

Partnership rights

of same sex couples

LEGAL SERIES



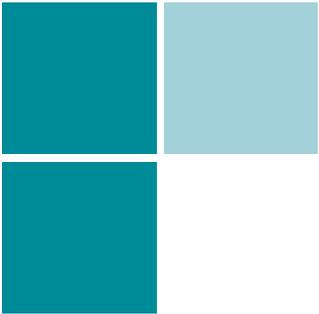
THE EQUALITY AUTHORITY
AN tÚDARÁS COMHIONANNAIS

Acknowledgements

The authors would like to thank the following members of the Department of Law at University College Cork who gave us the benefit of their expertise in a number of areas covered by this project: Aine Ryall, Tim Murphy, Deirdre Madden, Mary Donnelly, Olivia Smith and Ursula Kilkelly. Special thanks are due to John Kenny for his very useful contribution in relation to the pensions issue. Finally, we would like to thank all those from various government departments and agencies who dealt helpfully with queries relating to the project. None of those mentioned bears any responsibility for any errors which may remain in this report

Dr John Mee

Ms Kaye Ronayne



Report on

Partnership rights of same sex couples

Dr John Mee

Ms Kaye Ronayne

June 2000

Foreword

This report on partnership rights of same sex couples is the first in the Legal Series of the Equality Authority publications. This series will address matters relating to:-

- The legal status or situation of groups covered by the equality legislation.
- The evolution and development of the equality legislation itself.
- Developing deeper understandings of the provisions of the equality legislation.
- Building a knowledge base relevant to casework under the equality legislation.

The issue of partnership rights of same sex couples has been posed for the Equality Authority by the Advisory Committee established to report to the Equality Authority on the equality agenda for Lesbian, Gay and Bisexual people. This Advisory Committee will report during 2001. This report will contribute to a visibility for lesbian, gay and bisexual issues in the work of the Equality Authority and in the wider equality strategies and initiatives being pursued across Irish society.

Partnership rights emerged as a key and complex theme in the work of the advisory committee. This report prepared by Dr. John Mee and Kaye Ronayne was commissioned to inform debate within the committee. The report was of such depth and quality that the Equality Authority decided to publish it so that it could receive a wider debate within the lesbian, gay and bisexual communities and among those responsible for legislation, policy and practice in this area.

Partnership rights are reflected across a broad range of areas in anybody's life. They relate to the care of children, access to workplace benefits, ownership of property, taxation, social welfare, protection around domestic violence, emergency health care situations and immigration and access to work permits. All these areas are covered in the publication. Their breadth and centrality highlighted the impact of the partnership rights theme. Equally they highlighted the importance of securing equality in this area if we are to achieve an equal status across diversity and if we are to address what all too often ends up in great distress for people.

The publication is an audit of the current situation. The audit clarifies, the need for action in this area but does not make specific recommendations. Change in this area will be a product of informed dialogue - dialogue within the lesbian, gay and bisexual communities and dialogue with legislators and policy makers. The audit therefore provides the basis and starting point for this dialogue. The work of the advisory committee will, of course, take this dialogue further.

We hope that the publication will be a resource to a wider range of interests. We hope that it will assist change in this important area. We are grateful to Dr. John Mee and Kaye Ronayne for the quality and thoroughness of their work.

Niall Crowley.


Niall Crowley

Contents

Introduction	5
1. Children and same-sex couples	6
Adoption	6
Fostering	7
Legal Guardianship	8
Custody and Access	9
Financial Support	11
Registration of Births	11
Passports	12
Fertility Services	12
Surrogacy	14
2. Workplace benefits	
Workplace Benefits	16
Pensions and Non-Marital Partners	18
3. The property rights of same-sex couples	
Access to Housing and Succession of Tenancy	22
Succession Rights	25
Restrictions on the Transfer of the Family Home	28
Property Rights upon Judicial Separation or Divorce	28
Property Rights of Unmarried Couples upon Breakdown of the Relationship	29
Cohabitation Contracts Regulating Property Entitlements	32

4. Taxation and the same-sex couple

Income Tax	34
P.R.S.I. and Health Contribution Levy	36
Capital Gains Tax	36
Capital Acquisitions Tax	37
Stamp Duty	38
Probate Tax	38

5. Miscellaneous

Social Welfare	39
Protection Against Domestic Misconduct	41
Insurance	42
The Rights of Partners in Emergency Situations	42
Funeral and Other Arrangements upon Death	44
Immigration, Work Permits, Nationality and Citizenship	45
Legal Aid	47
Wrongful Death of a Dependant	48
The Law of Evidence and Marital Privilege	48

6. Text references 49

Introduction

This audit report attempts to identify the areas of Irish law where married couples receive different treatment to same sex couples (who are prohibited from marrying). It will be seen that a wide range of legal privileges and obligations are triggered by the status of marriage. Interestingly, in a small but growing number of recent legislative provisions, some significant consequences have been attached to the status of "living together as husband and wife" without being formally married. Although the matter has not yet been tested in the courts, it appears that this formula does not encompass same sex couples. As it happens, the consequences of legal recognition of an unmarried cohabitation are not always favourable to those concerned, e.g. in the social welfare context. Therefore, it should be remembered that the widening of this legislative definition would not be without adverse consequences for certain same sex couples.

This report concentrates primarily on the formal legal rules, which can be identified as affecting the partnership rights of same sex couples. In the interstices of the legal rules there will often be room for the exercise of discretion by relevant officials. Here, of course, there is potential for discrimination against same sex couples despite the strict legal position. It should be borne in mind that, in principle, the exercise of discretion by public officials on a matter affecting the entitlement of individuals is subject to judicial review in the courts. In addition, the recently enacted Equal Status Act 2000 will operate to prohibit discrimination on the grounds of sexual orientation¹ in the provision of goods and services (including the provision of private rented accommodation).

1 Children and same sex couples

Adoption

Under current adoption legislation in Ireland,² a child may be adopted by a number of specified classes of persons, including married couples, a mother or father of the child, a relative of the child, a widow or a widower³ and other persons not specified where the Adoption Board consider it to be desirable that an adoption order be made.⁴ There is no facility for couples, other than married couples, to adopt a child.

Adoption by couples

The primary distinction between married couples and same-sex couples in the area of adoption concerns their ability jointly to adopt a child. A joint adoption by a couple is only possible where that couple is married and living together.⁵ This rule prevents a same-sex couple from jointly adopting a child. The legislation similarly prevents an unmarried cohabiting heterosexual couple from jointly adopting a child.⁶

Upon marriage to another party who is not the natural parent of the child, the natural mother of a non-marital child, or the natural father with custody, can apply to adopt the child jointly with his or her new partner.⁷ In effect, this gives both spouses the same legal relationship to the child as would have existed if the child had been born to the couple in marriage and vests in the child the same legal rights within the family as any children subsequently born to the couple. Such adoption orders are facilitated only where the child is a non-marital child, in order that the child is an eligible child for the purpose of the legislation.⁸ However, where same-sex couples raise a child together, but where only one partner is the biological and legal parent, or legal adoptive parent of the child, there is no facility in Irish law for the non-legal parent to adopt the child of his or her partner.

Adoption by a Single Person in a Same-Sex Relationship

While there is no provision in the Adoption Act for a single person to adopt a child,⁹ section 10(2) of the Act confers a discretion on the Board to make an adoption order in favour of applicants who do not fall within any of the specified categories, including applications by single persons. The Board would be required, in the exercise of its discretion, to regard the welfare of the child as the first and paramount consideration.¹⁰ Thus, a person living with a same sex partner may apply to adopt a child in his or her own right, intending to raise the child with his or her partner. However, the partner would have no rights in relation to the child.

It is not possible for a partner in a same-sex relationship to apply to adopt the natural child of his or her partner as a single person. This situation might arise where a same-sex couple has raised the natural or adoptive child of one of the partners and the other partner wishes legal recognition of the relationship that exists between the child and himself or herself.

Intercountry Adoptions

Under the Adoption Act 1991, in order for foreign adoptions to be recognised in Ireland, the adoption must accord with the definition of adoption in Irish law. It follows that adopter/adopters must therefore also fall within the classes of persons eligible to adopt under present domestic adoption law. As with domestic adoptions, it is only in the case of a married couple living together that an adoption order can be made in favour of more than one person.¹¹ This rules out the joint adoption of a foreign child by a same-sex couple. A single person may apply under the legislation to adopt a foreign child and such adoption will be facilitated where the Board is satisfied that such an adoption is desirable.¹² This could facilitate a person in a same-sex relationship who wishes to apply to adopt a foreign child in order to raise that child within the relationship. Eligibility to adopt must be further supported by a report from a health board or adoption society, based on an assessment as to the suitability of the applicant based on moral character as well as the ability of the applicant to support the child.¹³

Fostering

Under the Child Care Act 1991, a health board is obliged to intervene where it appears to it that a child requires care or protection which he is unlikely to receive unless a court makes a care order or supervision order in respect of him".¹⁴

The health board must determine the type of care to be afforded to a child having regard to the "best interests" of that child.¹⁵ The options available to the health board in providing for children taken into care voluntary, or by way of court order, include the placement of the child with a foster parent.¹⁶ Under the 1991 Act,¹⁷ a foster parent is defined as "a person other than a relative of a child who is taking care of the child on behalf of a health board in accordance with regulations..."

The Child Care (Placement of Children in Foster Care) Regulations, 1995¹⁸ set out the provisions relating to the placement of children in fosterage by health board, including the assessment of applicants. The health board is required in its determinations to consider the "best interests" of the child.¹⁹

There is nothing to exclude an application for fostering by a same-sex couple. The general consensus of the health authorities contacted is that in the absence of formal policy, there is no reason to suggest that an application by a same-sex couple would be dealt with any differently to an application by an unmarried heterosexual couple or a married couple.²⁰ However, in the Northern Area Health Board, same-sex couples are singled out for specific consideration as regards their eligibility to foster a child. An internal memorandum points out that the policy in relation to applications to foster from gay couples has been revised.

Accordingly, the Programme Manager recommends that any such case be treated on its own merits. The board is required to send an interim report to the placement board for consideration in such circumstances. The precise significance of their memorandum is unclear.

The fostering of children by relatives

Similar provisions apply to the fostering of children by relatives as to those outlined above.²¹ However, the health board can place a child in the foster care of relatives immediately and without the necessity of having to carry out a full pre-placement assessment, as is required for other foster parents.²² There is nothing in the provisions of these Regulations to exclude the relatives of a child, who are involved in a same-sex relationship, from applying to foster that child.

Legal Guardianship

Guardianship describes the rights and responsibilities that vest in the parent/s of a child regarding the upbringing of that child. It encompasses the duty to maintain and properly care for a child and the right to make decisions about a child's religious and secular education, health requirements and general welfare. Under Irish legislation, only the guardians of a child have the right to custody and access of that child.

Under the Guardianship of Infants Act 1964, the parents of a child have equal rights in relation to their child where they are married.²³ Similarly, married persons who jointly adopt a child are joint guardians of that child.²⁴ The mother of a child, born outside of marriage, is the sole guardian of that child.²⁵ Current legislation does not recognise the father of a child born outside of wedlock as the guardian of that child, save for where he is appointed by the court,²⁶ or where he subsequently marries the child's mother.²⁷ The court also has jurisdiction in limited circumstances to appoint guardians of a child.²⁸

The guardianship rights of married parents is not relinquished upon separation or divorce and either partner can apply to the court for an order relating to custody of and access to the child.²⁹ The court is obliged to regard the welfare of the child as the determining factor in the dispute resolution process. In its deliberations, the court is required to consider "the totality of the picture",³⁰ taking into account all the factors comprised in the concept of welfare. In practice, it would appear that the courts have been prepared to award joint custody of marital children to their parents, thereby vesting the same rights and responsibilities regarding the upbringing of the child in both parents but with custody to one parent and access to the other.

Same-sex partners cannot have a natural child between them, nor can they jointly adopt a

child. Thus the issue of guardianship of a child as between them does not arise. However, the issue of guardianship may arise where one of the partners, who has guardianship rights in a child from a previous relationship, wishes the other partner to have guardianship rights in regard to that child. A lesbian mother, who has a child from a previous relationship, may wish her same-sex partner to have rights regarding the child's upbringing, where the child lives with the couple. Similarly, a homosexual father, who has guardianship and custody of a child from a former marriage/relationship, may wish his partner to have rights in respect of the child. Under current legislation, there is no facility for such an arrangement.

Where a parent of a child is involved in a same-sex relationship, his or her partner may be given guardianship rights in respect of that child in the somewhat unlikely event that the other parent of the child, in the event of his or her death, appoints him or her as a testamentary guardian to act jointly with the surviving parent.³¹

Custody and access

The section examines whether the right of a parent to custody of his or her child, upon separation or divorce, is affected where he or she has subsequently become involved in a same-sex relationship.

Custody concerns the right to the physical care and control of a child.

Where parents are married and living together, they are the joint custodians of their children. If the parents separate, custody vests in the parent with whom the child continues to live. The parent deprived of custody as a result of marital breakdown still remains a guardian of his or her child. He or she is therefore entitled to be involved in making decisions regarding the upbringing of the child etc. Similarly, the father of a child born outside marriage who is appointed a guardian of his child (jointly with the child's mother) must be involved in any decisions concerning the upbringing of that child as long as the mother remains the custodian.

