

## **SPLITTING HEIRS - DIVORCE PLANNING AND PRE-NUPTIAL AGREEMENTS FOR FAMILY BUSINESSES IN IRELAND**

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### **Abstract**

**Objectives:** The main aim of this paper is to examine what can be done to plan for divorce should divorce arise for members of a family business in Ireland. A number of objectives have been formulated; firstly the research will examine the issue of divorce and what the law states pertaining to it. Next what support there is for family businesses when it comes to divorce and what preparations could be made should divorce occur will be identified. Prenuptial agreements will be examined and the views and opinions of owner/managers of family businesses will also be examined.

**Prior work:** Little to no research has been conducted in Ireland to examine the views and opinions of family owned businesses and the implications divorce may have on the business. Since divorce is still a fairly new concept in Ireland this will be a seminal piece of research.

**Approach:** Primary data from a stratified random sample of independent unquoted businesses was collected. The study relied upon a single key informant per family business for obtaining self-reported data.

**Results:** The interim results indicate that divorce has not been planned for by family businesses in Ireland. There are mixed feelings as to prenuptial agreements. Some respondents have indicated that prenuptial agreements are just for 'rich' people and aren't necessary in Ireland. Others want the law to be changed so as to enable prenuptial agreements to be legal.

**Implications:** This research is of value to the owner/managers of family businesses as it gives an indication as to what should be included in a prenuptial agreement. Furthermore, since the Irish government has established an executive committee to examine prenuptial agreements the results of this research will be invaluable to them.

**Value:** Little to no research has been conducted in Ireland pertaining to the impact of divorce on family businesses. Therefore, the importance of this research is that it fills a gap in the literature.

**Keywords:** Family business, divorce, prenuptial agreement, Ireland, planning.

## INTRODUCTION

The objective of this paper is to examine the concept of divorce and the implications it has on the family business in Ireland. Divorce is unpleasant for everyone, but for the owners of a family business, it can be a disaster. A couple not only has to dissolve the family as it once was, they also have to sell or divide their business. Divorce in Ireland is still a relatively new concept, it being a mere ten years since it was first introduced. A large number of small and medium-sized enterprises in Ireland are being run by husband and wife teams, also known as copreneurs and by multi-generational family businesses. Divorce in these businesses will obviously have serious ramifications for the business itself, its employees and the local environment it operates. Research has found that most businesses that go through a divorce fail to continue after the divorce due to poor management and uncertainty, which can cause irreversible damage in the process (Cole and Johnson, 2007). In order to answer the aim of this paper –the concept of divorce and its implications on family businesses – a number of objectives have been devised. Firstly, the paper aims to examine the issue of divorce and what the law states pertaining to it. Next what support there is for family businesses when it comes to divorce and what preparations could be made should divorce occur will be identified. Members of family businesses will be questioned as to garner their views and opinions on the issue of divorce and prenuptial agreements. Furthermore, since divorce is a fairly new concept in Ireland it is essential to look elsewhere to identify best practices for the preparation of agreements prior to a ‘marriage’ occurring that then can be used by either party should a divorce occur.

### Family Business Defined

The field of family business is a rather young academic field of inquiry, uniting a diverse group of people such as family therapists, psychologists, family business owners, family business members, consultants, solicitors, accountants, academics, and researchers. Academics, consultants, professionals, and practitioners struggled to define these terms even before the field of study emerged in the 1980s. One indication that a research paradigm’s development is still nascent is if it lacks agreement on the basic definitions (Lakatos, 1970). The field of entrepreneurship went through much debate regarding the definition of ‘entrepreneur’ and ‘entrepreneurship’ although little agreement was reached, a sort of academic pragmatism with each researcher specifically stating his or her own definition (Katz *et al.*, 1993). Unfortunately this makes any kind of constructive and comparative effort practically impossible. The developments in the family business arena are similarly frustrating.

The definitional problem is compounded by a lack of consensus about what constitutes a family: whether it should include only parents and children or all blood relations and in-laws. The difficulty with the definition of a family business is compounded with the finding that family-business relationship changes according to the structure and size of the business (Birley, 2000). The husband-wife business is largely different from a large family company considering the participation of family members in ownership and day-to-day management. Gersick *et al.*, (1997) proposed a three-dimensional view of the family business taking account of the position of a company in terms of family, ownership and business life cycles. Birley (2000) maintained that without family involvement in both the ownership and the management of the business one does not have a family business.

Handler (1989) identified four dimensions used by writers in the family business literature to define the family firm: (1) degree of ownership and management by family members, (2) interdependent sub-systems, (3) generational transfer, and (4) multiple conditions. She observed that although there is no consensus as to what uniquely defines a family business, there seems to be a general agreement that the dimensions to be considered are the first three. Some authors use only one of the aforementioned dimensions to define a family business although their writings do recognise the importance of the others. If all of these dimensions are important in defining the family business, then a definition must incorporate them all to be widely acceptable. Handler's (1989) attempt provides a conceptual clarification of the dimensions involved in defining the family business.

