Russian.

It is worth noting that the State is already *legally obliged* under EU law to recognise durable *de facto* relationships existing between non-marital partners, one of whom is not Irish but is an EU national and the other of whom is not. Council Directive 2004/38/EC requires the State to recognise a durable *de facto*

⁶³ <http://www.inis.gov.ie/en/INIS/Pages/WP07000278> consulted July 31, 2009.

relationship between an EU national (though not, notably, if that EU national is an Irish citizen) and a non-EU national. Typically, the State will require evidence that the partners have cohabited for at least two years. It is, however, not necessary for this purpose that the parties have previously lived together in another EU state. They may, for instance, have lived together outside the EU.⁶⁴

The effect of such recognition is to allow an EU national to be joined in Ireland by his or her non-marital partner, regardless of the nationality of the latter.⁶⁵ Council Directive 2004/38/EC also confers a right to work or be self-employed on both the EU and the non-EU partner.

9.3.4 I'm from the United States and have been granted a green card entitling me to work in Ireland. Can I bring my same-sex partner, who is also from the US?

Subject to certain conditions, the partners may accompany each other to Ireland. The main condition is that the partners have been in a durable relationship for at least 4 years. Evidence of this relationship and of the partners' finances must be provided. The "history of activities" of the parties in the State will also be taken into account (this may, for instance, mean that if either party has previously resided illegally in the State that immigration status will not be conferred).

It is important to note, however, that even if the relationship is recognised, both partners will require a work permit or green card in order to work in the State.

9.4 What will be the immigration status of civil partners?

As noted above, the Minister has expressed his intention that, for immigration purposes, civil partners will be treated the same as spouses. This does not mean, of course, that the civil partners of Irish citizens will have an *automatic right* to reside in Ireland. Even in relation to the spouses of Irish citizens, the Minister

⁶⁴ See *Metock v Minister for Justice, Equality and Law Reform*, European Court of Justice, July 25, 2008.

⁶⁵ This has been implemented into Irish law by the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006).

retains the discretion to refuse permission, and is unlikely to wish to cede this discretion in relation to civil partners. At a minimum, however, civil partners should formally be treated for the purposes of immigration in the same manner as married couples.⁶⁶ Indeed, the State already recognizes some same-sex partners and other *de facto* relationships for the purpose of immigration, and has granted residence rights on the basis of established same-sex relationships.

9.4.1 Civil Partnerships and EU Law: Council Directive 2004/38/EC.

As discussed above, the State is already legally obliged under EU law to recognise durable *de facto* relationships existing between non-marital partners, one of whom is an EU national and the other of whom is not. The effect of such recognition is to allow an EU national (though not, notably, an Irish national) to be joined in Ireland by his or her non-marital partner.⁶⁷

The same EU provision – Council Directive 2004/38/EC - requires that where an EU state recognises a form of registered partnership, it must also treat a person with whom a Union citizen has contracted a registered partnership in another EU state as a member of the Union citizen's family. Such a registered partnership will only be recognized, however, if the legislation of the host Member State treats registered partnerships as equivalent to marriage.

It is an open question whether Ireland will meet this last condition, and will thus be obliged to recognize EU registered partnerships for the purpose of the Directive. Although very similar to marriage, it is clearly envisaged that some legal differences (most of which are minor) will remain. The Bill likewise takes particular care (probably for constitutional reasons) not to suggest any explicit comparability with marriage.

That said, the Directive does not require equality, only equivalence. Given the substantially similar effects of civil partnership and marriage, it is certainly

⁶⁶ It is notable that the spouses of Irish citizens as well as widows and widowers who were formerly married to Irish citizens do not have to pay the €150 fee normally required of non-EU nationals registering with the Garda National Immigration Bureau. This exemption should, by rights, also be applied to civil partners.

⁶⁷ This has been implemented into Irish law by the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006).

possible to argue that in substance Irish civil partnership and marriage are equivalent for the purpose of EU Law. Notably, the civil partnership regime proposed for Ireland is extensive, and not limited in nature. Thus, it is possible that Ireland will be required either to recognize foreign civil partners and that foreign jurisdictions will be required to recognize an Irish civil partnership for the purpose of the Directive. (Even if they were not, civil partners would undoubtedly meet the durable relationship criterion discussed above.)