Disputes relating to the custody of a child are determined upon application to the court under Section 11 of the Guardianship of Infants Act 1964. Section 11 of the 1964 Act confers on the guardian of a child the right to apply to the court for an order in relation to the custody of that child. In the determination of custody orders, the courts are required to regard the welfare of the child as the determining factor in their decision.³² Welfare in this regard is considered to comprise of the child's religious, moral, intellectual, physical and social welfare. The moral welfare of the child is concerned with the moral example given by a parent to his child, and the court will be concerned with the influence that the parent's behaviour may have on the child's development and the manner in which the parent's conduct is likely to affect the child's welfare.

Under current legislation, it appears that the fact that a parent has entered into a same-sex union should have no bearing on that parent's right to apply to the court for custody of his or her child, save for where the court determines that such behaviour is likely to affect the child's welfare. The issue is one which has yet to be considered by the Irish courts. English decisions in this regard have seen the courts awarding custody of a child to a parent involved in a homosexual relationship.³³ In practice, Irish courts have tended to be quite conservative regarding the behaviour of parents when awarding custody in disputes. In some cases, the court's concern with the danger of moral corruption of a child as a result of a parent's adulterous conduct has resulted in custody being awarded to the non-adulterous parent rather than to the parent involved in the adulterous relationship.³⁴

Access

This section considers the right of a parent, involved in a same-sex relationship, to be granted access to his or her child following the separation/divorce from his or her former spouse. It further examines the right of a person to access to a child of a former same-sex partner.

The right of a non-custodial parent to have access to his or her child or children in Irish law is afforded only to the parents or guardians of a child and includes the right to have the child/children reside with and go on holidays with the non-custodial parent for a proportion of the school holidays, the right to stay overnight with such parent on alternate weekends, etc.

Access orders may set down a number of conditions. The court is guided, in its determination of an access application, by the principle that the welfare of the child is the first and paramount consideration. In this regard, it would seem all parents are in equal standing before the courts, whether the parents are homosexual or otherwise. The courts however have not been slow in making it a condition of access orders that the person with whom the parent is involved with in a relationship not be present when the parent has access to his or her child.³⁶ Generally, however, it would seem that the judiciary considers it contrary to the welfare of the child to exclude them totally from contact with the person with whom one parent is residing. The issue of giving access to a parent, who subsequently becomes involved in a homosexual relationship, has not been pronounced upon in Irish law. Neither is it clear whether the court would consider it prudent to attach conditions to an access order to prevent a homosexual partner of the parent being present while the children are present.

A former partner in a same-sex relationship has no legal right of access to a child of his or her former partner because, under current Irish law, he or she is not recognised for the purposes of the legislation as a parent or guardian of the child. Applications for access can

only be made, under the Guardianship of Infants Act 1964, by a guardian or parent of a child.³⁷ The only means by which a relative of a child, or another third party who wishes to be granted access to that child, can be granted access is by resorting to the wards of court jurisdiction.³⁸ Wardship proceedings may be commenced by a third party even though the parents or guardians of a child are alive and even though such third party has no right to the custody of the child. The process is a difficult one and wardship presents an unlikely route to a person who wishes to have access to the child of a former partner where he or she has no rights regarding the child.

Financial support

Maintenance of Spouses and Partners

Under the Family Law (Maintenance of Spouses and Children) Act 1976, application may be made to the court by either spouse for a maintenance order, and the court may make such order, where it appears to the court that the other spouse has failed to provide such maintenance for the applicant spouse as is proper in the circumstances.³⁹ There is no requirement for the couple to be living apart or separated for a maintenance order to be made. Provision under the Act is limited to a "spouse." This operates to debar an application from a party to a marriage in respect of which a civil decree of nullity has been granted. It also debars an application for the making of a maintenance order by a heterosexual cohabitee or former heterosexual cohabitee, or the partners in a same-sex relationship. Thus, upon the separation of an unmarried couple, irrespective of sexual orientation, no provision is available whereby maintenance can be sought from one partner in respect of the other.

Registration of Births

There is no facility in Irish law to register anyone other than the parents of a child on the child's birth certificate. The automatic right of a father and mother to have their names registered on the birth certificate of their child depends on the marital status of the couple.

There is no facility in Irish law for the registration of a homosexual couple as parents of a child on the birth certificate of a child, where that child is born either through a surrogacy arrangement, where the male of a homosexual couple provides the sperm to facilitate the pregnancy, or where a lesbian gives birth through the means of donor insemination. In a surrogate situation, where the mother of the child is unmarried, only the mother of the child is registered, albeit the father of the child can be registered on application to the court. Where a lesbian gives birth as a result of donor insemination, she is registered as the

mother of the child. Thus, Irish law relating to the registration of births allows only for the registration of the parents of the child. There is no provision for the registration of other parties as parents of the child.⁴⁰

Passports

There is no legislation governing the issuing of passports and the eligibility of applicants for passports.⁴¹ Any practices in relation to the issuing of passports are all of administrative origin.

A child of married parents may be included on either parent's passport with the written consent of the other parent, even where the parents have separated. Similarly, the written consent of both parents is required in order that a passport can be issued to a child. As a same-sex couple cannot legally have a child together, either naturally or through adoption, their joint consent to the issuing of passports for a child would not arise, as it does for parents of a child born within wedlock.

Fertility Services

This section is concerned with the eligibility of same-sex couples to avail of fertility services in order to assist in the conception of a child.

The categories of fertility treatment include:

- Artificial insemination of a woman by her husband/partner;
- Artificial insemination of a woman by donor (not available in Ireland);
- In Vitro Fertilisation;
- Gamete Intra-Fallopian Transfer.

General guidelines as to practices in Ireland regarding Assisted Reproduction and Same-Sex Couples

There is no legislation in Ireland dealing with the issues raised by the procedures involved in Assisted Reproduction. In the absence of legislation, the only guidance comes from various Irish Medical Council Guides. The Irish Medical Council, in its guidelines on Ethical Conduct and Behaviour,⁴² makes no reference to the marital status of recipients of assisted

reproduction. This represents a departure from previous guidelines, which had limited the treatments to "married couples" only. It is unclear whether such a departure suggests a deliberate omission that ultimately facilitates unmarried couples, including lesbian couples, wishing to avail of the treatments.

The lack of clarity in the Guides has led referring consultants to recommend that practitioners keep, in so far as possible, within guidelines set down by the Human Fertilisation and Embryology Authority in the UK (HFEA). The Code of Behaviour of the HFEA sets out a number of conditions for treatment for assisted reproduction. Such conditions include that account must be taken of the welfare of the child who may be born.⁴³ Section 13.14 of the Code of Behaviour sets down that the HFE Act does not exclude any category of woman from being considered for treatment. In theory, it would appear from the above guidelines that the British legislation does not prevent the treatment of lesbians, involved in a same-sex relationship, for assisted reproduction. In practice however, many clinics in the U.K. operating under the same guidelines refuse to treat same-sex couples. It appears that Irish clinics operating under the guidelines also do not make the service available to same-sex couples.

A recent Report of the Assisted Reproduction Sub-Committee of the Executive Council of the Institute of Obstetricians and Gynaecologists⁴⁴ makes reference to the eligibility of applicants for assisted reproduction. It states that the preferred applicants would be those in a "stable relationship", but gives no definition of what amounts to a "stable relationship". Practitioners understand this to mean married and unmarried heterosexual couples, thus excluding same-sex couples from its ambit. Furthermore, the Report sets out that the practice of assisted reproduction is to be used for the treatment of selected causes of human infertility.⁴⁵ Same-sex couples seeking assisted reproduction treatment do so because of the inability of the couple to conceive a child naturally. This further rules out any treatment because treatment is confined to those with fertility and genetic problems.

It is clear therefore that, in practice, same-sex couples are denied assisted reproduction treatments, which are available to married and heterosexual unmarried couples, on the basis of their relationship. On the face of it, this would appear to be contrary to section 5 of the Equal Status Act which prohibits discrimination (inter alia on the grounds of sexual orientation⁴⁶) in the provision of a service to the public generally or to a section of the

Surrogacy

Surrogate motherhood is the practice whereby a woman agrees to be artificially inseminated or to have an embryo transferred to her uterus in order to become pregnant and carry a child to term with the intention of relinquishing custody of the child upon birth to the couple with whom she has made the agreement. This is usually, but by no means invariably, done in exchange for a payment to the surrogate mother.

There is no specific legislation in Ireland governing surrogacy. The mother giving birth to the child is regarded, under the Guardianship of Infants Act 1964, as the natural mother of the child⁴⁷ even where she has agreed to act as a surrogate for her child's father and his wife. The child born in such circumstances will be regarded as non-marital. Where the mother is not married, she is the sole guardian of that child, albeit a father is enabled to become guardian of his child by court order.⁴⁸ Where she is married, her husband is presumed to be the father of the child given the presumption of paternity⁴⁹ but such presumption is rebuttable.

Surrogacy and the same-sex couple

Adoption

As noted above, the adoption process in Ireland is governed by the Adoption Acts 1952 – 1991 which set out the procedures whereby a child can be adopted. Under this legislation, only a registered adoption society or a public assistance authority can arrange for the adoption of a child.⁵⁰ Private adoptions are not permitted and amount to an offence, liable on summary conviction to imprisonment and/or a fine.⁵¹ Where a surrogate has conceived a child through insemination with the sperm of the husband of a married couple hoping to adopt the child, the surrogate mother may place her non-marital child for adoption, but there is no guarantee that the child will be placed with the father of the child, even where he has been screened by the Adoption Board. Furthermore, a parent of a child is prohibited from receiving any payment in consideration of the adoption of a child,⁵² the contravention of which prohibition is an offence.⁵³

Thus, a homosexual man involved in a same-sex relationship could in theory donate sperm to facilitate the conception of his child by a surrogate mother, providing he has not paid her in return for her giving the child to him under a private adoption arrangement. Whether or not the adoption authority or the court would facilitate the father in the adoption of his child, where he is living with a homosexual partner, is a question that would be considered in light of the welfare of the child.

Guardianship

As noted above, under the Guardianship of Infants Act 1964, a mother is recognised as the

sole guardian of a child born outside of marriage,⁵⁴ irrespective of how or why the child was conceived. However, the father of the child can apply to the court to be appointed joint guardian of his child and to seek custody of and access to his child.⁵⁵ To date, the Irish courts have ruled, in relation to the question of guardianship and the unmarried father, that while legislative provisions confer the right on such a father to apply to the court to be appointed a guardian, his position is not equivalent to that of a father who is married to the mother of his child.⁵⁶

There is no legislative provision which expressly prohibits a homosexual father from applying to the court for joint guardianship of his child, where that child is born outside marriage, irrespective of whether or not the child was the result of a surrogate relationship. The court will be guided by the welfare interests of the child, which are the first and paramount consideration.⁵⁷

Custody and Access

The rights contained in the Guardianship of Infants Act 1964, which afford the father of a child the right to apply to the court for guardianship of his child, also confer jurisdiction on the court to adjudicate upon matters of custody of and access to the child.⁵⁸ This issue will be decided by the court on the basis of the welfare of the child as its first and paramount consideration. To date, no case has come before the Irish courts in relation to a homosexual father, who is involved in a same-sex relationship. In a recent unreported decision of the Circuit Court in Ireland, relating to the adoption of a child by the natural but unmarried father, where the child was born as a result of a surrogate arrangement, the court granted custody to the father where the mother did not want custody of the child. However, it is unclear whether the court would reach the same conclusion in the case of a homosexual father.

Access

It is usual in disputes that come before the courts, regarding circumstances of access, that in granting custody to one parent of the child, the court will grant access rights to the other parent. This is based on the understanding that the child's best interests are served by having contact with both parents. More modern cases illustrate that where there is a stable second relationship following marital breakdown, it is unrealistic and contrary to the welfare of children to exclude them totally from contact with the person with whom one parent is residing.

A homosexual man, involved in a stable relationship and who has fathered a child through a surrogacy arrangement would not appear to be excluded by such criteria, if applying for access rights to the resulting child where custody has been denied him. However, as there is no case-law directly on the point, one cannot conjecture as to whether the court would attach conditions regarding the access to the child in such circumstances as there is no case-law directly on the point.

2 Workplace benefits

Parental Leave

Under the Parental Leave Act 1998, there is a statutory entitlement to unpaid parental leave for men and women, in respect of each child of which he or she is the natural or adoptive parent.⁵⁹ Each parent has a separate entitlement to parental leave from his or her job.⁶⁰

Parental Leave is defined in Section 6(1) of the Act, which sets out that:

- "an employee who is the natural or adoptive parent of a child shall be entitled to leave from his or her employment, to be known and referred to in this Act as "parental leave", for a period of 14 weeks to enable him or her to take care of the child".

An employee who is the natural mother of a child, and who is involved in a same-sex relationship, is entitled to parental leave under the Act. The Act does not, however, entitle her partner to parental leave as the partner is not the natural parent of the child.

An adoptive parent is entitled to parental leave, as a natural parent, in respect of the child.⁶¹ Married couples can jointly adopt a child and therefore the Act affords parental leave to both parents. Present adoption legislation does not allow for the joint adoption of a child by unmarried couples, including same-sex couples. Thus, where a single person adopts a child, whether homosexual or heterosexual, that person is entitled to parental leave under the Act but not his or her partner.