For the purpose of this study, the family business is defined as:

*"A proprietorship, partnership, corporation, or any form of business association, which is classified as an SME and where the majority ownership is held by the family and family members are employed in the family business and/or the family is represented on the Board of Directors"* (Birdthistle, 2003, p.76).

Based on the presentation of Handler's four dimensions, some dimensions are treated as variables for the definition of the unit of analysis presented in this paper, most notably ownership, structure, and family size. Therefore the unit of analysis for this study is a business, which is classified as an SME and where the family holds the majority ownership of the business, the business is a source of employment for family members and the Board of Directors is composed of at least one family member.

### **Family Businesses In Ireland**

With the exception of the ever fewer socialist economies, family businesses are the predominant form of enterprise throughout the world (Lank, 1994). There is no official registrar of family businesses in Ireland and as a result of this it is hard to quantify how many businesses are family businesses. However, in 2004 respondents to the Annual Services Inquiry (ASI) were asked to indicate whether or not the enterprise was a family business. A total of 12,451 statutory ASI forms were issued to the sampled enterprises from the Business Register and a valid response of 78% was received (n=9,701). The findings indicate that family businesses accounted for 47% of service sector enterprises, they also account for 28% of turnover, 39% of persons engaged and 24% of gross value added for the services sector (Central Statistics Office, 2004). These results indicate that family businesses in Ireland make very important contributions to gross national product and to employment. The economic value provided by family businesses is enhanced by their tendency toward long-term strategies rather than a need for quarterly results and aversion to debt and their inclination to reinvest dividends. A family business therefore by its very nature is more inclined than other types of companies to re-invest in itself, to support and perpetuate wealth of future generations.

Research conducted by Birdthistle (2003, 2004) has identified that family businesses in Ireland come in all shapes and sizes, ranging from the sole trader to the multi-member incorporated business. Many family businesses are single-member compa-

nies, where the member is the husband, and the directors are the husband and wife. Often the husband may hold 99 per cent of the issued share capital, and the wife the remaining one per cent. However, due to a change in legislation one member can now be the sole shareholder, owning 100% of the shares. More often than not, the family business is intimately entwined in a couple's life, with the husband as managing director, the wife as company secretary and other family members also employed. Often the business is run from the family home. Typically, the utility and motor expenses are put through the business, either directly or via the business credit cards. It is not unusual for the husband to pay himself and his wife modest salaries or directors' fees, while at the same time making substantial drawings from the business. This frequently causes difficulty in marital breakdown, not only because of the effect on values and individual liabilities, but also because of improper Revenue compliance. Often the company will have made substantial pension contributions on the husband's behalf, but very rarely on the wife's.

## **DIVORCE**

### **Meaning of Divorce**

Divorce has been defined as 'the dissolution of a marriage contracted between a man and a woman, by the judgment of a court of competent jurisdiction (Letric Law 2007). The Family Law (Divorce) Act was introduced in 1996 but did not come into operation until 27<sup>th</sup> February 1997. [See Appendix A for the components of the Family Law (Divorce) Act 1996]. In order to be granted a divorce both parties must meet the following conditions:

- the spouses must have lived apart for at least four of the previous five years;
- there is no possibility of reconciliation and
- there is proper provision for spouses and dependent family members.
- Additionally, one spouse must be domiciled in the Republic of Ireland (this means having residence in Ireland with the intention of living here permanently) or have lived in the country for one year before bringing proceedings.

Once these conditions have been met, either party to the marriage may apply to court for a decree of divorce, and once the court is satisfied that these conditions are fulfilled a decree will be granted, thereby dissolving the marriage.

### **Divorce Procedure In Ireland:**

The first step when seeking a divorce is to consult a solicitor. A person can bring the action in his or her own right but the legislation is difficult to understand without the aid of a solicitor. The Family Law (Divorce) Act 1996 requires a solicitor to inform the couple of the other possibilities of reconciliation, mediation and separation agreements and judicial separation. Collaborative practice is a new way of working out an agreement between a couple whose marriage has broken down. At the outset the spouses and their respective lawyers commit themselves not to go to court or threaten to do so for the duration of the collaborative process. Both parties must also undertake to be completely honest and open about all matters and to make full and frank disclosure of all their assets. Talks between the parties and their lawyers are face-to-face and parties must accept that the aim of the process is to reach an agreement that is fair

to everyone. The hope is that a couple will sort out a workable agreement that is more effective and less stressful than the court process or the decisions which can be imposed on a couple by a court. A court at the end of the process must approve the agreement. Both spouses work with a specially trained collaborative lawyer who provides legal advice and guidance. These two lawyers cannot act for either spouse in any later court proceedings if the collaborative process does not work out.