9.4.2 Recognition of same-sex couples who are not civil partners.

It is contended that the recognition of civil partnerships for the purpose of immigration legislation should not prejudice the entitlement of *de facto* partners of Irish citizens to seek immigration status. If the law is to confine recognition to those in a recognised legal relationship with an Irish citizen, it risks prejudicing couples who come to Ireland from jurisdictions that do not recognise any form civil partnership (or worse, that criminalise same-sex relations).

9.5 Citizenship.

The Bill makes no reference to citizenship. It is thus not clear whether citizenship laws will be changed to treat spouses and civil partners alike for the purpose of acquiring citizenship after marriage to or entering into a civil partnership with an Irish citizen.

In the case of citizenship, the Irish Nationality and Citizenship Acts 1956-2004 should be amended to allow a civil partner to be treated as equivalent to a spouse in determining the right to citizenship. In particular, a spouse of an Irish citizen may apply for citizenship after three years' residence (out of the previous five years) in Ireland (provided certain conditions are met: the parties must have been married for at least three years, must not be separated, and must intend to continue residing in Ireland after naturalisation.) Any other person (with the exception of refugees) will normally only be naturalised where they have lived in

Ireland for at least five of the previous nine years.⁶⁸ Applications by spouses of Irish citizens can, in other words, be fast-tracked. It is unclear why a similar right is not to be conferred on civil partners.

⁶⁸ The Irish Nationality and Citizenship (Fees) Regulations 2008 set a fee of €950 for the granting of naturalisation. Where the application is made by a widow or widower whose spouse was, immediately before death, an Irish citizen, and who has not, subsequent to the spouse's death, become a naturalised citizen of a state other than the State, a lower fee of €200 applies. Similar provisions should arguably apply in the case of surviving civil partners.

10. What other improvements can be made to the Bill?

The Civil Partnership Bill is arguably a momentous measure. It will profoundly alter the rights and obligations of those who enter into a civil partnership, and will offer important protections to cohabitants both of the same sex and of the opposite sex.

Nonetheless, the Bill does not address a number of matters, some of general importance, others that may be important only in isolated and specific cases. Some of these deficiencies have been addressed in the preceding chapters. Without wishing to detract from the general significance of the Bill, some specific matters may be worth highlighting.

10.1 The Definition of a ‘Family’⁶⁹

While granting many important legal rights and entitlements, the Bill generally avoids describing civil partners as a ‘family’. For instance, the provisions relating to the home of civil partners refer to a ‘shared home’ rather than ‘family home’ (the term that is applied to the home of married couples). Likewise, the Bill does not appear to recognise relationships formed through a civil partnership, i.e. ‘in-law’ relationships.

While there is possibly some constitutional difficulty in describing unmarried couples as ‘family’,⁷⁰ the general avoidance of the term ‘family’ to describe civil

⁶⁹ For a detailed discussion around the definition of family, see generally, Michael Staines, “The Concept of ‘the Family’ under the Irish Constitution” 11 *Ir. Jur.* (n.s.) 223; Fergus Ryan, “Sexuality, Ideology and the Legal Construction of Family” [2000] 3 *IJFL*. 2; Lisa Glennon, “‘The Family’ —A Comparative Analysis of a Contextual Definition” [2002] 2 *IJFL*. 17; Siobhán Wills, “Protecting the Rights of Cohabitees — Recommendations for Reform” [2002] 3 *IJFL*. 8.

partners is notable. The symbolism of this exclusion is particularly glaring, and more than likely will be regarded as derogatory (whether this exclusion is intended as such or not).

The main exception is in relation to the definition of a “member of the family” for the purposes of the Employment Equality Act 1998 and the Equal Status Act 2000, which is deemed to include civil partners as well as spouses.

10.2 Citizenship

In the case of citizenship, the Irish Nationality and Citizenship Acts 1956-2004 should be amended to allow a civil partner to be treated as equal to a spouse in determining the right to citizenship. In particular, a spouse of an Irish citizen may apply for citizenship after three years’ residence (of the previous five years) in Ireland (provided certain conditions are met: the parties must have been married for at least three years, must not be separated, and must intend to continue residing in Ireland.) Any other person (with the exception of refugees) will normally only be naturalised where they have lived in Ireland for at least five of the previous nine years.⁷¹ Applications by spouses of Irish citizens can, in other words, be fast-tracked. It is unclear why a similar right is not to be conferred on civil partners.