Leave on grounds of "force majeure"

Under Section 13 of the Parental Leave Act 1998, an employee shall be entitled to leave from his or her employment, known as "force majeure leave" where, for urgent family reasons, owing to an injury to or the illness of a person specified in the Act, the presence of the employee is indispensable at the place where the person is. The categories of persons who may apply for such leave includes:

- (a) a person of whom the employee is the parent or adoptive parent,
- (b) the spouse of the employee or a person with whom the employee is living as husband or wife,
- (c) a person to whom the employee is in loco parentis,
- (d) a brother or sister of the employee,
- (e) a parent or grandparent of the employee, and
- (f) persons of such other (if any) class or classes as may be prescribed.

Clearly, under s. 13(2)(b), a spouse is entitled to "force majeure" leave where his or her spouse is ill or injured. Also, a partner in a cohabiting relationship, where the couple are living as husband and wife, is also entitled under this section to "force majeure" leave,⁶² where his or her partner is ill or injured. The wording of Section 13(2)(b) does not lend

itself to extending "force majeure" leave to couples in a same-sex relationship due to the fact that such partners cannot marry under existing law and therefore cannot come within the understanding of "spouse". Neither would a same-sex couple living together come within the understanding of a couple living together as "husband and wife". However, section 13(2)(f) prescribes that persons of other classes may be included and discussions with the Equality Authority suggest that this sub-section may ultimately allow for a class of persons who are involved in same-sex relationships to be included under the Act.

Adoptive Leave

Under the Adoptive Leave Act 1995, an "employed adopting mother", a "sole male adopter" or "an adoptive father" (where an adopting mother dies), shall be entitled to "adoptive leave" from his or her employment for a period of not less than 10 consecutive weeks, beginning on the day of placement. This form of leave operates as the functional equivalent of maternity leave in the adoption context.

The only issue raised by this legislation, for present purposes, concerns the adoptive leave which accrues to an "adoptive father", defined in the Act under Section 2(1) as:

- "a male employee in whose care a child has been placed or is to be placed with a view to the making of an adoption order, or to the effecting of a foreign adoption or following any such adoption, where the adopting mother has died".

Under Section 9 of the legislation, an adoptive father is entitled to adoptive leave, and under Section 10 to additional adoptive leave, where the adoptive mother dies on or after the day of placement. This section is applicable to married couples who, under present adoption legislation,⁶³ represent the only class of persons who can adopt jointly, both effectively becoming parents of the child. Where an adopting mother, involved in a same-sex relationship, dies on or after the day of placement, her partner is not entitled to adoptive leave under the Act because of her inability to come within the definition of "adopting father". Similarly, the partner of a sole male adopter, involved in a same-sex relationship, who dies on or after the day of placement, will not come within the definition of "adopting father" for the purposes of the Act.

Pensions and non-marital partners

Membership of occupational pension schemes and retirement annuity contracts (designed for the self-employed and those in non-pensionable employment) is a personal matter and discrimination as between individuals in terms of eligibility for membership of these arrangements does not arise. Neither is there any discrimination related to the marital status of individuals in terms of personal benefits. These pension schemes give the same rights to all members regardless of marital status in the calculation of personal pensions and lump sums.

Discrimination tends to arise in pension arrangements in the area of death in service benefits and benefits payable on death after retirement. In addition, there are the complications raised for pension arrangements by the Family Law Act 1995 and the Family Law (Divorce) Act 1996.

Employed persons are, in general, members of occupational pension schemes, which are sponsored and designed by employers. Such schemes are divided into public sector occupational pension schemes and private sector occupational pension schemes.

Public Sector Schemes

The structure of public sector schemes is discriminatory by nature, inflexible and, in general, there are no trustees with discretionary powers involved in a decision-making process. The scheme is generally constructed in two separate parts – the main pension scheme and one designed to provide for spouses and children of members. The only death benefit payable under the main pension scheme is the lump sum payable on death in service (one to one and a half times salary in general). These benefits are payable to the legal personal representatives or estate of the individual member and therefore are dealt with in accordance with the rules of intestacy or the will of the individual, as the case may be. The schemes providing for the spouses and children of members are confined to the lawful spouse. This would exclude the payment of benefits to the same-sex partner of a member of the scheme.

Private Sector Schemes

Private sector schemes are employer-sponsored arrangements and are designed to provide 'relevant benefits', including personal pensions, pensions payable to dependants, and lump sums payable on death in service or after retirement. Depending upon the design of the scheme itself, such schemes may or may not discriminate against non-marital partners in making provisions for benefits for dependants on the death after retirement of a member. There is a large and growing body of such schemes where trustees have sufficient discretion to enable them to deal with actual situations which they find on the death of a scheme member. By and large, however, the problem has not been specifically addressed by

employers. There are some exceptions, often in companies whose headquarters are in the United States, where these issues have already been raised and successfully dealt with.

Self-employed Schemes

Self-employed schemes are in the hands of the owner and the proceeds of a retirement annuity contract are at all times within the control of its owner. Such contracts are designed to produce a fund which can be used by the individual at his or her own option to provide benefits in accordance with his or her personal circumstances upon retirement. Thus, a person possessed of one of these contracts may choose to purchase an annuity on his or her own life, or on joint lives with another person. It does not matter whether the other person is a marital partner or not, or of the same or opposite sex. In the event of death prior to reaching retirement age, the proceeds of a retirement annuity contract go to the person's estate and therefore will be dealt with in accordance with his or her will or with the rules of intestacy, as appropriate. Thus, the proceeds of a retirement annuity contract are at all times totally within the control of its owner.

Death in service benefits

Death in service is a different proposition, however, and the benefits payable under these schemes in the event of death before reaching retirement age will be subject to precisely the same regime as applies to defined benefit schemes. These are schemes where the benefits are promised in advance. This is a pattern typically followed by the pension arrangements of the public service and by major private sector employers. In these schemes, the benefits to be paid are specified and it is therefore a question of the design of the scheme itself what forms these benefits take. Again, possible areas of discrimination arise in the area of death, both in service and after retirement.

The primary death in service benefit which occupational pension schemes pay is a lump sum, free of income tax. This may be up to four times final remuneration, plus a refund of employee's own contributions, plus interest on those. It is rare for the payment of a lump sum benefit to be directed by the rules of the pension scheme. In the vast majority of cases, the payment of the lump sum is at the discretion of the trustees – or, more precisely, the destination of such payment is at their discretion. The legal ownership of a pension scheme's assets lies with the trustees. Generally, occupational pension schemes will confer very wide discretionary powers, either on the trustees or, less usually, on the sponsoring employer, to determine the destination of death-in-service benefits, within boundaries specified by the trust deed and rules of the scheme. These powers will enable the person exercising them to make payment, for example, to "such one or more of the dependants/beneficiaries/legal personal representatives as the trustees [employer] in their [its] absolute discretion shall decide". Clearly, this enables the trustees to deal with a great many situations, including payment to non-marital partners, of the same or the opposite sex. In general, the term "beneficiaries" will be defined to include most blood relations.

The term "dependants" will be more widely defined and usually includes a "catch all" definition, such as "any person who, at the time of death, was wholly or partly dependent on the deceased for the ordinary necessities of life". A clause of this nature clearly gives the trustees very wide discretion as to how the death benefit should be paid and they may decide to divide it among several separate beneficiaries.⁶⁴ In practice, trustees of pension schemes do encounter situations where the nearest dependant falls into one of these categories and discretions are frequently exercised in favour of such partners.

Occupational pension schemes are also allowed to provide considerable benefits in the form of a pension, upon the death of a member, either before or after retirement. These benefits could amount to up to two-thirds of the individual member's salary per annum in total. These benefits are most frequently defined as spouses' pensions, and, if they are so defined, this removes any discretion that the trustees might otherwise seem able to exercise. It is unusual outside the public sector to have a cesser on remarriage or co-habitation. However, the rules of some schemes will permit the trustees discretion to redirect a spouse's pension and to pay it to one or more other dependants, in the form of pensions having the same actuarial value as the original spouse's pension. This enables the trustees to consider the claims of individuals apart from a spouse, or deal with a case where there is no spouse. In some schemes, members are invited to nominate a person as a "family member", who will be the beneficiary of the death benefit in the event of the death of the scheme member. In many schemes, particularly as they relate to lump sum death benefits, but also on occasions in relation to pension benefits, members may be invited to complete a "wishes letter". This is sometimes also called a "nomination" and enables the member to specify the person or persons to whom the death benefit should be paid in the event of his or her death. Such nominations are not binding on trustees but do serve as an indication of the member's own wishes. Trustees are bound by law to consider the possible claims of anyone who falls within the defined categories of beneficiary specified by the rules, whether ultimately they pay them anything or not.

Death benefits under pension schemes are subject to the normal rules of inheritance tax, as if they had come from the estate of the individual. Thus, benefits passing between husband and wife, even though they flow from a pension scheme, are tax-free. The normal thresholds apply to other persons inheriting. This, of course, means that anyone who is regarded as a "stranger" in law, such as a same-sex partner, may have a very large tax bill to pay if they receive a substantial payment under the rules of a pension scheme. Indeed, there may be a double taxation element here, as a survivor who inherits a benefit payable in pension form will be charged to Capital Acquisitions Tax on the capitalised value of the pension, while still being liable to income tax on the pension itself.

Thus, in private sector pension schemes, there exists the possibility of non-discrimination against non-marital partners of either sex. In practice, there still tends to be a degree of discrimination in the design of occupational pension schemes. Employers very often shy away from providing for the unusual, as they would see it, and deliberately design their

schemes to avoid possible complications – or, at any rate, decisions which might be difficult.

Family Law Act 1995, Family Law (Divorce) Act 1996

Pensions are subject to the Family Law Act 1995 and the Family Law (Divorce) Act 1996, under which, following a judicial separation or divorce, a portion of the pension may be calculated and allocated to the spouse who is not a member of the pension scheme. By definition, this facility obtains only in relation to married persons. In cases of marital breakdown, it is common to see agreements between the parties, outside the context of judicial separation or divorce proceedings, wherein one party disclaims any rights arising from membership of a pension scheme by the other party. Such agreements have no legal force, and do not remove the obligation on trustees to consider the possibility of payment to any individual who falls within the categories of potential beneficiary defined by the scheme rules, whether such people apply for consideration or not. No such rights accrue to unmarried partners, in heterosexual or homosexual relationships, upon the breakdown or separation of the parties.

Social Welfare Pensions

Social welfare pensions are those paid by the Department of Social, Community & Family Affairs either as a social assistance benefit (non-contributory) or as an entitlement (social security). Contributory old age and retirement pensions seem to be non-discriminatory, in the sense that a person who is entitled to such a pension may apply for a supplement to provide for an adult dependant. It appears that such a dependant may be of either sex and the only qualification here is a means test in relation to that dependant. To qualify as a dependant, a person would have to have income of less than £70 per week, although a sliding scale of dependants' benefits will operate from this year onwards in relation to dependants whose income is between £70 and £140 per week.

However, on death, the social security system again discriminates and survivors' pensions are payable only to the lawful spouses of deceased contributors.

3 The Property rights of same sex couples

Access to housing and succession to tenancy

Allocation of Local Authority Housing

Local Authorities are the main providers of housing for people who are in need of housing and who cannot afford it from their own resources. Housing is allocated to applicants in order of priority, taking all circumstances into account.⁶⁵ Rents charged for the housing are related to the ability of the applicant to pay.

The need for Local Authority Housing by an applicant must be established by the Local Authority to whom an application is made. This is determined primarily upon the submission of an application form and consideration for an offer of accommodation by the Local Authority will be based upon the applicant's need of housing and an incapacity to afford housing from his or her own resources. Once accepted, applicants are allocated housing in order of priority, taking all circumstances of the applicant into account.⁶⁶

Application may be made by a single person, a married or unmarried couple, or other group of people who wish to share accommodation. The application forms of most local authorities for housing are silent as to the marital status of the applicant/s. Discussions with a number of local authorities suggest that there is nothing to prevent a same-sex couple from being allocated housing. Once the applicant/s have been accepted as being in need of accommodation and not in the position to provide such accommodation from their own resources, the application is then considered according to a Scheme of Letting Priorities.

Scheme of Letting Priorities

The allocation of housing to applicants is based upon a 'Scheme of Letting Priorities', which is the means for determining the order of priority to be afforded to persons whose need for accommodation has been established by the local authority. A number of Schemes representing a cross-section of Local Authorities were examined in the course of this research project, including:

- Dublin Corporation
- Dublin County Council
- Fingal County Council
- Dun Laoghaire/Rathdown County Council
- Sligo Corporation
- Sligo County Council
- Waterford Corporation
- Galway Corporation
- Louth County Council.

It appears from the Schemes examined that needs are prioritised as follows:

- Families or persons living in dangerous premises on whom a requisition under Section 3(9) of the Local Government (Sanitary Services) Act 1964 has been served.⁶⁷
- Persons who are homeless.⁶⁸
- Overcrowding.
- Displacement (resulting from acts of the Local Authority).
- Persons sharing accommodation with another person or persons and who in the opinion of the Authority have a reasonable requirement for separate accommodation.
- Families, including single parent families, elderly persons and couples in exceptional hardship circumstances being evicted on foot of a Court Order and not in a position financially to provide for their own housing.
- Persons in need of accommodation on medical, social or compassionate grounds.
- Applicants (or applicants' family) suffering from infectious tuberculosis and living in overcrowded conditions.

The Scheme operates according to a points system, whereby points are allocated having regard to the circumstances of the applicant. The higher on the list of priorities those circumstances are, the higher the number of points allocated and the higher the priority of the applicant for housing. In some circumstances, no points are necessary for the allocation of housing, such applications being deemed Urgent Overall Priority Cases.⁶⁹ In practice, it appears that couples with a large number of children tend to be allocated housing first, due to overcrowding etc.