Where the parties are unable to resolve the issues between them, they can turn to the courts for a determination of the terms of their divorce. A court must grant all divorces. As mentioned previously, the person who makes the application for divorce is known as the applicant in court documents. Their spouse is known as the respondent. This is the person who must reply through the court to the divorce application. To apply for a divorce in Ireland four documents must be submitted to the Circuit Court:

1. An application form (known as a Family Law Civil Bill). This describes both spouses, what they do for a living, where they live, when they were married, how long they have lived apart and the names and birthdates of children (if any).
2. A sworn statement of means including: assets, income, debts or liabilities and outgoings.
3. A sworn statement regarding the welfare of any children. This sets out the child's background including where and with whom they live, their education, health, childcare arrangements and any maintenance and access arrangements already in place.
4. A document that certifies they have been advised of the alternatives to divorce. This is signed by a solicitor, and certifies that both spouses have discussed the possibilities of reconciliation, mediation and separation.

Once all documents are filed, a date will be given for the court hearing, in which it will need to be shown, to the court, that the requirements of the Family Law (Divorce) Act 1996 have been met. A person may have to wait for a considerable amount of time (sometimes up to a year) before their case is heard. In the meantime, either spouse is entitled to apply for an Interim Order, which will remain in place until the full hearing. These orders can arrange such matters as: maintenance; custody of children; safety/barring orders; and the entitlement of one spouse to sole occupancy of the family home. All cases in the Family Law Courts are heard *in camera* (in private). Therefore, members of the general public are not permitted to enter the court.

### **The Effect of a Decree of Divorce**

The result of receiving a decree of divorce means that the marriage is dissolved and the parties are no longer spouses, so they are free to remarry. Spouses lose their Succession Act (inheritance) rights in relation to each other. Some rights survive including: parties remain spouses for the purposes of the Domestic Violence Act, both spouses remain guardians of their children, and spouses are not deprived of a widow's/widower's pension. While a couple remain married the Family Home Protection Act 1976 is relevant even when the home is held in the name of one spouse only. Any sale, loan against or mortgage of the property will, under this law, require the formal consent of both spouses. So even where the property is not in their joint

names, one spouse cannot dispose of the family home or borrow against it without the proper consent of the other.

### Divorce Figures for Ireland

It was thought that there would be a deluge of applications when divorce was first introduced, but in the first five months after the introduction of the legislation, only 431 couples applied and 95 were granted a divorce. Since then, the numbers have increased (see Table 1). A total of 3,347 divorces were granted by the Courts in Ireland during 2005. Each year about 5,000 people consult a solicitor to end their marriages. Of these, about 4,000 are processed through the courts. Many marriages end with separation agreements arranged between solicitors. These agreements are not recorded unless they are subsequently "ruled" in court. There were 7,653 judicial separation applications between 1996 and 2001. Almost 5,000 judicial separations were granted between July 1996 and December 2000. Based on official marriage statistics however, Ireland's divorce rate of 16% remains low, compared to other EU countries.

**Table 1. Divorce and Separation Applications Since 1995.**

Year	Judicial separation applications	Divorce applications	Nulity applications
	Received-Granted	Received-Granted	Received-Granted
Year ending July 2001	1,592-310*	3,339-953*	n/a
Year ending July 2000	1,621-1,035	3,346-2,623	98-56
Year ending July 1999	1,595-999	3,316-2,333	91-54
Year ending July 1998	1,581-946	2,761-1,421	75-70
Year ending July 1997	1,263-1,481	431-95	48-53
		divorce introduced Feb'97	
Year ending July 1996	1,740-1,215	divorce not available	86-47
Year ending July 1995	1,449-951	divorce not available	67-32

\*granted up to December 31,2000

Source: Carswell 2002

## DIVORCE AND FAMILY BUSINESSES

### Ensuring Continuity Of The Family Business Even After Divorce

No one enters into a marriage or business with the intention of eventually divorcing or splitting up the business. Therefore, very few people have a plan in place, or have given any real thought to the consequences of such an action until divorce is imminent. Unlike death or disability, where one can easily purchase insurance to cover the unforeseen loss of a partner or spouse, insurance policies to protect oneself against the hazard of divorce and the resultant economic hardships are not available.

In today's environment, however, it is not uncommon for first or subsequent generation owners of family-owned businesses to ask their children's intended spouses to

sign prenuptial agreements in order to protect the family business assets from the potentially adverse financial consequences that a divorce may bring.

Typically only one spouse holds title to the business interest. However, situations wherein both spouses hold a certain percentage of a closely held business entity frequently occur as well. One spouse is usually more active in the business than the other, generally because that spouse started the business, because the business had been in that spouse's family for several generations, or for parenting and other family-related reasons. In recent years, it is sometimes the case that both spouses are intimately involved in starting and operating a family business. In the case of a pending divorce, very different approaches are called for when planning the future of the business entity, dependent on the varying degrees of involvement by the respective spouses and the manner in which ownership is held.

In cases where only one spouse holds title and actively participates in the management of the business entity, the inactive non-titled spouse is often "bought out" by virtue of an unequal allocation of the non-business assets that are included in the marital estate. In situations where both spouses hold an ownership interest or both spouses are active in the daily management of the business, issues formerly discussed in the dining room are now moved to the boardroom or courtroom. In such instances, the issue of who will own and control the business after the divorce becomes equal in importance to the issue of valuing and dividing the assets.