10.3 Foreign Relationships

Section 5 of the Civil Partnership Bill allows the Minister for Justice, Equality and Law Reform to designate certain classes of relationships entered into abroad as having the same legal effects as an Irish civil partnership, if certain conditions are met. The conditions are discussed above at 3.10.

⁷⁰ The Constitution of Ireland indicates that a family for the purpose of Article 41 is the family based on marriage alone.

⁷¹ The Irish Nationality and Citizenship (Fees) Regulations 2008 set a fee of €950 for the granting of naturalisation. Where the application is made by a widow or widower whose spouse was, immediately before death, an Irish citizen, and who has not, subsequent to the spouse’s death, become a naturalised citizen of a state other than the State, a lower fee of €200 applies. Similar provisions should arguably apply in the case of surviving civil partners.

A class of legal relationship will only be recognised if the Minister explicitly recognises it in a statutory instrument. It is likely that this will require the Minister to keep a very regular eye on overseas developments. The pace at which same-sex unions are being recognised worldwide is significant. It is thus possible that legislative recognition will lag behind developments if this pace is maintained.

As such, it is recommended that section 5 be amended to provide for the general recognition of relationships that meet the conditions set out in that section, without the need for ministerial approval. The right to determine eligibility may be conferred on a court. It may be advisable, in such circumstances, to introduce a clause allowing automatic recognition of qualifying legal relationships subject to a power to veto recognition of a class of relationship if such recognition is considered inappropriate.

10.4 Maintenance

The maintenance provisions of the legislation largely mirror those applicable to married couples. However, two key enforcement provisions appear not to have been extended to civil partners unless their relationship has been dissolved. Sections 41 and 42 of the Family Law Act 1995 allow, respectively, the securing of maintenance payments, and the provision of a lump sum in lieu of periodical payments. These apply only to maintenance owed to children or spouses. The Bill does not appear to amend these measures to include civil partners.

The measures adopted in sections 41 and 42 of the Family Law Act are designed to ensure better enforcement of maintenance obligations. It is unclear why these provisions would not be extended to civil partners. There is no cost to the State in so doing. In fact, the extension of section 41 and 42 to civil partners would improve enforcement, thus potentially lowering the likelihood of the maintenance creditor having to seek state support.

The Bill also places no financial obligations on a civil partner of a parent in relation to the biological children of that parent. This is the case even if the civil

partners have expressly agreed to raise the child together, and even if the civil partner who is not a biological parent has persuaded the biological parent to have the child.

10.4.1 Definitions in Parts 5 and 6.

Certain phrases are defined for the purpose of part 5 of the Bill (dealing with maintenance) but are left undefined for the purpose of Part 6 (attachment of earnings) even though the same phrases are used in Part 6. These include the phrases “antecedent order”, “maintenance debtor” and “maintenance creditor” which are used in Part 6 but not defined therein. One possible solution is to replicate the definitions of these terms found in Part 5.

10.5 Succession

The succession provisions of the legislation largely mirror those applicable to married couples. Nonetheless, there is an important distinction made between surviving spouses and surviving civil partners in relation to the rights conferred on children by section 117 of the Succession Act 1965. Section 117 confers a right on a child to sue the estate of a biological parent for provision from that estate. This may be done where it can be shown that “the testator [a deceased party who died having made a will] has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise...” If the court determines that there has been such a failure, it can make such provision out of the deceased’s estate for the child as it considers just. This allows the court to override the will with a view to making proper provision for a child of the testator.

In making such an order, the legal right of the testator’s spouse is ring-fenced. In other words the court, in making provision for a child, cannot diminish the portion of the estate to which the spouse succeeds by legal right. Subsection 117(3) expressly stipulates that “...[a]n order under this section shall not affect the legal

right of a surviving spouse or, if the surviving spouse is the mother or father of the child, any devise or bequest to the spouse or any share to which the spouse is entitled on intestacy.”

The position is different where the testator leaves a civil partner and children. In such a case, an order under section 117 *ordinarily* shall not affect the legal right of the civil partner. The proposed sub-section 117(3A) however, introduces an exception that potentially allows the court to make an order that would affect the legal right of the civil partner. This exception does not apply to spouses. The exception may be invoked where the court, after consideration of all of the circumstances, including the testator’s financial circumstances and his or her obligations to the surviving civil partner, is “...of the opinion that it would be unjust not to make the order.”