Joint Tenancies

Where an application is made for local authority housing by a married couple, the tenancy of the dwelling will normally be in the joint names of husband and wife.⁷⁰ In other circumstances, e.g. unmarried couples or friends, it appears that joint tenancies may be created 'where it is considered advisable'.⁷¹ A person who subsequently moves in with a sole tenant of a local authority dwelling, and whose income is assessed for rent purposes, may apply after a period of two years for a joint tenancy, which places his rights in relation to the property on par with the other tenant. Where a tenant remains a sub-tenant, he has some rights but not equal rights with the main tenant.

Succession of Tenancy

The policies relating to the succession of tenancy in the event of the death or departure of one party differ as between the different Local Authorities. Where there is a joint tenancy, it appears that there is a consensus among Authorities that the surviving joint tenant should succeed the tenancy. Thus, in the event of a death or a departure of a joint tenant, usually a spouse, the tenancy may be transferred to the other joint tenant. Generally, it appears that

joint tenancy occurs where the tenants are married although, as mentioned above, other situations may give rise to joint tenancies. In the case of a married couple, where the tenancy is not in joint names, a number of Local Authorities state that the tenancy shall be transferred to the surviving spouse remaining in occupation.⁷²

Where the tenancy is in the sole name of one party resident in the dwelling, it appears to lie at the discretion of the individual Authorities whether or not the tenancy should transfer to the other tenants of the dwelling. It would appear that sub-tenants, per se, have no right to a succession of the tenancy. In some instances, Local Authorities state that the tenancy may be transferred, on the death of the tenant, to a member of the tenant's immediate family, normally resident in the dwelling at the date of the tenant's death.⁷³ Sligo County Council alone makes reference to the fact that the tenancy may also be transferred in the event of the death or departure of a tenant, in a case where the tenancy is not in joint names, to a person normally resident in the dwelling, not necessarily a relative of the tenant.

It follows that the ability of a person to succeed to the tenancy of a Local Authority dwelling on the death of his or her same-sex partner depends initially upon whether or not the tenancy was in their joint names. It appears that, where it is, there should be little difficulty in the tenancy transferring to the surviving partner. Where the tenancy is in the sole name of the deceased partner, it would seem that the transfer of the tenancy to the surviving partner lies at the discretion of the individual Local Authorities. As stated above, the policy of some Authorities appears to suggest that the transfer of tenancy in such situations will be to immediate family members only, while others are prepared to transfer to persons normally resident in the dwelling at the date of the death, or the departure of, the appointed tenant.

Private Rented Accommodation

The private rented market is marked in the main by rental contracts which are renewable on an annual basis. The renewal of the contract may coincide with the landlord attaching new conditions for rental, including for increases in the rent etc. Under the Equal Status Act, 2000, a landlord renting a private dwelling is prohibited from discriminating in providing accommodation or any services or amenities related to accommodation or ceasing to provide accommodation or any such services or amenities on grounds of sexual orientation.⁷⁴ Given such provision, a landlord renting a private dwelling would not be legally entitled to discriminate against a same-sex couple on the basis of their sexual orientation.

Private Housing Market

In respect of securing mortgages for the purpose of purchasing private housing, it appears that the policy of lending institutions is very much geared toward the ability of applicants for mortgages, joint or otherwise, to repay the loan.⁷⁵ The sexual orientation of joint

applicants is not an issue for these institutions. All confirmed that joint mortgages are given out regularly to couples of the same sex, not all necessarily involved in same-sex relationships, but for business purposes etc.

Life Assurance Policies and Mortgage Protection Policies

Difficulties may arise in situations where a same-sex couple have secured a mortgage and need to secure a mortgage protection policy and/or life assurance policy. Generally, such policies are loaded in the case of male applicants on the basis of a perceived risk of HIV.⁷⁶ No difficulties arise in this regard where the applicants for the policy are women. Thus, in the main, two women, irrespective of sexual orientation, who apply for a mortgage protection policy for an amount up to £500,000, will be covered without question.

Where an application is made for a mortgage protection policy or for life assurance by single men, over thirty years, the application form will inquire of the applicant whether or not he has received any medical advice or blood tests pertaining to HIV or whether he considers he would have reason to have such advice/tests. Where an applicant answers in the affirmative, the completion of a "Lifestyle Questionnaire" is required and an HIV test will follow, if required. (Where an HIV test had been completed on the applicant in the recent past, no further test is required providing access to the results of the earlier test is available). The lifestyle questionnaire is general in form but includes, among its list of inquiries, questions about the lifestyle of the applicant, including whether or not he is or has been involved in a homosexual relationship etc. Such applicants are considered to be 'high risk'. Such category of applicants includes asthmatics, diabetics etc. Because women are in a low risk category in relation to HIV, no such requirements attach to their applications for mortgage protection cover.

Succession rights

The law of succession in Ireland is governed by the Succession Act 1965. A person may die testate (leaving a will) or intestate (leaving no will). These two situations will now be considered in turn.

Testate Succession

Any person who has reached the age of eighteen (or is or has been married) and is of sound disposing mind may dispose of all his property by will.⁷⁷ A will is automatically revoked upon the marriage of the testator, unless the will was expressly or impliedly made in contemplation of marriage. Entering into same-sex cohabitation has no effect on the validity of a will.

Until comparatively recently, a person was entitled to leave his or her property to whomever he or she desired. However, the Succession Act 1965 introduced significant restrictions on freedom of testation in order to protect the position of the spouse and children of the testator. Section 121 of the 1965 Act allows the court to review any disposition of property made within three years of death which was intended to defeat these provisions.

The Legal Right of a Spouse

Where a testator is survived by a spouse and no children, the spouse is entitled to one-half of the net estate of the deceased spouse as a "legal right share".⁷⁸ Where a testator dies and leaves a spouse and children, the spouse's legal right share is one-third of the estate.⁷⁹ This legal right share takes priority over all devises, bequests and shares on intestacy and is subject only to the claims of creditors of the testator.

Any devise or bequest to a spouse in a will may be expressly stated to be in addition to the legal right share.⁸⁰ In any other case, a devise or bequest to a spouse is deemed to have been intended by the testator to be in satisfaction of the legal right of the spouse.⁸¹ If there is a devise or bequest to a spouse in the will of a testator, the spouse may elect to take either that which is left to him by the will or the share to which he is entitled as a legal right.⁸² If the spouse fails to elect, he must take under the will and cannot claim any share as a legal right.⁸³ If the spouse is left nothing under the will, he or she receives the legal right share automatically.

There is no provision in the legislation to entitle a same sex partner (or an unmarried heterosexual partner) to a legal right share, irrespective of the length of the cohabitation.

Where there has been specific provision made in a will for a same sex partner, the latter's share of the estate may be considerably reduced if the deceased is still validly married to someone else (who is entitled to a legal right share). However, it is important to note that a spouse's entitlement to a legal right share is extinguished upon divorce and may, at the discretion of the court, also be extinguished upon a judicial separation.⁸⁴ Admittedly, it is possible for a divorced spouse, or a judicially separated spouse whose succession rights have been extinguished, to apply to court seeking provision from the estate of their estranged spouse on the basis that "proper provision in the circumstances was not made for the applicant during the lifetime of the deceased spouse".⁸⁵ Therefore, upon obtaining a divorce or judicial separation, it is advisable for a spouse to seek an order blocking their estranged spouse from making any application for provision from their estate upon their death.⁸⁶ Particularly in cases where the court has already decided to extinguish the succession rights of the other spouse upon a judicial separation, it is difficult to see why it would refuse to make an order preventing a subsequent application for provision from the estate.

The Rights of Children

Although the children of a testator have no entitlement to an automatic legal right share, they are entitled under section 117 of the Succession Act to apply for increased provision on the basis that the testator failed in his moral duty to make proper provision for them. Non-marital children and adopted children (but not step-children) have full entitlement to apply under section 117.

It lies with the court to determine whether there has been a failure in moral duty towards an applicant child and, if so, what provision should be made for the child. In determining whether there has been a failure in moral duty, the court must look at other moral claims on the testator's property, including those of a person with whom he was cohabiting.⁸⁷ When provision is ordered under s 117, it follows that the other beneficiaries will receive a reduced benefit. The court tries to interfere as little as possible with the intention of the testator in reallocating the entitlements under the will. However, it is not possible for an order in favour of a child under s 117 to interfere with the legal right share of the surviving spouse or with any gift to a spouse who is the mother of the applicant child.⁸⁸

The Position of Same Sex Couples

No Protection from Disinheritance

As stated above, a same sex partner has no right to complain if his or her partner leaves nothing to him or her in a will.

Effect of Limitations on Freedom of Testation on Same Sex Partners

There is nothing to prevent a person leaving some or all of his property to his or her same sex partner. However, the legislative provisions discussed above can impact upon the effectiveness of such a bequest. To prevent a claim from an estranged spouse to a legal right share, it is necessary for the testator to extract himself or herself from any previous marriage. In relation to claims by children, a same sex partner is in a weaker position than a spouse in that a claim by a child cannot interfere with the legal right share of the spouse. In other words, however deserving the children of the testator, the spouse is guaranteed one-third of the estate.⁸⁹ Same sex partners have no such guarantee.

Intestate Succession

If a person dies without a will, his or her property is distributed according to the provisions of Part IV of the Succession Act 1965. These provisions are said to represent an attempt to provide, in a fair and just manner, for the distribution which the deceased person might reasonably have been expected to choose had he made a will. Those entitled to the property are, in order of priority, the deceased's spouse and issue, parents, siblings, nieces

and nephew and next of kin (and ultimately the State).

There is no entitlement for a same sex partner (or an unmarried heterosexual partner) to inherit anything on intestacy.

Property Not Covered by the Rules of Succession

If property is acquired in joint tenancy, the deceased person's share in the ownership ceases on death. The other partner takes through the right of survivorship inherent in such ownership and not through the law of succession. However, where only one of the partners paid for property acquired in joint tenancy and no substantial direct or indirect contribution to the property was made by the other cohabitee to the acquisition, the latter's interest in the property may be regarded in law as held for the former on resulting or constructive trust. In such circumstances, the surviving partner holds the property in trust for the deceased's estate (and so it is subject to the rules in the Succession Act). This result can be avoided by proof of a clear intention that the beneficial interest was intended to vest in the survivor.⁹⁰

Restrictions on the transfer of the family home

The Family Home Protection Act 1976 confers on a spouse a statutory right to veto any unilateral disposition of the home by the other spouse. It does so by rendering invalid any disposition that took place without the other spouse's prior written consent. This prevents the sale or mortgaging of the family home by one spouse without the agreement of the other. The Act also provides a specific right of action to enable a spouse to obtain appropriate court orders to protect the family home so as to prevent its loss or its being rendered uninhabitable. Such orders may provide for a transfer of a spouse's ownership interest in the home to the other spouse. In general, contrary to popular belief, the 1976 Act does not give a spouse any right to share in the ownership of a family home belonging to his or her spouse.

This Act has no application to unmarried couples, irrespective of their sexual orientation.

Property rights upon judicial separation or divorce

Upon judicial separation or divorce, the courts have wide powers in relation to property adjustment orders.⁹¹ By such order, the court may provide for the transfer of specified property by one spouse to the other spouse, to any dependent child or to any specified persons for the benefit of such a child. Property adjustment orders are most frequently

made in relation to the family home. The court may consider factors such as the welfare of the spouses and dependent family members, and the accommodation needs of the parties.

The court may order an absolute transfer of a spouse's entire interest in property to the other spouse or the transfer of a part interest. Where an order is made vesting ownership of the family home in one spouse, section 3 (1) of the Family Home Protection Act 1976 (requiring the consent of the other spouse to any conveyance of the property) shall not apply. The court may also order that property to which either spouse is entitled should be settled for the benefit of the other spouse and/or dependent children.⁹²

In addition, the court has the power to make a range of other orders, including (amongst others) periodical payment orders, lump sum orders, orders for exclusive residence in, or for the sale of, the family home; financial compensation orders;⁹³ and pension adjustment orders.

Since same sex couples are not able to marry, their position is not governed by the legislative framework governing the adjustment of property rights on judicial separation or divorce.

Property rights of unmarried couples upon breakdown of the relationship

Claims to Property under the Law of Trusts

If an unmarried couple splits up, the family home (and other family assets) will belong to the person who holds the legal title to the assets in question unless the other party can establish a resulting trust over the disputed property. The law of trusts is not set down in legislation but has been developed over the years by the courts (historically by special courts known as the courts of equity). It will be seen from the discussion below that the legal rules are not generous to claimants (although the Irish courts sometimes bend the strict rules if they feel sympathy for a particular claimant). While most of the Irish cases have concerned married couples (the majority before recent legislative reform of the law of matrimonial property) and none have involved same sex unmarried couples, it would be logical to suppose that the rules outlined below would be applied in favour of a claimant in a same sex relationship. However, since there are no reported cases in this context, one cannot be entirely sure what approach a court would take. There is always the danger that a particular judge might take an even more restrictive approach than usual, with the result that the claimant would have even less chance of success than a heterosexual claimant.

An attempt will now be made to provide a brief summary of the complex legal rules which apply in this area. The starting point is the principle that a non-owning partner may gain a

share in a family home under a resulting trust if he or she can establish that he or she made a contribution to the purchase price of the property with the intention of gaining a share in the ownership.