In cases where both spouses want to continue operating the business following the divorce, 50-50 ownership structures are oftentimes unworkable. Majority ownership allows for easier and more effective implementation of management decisions, but can create other problems. When divorced spouses determine that they will continue to jointly operate a business enterprise, careful planning, formal documentation of agreements, policies and procedures, and a provision for independent oversight and dispute resolution are critical. The business will almost always stagnate and be held hostage to differences of opinion unless carefully planned and agreed-to procedures are put in place to facilitate the profitable continuation of the enterprise.

Many businesspeople are wondering can anything be done to protect the assets that an entrepreneur may bring to a marriage. As unromantic as it sounds, an entrepreneur may wish to consider the execution of a prenuptial agreement. Currently the Irish government does not recognise the legality of prenuptial agreements. However, the Tanaiste established a Study Group on prenuptial agreements in December 2006. The Group concluded that prenuptial agreements do not offend against the constitutional protection accorded to the institution of marriage and the right to marry (Department of Justice, Equality and Law Reform, 2007). The Group's core recommendation is that separate provision be made in both the Family Law Act 1995 and Family Law (Divorce) Act 1996 to provide that the courts be required to have regard to existing prenuptial agreements when making ancillary relief order in judicial separation and divorce proceedings. The Study Group is of the view that prenuptial agreements are enforceable and capable of variation under existing Irish statute law. Therefore, should prenuptial agreements become legal in Ireland, entrepreneurs who have a wedding on the horizon should consider writing a prenuptial agreement. This is particularly true if the entrepreneur is bringing significant assets into the marriage, or if

he/she might own the business outright, or have family money and wishes to protect it should the relationship breakdown.

### **Plans That Can Be Made: Prenuptial Agreements**

A prenuptial agreement is an agreement that is entered into by a couple prior to marriage so as to determine their rights and responsibilities in the event of a divorce. An agreement that is entered into during marriage is called an antenuptial agreement. Basically, a prenuptial agreement determines how spouses define equality in their partnership. It is important that the agreement is not designed to promote divorce, nor should it be written or signed with the intention of divorcing. The agreement must be created fairly and agreed upon by both parties. As a result of drawing up a prenuptial agreement many of the difficulties of divorce are avoided should the marriage end. Prenuptial agreements can be modified after a marriage, once it is written and signed by both parties. However, it is important to note that while the original decisions made prior to the marriage can be added to, no subtractions can be made. Given the success of Irish businesses during the Celtic Tiger, there is now a stronger need for these formal agreements as people tend to marry later in life after they have achieved professional success and accumulated substantial financial assets.

Prenuptial agreements are not for everyone; however there are a number of people who should take it into consideration. Firstly, a couple who have between them a significant amount of assets by which the current divorce rule of 50/50 is not an option especially if a spouse has significantly more assets than the other. Secondly, if one partner is concerned about a future spouses' current debt, by drawing up such an agreement, then one spouse would not be held liable for the debts of the other should a marriage fail. Finally, and most importantly, family businesses with whom a partner is to marry into should consider this approach before the marriage. This is especially true if they want to keep the business within the family and should a divorce occur the division of assets does not financially affect other members of the family business during divorce proceedings. Prenuptial agreements can be modified after a marriage once it is written and signed by both parties. It is important to note that where it can be added to, it cannot be subtracted from the original decisions made prior to the marriage.

### **Guidelines On Writing Prenuptial Agreements**

If one is considering writing a prenuptial agreement the following guidelines should be adhered to. Additionally refer to Appendix B for a sample prenuptial agreement:

- **Engage in candid discussions prior to hiring a solicitor.**  
Don't simply spring the idea on your loved one. The process of negotiating and drafting a prenuptial agreement proceeds more smoothly if the couple has had forthright discussions about the financial implications of their marriage and the general concept of a prenuptial agreement. Try to avoid, however, negotiating specific terms with your potential spouse prior to seeking legal counsel, so that you are not locked into a promise, which, upon guidance of counsel, may not be advisable. One will want to make it very clear from the beginning that one's desire for a prenuptial agreement is not related to your love or your commitment to your fiancé/fiancée. Most likely, one is asking for a prenuptial agreement because



one has been hurt or burned in a previous marriage so its really about your own issues.

- **Enter into the process well in advance of your wedding date.**  
This avoids the stress of one party later claiming duress due to the pressure created by the time constraint.
- **Hire separate solicitors.**  
Each party should have his or her own solicitor who can explain property rights upon divorce and death and any waivers of those rights that are made in the agreement. Both parties should have a full understanding of their rights upon divorce as well as upon the death of the other party, so that any waiver of those rights is made by informed decision.
- **Prepare detailed financial disclosure statements.**  
This should include a statement of all assets and liabilities. Each party should disclose their annual gross income, interests in family trusts, and potential inheritances. This helps defend against a challenge by either party that he or she did not understand the value or extent of the financial rights that were waived.
- **Keep in mind that the process of negotiating and signing a prenuptial agreement can often lead to tension, even for mature couples.**  
The most difficult aspect of a prenuptial agreement is that it is essentially a business transaction negotiated between two parties who are in love. In addition, in order to protect their respective clients, the solicitors involved must negotiate and draft the agreement as if a divorce will occur. Inevitably, the process of drafting a prenuptial agreement brings up emotional issues for one or both parties. If you decide that you want to have a prenuptial agreement, you, your potential spouse, and your solicitor should all be attuned to the potential emotional issues that may surface.