It is unclear why the legal right of a spouse should be so securely protected from the effects of a section 117 order, when the legal right of a civil partner is not. Arguably, the exception to the general rule is a good exception, if it allows the court to avoid injustice towards the child of a testator. Nonetheless, if an exception is to be introduced, it should be introduced in respect of both civil partners and spouses. As currently framed, the legislation appears to place the child of a civil partner in a better position than a child of married parents.

A similar point may be made in relation to the proposed treatment of civil partners who do not make a will. This is discussed further at 4.3.1 above.

10.6 Qualified cohabitants: definition and matters of succession

An allied point applies in respect of the right to seek provision from the estate of a cohabitant. The Bill allows a qualified cohabitant to seek provision from the estate of a deceased cohabitant on much the same basis as is facilitated by section 117. The Bill makes it clear that such provision cannot prejudice or affect the legal right of any spouse, though it makes no such provision for the legal rights of a surviving civil partner.

Indeed, it is worth noting that while the definition of ‘qualified cohabitants’ excludes a situation where either party is still married (unless the married couple have been living apart for at least four of the previous five years), a person may still be a qualified cohabitant even if she or her partner is in an existing civil partnership with another person.

These measures appear to offer protection to spouses (and to limit the rights of otherwise married cohabitants). Such protection is not, however, available to civil partners such that a civil partner may have to compete with a qualified cohabitant (for instance) for a share of a deceased civil partner’s estate.

10.7 Dissolution of a Civil Partnership

As discussed above, the period of living apart for dissolution is shorter than is the case for divorce on respect of a marriage. The constitutionally required period of living apart for divorce is four of the previous five years. The legislative proposal for civil partnership dissolution requires, by contrast, living apart for two of the previous three years. The latter is probably a more reasonable waiting period than four years. Nonetheless, the distinction between divorce and dissolution arguably signals that dissolution is not considered as serious a remedy as divorce.

The Civil Partnership Bill also makes little effort to ensure that the parties to dissolution are in fact irreconcilable. A divorce will only be granted, by contrast, where there is “no reasonable prospect of reconciliation” between the spouses. Divorce proceedings, indeed, cannot be commenced unless both parties’ solicitors certify that they have discussed the alternatives to divorce (i.e. mediation, separation, reconciliation) with the spouses.

It is certainly likely that the very fact that the parties are seeking dissolution (not to mention that they have lived apart for two years) suggests in itself that reconciliation is unlikely. That said, it is arguable that the Bill should designate dissolution as a ‘last resort’, to be sought only where all other avenues have been explored.

10.8 Application of variation clause to Property Adjustment Orders.

Section 116 of the Bill allows for the making of property adjustment orders on dissolution of a civil partnership. Section 116(2) would allow a court, when making a property adjustment order, to restrict or exclude the application of section 128 of the Bill in relation to a property adjustment order. Section 128, however, deals with the potential retrospectivity of periodical payments orders. It does not relate to property adjustment orders.

It is likely that the reference to section 128 in section 116(2) should in fact read “section 129”. Section 14(2) of the Family Law (Divorce) Act 1996 (which is similar to section 116(2) of the Bill) allows a court to restrict or exclude the application of section 22 of that Act. Section 22 of the 1996 Act allows for the variation of ancillary orders made on divorce where circumstances have changed since the order was first made. If the true intention is to allow the court to place restrictions on the variation of property adjustment orders, then section 116(2) should refer to section 129 rather than section 128.

10.9 Third-party rights under Contracts (including Contracts of Insurance)

Sections 7 and 8 of the Married Women’s Status Act 1957 may be relevant in this context. They deal collectively with the issue of ‘privity of contract’, a principle that generally prevents a person from suing (and relieves them from being sued) on foot of a contract to which they were not a party. Section 7 addresses the situation where a spouse or parent takes out a life assurance policy or endowment that is expressed to be for the benefit of a spouse or child of the insured party. Section 7 acts so as to create a trust in favour of the spouse and/or child(ren) named as objects of the policy. This means that they can, as beneficiaries under a trust, sue should the policy not be honoured.

Section 8 addresses the situation where a person enters into any contract expressed to be for the benefit of the spouse or child of the contracting party.