Contributions

The simplest example of a qualifying contribution would be a financial contribution, at the time of the purchase, to the initial down-payment. The courts have also upheld the claims of those who contributed over the years through the direct payment of mortgage instalments which were owed by their partner. Indirect contributions to the repayment of a mortgage are also sufficient, for example through discharging other household expenses or through unpaid work in the legal owner's business while the legally owning partner was paying the mortgage. However, the courts have held that no beneficial interest will be acquired by a spouse who has worked in the home and in rearing the children of the relationship. A resulting trust cannot be founded upon financial contributions to family expenses made at a time when no mortgage is being repaid. However, if a contribution can be linked to the repayment of a mortgage, it is considered (illogically) to be irrelevant that the mortgage in question does not represent the price of purchasing the disputed property and in fact secures a loan which was taken out for some other purpose. Money or labour contributed by a claimant to the improvement of the home cannot contribute to the acquisition of a beneficial interest, since a somewhat artificial distinction is drawn in the law between the purchase and the improvement of a property. In general, where a beneficial interest is established under a trust, it will be in proportion to the extent of the claimant's contribution (e.g. if a claimant was deemed to have paid off half of a mortgage representing 90% of the purchase price, the claimant would be entitled to 45% of the ownership of the property).

The Question of Intention

Once a contribution has been shown, the second hurdle for a claimant is to establish that the contribution was made with the intention of gaining a share in the ownership of the property, rather than in order to make a gift to the legal owner of the property. In general, the contributor is assisted by what is known as the "presumption of resulting trust". What is meant by this is that it is normally presumed that someone who pays money intends to get something in return for it. So, when one cohabitee contributes to the purchase price, it is assumed that they intended to gain a share unless a contrary intention is demonstrated. Since people in intimate cohabitations rarely give any thought to the question of separate ownership, the reality will often be that the contribution was made with no thought as to its legal consequences. In that event, it will not be possible for the legal owner to prove that the contributor intended to make a gift to him (because the contributor really had no intention at all). The result will be that the claim to a resulting trust will succeed.

In the case of married couples, the question of intention is dealt with somewhat differently.

It is assumed that when a husband contributes towards property, which is purchased in his wife's name, he intends to make a gift to her (rather than to keep a share in the ownership for himself). This presumption is known as the presumption of advancement. Oddly enough, when a wife contributes to property purchased in her husband's name, the ordinary presumption of resulting trust applies and she is assumed to intend to gain a share for herself. In modern times, it is not possible to justify the differing presumptions that apply in the two situations. (Of course, the legislation discussed in the previous section has greatly reduced the practical significance of the presumption of advancement in the marital context but there can still be cases where marital property disputes are decided outside the legislative framework).⁹⁴ The presumption of advancement has no application to unmarried couples, irrespective of their sexual orientation.

Property in Joint Names

The question of intention is of particular importance when property is conveyed into the joint names of the parties (whether as joint tenants or tenants in common).⁹⁵ The fact that the property is held in joint names does not, in itself, preclude a claim to a resulting trust by the party who paid the bulk of the purchase money. In the case of married couples, the presumption of advancement tends to eliminate the problem. If a husband has paid more than half of the purchase money, he is presumed to be making a gift of the excess amount to his wife. Since he is unlikely to have given the matter any thought, he will generally be unable to convince a court that his intention when making his greater contribution was to keep more than half of the ownership for himself. However, in cases involving unmarried cohabitantes (or where the wife is the spouse who has made the greater contribution) the presumption of advancement has no application and a contributor will be presumed to have intended to get a share proportionate to his contribution. This can lead to problems where one partner works in the home while the other is the breadwinner and is in a position to make most of the financial payments towards the house. The law presumes that the person making the contributions intended to get a proportionate share and it is for the other party to produce some positive evidence that a gift of the amount in excess of a half was in fact intended. Since, as was mentioned already, people in this situation normally have no intention at all, it can be very difficult to prove affirmatively that one's partner intended a gift. The result can be that a person may lose out despite having believed that their position was secure due to their name being on the title.

Fortunately, it appears that there is a solution to the problem outlined in the previous paragraph. It is standard practice in England when conveying a property into joint names to include an express declaration that the property is to be held "as joint tenants in law and in equity" (or "as tenants in common in equal shares in law and in equity" or whatever is desired).⁹⁶ The English courts have held that this sort of express declaration of the beneficial interests in the property is sufficient to prevent the establishment of a trust, which contradicts the position, which has been expressly declared. The legal basis for this appears to be that a person who has declared the ownership to be held in a certain way is

prevented (or, in legal language, "estopped") from going back on this declaration at a later date. While this strategy has not yet been tested in the Irish courts, it seems likely that it would be successful in this jurisdiction.⁹⁷

The Doctrine of Equitable Estoppel

Under another legal doctrine known as equitable estoppel, if the owner of property makes a representation to another person which leads that other person to act to their detriment in the expectation that they have (or will acquire) an interest in the property, then the court has a discretion to grant a remedy. Detrimental reliance would include, for example, paying for improvements to a house in the false belief, encouraged by the owner, that one was entitled to a share in the ownership. The remedy under this doctrine may take the form (amongst other things) of an entitlement to monetary compensation or to remain indefinitely living in the property or even to a share in the ownership of the property. In practice, this doctrine is rarely applicable in the context of intimate personal relationships since the parties are unlikely to make explicit representations to each other about their separate property entitlements. There has only been one Irish case where equitable estoppel was applied in the family context and the facts of this case were somewhat out of the normal run of family property disputes.⁹⁸

Cohabitation contracts

Given the restrictive nature of the rules described in the previous section, it would not be unreasonable for unmarried couples, including same sex couples, to seek to protect their legal entitlement through some form of cohabitation contract. Before discussing the legal status of such contracts in Ireland, it is worth noting that, while they seem a good idea in theory, such contracts have not proven to be very popular in practice. It appears that, while a relationship is going well, the parties are reluctant to bring trouble upon themselves by considering what will happen to their property in the event that things turn sour. As one Canadian judge put it, in a case involving a dispute between a lesbian couple, "who reads the end of the book first?"

In any case, cohabitation contracts have a very uncertain status in Irish law. The traditional legal position, going back to cases from the eighteenth and nineteenth centuries, was that any cohabitation contract was illegal because of the immoral circumstances in which it arose. In modern times, it was famously held in a Californian case involving the actor Lee Marvin that a cohabitation contract would be enforceable unless the consideration for the contract involved the provision of sexual services. A similar view of the law has since been taken in jurisdictions with a legal system similar to ours such as Canada, Australia and New Zealand. Although the point has never been directly decided, it is generally assumed that the same view would be taken in England if a case arose. Unfortunately, in the recent Irish High

Court case of *Ennis v Butterley*⁹⁹ an extremely old-fashioned view was taken of the law. Kelly J. held in *Ennis* that cohabitation contracts represented a threat to the institution of marriage and that the courts would be in breach of their constitutional duty to safeguard that institution if they did not refuse to enforce such a contract. Given the very limited protection that the courts afford to unmarried partners upon the break-up of their relationship, it seems particularly illogical to strike down as offensive to public policy any attempt by them to reach a private agreement about their property entitlements.

It is arguable that the approach in the *Ennis* case was that of one particular judge and that cohabitation contracts between heterosexual cohabitantes might be treated more favourably in a future case. Certainly, *Ennis* was not an ideal test case, in that the claim seemed particularly unmeritorious and the contract pleaded was an oral one rather than a carefully drafted and tightly focused written agreement. It is arguable that, in the heterosexual context, our courts would enforce a cohabitation contract which was contained in a deed under seal (thus allowing it to be enforced with the need to show consideration for the promises contained in the contract) and which concentrated on specific issues such as property entitlements.

It is even more difficult to say what would be the status of a cohabitation contract between a same sex couple. On the one hand, it might seem that the traditional antipathy of the law to same sex relationships might lead a court to reject this kind of agreement as even more "immoral" than one concluded between an unmarried heterosexual couple. On the other hand, it could be argued that since same sex couples are prohibited from marriage, there is no danger that a cohabitation contract would replace the constitutionally protected institution of marriage (as Kelly J. seemed to fear on the facts of *Ennis*). The law remains uncertain on this point.

4 Taxation and the same sex couple

A valid marriage, recognised by Irish law, attracts many tax advantages, which are not available to any other kinds of relationship – specifically the same-sex relationship. Such relationships are devoid of all legal standing which extends into the rules governing the tax system.

Income tax

Under sections 1015–1023 of the Taxes Consolidation Act 1997, married couples are entitled to "joint assessment" of their income. Following the decision of the court in *Gilligan v Criminal Assets Bureau*,¹⁰⁰ joint assessment is now automatic in the tax year following marriage. Joint assessment does not necessitate both spouses to be working – only one spouse need work.

Those in a same-sex relationship, because of their inability to marry, cannot opt for joint assessment and, thus, neither partner is entitled to the marriage allowance or the double rate tax band.

A system of individualisation of standard rate tax bands has been introduced in Budget 2000. This will impact upon the double allowances formerly available to married couples where only one spouse is working. Under the new system, detailed below, married two-income families are entitled to double allowances and married one income families are entitled to less, but with an entitlement to claim a Home Carer's Allowance where the non-working spouse is caring for dependents, which compensates for the shortfall in allowances between the classes.

The benefits which accrue generally to married couples include:

1. A higher band of tax to married one-income families.
2. Double the rate bands of tax available to single persons, where both spouses are working.
3. A home carer's allowance for one-income families.
4. Double the mortgage interest relief limit available for a single person for principal private residence.
5. Trading losses incurred by one spouse can be set against income of the other spouse.
6. Tax relief for spouse for VHI and other qualifying payments made for the other spouse.

7. Tax relief for spouse for gifts made by other spouse.
8. Medical expenses incurred or defrayed by one spouse can be claimed by the assessable spouse.
9. Tax relief can be obtained by one spouse in respect of a person employed to take care of the incapacitated other spouse.
10. Double tax relief for rent payments
11. Tax relief for spouse for part-time 3rd level educational fees and training course fees paid by or for the other spouse.
12. Service charges paid by one spouse can qualify for tax relief in the hands of the other spouse.

Standard Rate Tax Bands: The Married Couple and the Unmarried Couple and the Implications of Individualisation of Income Tax, Budget 2000¹⁰¹

The income tax system is weighted in favour of the married couple. Unmarried couples, irrespective of their sexual orientation, are taxed as single persons. Thus, where only one of the couple works, the single standard rate tax band will apply, with no allowance being made for the unmarried partner who is not working.

Under the system of taxation introduced by the Minister for Finance in Budget 2000, each individual, whether single or married, will have his or her own standard rate tax band which can be set against his or her own income but which cannot be transferred between spouses.

Single persons standard rate tax band:

The single rate tax band of a person is now £17,000.

Two income married couples:

For two income married couples, a combined standard rate tax band of up to £34,000 per annum, the equivalent of two single bands of £17,000 each. The band for the couple will be transferable from one earning spouse to the other, subject to a maximum individual band of £28,000 for either spouse. This means that a two income couple will be able to split their bands as they choose, to a maximum of £28,000 for either spouse.

One income married couples:

The married one income couple has a standard rate band of £28,000 which is available to the taxpaying spouse.

A controversial new allowance, at the standard rate of tax, was also introduced for the one income married couple. The "Home Carer's Allowance"¹⁰² is a new tax allowance of up to £3,000 which may be claimed by a married couple where one spouse (the 'Home Carer') cares for one or more dependent persons.¹⁰³ The Home Carer who has some income in his or her own right may still claim the allowance where such income is £4,000 or less. Where the income is more, the allowance is reduced on a £3 for £1 basis. The Minister for Finance said that this measure was implemented to recognise the role of spouses who work in the home and to balance the tax relief measures announced in the Budget which addressed the position where both spouses were in paid employment.¹⁰⁴

Budget 2000 and the Same-Sex Couple

As an unmarried couple, the same-sex couple is still subject to the single standard rate tax band of £17,000 where both are working, with no allowance made for situations where one of the partners stays at home. Thus, in such situations, the working partner will be taxed as an individual.

Similarly, there is no provision for the non-working partner of a same-sex couple to claim the Home Carer's allowance of £3,000 because this allowance is restricted to married couples.

P.R.S.I. and health contribution levy

Liability for P.R.S.I. and the Health Contribution Levy is determined according to the reckonable income of each partner, whether married or not. Marital status does not therefore affect liability to pay same.

Capital gains tax

A couple must be married and "living together" in order to obtain any Capital Gains Tax benefits,¹⁰⁵ which include:

- Joint assessment or separate assessment
- Entitlement to dispose of assets to each other without attracting Capital Gains Tax
- Each spouse entitled to annual exemption of one thousand pounds
- Capital losses available to one spouse can be used by the other.

No benefits in respect of Capital Gains Tax accrue to a same-sex couple except in respect of the transfer of assets to a child. However, there is no Capital Gains Tax allowance where one same-sex partner wishes to transfer assets to the child of his partner from a former relationship.

Capital acquisitions tax

All gifts¹⁰⁶ and inheritances given by one spouse to another are exempt from Capital Acquisitions Tax.¹⁰⁷ In other words, if at the date of the inheritance, the recipient is a spouse of the donor, then the inheritance is exempt from inheritance tax and is not taken into account in calculating the Capital Acquisitions Tax on later gifts or inheritances from any source.

In the case of same-sex couples, partners are treated as "strangers in blood". The exemption threshold for assets passing from one partner to another in such circumstances is minimal, the threshold being £12,860.¹⁰⁸ This contrasts significantly with the situation of gifts/inheritances received by a spouse, which attract no Capital Acquisitions Tax. Thus, the question of providing for each partner on death gives rise to a particular problem from a tax point of view.