### **The Benefits and Criticisms of Prenuptial Agreements**

Many people prefer an amiable separation to courtroom confrontations during a divorce. Some people simply wish to have certainty as to property rights and maintenance payments upon a potential divorce. By entering into a prenuptial agreement, they eliminate much of the financial uncertainty associated with a divorce. A fairly negotiated prenuptial agreement can provide some assurance to the wealthier spouse as to the extent of the financial impact of a divorce, while at the same time, providing the less wealthy spouse with some guarantee of his or her entitlement to a property distribution and/or maintenance upon a divorce. Whether you have a lot of valuable assets or are just starting out, have or do not have children, there are many reasons a prenuptial agreement can be beneficial to you and your spouse. Other reasons include:

1. To determine how you and your spouse define equality in your partnership.
2. To establish the value of non-monetary contributions to a marriage, such as being a stay-at-home spouse.
3. To cover your pre-marriage nest egg, such as your home, pension plan, stock portfolio, or property with emotional value.
4. To protect gifts and inheritances you receive.
5. To ensure that in the event of death or divorce, you will avoid difficult disputes over property, such as family businesses, stock options, professional degrees, licenses and practices, pension plans, and copyrights.
6. To protect and preserve the rights of children of an earlier marriage.

There are however many criticisms regarding prenuptial agreements. Many of these criticisms focus on maintaining the value and sanctity of a marriage. However, having a prenuptial agreement is a very personal choice and one that should certainly not be taken lightly. Some fear that it raises the thought of divorce before a marriage takes place and discourages people from getting married. While it is difficult to predict the future about how potential issues should be handled, such a discussion could put a strain on the relationship. However, it has also been said that a prenuptial agreement can facilitate a marriage. An agreement as to future property settlement or spousal support payments can provide the wealthier spouse with financial protection.

### **Alternatives To Prenuptial Agreements**

However, there are also other alternatives to a prenuptial agreement that can be enforced by the owner of a family business in Ireland. A starting point for the owner of the family business would be to include in the Articles of Association of the company a proviso that prohibits the transfer of shares to spouses and if there is a shareholders agreement to include such a proviso as well. There should also be a pre-emption provision in the Articles of Association, which requires shareholders who dispose of their shares to offer them first to existing shareholders. Having all family members sign a family charter, which emphasises that the family business is principally an income generator and the members of the family are custodians of the family assets for future generations is another alternative to a prenuptial agreement. The other alternative is for the family business to establish a trust. It is essential that the family business receive legal and financial advice about the establishment of trusts.

## **EXPLORATORY RESEARCH FINDINGS**

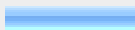
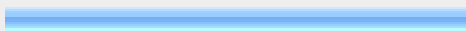
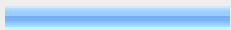

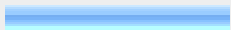
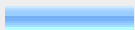
### **Method And Data Collection**

Exploratory research was conducted on family businesses in Ireland, which questioned the views and opinions of a member of a family business on the issue of divorce and prenuptial agreements. A database of family businesses was compiled from the Kompass database. In order to minimise costs it was decided to administer the questionnaire through an online survey, thus surveymonkey.com was utilised to design and administer the questionnaire. In total 104 questionnaires were emailed to family businesses and 34 valid responses were received, giving an overall response rate of 33%. All respondents adhered to the definition of family businesses proposed for this study.






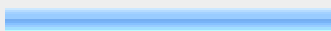
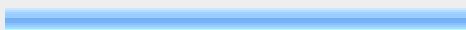
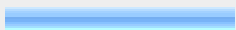
### **Research findings**

#### **Family business description**

Of the respondents, 53% employed less than 10 employees (thus classified as a micro family business). Some 23% employed between 10 and less than 50 employees (thus classified as a small family businesses). Medium sized family businesses accounted for 15% of respondents (between 50 and 250 employees) and large family businesses (greater than 250 employees) accounted for 9% of respondents. As Table 2 below indicates retailing was the most common sector the respondents were involved in.

Table 2. Business Sector Respondents were Operating In.		Response Percent	Response Count
Service Sector		20.6%	7
<b>Retailing</b>		<b>35.3%</b>	12
Agriculture		14.7%	5
Professional Services		5.9%	2
Construction		14.7%	5
Manufacturing		8.8%	3
<i>answered question</i>			<b>34</b>

Respondents were asked how active the family were in the business in terms of employment. The average number of full-time employed family members were 2 and on a part-time basis, 1 family member. As Table 3 indicates the majority of respondents family business were established post 1970. However, the results also indicate that Ireland has family businesses that are quite old.