Ordinarily, the privity of contract rule would prevent the beneficiary from enforcing the contract, as they were not a party to the contract. Section 8, notwithstanding the privity rule, allows the named beneficiary to sue to enforce the contract as if he or she were a party to the contract, (subject to the caveat that the normal defences to contractual liability apply).

There does not appear to be any reason why like provisions should not be extended to civil partners.

10.10 Separate Legal Personality of Civil Partners

The Married Women's Status Act 1957 generally makes clear that husbands and wives are separate persons for the purposes of the law of contracts, torts and in relation to trusts, property, debts and other obligations. A husband, for instance, cannot be made liable for the debts or civil wrongs of his wife.

Historically, husbands and wives were deemed to be one person in law (the theory of 'unipersonality'). The Act of 1957 was designed to confer separate legal personality on the spouses and in particular, to confer various rights on married women that previously had been lost of marriage.

There is nothing in the Bill or in the law generally to suggest that the principle of unipersonality would apply to civil partners. That said, there may be some benefit in clarifying that the partners retain their separate legal personality, and in particular, that the partners will not be liable (in the absence of a guarantee or surety agreement) for each other's separate debts, torts or other obligations contracted independently.

10.11 Judicial Separation and Civil Partners

Married spouses who wish to separate have two legal options. First, they may seek to enter into a separation agreement. As an alternative to a separation agreement (and usually where the parties cannot reach an agreement), one or other party to a marriage may seek a judicial separation. Notably, the Civil Partnership Bill does not propose to extend judicial separation to civil partners.

Judicial Separation was introduced in 1989. Although a useful remedy in its own right, it was widely viewed as a response to the rejection of the first divorce referendum in 1986. In certain respects, it could be considered as a prototype for divorce. Indeed the Judicial Separation and Family Law Reform Act 1989 was modelled closely on the form of divorce available in England and Wales, with very similar grounds. Likewise, the financial and proprietary remedies available on judicial separation are largely identical to those available now available on divorce.

This context is important in considering the Civil Partnership Bill. Whereas judicial separation was enacted in the vacuum created by the constitutional ban on divorce, no such considerations apply to civil partnership. Civil partners will be allowed to dissolve their partnership under Part 12 of the Bill.

10.11.1 What are the grounds for Judicial Separation?

There are a number of grounds for Judicial Separation, six in all, though it is the last of these grounds that is most frequently relied upon. Three of the grounds are fault-based, requiring some conduct on the part of the respondent (the person against whom an application for judicial separation is taken). These are:

- (a) *Adultery on the part of the respondent*⁷². Adultery comprises a single act of heterosexual sexual intercourse by the respondent with a person who is not the respondent's spouse. For this purpose, conduct falling short of an act of penile-vaginal sexual intercourse does not constitute adultery. Curiously, this means that acts of oral sexual contact and homosexual sexual contact are not

⁷² The 'respondent' is the person against whom the case is taken by the 'applicant'.

deemed to be acts of adultery. The fact of adultery need only be proved 'on the balance of probabilities' and may, in particular, be inferred from circumstances (such as evidence that the parties were seen together entering a hotel bedroom).

- (b) *Behaviour of the respondent of such a nature as to make it unreasonable to expect the applicant to continue cohabiting with the respondent.* Such behaviour would certainly include physical or sexual assault of the applicant, though it has also been deemed to include profound emotional abuse, sustained verbal harassment or neglect of a spouse, and gross financial wrongdoing on the part of the respondent. Extra-marital sexual activity not deemed to be adultery might also constitute behaviour for this purpose. It is not necessary to prove intent on the part of the respondent. The behaviour may, for instance, be the result of a mental illness, alcoholism or drug abuse, the key factor being the effect on the applicant rather than the intent or culpability of the respondent.
- (c) *Desertion by the respondent for a period of one year or more.* For this purpose, a person may be deemed to be in constructive desertion where that person's conduct has forced a spouse (with just cause) to leave the family home.
- (d) *Living apart for one year, where both parties consent to the decree of judicial separation.*
- (e) *Living apart for periods amounting to three years, where the respondent objects to the application for judicial separation.*
- (f) *The marriage has broken down to a point where a normal marriage relationship has not existed between the spouses for a period of at least one year before the application.*

10.11.2 Should judicial separation be extended to civil partners?

There are a number of reasons why a couple might opt for a judicial separation over a divorce:

- a. Where the parties wish to divorce but do not meet the requirements to divorce. It is worth bearing in mind that the parties to a divorce must have been living apart for at least four of the previous five years. As such, the

remedy of judicial separation is likely to be of greater appeal to a married couple than to civil partners, who will be able to dissolve their relationship after two years of living apart. Given the speedier access to dissolution for civil partners, and the largely similar remedies available on judicial separation and dissolution of a civil partnership, there is likely to be little benefit in applying for judicial separation in preference to dissolution of a civil partnership. Indeed, the absence of judicial separation in the case of civil partnership avoids the duplication of legal costs borne by spouses who obtain a judicial separation followed by a divorce.

- b. For religious reasons, spouses sometimes prefer judicial separation to divorce. While the spouses may wish formally to be separated, they may regard their marriage bond as religiously ordained, a bond that may only be broken by death, (though, notably, such views do not prevent one of the parties from forcing a divorce if the grounds for divorce are met). These very valid reasons are less likely to apply in the case of civil partnership, given that civil partnership is solely a civil measure and not a religious sacrament. It is worth noting also that two civil partners who do not wish to seek dissolution of their relationship may still enter into a separation agreement. In substance, this will achieve most if not all of the same outcomes as a judicial separation, at considerably less expense.
- c. Most of the remedies available on judicial separation can be given effect to by means of a separation agreement. For instance, while a court may extinguish succession rights on judicial separation, award maintenance, and deal with property, the parties are also free to agree on all of these matters by means of an agreement. The main exception relates to pensions. A separation agreement cannot on its own alter a pension trust or scheme. Usually, this is best achieved through a pension adjustment order, which can only be ordered by a court. This remedy is, however, available to civil partners on dissolution. Thus, the omission to provide for judicial separation of civil partners may be of little consequence.

The likely benefits of extending judicial separation to civil partners are thus probably limited. In particular, the marginal difference between the living apart requirements for judicial separation and the two year requirement for dissolution

more than likely means that there would be little advantage in seeking a judicial separation over a dissolution.

In most cases, a judicial separation will only be sought where a separation agreement is not possible because of spousal disagreement. As noted above, there is no reason why the civil partners should not be able to make a separation agreement. Indeed, in terms of costs and time there is every advantage in seeking to agree matters rather than proceeding to court.

It is arguable also that the fault-based grounds for judicial separation encourage spousal disharmony in a manner that does not add any value to the work of the court. In particular, the invocation of fault-based grounds may encourage rancour and the apportionment of blame in manner that adds little to the court's task of effecting an orderly separation of the parties, making proper provision for the future needs of all affected parties. Indeed, typically, the parties to a judicial separation are more likely to rely on the non-fault based grounds, which are easier and less costly to prove.

The adultery ground, in particular, would not be easily applied to sexual conduct outside the limited definition of adultery. Although the concept of adultery has been applied to same-sex marriages (and homosexual sexual conduct) in Canada, the UK Civil Partnerships Act avoided extending this ground to civil partners. Problematically, this ground relates only to an act of heterosexual sexual intercourse and not to other sexual acts. Given the limited technical definition of adultery, it is difficult to envisage how it might be extended to cover homosexual sexual activity, particularly where the activity is non-penetrative. Indeed, the better view may be that the outdated ground of adultery should be removed outright from the Judicial Separation Act. A court could still consider extra-marital sexual conduct under the behaviour ground. At any rate, adultery is arguably symptomatic of the breakdown of a normal marriage relationship rather than a cause thereof.

10.12 S.59E and Fees for Civil Partnership Celebrations.

The fees set by statutory instrument for the celebration of a civil partnership should be the same and certainly no higher than those that apply to marriage. The Bill is silent on this point, though it is to be assumed that marrying couples and civil partners will be treated equally in this regard.

10.13 Creation of a joint tenancy.

When a spouse who has sole legal ownership of a family home transfers the home into the joint names of the husband and wife, stamp duty is not payable. With a view to encouraging joint ownership of family homes, the Family Home Protection Act 1976, exempts the spouses from stamp duty. A similar provision should be made in the case of civil partners.