Parents, married or otherwise, may give their children up to a total sum of £192,900 without any Capital Acquisitions Tax arising. The transfer of the gift only attracts this limit where the transfer is to each partner's own child, step-child or adopted child.¹⁰⁹ It would not extend therefore to the transfer of assets by one partner in a same-sex relationship to the child or step-child of the other partner.

A new relief which applies in the case of CAT and which will be of advantage to cohabiting heterosexual or same-sex couples is the Principal Residence Relief, introduced in Budget 2000. This relief allows an individual to receive a gift or inheritance of a residential property free from capital acquisition tax, upon satisfaction of the following conditions:

- The premises was the beneficiary's principal private residence for three years prior to the gift or inheritance. Where the accommodation has directly or indirectly replaced other property, this condition may be satisfied where the beneficiary has continuously occupied both properties as his or her only or main residence for three of the four years immediately prior to the date of the gift or inheritance;
- The individual has no beneficial interest in any residential property in the State;
- The individual remains living in the property for six years after the gift or inheritance. This condition is relaxed in the case of absences imposed by employment obligations and removed if the beneficiary dies or is over 55 years or has to sell the property to go into a nursing home.

Stamp duty

Married couples have always been entitled to relief from normal rates of stamp duty for any property other than stocks and shares.¹¹⁰ As from the Finance Act 1990,¹¹¹ relief from stamp duty applies to the transfer of all assets, either direct transfer from one to the other or from one spouse into the joint names of both.

Such relief is not available in non-marital situations, the full ad valorem rates applying.

A reduced rate of stamp duty applies to transfers of property to a child/children where the children come within the ambit of the relevant legislation, similar to the definition provided for in respect of Capital Acquisition Tax, discussed above.¹¹² Any transfer of assets by a parent (or parents) to a child is liable to 50% of the duty that would otherwise be payable unless the transfer relates to shares (in which case the normal 1% rate still applies). Given the definition of 'children', it would not be possible for a partner in a same-sex relationship to transfer assets to the child/children of his or her partner without attracting full rates of stamp duty.

Probate tax

Since 1994, no probate tax is payable where assets are left absolutely to a spouse.¹¹³

As with Stamp Duty, there is no exemption from Probate Tax for same-sex couples regarding the transfer of property between partners. Relief from Probate Tax in respect of a transfer to a child is possible where the child is a "dependent child" as defined by legislation.¹¹⁴

5 Miscellaneous

Social welfare and family law

The Department of Social, Community and Family Affairs makes a number of social welfare payments available, across a number of categories, to support families. These include: Child Benefit; Family Income Supplement (FIS); Health and Safety Benefit; Maternity Benefit; Adoptive Benefit; Carer's Allowance; One Parent Family Payment; Widow's or Widower's (Contributory) Pension; Widow's or Widower's (Non-Contributory) Pension; Orphan's (Contributory) Allowance; Orphan's (Non-Contributory) Pension; Supplementary Welfare Allowance.

Means Tests

Many of the available payments are means tested,¹¹⁵ according to the income of the applicant, or where the applicant is married or cohabiting with a partner as husband and wife, according to the incomes available to the applicant and their spouse/partner jointly. This can operate to the disadvantage of many such couples where both partners are working and their joint incomes exceed the maximum amounts for qualification. However, for the applicant who is cohabiting with a same-sex partner and whose relationship does not meet the definition of 'living together as husband and wife', the means are assessed of the applicant alone. This gives same sex couples a distinct advantage over married couples or cohabiting heterosexual couples.

The Cohabitation Rule

A number of social welfare benefits are subject to what is known as the "cohabitation rule". In other words, the applicant forfeits the benefit if, and for so long as, they cohabit with another person as 'husband and wife.'¹¹⁶ The benefits affected by the cohabitation rule are the One Parent Family Payment,¹¹⁷ the Widow's or Widower's (Contributory) Pension; and the Widow's or Widower's (Non-Contributory) Pension.

Since those in same sex relationships are not regarded as "living together as husband and wife", they are not affected by the cohabitation rule and gain an advantage over other couples.

Limit on Total Unemployment Assistance for Couples

The unemployment payment is made up of a personal rate for the applicant which is calculated according to the means of the applicant and the amount of time he or she has been unemployed. Increased provision is given for dependants. Dependants include a spouse or partner with whom the applicant is living as husband and wife, and children. Same sex couples therefore suffer from the fact that a partner cannot come within the definition of "dependant".

On the other hand, there is an advantage to same sex couples in respect of the question of maximum limits on the amount payable. Where a husband and wife, or a heterosexual couple living together as husband and wife, both claim Unemployment Assistance, the maximum amount payable to the couple is the personal rate payable to one applicant plus an allowance which is given in respect of the other partner (and an allowance for child dependents, if any). Where both parties in a same sex relationship are in receipt of Unemployment Assistance, they qualify as individual applicants. Therefore, unlike the position in relation to married couples and heterosexual cohabitantes, the unemployment assistance received by one partner is not considered in the calculation of the unemployment assistance for the other.

Additional Allowances for Dependents

Recipients of Unemployment Benefit or Unemployment Assistance are entitled to an extra allowance for an "qualified adult". The definition of "qualified adult" extends only to a spouse or person with whom the recipient is living as husband and wife and whom the recipient is wholly or mainly supporting. Thus, there is no possibility of receiving an allowance for a same sex partner who is dependent on the recipient. Similarly, recipients of Supplementary Welfare Allowance receive extra benefit for dependents. Again, the class of dependents can include spouses and heterosexual partners but not same sex partners.

Family Income Supplement

The Family Income Supplement (FIS) is a weekly allowance to help families on low pay. There are various requirements to qualify for this allowance. One of these is that the applicant must work at least 19 hours every week (or 38 hours every fortnight). If the applicant is married, or living with someone as 'husband and wife', and the spouse/partner is working, the hours worked by the spouse/partner will be combined. This allows a family to qualify for the FIS where neither spouse nor partner can make up the required hours on their own. However, given that same sex couples do not fall within the definition of "living together as husband and wife", they are unable to combine their hours of work in order to make themselves eligible for FIS. (On the other hand, same sex couples do have the advantage mentioned earlier that, if one partner works the requisite number of hours, his or her partner's income will not be taken into account in assessing eligibility for FIS).

Summary

Same sex couples both gain and lose from the fact that the social welfare code recognises only spouses and those living together "as husband and wife". It is possible that the relevant legislation could be amended and the phrase "living together as husband and wife" replaced by some more broad formula (e.g. "living together in a relationship akin to marriage"). This would remove the distinction in treatment between heterosexual couples and same sex couples. It is arguable that this would be to the financial disadvantages of many same sex

couples. However, it is difficult to contend that discrimination should continue where it is beneficial to same sex couples but be eliminated in other areas of the law where it operates to their disadvantage.

Production against domestic misconduct

The Domestic Violence Act 1996 affords protection to persons in instances of domestic misconduct. The most potent remedy under the Act is the barring order (which can be prefaced by an interim barring order).¹¹⁸ This order may be obtained by spouses or, subject to certain limitations, by partners "living together as husband and wife." The Act requires that the parties must have lived together "as husband and wife"¹¹⁹ for a period of six months in aggregate during the period of nine months immediately prior to the application for the order (s. 3(1)(b)). The Court cannot make an order where the person against whom the order is sought has a greater legal or beneficial interest in the property in question than the applicant (s. 4(a)).

Although the phrase "living together as husband and wife" is not defined explicitly in the Act, it seems clear that it does not cover persons in a same sex relationship.¹²⁰ Thus, in this important respect, same sex cohabittees suffer clear discrimination as against married couples and heterosexual cohabittees.

Same sex cohabittees are, however, entitled to apply for a Safety Order or an Interim Protection Order. These orders are available to (amongst others) applicants of full age who "reside with the respondent in a relationship the basis of which is not primarily contractual."¹²¹ The definition of this phrase clearly covers same sex couples (see section 2(1)(iv)). A safety order directs that the respondent shall not "use or threaten to use violence against, molest or put in fear" the applicant or any dependent child or "watch or beset" the place where the applicant or dependent child resides.¹²² A safety order cannot require a respondent to vacate the home in which the applicant or a dependent child resides nor can it prevent a respondent who is not living with the applicant and/or dependent child at the time of the court application from entering the place in which either or both of them reside. A protection order is available to the same class of applicants as a Safety Order. It is an interim measure which offers the same protection as a Safety Order pending determination by the court of the application for a Safety (or Barring) Order.¹²³

Insurance

There are two types of insurance, general and life insurance.

General insurance includes the insurance of assets and potential liabilities (e.g. house or car insurance). In relation to this type of insurance, no relevance attaches to the personal relationship of the parties involved.

A number of issues arise under the heading of life insurance, primarily in the area of life assurance policies and mortgage protection policies. These issues are discussed in Section 3.1 which covers the general area of "Housing".

The rights of partners in emergency situations

This section compares the position of same sex couples to that of married couples in emergency situations, e.g. where one partner is admitted to hospital (whether conscious or unconscious) or becomes mentally incapacitated due to illness. On the whole, it would appear that there is no formal discrimination in this area, in that one spouse has no specific legal rights in respect of the treatment of the other spouse. However, that is not to say that there is not the potential for discrimination on the part of individual medical practitioners who retain some elements of discretion.

The Provision of Information

In the absence of legislation governing the question of the provision of information to others on a patient's condition, doctors are guided by the Irish Medical Organisation publication *A Guide to Ethical Conduct and Behaviour* (5th Edition 1998).¹²⁴ The Guide states the basic principle that "[w]hile the concerns of relatives and close friends is understandable, the doctor must not disclose information to any person without the consent of the patient". Thus, in theory at least, a doctor must have permission from a patient to impart information to a spouse or any other person. It follows from this that a patient is entitled to nominate the person or persons (including a same sex partner) to whom information is to be given or with whom the patient's welfare is to be discussed. Indeed, upon admission to a hospital, all patients are required to provide this information. Given this requirement, it is unlikely that a doctor in a hospital would refuse to engage with the person nominated on the grounds that he or she is the same sex partner of the patient (even though the matter is not explicitly addressed in the IMO Guide).

In the event that the patient is admitted to the hospital in an unconscious state, it is not readily apparent how the IMO guidance is to be applied. If the patient's identity is unknown, personal belongings are examined in an effort to find a means of contacting someone close

to the patient. One assumes that in practice (despite the letter of the IMO guidance) the patient's condition is discussed, in outline at least, with whoever accompanied the unconscious patient to the hospital or was subsequently contacted and/or with whoever seems to be closest to the patient. There would appear to be room here for discrimination against same sex partners, although doctors to whom we spoke insisted that this would not occur.

Input into Treatment Decisions

In principle, neither a patient's spouse nor the next of kin have any right to an input into decisions concerning the treatment of a patient's condition. The doctor must discuss the matter with the patient (and anyone nominated by the patient) and thereafter act with the consent of the patient. If the patient is not in a position to give consent, the doctor must act in the best interests of the patient (and is protected by the defence of necessity from criminal liability for interfering with the patient without consent). It is not for the patient's spouse (or anyone else) to consent on his or her behalf.

While this principle holds true in general, the IMO Guide directs that "[f]or the seriously ill patient who is unable to communicate or understand, it is desirable that the doctor discusses management with the next of kin or the legal guardian prior to reaching a decision about the use or non-use of **treatments which will not contribute to recovery from a primary illness**" (original emphasis).¹²⁵ The wording of the IMO guidance does not appear to extend to same sex partners and it is unclear whether doctors in this situation would respect the wishes of a partner above those of the relatives of a patient. It is also uncertain whether it would make a difference if the same sex partner had originally been nominated by the patient as the person with whom their condition was to be discussed. (Even if the partner had been given an enduring power of attorney (see next section), this would not seem to confer the right to make decisions about health matters.)

Personal Care Decisions

Under the Powers of Attorney Act 1996, a person can give another person an enduring power of attorney, which will allow the nominated person to make "personal care decisions" for the donor in the event of his or her mental incapacity.¹²⁶ Mental incapacity means incapacity by reason of a mental condition to manage and administer one's own property and affairs.¹²⁷ Under the Act, a personal care decision means a decision relating to one or more of the following matters:

- Where the donor should live
- With whom the donor should live
- Whom the donor should see and not see
- What training or rehabilitation the donor should get

- The donor's diet and dress
- Inspection of the donor's personal papers
- Housing, social welfare and other benefits for the donor.¹²⁸

The person given the power of attorney must have attained eighteen years of age and must not have been adjudicated bankrupt or convicted of an offence involving fraud or dishonesty, or an offence against the person or property of the donor. Furthermore, the attorney cannot be the owner of a nursing home in which the donor resides, or a person residing with or an employee or agent of the owner, unless the attorney is a spouse, parent, child or sibling of the donor.¹³⁰

The above legislation clearly applies to same sex partners and is potentially very useful. Unfortunately, the procedure for establishing and activating an enduring power of attorney is cumbersome and expensive and therefore has not been much used in practice. Another, even more cumbersome, legal alternative is to have the mentally incompetent patient made a ward of court. This involves the appointment of a committee by the court to make decisions on behalf of the ward.¹³¹ The membership of the committee is generally comprised of the spouse or a relative or relatives of the ward. However, there is no legislative requirement excluding a same sex partner and it would be open to such a person to argue before the court that he or she should constitute the committee.