Table 3. Year the Business Was Established.		Response Percent	Response Count
1900<1910		3%	1
1930<1940		6%	2
1940<1950		3%	1
1950<1960		3%	1
1960<1970		3%	1
1970<1980		26%	9
1980<1990		35%	12
1990<2000		21%	7
<i>answered question</i>			<b>34</b>

Respondents were questioned as to how many family members involved in the family business were either married or co-habiting. Some 88% replied there were family members involved in the business who were either married or co-habiting and 12% were not.

### Respondents Knowledge and Awareness of the Divorce Act

Respondents were asked to rate on a scale of one to five (1 being very familiar and 5 being very unfamiliar) how familiar they are with the Divorce Act of 1996 and Table

4 below indicates the results. The exploratory findings from Table 4 are very worrying for family businesses in Ireland, since 47.1% of respondents are very unfamiliar and 17.7% are unfamiliar with the Divorce Act of 1996 and thus are unaware of the implications this Act can have on their family business. What is interesting to note is that 82.4% of respondents agreed that divorce is an issue of concern for family businesses in Ireland, however when asked if it was a concern for *their* family business, 70% said no it was not a concern whereby only 30% said it was.


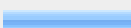
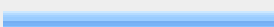
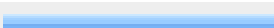
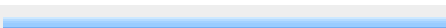
<b>Table 4. Familiarity with the Divorce Act 1996?</b>		<b>Response Percent</b>	<b>Response Count</b>
1 Very familiar		8.8%	3
2 Familiar		8.8%	3
3 No opinion		17.7%	6
4 Unfamiliar		17.7%	6
5 Very unfamiliar		47.1%	16
<i>answered question</i>			<b>34</b>

Table 5 below provides some anecdotal responses for why respondents believe divorce is an issue of concern for their family business.

**Table 5. Anecdotal Responses To Why Divorce is An Issue of Concern.**

Could lose half your business if divorced. Then if spouse remarried - great fun!
It breaks down the family unit.
You end up with nothing
It could end the business
Distribution and ownership of company assets
It causes disruption
Division of assets and equipment is very likely. All concerned end up losing out
Divorce can reduce the liquidity of the business
Divorce requires the division of assets
Divorce will cause financial problems for small businesses.
Divorce costs money as you have to half business.
I know farmers who are afraid to get married as they reckon you come back down the aisle with 50% of the farm.
Divorce can lead to asset dilution
If divorce occurs one may have to sell the business to divide the money
The obvious division of assets between a couple due to divorce may create problems.

From the above responses one can see that the major issue of concern concerning the issue of divorce are the financial implications associated with it. However, [if and when] prenuptial agreement are legalised in Ireland, signing this could reduce the financial hardship faced by family businesses. Respondents were then asked if they have made any provisions for the possibility of divorce occurring i.e. preparing an agreement prior to marriage, changing the Articles of Association so as to protect the family business etc. Only one respondent replied that they had made provisions and those provisions were that his *“Wife would have income from the business but no shareholding and that the children get the business”*.

Some anecdotal responses were received from respondents who explained why they have not made provisions and Table 6 below indicates the results.

**Table 6. Anecdotal Responses For Why No Provisions Have Been Made.**

Haven't considered it till now. Will probably put a stipulation in my will.

They are happily married!

The question does not arise.

Divorce is an expensive process.

Do not know what provisions I could make

No risk of occurrence.

Only one family member is a shareholder so far.

I will not be getting a divorce.

Table 6 indicates a mixed response as to why provisions have not been made, reasons like divorce will not happen to us; happily married; and no understanding of how to make provisions were given. Respondents were then asked, if in the unfortunate event of a divorce occurring where would they seek assistance. The overwhelming response was that they would get assistance from their solicitor; however 9 respondents identified their accountant and/or financial advisor.

### **Respondents Views of Prenuptial Agreements**

Respondents were asked if they were aware that in Ireland prenuptial agreements were not available. Some 59% of respondents were aware that there are currently no prenuptial agreements in Ireland, however 41% were unaware. Furthermore, respondents were questioned as to their awareness of the Irish government trying to introduce prenuptial agreements. Only 29.4% of respondents were aware of this with the remaining 70.6% being unaware. When asked if they thought the introduction of prenuptial agreements was a good thing, an overwhelming 87.5% of respondents indicated yes and only 12.5% indicated no. This therefore means that family businesses in Ireland would be agreeable to the introduction of prenuptial agreements.

To conclude this section of the questionnaire, respondents were asked if prenuptial agreements became legal in Ireland would it be something their business might avail of, only 39.4% of respondents indicated it would be and the majority, 60.6% said it would not. This sounds like a contradiction since the majority would be in favour of

the introduction of prenuptial agreements, but when it came to their business they would not have them.

Lastly the respondents were asked if they have any further opinions on the subject under discussion in the questionnaire and Table 7 indicates the anecdotal responses to this question.

**Table 7. Further Opinions on the Subject Under Discussion.**

Open ended divorce very unfair. Should be a final settlement.

I think you should marry for love and honour your marriage vows.

More information would be useful.

I was not aware there are no prenuptial agreements in Ireland and I found this surprising. My main concern is that as a family business I hope my children will one day carry on. It would be sad to think that maybe one day due to divorce in their marriage a lot of what I have worked for and achieved would leave the family.