10.14 Social Reports.

The Civil Partnership Bill makes no provision for social reports to be made in respect of a civil partner or his or her children in relation to questions affecting their welfare. Such social reports can be made in family law proceedings relating to married couples (see s.47 of the Family Law Act 1995 and Section 42 of the Family Law (Divorce) Act 1996). A similar provision should be made in the case of civil partners.

10.15 Marital Privilege.

A husband and wife enjoy a general privilege in respect of their spousal communications. In particular, a husband and wife cannot generally be forced to disclose the content of inter-spousal discussions in a court of law. This right generally protects the privacy of the spouses, and preserves a respect for the intimate nature of the spouses' relationship.

This general right has been abridged by the Criminal Evidence Act 1992, such that a spouse of an accused person is generally competent to give evidence at a criminal trial of the accused spouse, either on behalf of the prosecution or the accused. In more limited circumstances, a spouse of the accused can be compelled to give evidence against their accused spouse in relation to a sexual offence, where the offence is committed against a child of either spouse or against any person who was under the age of 17 at the time of offence. Additionally, a spouse may be forced to give evidence in respect of an offence involving violence or threatened violence, where the offence is committed against the spouse, a child of the spouse or of the accused or any person who was under the age of 17 at the time of offence.

It is arguable that a similar right should be extended to civil partners, subject to the same exceptions as apply to spouses as a result of the Criminal Evidence Act.

10.16 Other miscellaneous consequential amendments

It is finally suggested that the following pieces of legislation be amended, as described in the table below:

Fig. 2, Further suggested amendments:

Proceeds of Crime Act 1996, section 9(2), 14C(6) and section 16B(6)(a)(iii)	Insert 'or civil partner,' after 'spouse'
Land Act 2005, section 5(3)	Insert 'or civil partners' after 'spouses' wherever it appears, and 'or civil partner' after 'spouse'
Parental Leave Act 1998, section 13	Insert 'or shared home' after 'family home' Insert 'or civil partner' after 'spouse'
Diplomatic Relations and Immunities Act 1967	Spouse appears 23 times. Insert 'or civil partners' after 'spouses' wherever it appears, and 'or civil partner' after 'spouse'
Passports Act 2008, section 10(2)	Insert 'or civil partner,' after 'spouse' wherever it appears

Further suggested reading on cohabiting couples and same-sex couples:

Reports

- Equality Authority, *Implementing Equality for Lesbians, Gays and Bisexuals*, (Dublin, 2002) www.equality.ie,
- Ronayne and Mee, *Partnership Rights of Same-Sex Couples*, (Dublin, Equality Authority 2000) www.equality.ie,
- Law Reform Commission, *Consultation Paper on the Rights and Duties of Cohabitees*, LRC-32-2004 (Dublin: LRC, 2004) www.lawreform.ie
- *The Rights and Duties of Cohabitants*, LRC-82-2006, (Dublin: Law Reform Commission, 2006),
- Ó Cinnéide, Equality Authority/Equality Commission for Northern Ireland, *Equivalence in Promoting Equality, Dublin/Belfast, 2005*) www.equality.ie,
- Walsh and Ryan, *The Rights of De Facto Couples*, (Dublin: IHRC, 2006)
- Working Group on Domestic Partnership, *Options Paper*, (Dublin: Department of Justice, Equality and Law Reform, 2006)
- The All-Party Oireachtas Committee on the Constitution, *Tenth Progress Report: The Family*, (Dublin: The Stationery Office, 2006)
- Irish Council for Civil Liberties, *Equality for All Families* (Dublin: ICCL, 2006)

Academic Books and Journal Articles

- Binchy and Doyle (eds.) *Committed Relationships and the Law*, (Dublin: Four Courts Press, 2007)
- Ryan, "The General Scheme of the Civil Partnership Bill 2008: Brave New Dawn or Missed Opportunity?" (2008) 11(3) *Irish Journal of Family Law* 51
- Ryan, "21st Century Families: 19th Century Values; Modern Family Law in the Shadow of the Constitution" in Carolan and Doyle (eds.), *The Irish Constitution: Governance and Values* (Dublin: Thomson Round Hall, 2008)

- Ryan, “Benchmarking’ Civil Partnership: Comparing Civil Partnership with Marriage and Considering the Legal Position of Children” in *ICCL Seminar Series* Vol. 1 “The General Scheme of the Civil Partnership Bill: Legal Consequences and Human Rights Implications” (Dublin: ICCL, 2009)
www.iccl.ie