Funeral and other arrangements upon death

It is the duty of the person nominated as executor in the will of the deceased to arrange for the disposal of the body. Although it is normal for the executor to consider the wishes of the family of the deceased, this is not a legally binding obligation (nor, in fact, is there any legal obligation to respect any wishes expressed by the deceased).¹³² It is less clear who has the responsibility for the disposal of the body in cases where there is no will, or where the executor appointed in the will is no longer living, or where no executor was appointed in the will. In such circumstances, the court will ultimately appoint an administrator to act as personal representative and deal with the deceased's property. This appointment will, however, come too late to have any bearing on the disposal of the body. It is arguable that the next of kin of the testator would have responsibility in this situation (i.e. whoever was the closest relative for the purposes of the inheritance of property under the rules of intestacy).¹³³

It follows from the above statement of the law that a person who wishes his or her partner to have the control of the disposal of the body upon his or her death should nominate that partner as executor in a will.

Immigration, work permits, Irish nationality and citizenship

Immigration Policy

The entry requirements of non-EEA¹³⁴ nationals largely depend on their country of origin. Citizens from a number of designated countries do not require an Irish Visa to enter the State.¹³⁵ The fact that one does not require an Entry Visa however is no guarantee that they will be allowed to enter the Country. An immigration officer may, at the point of entry, refuse leave to land to an alien coming from a place outside the State other than Great Britain or Northern Ireland on a number of grounds,¹³⁶ and may attach conditions as to the duration of stay and the engagement in business permitted to an alien granted leave to land.¹³⁷ Immigration officials will stamp the passport of the alien to indicate the period of time he or she is allowed to remain in the State.

Immigration policy in Ireland is heavily weighted in favour of the married couple where one of the spouses is an Irish Citizen and wishes to return to the State with his non-EEA spouse. There are no concessions outside the Immigration Rules for unmarried partners. The Irish situation in this regard differs from a number of other jurisdictions worldwide which make provision in their immigration policies for the entry of non-national partners of citizens of their States.¹³⁸ In effect, unlike married couples where the non-EEA spouse of the employee is granted residency on the basis of her marriage to an Irish National and is not required to secure a work permit in order to work in the State, the parties in an unmarried heterosexual or homosexual relationship are treated individually for the purpose of working and residing in the State.

Where an Irish national marries a non-EEA national, it is necessary for the non-EEA spouse of the Irish national to follow a number of procedures in order for her to settle and work in Ireland. The couple must present the following documents to the Immigration Officer at the point of entry: an entry visa (if the person is a citizen of a country which requires an entry visa), a certificate of marriage, the birth certificate of the non-EEA national and the passports of both parties. The Immigration Officer can stamp the passport to allow the non-EEA national to remain in the State for a maximum period of three months. During this period, the non-EEA national must report to either a local Garda Station, or the Immigration Office in Dublin, and present to them the same documents as above, including the birth certificate of the Irish national. On the basis of same, the non-national can apply for residency in the State. The passport of the non-national is endorsed for a further period of twelve months after which, save for exceptional circumstances, residency is granted. This is in stark contrast to the situation of an unmarried non-EEA partner of an Irish citizen, who wishes to reside in the State with her partner. Such person must apply for an extension every three months in order to remain and prove that in so doing he or she can support himself or herself, without being a burden on the State.

Work Permits, Work Visas and Work Authorisations

All non-EEA citizens require a Work Permit, a Work Visa or a Work Authorisation, depending on their country of origin, to enable them to work in Ireland,¹³⁹ with the exception of the non-EEA spouse of an Irish National who no longer requires a work permit to enable him or her to work in Ireland.¹⁴⁰ The employment sought must be in an area in which there is a shortage of skills among nationals and EEA nationals.¹⁴¹

A citizen of the EEA may bring his or her spouse and dependants to Ireland without the need for a work permit. Similarly, partners in a same-sex relationship, who are both EEA nationals, can travel and work in a Member State, including Ireland, without requiring work permits.

A citizen of the EEA whose spouse is a non-EEA national may be accompanied by that spouse providing the marriage is one that is recognised by the State. "Marriage" is understood to refer to heterosexual marriage and would not, by definition, extend to homosexual marriages.

A non-EEA holder of a work visa/authorisation may be joined by his or her spouse and/or minor dependant children once he or she can show that he or she is in employment. The person must have been in Ireland for one year and have the expectation of at least a further year before he or she can be joined by his or her spouse and/or dependant children. The holder of a working visa/ authorisation must be able to support the family members in question without the need for them to have recourse to public funds or paid employment (unless a family member holds a working visa, work authorisation or work permit in his or her own right.¹⁴² The type of application under discussion is rarely refused according to the Visa Office.

A non-EU/EEA person, involved in a same-sex relationship with an EU/EEA citizen, can travel to Ireland without a visa if he is a citizen of a State designated as not requiring a visa. In all other cases, a visa will be required. Should that persons wish to remain in the State, the same requirements as for the non-EU/EEA partner of an EU/EEA citizen, detailed above, will apply.

Irish Nationality and Citizenship

Under the terms of the Irish Nationality and Citizenship Acts, 1956 and 1986, there are three ways in which a non-national can become an Irish Citizen: by descent,¹⁴³ through naturalisation¹⁴⁴ and through post-nuptial citizenship. This exposes an area of discrimination in that non-national persons who are married to Irish citizens may be accorded citizenship on the basis of their marital status,¹⁴⁵ subject to certain conditions. As marriage is denied to same-sex couples in Ireland, an alien, involved in a homosexual relationship with an Irish national, is not entitled to citizenship under the post-nuptial

provisions. Furthermore, the marriage would have to be one recognised in Ireland, ruling out same-sex marriages that are conducted abroad. The non-national same-sex partner of an Irish citizen who wishes to become an Irish citizen must apply for naturalisation under the relevant provisions of the Irish Nationality and Citizenship Acts.

Legal aid

Civil Legal Aid

The Legal Aid Board provides legal advice and legal aid in civil cases to persons who satisfy the requirements of the Civil Legal Aid Act, 1995 and Regulations made thereunder. Legal Aid covers any oral or written advice given by a Solicitor or by a Barrister.¹⁴⁶ It includes writing a solicitor's letter and negotiations on a client's behalf.¹⁴⁷

Qualifications for Civil Legal Aid

Before a person is granted a legal aid certificate, it is necessary for him to produce a statement of means to assist in determining whether his means are insufficient so as to enable him to obtain legal aid.¹⁴⁸ It must also be established that there are reasonable grounds for seeking legal advice and/or legal aid and that it is reasonable, in the circumstances of the case, to grant legal advice or/and legal aid.

In computing the income and capital resources of an applicant who is married, the resources of his or her spouse shall be treated as his or her resources. Similarly, where the applicant is living with a partner as man and wife, the resources of his or her partner shall be treated as his or her resources, except where the parties are separated, or where the spouse or partner has a contrary interest in the matter in respect of which the application is made, or where it would be unreasonable in the circumstances to take such resources into account.¹⁴⁹

The inability of same-sex couples to come within the definition of 'living together as husband and wife' results in the parties to a same-sex relationship being treated as individuals and thus the income of one will have no bearing on the assessable income of the other. This means that parties to a same-sex relationship are more favourably situated to receive legal aid than those whose incomes are assessed jointly and are less likely to fall below the thresholds set by the Regulations.

Criminal Legal Aid

Where it appears that the means of a person charged before it with an offence has insufficient means to enable him to obtain legal aid, and the gravity of the charge makes it essential in the interests of justice that he should have legal aid in the preparation and conduct of his defence, the District Court will grant a certificate for free legal aid to an applicant.¹⁵⁰ Although an applicant may be required to furnish a written statement of means,¹⁵¹ there does not appear to be any express stipulation that the means of a spouse or partner must be taken into account.

Wrongful death of a dependant ¹⁵²

The Civil Liability Act 1961 makes provision for dependants of a deceased to recover damages where the deceased's death is caused by the wrongful act of another, if the act was such as would have entitled the deceased, but for his death, to have maintained an action and have recovered damages from the other.¹⁵³ The Civil Liability (Amendment) Act, 1996, extended the definition of dependants to include, in addition to a spouse and various relatives, "a person who is not married to the deceased but who, until the date of the deceased's death, had been living with the deceased as husband or wife for a continuous period of not less than three years."¹⁵⁴ Prescribed dependants under the Act can recover damages for injury, mental distress and for funeral and other expenses.¹⁵⁵

Given that the cohabiting couple must have been living together as "husband and wife" in order to come within the definition of dependent, a same-sex partner is excluded from eligibility under the Act.

The law of evidence: marital privilege

Under section 3 of the Evidence (Amendment) Act, 1853 a spouse cannot be compelled to give evidence in a civil case of any communication made to the other spouse during their marriage. A similar privilege in respect of criminal cases was formulated in section 1(d) of the Criminal Justice (Evidence) Act 1924. More recently, the extent of the privilege in criminal cases was restricted by section 22 of the Criminal Evidence Act 1992, which provides that spouses can be compelled to give evidence at the instance of the prosecution where the offence is a sexual one, or involves violence or the threat of violence, and is perpetrated against the spouse, a child of the spouse or of the accused, or any person under the age of 17 years. Marital privilege has no application to unmarried couples, whether heterosexual or homosexual.

Text references

1. See section 3(2)(d).
2. Adoption Act 1952 and amending legislation.
3. Adoption Act 1991, Section 10(1).
4. Ibid, Section 10(2).
5. Ibid, Section 10(1) and 10(3).
6. In a recent report entitled "Adoption Law: The Case For Reform" published 13th April 2000, the Law Society's Law Reform Commission recommends, inter alia, the removal of the exclusion of unmarried couples, whether heterosexual or homosexual, from adopting. The Report comments (at p.58) that "it is anomalous that the 1991 Act allows for single persons unrelated to the child, for one partner of a married but separated couple, and for widowed persons to adopt but excludes unmarried couples in stable cohabitation from eligibility."
7. Adoption Act 1991, section 10(1)(a).
8. Adoption Act 1952, section 10(c).
9. Unless that person is a widow or widower or a relative of the child, Adoption Act 1991, section 10 (1).
10. Adoption Act 1974, section 2.
11. Adoption Act 1991, section 10(3).
12. Ibid, section 10(2).
13. Ibid, section 8. See also section 13(1) of the 1952 Act.
14. Child Care Act 1991, section 16.
15. Ibid, section 36.
16. Ibid, section 36(1)
17. Ibid, section 36(2).
18. S I 260/1995.
19. See Section 36 (1) of the Child Care Act 1991.
20. The following health boards were contacted regarding their policy (if any) towards same-sex couples who apply to foster a child: South Eastern Health Board, North Eastern Health Board, North Western Health Board, Mid-Western Health Board, Midland Health Board, Eastern Health Board and Southern Health Board.
21. See Child Care (Placement of Children With Relatives) Regulations, 1995, Article 6 (S.I. No. 261/1995)
22. See Child Care (Placement of Children in Foster Care) Regulations, 1995, Article 5 (2).
23. Section 6(1) of the Guardianship of Infants Act 1964.
24. Ibid, sections 2 and 6, Adoption Act 1952, section 24.
25. Section 6 (4) of The Guardianship of Infants Act 1964.
26. Guardianship of Infants Act 1964, section 6A as inserted by the Status of Children Act 1987, section 12.
27. Section 1 of the Legitimacy Act 1931, as amended by the Status of Children Act 1987, Section 7.
28. See Guardianship of Infants Act 1964, section 6(A) as inserted by the Status of Children Act 1987, section 12 and the Guardianship of Infants Act 1964, section 7.