It is time that prenuptial agreements are legalised.

This only applies to wealthy people who have plenty of property and assets

I think the implications of divorce are devastating on people concerned. It is a double blow when the finances and security of the business are also implicated

While pre nuptials may be a good protection for businesses. I think it is terrible reflection of our society particularly our courts and government.

I think all young people getting married especially with their own business should have an agreement to be honoured.

## **DISCUSSION**

As previously mentioned, the main aim of this research was to examine what can be done to plan for divorce should divorce arise for members of a family business. As outlined in the paper, the issue of divorce is now very much entrenched in the Irish legal system and members of family businesses are aware of the concept of divorce but not necessarily its detailed components. Furthermore, the research conducted and presented in this paper outlines the importance of changing the current legislation so as to enable prenuptial agreements to be deemed a legal document in Ireland. This was echoed by the Expert Group that was established by the Irish Government in 2006. To recap, they concluded that prenuptial agreements do not offend against the constitutional protection accorded to the institution of marriage and the right to marry. Thus the Group's core recommendation is that separate provision be made in both the Family Law Act 1995 and Family Law (Divorce) Act 1996 to provide that the courts be required to have regard to existing prenuptial agreements when making ancillary relief order in judicial separation and divorce proceedings. The Study Group is of the view that prenuptial agreements are enforceable and capable of variation under existing Irish statute law. Furthermore, the respondents of the primary research overwhelmingly agreed that the introduction of prenuptial agreements would be a good thing. The primary exploratory research conducted thus far indicates the acceptance of members of family businesses to the issue of prenuptial agreements. However, this

acceptance does not mean that they themselves will adopt prenuptial agreements for their family business.

## **Conclusion**

The primary research conducted however does indicate the lack of communication to the business world about the importance of planning for divorce in Ireland. Based on the anecdotal responses one can see the Irish culture, religion and history still influence people's views on divorce. Some respondents would not consider divorce, no matter what, due to religious reasons (according to the Catholic Church divorce is a sin and over 95% of the Irish population are Catholic). Others were of the belief that divorce was not an issue for them due to the fact they were not millionaires.

The subject of a prenuptial agreement is a difficult one to broach. Quite easily it could raise a red flag screaming 'I don't trust you' or 'I have my doubts about this marriage will work'. To proceed tactfully one should develop the right mindset. Understand that a prenuptial agreement is a way of protecting assets one brings into a marriage in the unlikely event of divorce or death. The protection applies to both spouses although it is likely that one or the other has greater assets.

For the moment, the situation facing businesses in Ireland concerning the legality of prenuptial agreements is very much a 'wait and see' approach. If prenuptial agreements do not become part of Irish law the implications for the family business owner is that one party is awarded the business and ordered to pay the other for his/her share in the business.

## **Further Research**

The absence of research on family businesses in Ireland is noticeable even though research on this form of enterprise has shown considerable international expansion over the past number of years. Other research on SMEs and new business start-ups has expanded rapidly in Ireland in parallel with the increasing recognition of the importance of SMEs and small business start-ups in modern economies. However, research on family businesses in Ireland has shown no comparable expansion over this period. The findings of this paper therefore point to several further research opportunities. These research opportunities are posed as possible questions for further research.

- Does the customer relations strategy differ when a family business is run by a divorced family member?
- Is the profitability of the family business affected as a result of divorce?
- Are family businesses which are operated by divorced family members more likely to engage non-family members on the Board of Directors?
- In light of the discussion on prenuptial agreements, are family businesses more aware of the implications of prenuptial agreements?
- Will family businesses utilise prenuptial agreements should they become legal?
- Do family businesses amend their organisational structure once a key family member becomes divorced?

A repeat of this study, either in Ireland or internationally, would allow for the comparison of findings.

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## Appendix A

### Components of The Family Law (Divorce) Act 1996

The Family Law (Divorce) Act consists of five main areas namely:

#### 1. *Preliminary*

This area consists mainly of an interpretation of the main provisions under the Divorce Act. One section which is particularly relevant to family businesses who want to keep things private is section 3 of the Act, which states that the media are restricted in publishing full details of divorce, nullity or separation cases. This means that the name and reputation of the business will not be splashed on the front pages of newspapers and hence will not ruin the reputation of well-established firms.

#### 2. *Obtaining a decree of divorce*

This area outlines the basic assumptions of the Divorce Act. The person applying for the divorce is known as the applicant and the other spouse is known as the respondent. This area also outlines what the solicitors of each spouse must discuss with their client before divorce proceedings begin i.e. the possibility of reconciling and mediating, or a written separation agreement. If the application is successful a decree of divorce is given to the spouses, which dissolves the marriage and spouses are free to marry, this does not however affect the right of joint guardianship of children.

#### 3. *Preliminary and ancillary orders during or after divorce proceedings*

Section eleven to thirty state what orders can be made during court proceedings which apply to separation of assets and property, the family home, custody of children and what happens if one of the spouses remarries. This section also states how payments can be made which include a periodical payments order, secured periodical payments order or a lump sum order for one spouse to make payments to the other.

