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Breaking up IS HARD TO DO

Advising on and drafting a prenuptial agreement is fraught with difficulty. Ann FitzGerald looks to the *Report of the Study Group on Prenuptial Agreements* for marriage guidance

In a survey reported by KPMG Accountants in November 2007, almost half (47%) of private business owners were reported as being "concerned about the impact of divorce or a family dispute on their businesses". Of those questioned, nearly two-thirds (64%) of the respondents said they had not taken any measures to protect those who would eventually inherit the business from them.

It is clear that the business community is concerned that well-managed succession arrangements are put in place to protect both business owners and their employees in the event of the marriage breakdown of a primary shareholder. There is no reason why a limited prenuptial agreement (PNA) could not answer these concerns in appropriate cases. Postnuptial agreements may also be appropriate, so that well-organised, hard-working members of the public can provide for the possible eventuality of a separation or divorce, while also ensuring that the other spouse is protected and provided for within the law.

Study group recommendations

PNAs and their legal status in Ireland has been considered fully in the *Report of the Study Group on Prenuptial Agreements* submitted to the Minister for Justice in April 2007. The report reviews the law, both in Ireland and elsewhere, puts the arguments for and against their recognition, and makes useful and timely recommendations. In addition, it reviews all the recent Irish case law on 'proper provision' and 'finality' and how these might impact on the enforcement of PNAs. It is written in clear, concise and forthright language.

It sets out that PNAs are reckoned to be enforceable in Ireland, but should be open to variation by a court in exercise of its discretion – both at judicial separation and more particularly on the making of a divorce. The study group took the view that a PNA would be recognised and recommended legislation both to clarify the legal position and to improve

certain procedural requirements and also to allow a court to vary the agreement.

The report recommended the following:

- 1) That an express statutory provision be made to recognise PNAs by introducing a new section 16(2)(a) of the *Family Law Act 1995* and a new section 20(3)(a) of the *Family Law (Divorce) Act 1996*. At present, section 20(3)(a) of the 1996 act provides for the court to *have regard to* the terms of any separation agreement that has been entered into by the spouses and still in force. The report recommends that a new section be inserted to allow the court to have regard to a PNA. This would, in turn, allow a court to examine and scrutinise a PNA, which is subject to different considerations than a separation agreement, and therefore an additional separate provision should be made to provide for same.
- 2) The study group recommends that no amendment be made to section 16(2) of the *Family Law Act 1995* or section 20(2) of the *Family Law (Divorce) Act 1996*. These sections deal with the various factors to be considered by the judge in exercising his or her decisionmaking power on separation or divorce. In the opinion of the study group, the inclusion of a PNA as one of the factors would not represent a sufficiently transparent way of showing whether or what weight had been attached to the agreement. It would place the execution of such an agreement on a par with factors such as the age of the parties, the duration of the marriage, and so on.
- 3) Given the provisions of section 113 of the *Succession Act 1965*, it is possible that a PNA might legally provide for the division and distribution of assets in the event of the death of one of the spouses. Thus, as a result of the passage of time or other intervening events, it is possible that a spouse could suffer hardship in the event of death, where the provisions of a PNA were enforced that included a renunciation of the legal right share of the surviving spouse on death. Section 113 is not

MAIN POINTS

- Report of the Study Group on Prenuptial Agreements
- Drafting a prenuptial agreement
- The use of questionable clauses



much used at present, but legislation in this field is likely to increase the number of PNAs and *Succession Act* renunciations.

The study group recommends that a statutory provision should be introduced providing for the court to have an opportunity to review the renunciation on similar terms as section 15A of the 1995 act or section 18 of the 1996 act and to make provision for a surviving spouse, notwithstanding the existence of a waiver, and that the court have the power to make provision for a surviving spouse where the existence of a PNA might give rise to an injustice. Otherwise, the provisions in section 15A of the 1995 act and section 18 of the 1996 act, whereby a spouse can seek provision out of the estate of a deceased spouse, only applies in cases of marriage breakdown and not otherwise.

- 4) The study group recommends that certain formalities and procedural requirements must be

carefully followed for a valid PNA to come into effect. The group recommends that the *Family Law Act 1995* and the *Family Law (Divorce) Act 1996* be amended to include a definition of a PNA, so that, for an enforceable agreement, it must be in writing, signed and witnessed, made after each party has received separate legal advice, with full disclosure of financial information, and executed by both parties not less than 28 days before the intended marriage.

Drafting a prenuptial agreement

There is little doubt that advising on and drafting a PNA is fraught with difficulty. In the first place, there is uncertainty surrounding its enforceability. In the case of a short marriage, it will almost certainly be of persuasive power if the reasonable formalities are fulfilled in its drafting and if each of the parties had independent legal advice with reasonable financial disclosure. Arguably, if the terms of the

agreement are fair, it is more likely to be enforced and to satisfy the 'proper provision' test for each spouse.

This is a big thing to be asked of the unfortunate solicitor advising a client. If the marriage survives, you will probably never hear from the client again. If it breaks down, the solicitor may end up as a witness in court in relation to disclosure and the timing of the agreement. Further, it may be unwise or impossible for either solicitor involved in the PNA to act for either party on the separation or divorce if the validity of the PNA is an issue raised by either party.

The result is that, both in the US and Australia, many family lawyers refuse to draw up PNAs, given that the risk of a negligence action is high and the benefit to the lawyer in financial terms would be small in comparison.

Sunset clauses

There is a demand for such agreements and, in certain limited cases, you may find that, as a practitioner, drafting such an agreement is advisable. A PNA may be adapted to suit the needs of the particular case – for example, to protect property for children of a first marriage. A PNA can be a useful tool to protect long-established assets where there are other assets available to provide for the spouse. A clause could be included, for example, to protect a pre-existing business asset, whereby the value of it will be added to the couple's

'balance sheet' on breakdown, but with a proviso that the asset cannot be sold.

Some company lawyers have also devised a so-called 'poison shareholding clause' to protect a family business built up over many decades. Whether such devices will stand the test of close judicial examination remains to be seen. Whether disclosure should be provided by 'affidavit of means' may also require consideration.

So-called 'sunset clauses' also are an option to consider, whereby a PNA could provide for a review of the agreement to be carried out after a specified period, for example, two or five years, with the possibility that the agreement would expire after a further stated period. Whether such a clause would be recognised in Ireland remains to be tested. The study group did not favour the use of sunset clauses.

There is a pressing need for reform to make such agreements fully recognised and enforceable within the framework of the existing family law legislation. Failure to legislate will result in more couples opting for cohabitation as opposed to marriage, which renders at least one of the parties in a very weak position legally in the event of breakdown. This position does not serve the public well. **G**

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