29. Ibid, section 11.
30. Per Walsh J in the Supreme Court decision in *MBO'S v PO'S* (1974) 110 ILTR 57 (SC).
31. Guardianship of Infants Act 1964, section 6.
32. Ibid, s.3.
33. *B v B (Minors) (Custody, Care and Control)* [1991] 1 FLR 402, *C v C (A Minor) (Custody:Appeal)* [1991] 1 FLR 223.
34. See *JW v BMW* (1971) 110 ILTR 49 wherein the Supreme Court overturned a decision of Kenny J in the High Court to award custody of three children to their mother. Fitzgerald CJ stated: "The fact is that the home which she has to offer to her children is one in which she continues an adulterous association with a man who has deserted his own wife and his own two children. A more unhealthy abode for the three children would be difficult to imagine." See also *EK v MK* Supreme Court, unreported, July 1974 where the court justified removing children from the custody of their mother, in favour of a custody order being granted to the father of the children, because of her involvement in an adulterous relationship. See similar examples in the case of *MacD v MacD* (1979) 114 ILTR 66 (SC) and the more recent case of *S v S* [1992] 12 ILRM 732 (SC).
35. See *SW v FW* [1995] 1 Fam LJ 24 (Circuit Court) where Mc Guinness J stated, at p. 25, that "Any access order made by the court must be made strictly on the basis of the welfare of the children".
36. In *Braun v Braun* High Court, unreported. December 1973, the court permitted a mother to have access to her children in the house in which she was living on condition that the person with whom she was living would not be present at the time.
37. Unlike the law of the United Kingdom, there is no provision in Irish law for relatives (including grandparents) or other significant persons in a child's life, such as a former homosexual (or other) partner of the child's parent, to apply for an access order to that child. See Martin, M., *Third Party Rights of Access to and Custody of Children*, [1996] Bar Review, 39.
38. Courts (Supplemental Provisions) Act 1961, s. 9. See also p.41 below.
39. Family Law (Maintenance of Spouses and Children) Act, 1976, section 5 (1).
40. On this point, it is notable that legal history was made in the state of California in December 1999, where twins were born as a result of a surrogacy arrangement made between a homosexual male couple and a married woman. The state of Los Angeles permits homosexual parenting. The Los Angeles Supreme Court ruled that the two British homosexual men, one of whom provided the sperm for the conception, were entitled to be named as the "official parents" on the birth certificate of their twins. They are listed as "Parent 1" and "Parent 2" on the children's birth certificates. No mother's name was recorded on the birth certificate. The children have subsequently been refused entry into Britain on grounds that the legal parents of the children are the surrogate mother and her husband in the United States. Britain does not recognise gay couples as legal parents. Furthermore, there is

- no automatic right of nationality for the children of unmarried fathers under UK law.
41. The only statutory reference to the issuing of passports is in the Ministers and Secretaries Act 1924, which provides that the Department of External Affairs shall "comprise the administration and business generally of public services in connection with the granting of passports and of visas to passport and all powers, duties and function connected with same."
 42. Irish Medical Council, Guide to Ethical Conduct and Behaviour, 5th Edition, 1998.
 43. Section 3.12 of the Code of Behaviour, which is replicated in respect of treatment licenses, states that "a woman shall not be provided with treatment services unless account has been taken of the welfare of the child as a result of the treatment (including the need of that child for a father) and any other child who may be affected by the birth".
 44. The Institute of Obstetricians and Gynecologists of the Royal College of Physicians of Ireland, Report of the Assisted Reproduction Sub-Committee of the Executive Council of the Institute of Obstetricians and Gynecologists, May 1999, p.5.
 45. Ibid.
 46. See Section 3 of the Equal Status Act 2000.
 47. Guardianship of Infants Act, Section 6 (4).
 48. Ibid, section 6(A) as inserted by the Status of Children Act, 1987, section 12.
 49. Status of Children Act 1987, Section 46 (1).
 50. Adoption Act 1952, Section 34 (1).
 51. Ibid, Section 34 (2).
 52. Adoption Act 1952, Section 42 (1)
 53. Ibid, Section 42 (4).
 54. Section 6 (4) of the Guardianship of Infants Act 1964.
 55. Ibid, section 6 (A), as amended by section 12 of the Status of Children Act 1987.
 56. See for example JK v VW [1990] 2 IR 437; GW v DJ & Ors, High Court, unreported, May 1992; WO'R v EH & An Bord Uchtala, Supreme Court, unreported, July 1996.
 57. Section 3 of the Guardianship of Infants Act 1964.
 58. Section 6 (A) of the Guardianship of Infants Act 1964, as inserted by Section 12 of the Status of Children Act, 1987.
 59. Section 6 (5) of the Parental Leave Act 1998.
 60. Ibid, section 6 (1).
 61. Ibid, section 6 (6).
 62. Ibid, section 13(2)(b).
 63. Adoption Act 1991, Section 10(1).
 64. It should be noted that non-marital partners may not be "dependent" on the deceased (for example, if they have their own employment) and so may be excluded.
 65. Note that section 6(6) of the Equal Status Act provides that the provisions of that Act do not prohibit a housing authority "from providing, in relation to housing accommodation, different treatment to persons based on family size, family status, marital status, disability, age or membership of the Traveller community."
 66. Department of the Environment Leaflet, Your Housing Options, October 1995.

67. This represented the top priority on the Scheme of Letting Priorities for the following Local Authorities: Dublin County Council, Dun Laoghaire/Rathdown County Council, Louth County Council, Waterford County Council, Fingal County Council.
68. Top Priority on the Scheme of Dublin Corporation Housing Department and Galway Corporation.
69. E.g. Dublin Corporation and Waterford Corporation.
70. Dublin County Council, Dun Laoghaire/Rathdown County Council, Fingal County Council,
71. Ibid.
72. E.g. Dublin Corporation, Sligo County Council, Dun Laoghaire/Rathdown County Council, Fingal County Council.
73. Fingal County Council, Sligo Corporation, Dun Laoghaire/Rathdown County Council.
74. Equal Status Act, 2000, sections 3(2) and 6(1)(c).
75. Institutions contacted were A.I.B., Bank of Ireland, Educational Building Society.
76. See section 5(2)(d) of the Equal Status Act 2000, which allows differential treatment in "relation to annuities, pensions, insurance policies or any other matters related to the assessment of risk" where the treatment is reasonable having regard to the reliability of the data and "other relevant underwriting or commercial factors".
77. Succession Act, section 77.
78. Ibid, section 111 (1).
79. Ibid, section 111 (2).
80. Ibid, section 114 (1).
81. Ibid, section 114 (2).
82. Ibid, section 115 (1) (a).
83. Ibid, section 115 (1) (b).
84. Under s 14 of the Family Law Act 1995, the court may extinguish the succession rights of either or both spouses.
85. See s 15A of the Family Law Act 1995 and s 18 of the Family Law (Divorce) Act 1996.
86. See s 15A(10) of the Family Law Act 1995 and s 18(10) of the Family Law (Divorce) Act 1996.
87. See *L v L* [1978] Irish Reports 288. Note, however, that a cohabitee does not have any right to seek additional provision under the will.
88. S 117(3).
89. If the spouse is also the parent of the applicant child, the gift to him or her is entirely safe from any action by the child. (Note that, under existing law, it is not possible for a same sex partner to be the parent of one of his or her partner's children).
90. See *Lynch v Burke* [1995] 2 Irish Reports 159.
91. See the Family Law Act 1995, section 9, as amended by section 52 (b) of the Family Law (Divorce) Act, 1996 and section 14 of the 1996 Act.
92. Section 9 (1)(b) of the 1995 Act; section 14(1)(b) of the 1996 Act.
93. This order requires one spouse to effect a policy of life insurance for the benefit of

- the other spouse, or to assign an interest in an existing life insurance policy or to make or continue to make payments on an existing life insurance policy.
94. For example, where the rights of a third party creditor intervene or where the dispute arises upon the death of one of the spouses rather than upon marital breakdown.
 95. In a joint tenancy, the survivor automatically takes the whole property, while in a tenancy in common the share of a deceased co-owner passes according to his or her will or intestacy. While joint tenants must have identical rights over the property, it is possible in a joint tenancy for the parties to hold different fractions of the ownership of the property.
 96. The point is that trusts are part of what is known as "equity", a body of law that grew up in the old courts of equity (which were once separate from the ordinary "common law" courts). If the ownership "in equity" is the same as that "at law" it means that no trust can arise to contradict the legal position.
 97. For further discussion, see Mee "Joint Ownership of the Family Home" [1992] Gazette of the Incorporated Law Society 59.
 98. See *Re JR (A Ward of Court)* [1993] ILRM 657, which concerned an elderly man who had led the claimant to believe that she could remain indefinitely in his house. When the man subsequently became mentally incompetent due to dementia, the court made an order in favour of the claimant.
 99. [1997] Irish Law Reports Monthly 28.
 100. [1997] Irish Tax Reports 424.
 101. Details regarding the individualisation of standard rate tax bands taken from the Department of Finance pages on the Internet, Annex B to Budget 2000, at <http://www.irlgov.ie/finance/budget00/annexb.htm> .
 102. Based on provisions contained in Section 12, Finance Bill, 2000.
 103. "Dependant persons" are defined as (a) a child for whom Social Welfare Child Benefit is payable, (b) a person aged 65 years or over, or (c) a person who is permanently incapacitated by reason of mental or physical infirmity. A dependant person does not include a spouse. A dependent person must normally reside with the married couple for the tax year. Provision is made to pay the allowance where the person being cared for resides outside of the home of the taxpayer but in close proximity to it. Taken from a briefing document distributed by the Revenue Commissioners, Issue 39, March 2000.
 104. See: "Minister for Finance announces £3,000 tax allowance for one income families whose spouses work at home to care for children, aged and the handicapped", at <http://www.irlgov.ie/finance/mcc534a.htm> .
 105. Taxes Consolidation Act (hereafter TCA) 1997, section (2).
 106. Finance Act 1990, section 127.
 107. Finance Act 1985, section 59.
 108. Capital Acquisitions Tax Act 1974, 1999 exemption threshold amount.
 109. *Ibid*, section 2. See also Finance Act 1992, section 223.
 110. Stamp Act, 1891.

111. Finance Act 1990, section 114, as amended by Finance Act 1992, section 141.
112. Finance Act 1972, sections 44 and 45, Part III Fourth Schedule Finance Act 1982, Taxes Consolidation Act 1997, section 8 and Finance Act 1992, section 214.
113. Finance Act 1994, amending retrospectively Finance Act 1993 Ch1, PtVI, Finance Act 1993, section 109 (1).
114. Finance Act 1993, section 109, defines a dependent child as one who, at the date of the parent's death is under 18 years or under 21 years and in full-time education or, if over the age of 21 years, was in full-time education continuously before reaching the age of 21 years. The total income of the dependent child cannot exceed £4,892.
115. Family Income Supplement; Carer's Allowance; One Parent Family Payment; Widow's or Widower's (Non-Contributory) Pension; Supplementary Welfare Allowance; Unemployment Assistance.
116. Social Welfare (Consolidation) Act 1993, section 160 as substituted by the Social Welfare Act, 1996, section 17 (1).
117. Lone parents, as defined for the purposes of this payment, can also avail of a range of employment supports and educational and training options operated by the Department of Social, Community and Family Affairs and other agencies. See the Department of Social, Community and Family Affairs website on <http://www.dsca.ie/dept/booklets/sw4/sect5b.htm> .
118. A barring order prohibits a respondent from continuing to reside in or from entering a place in which the applicant or a dependent child resides: see section 3(2) of the Act. An interim barring order is an emergency measure, which can be granted prior to a full hearing of the application for a barring order (s 4(1)).
119. Parents can also obtain such orders in certain circumstances.
120. Shatter Family Law (Dublin: Butterworths, 1997) p. 849 suggests that the point is arguable. It should be borne in mind, of course, that if "living together as husband and wife" did include same sex couples, it would follow that the same phrase in the social welfare legislation would have to be given the same interpretation. This would operate to the disadvantage of same sex couples. See page 36 below.
121. Section 2(1)(b).
122. Section 2 (2).
123. Ibid, section 5 (7).
124. Note that this Guide has no formal legal status.
125. Irish Medical Council, A Guide to Ethical Conduct and Behaviour, 5th Edition, 1998, p.38.
126. Powers of Attorney Act 1996, section 5(1). Such a power also allows decisions to be made in relation to the management of property.
127. Ibid.
128. Ibid.
129. Ibid, section 5(4)(a)
130. Ibid, section 5(4)(b).
131. Under the Lunacy Regulation (Ireland) Act 1871. This power also extends to making decisions in relation to the property of the ward.

132. *Williams v Williams* (1882) 20 Chancery Division 659.
133. These are discussed in the section on Succession.
134. EEA refers to the European Economic Area and comprises the European Union together with Norway, Iceland and Liechtenstein.
135. The list of countries whose citizens are exempt from requiring Irish visas in order to enter Ireland are set out in the Second Schedule of Aliens (Visas) Order, 1999, (S.I. No. 25 of 1999).
136. See the Fifth Schedule of the Aliens Act 1935, as amended by the Aliens (Amendment) Order, 1975 and the Aliens (Amendment) (No. 2) Order, 1999 (S.I. No. 24 of 1999).
137. Aliens (Amendment) Order, 1975 (S.I. No. 128 of 1975), Article 6.
138. Australia, New Zealand, Canada and the United Kingdom make concessions for unmarried persons to bring their partners to join them in their Home State, including same-sex partners.
139. A full list of designated countries is available on <http://www.irlgov.ie/iveagh/services/toireland/deptfa/htm> .
140. A procedural change, introduced on the 06/04/99, removes the requirement for the non-EEA spouse of an Irish Citizen to acquire a work permit to enable him/her to work in Ireland.
141. There are a number of designated categories of employment for which work permits are granted. See further <http://www.irlgov.ie/iveagh/services/toireland/deptfa.htm> .
142. *Ibid.*
143. Irish Nationality and Citizenship Act 1956, section 6(1) and 6(2).
144. *Ibid*, Part III, as amended by section 4 of the Irish Nationality and Citizenship Act 1986.
145. *Ibid*, section 8, as amended by section 3 of the 1986 Act. The legislation does not confer automatic citizenship upon a non-national upon marriage to an Irish citizen. Similarly, the acquisition of Irish citizenship by a person does not of itself confer Irish citizenship on his or her spouse. (See the Irish Nationality and Citizenship Act 1986, section 20). A declaration in a prescribed form must be lodged not less than three years following the date of the marriage whereupon, certain conditions being met, such person will be recognised as an Irish citizen from the date of lodgement.
146. Civil Legal Aid Act, 1995, section 25.
147. *Ibid*, section 27 (1).
148. *Ibid.*
149. *Ibid*, section 13 (4).
150. Criminal Justice (Legal Aid) Act 1962, section 2. See also the similar provisions of sections 3-6 of this Act.
151. *Ibid.* section 9.
152. See generally Shatter Family Law (Dublin: Butterworths, 1997) pp 266-270.
153. Civil Liability Act, 1961, section 48 (1).
154. Civil Liability Act 1961, section 47, as amended by the Civil Liability (Amendment) Act 1996, section 1.
155. *Ibid*, section 49.



The views expressed herein are those of the author, and do not necessarily represent the views of the Equality Authority.