Section eleven states that the court can make a number of orders before a divorce is granted including (a) safety, barring, temporary or protection orders, (b) custody, access or maintenance orders of a dependant child or (c) orders to protect the home, its contents or any money for its sale. Section fifteen states that the court can give one spouse the right to live in the family home and also gives direction on the sales of the assets and division of the proceeds. Section eighteen describes how a spouse may be provided for if a divorced spouse dies. This is based on the condition that (a) the application is made within six months of the death, (b) the other spouse has not remarried since the divorce and (c) the spouse informs the personal representative of the deceased spouse of their intention to apply for an order within one month or else the assets will be distributed among the people entitled to them.

Section twenty states that the court must ensure that the spouse and dependent children are provided for in all cases. The court will consider such things as income, financial resources, property, financial needs, standards of living in the past, age of the spouses, duration of marriage, disabilities of either spouse, the contribution of each spouse to the welfare of the family – financial or other, the conduct of either spouse and the rights of anybody else e.g. new husband or wife.

4. *Income tax, capital acquisitions tax, capital gains tax, probate tax and stamp duty.*

This area details if tax is payable under the provisions of the Act. Income Tax will not be deducted under the Act with the exception of pensions. Stamp Duty will not apply to property transfers. Any other gifts or inheritance that the court orders one spouse to pay is exempt from capital acquisitions tax.

5. *Miscellaneous*

The court can restrain a spouse from disposing of property or transferring it out of the State before proceedings have been decided. If the disposal of any property has occurred less than three years before the application, the court will presume the intention was to defeat the claim. The Circuit Family Court, the High Court and the Circuit Court can hear proceedings under the Family Law (Divorce) Act. Section forty-five to fifty-three details amendments to previous Acts such as the Succession Act, Family Law Act and Maintenance Act.

## Appendix B

### Adapted Prenuptial Agreement from Aaron Larson (USA)

This pre-marital agreement is made on this \_\_\_\_ day of \_\_\_\_\_, 200\_\_, between \_\_\_\_\_ and \_\_\_\_\_.

Whereas the parties intend to marry under Irish Law

and wish to set forth in advance of their marriage the rights and privileges that each will have in the property of the other in the event of death, divorce, or other circumstance which results in the termination of their marriage;

Whereas the parties have made to each other a full and complete disclosure of their assets,

Whereas both parties have been represented by independent counsel of their own choosing, and whereas both parties have received a full and complete explanation of their legal rights, the consequences of entering into this pre-marital agreement, and the rights they would possess were it not for their voluntary entry into this agreement; and

Whereas both parties acknowledge that they have read and understand this agreement, have not been subjected to any form of coercion, duress, or pressure, and believe this agreement to be fair and to represent their intentions with regard to their assets and to any estate that shall result from their marriage;

The parties hereby agree as follows:

1. Each party shall separately retain all of his or her rights in his or her separate property, free and clear of any claim of the other party, without regard to any time or effort invested during the course of the marriage in the maintenance, management, or improvement of that separate property.
2. At all times, the parties shall enjoy the full right and authority with regard to their separate property as each would have had if not married, including but not limited to the right and authority to use, sell, enjoy, manage, gift and convey the separate property. Both parties agree to execute any documentation necessary to permit the other to exercise these rights, provided the act of executing the documentation does not impose upon them any legal or financial responsibility for the separate property of the other.
3. The parties agree that each shall be responsible for any tax obligations associated with their separate property.
4. The parties agree that neither shall contest the validity or provisions of any will, account, trust agreement, or other instrument executed by the other which disposes of his or her separate property or which creates any interest therein in another. To the extent that such an action would create any right or interest in the separate property of the other, both parties hereby waive any right in the property of the other, whether created by statute or common law, including but not limited to any right to elect against the will of the other, or to take an intestate share of the other's property.

The wife hereby waives any dower interest in the husband's separate property, and the husband hereby waives any courtesy interest in the wife's separate property.

5. In the event of separation or divorce, the parties shall have no right against each other for division of property existing of this date.

6. Both parties acknowledge that they possess sufficient education and job skills to adequately provide for their own support, and hereby waive any claim to spousal support (alimony) except in the event that:

- i. One of the parties suffers medical disability and the other remains both employed and physically able, in which case the disabled party may receive reasonable spousal support consistent with Irish law until such time as the disability is resolved, or the other spouse retires or becomes disabled from working, either by agreement or by judicial determination;
- ii. The parties mutually agree that one of the parties shall reduce his or her work hours, or shall refrain from working, in order to care for any children born during the course of the marriage, in which case, if the parent's employability is affected by this full or partial withdrawal from employment, that parent may receive reasonable remedial spousal support consistent with Irish law for a period of not more than two years, either by agreement or judicial determination.

7. In the event of separation or divorce, marital property acquired after marriage shall remain subject to division, either by agreement or by judicial determination.

8. This agreement shall be binding and inure to the benefit of the parties, their successors, assigns, and legal representatives.

9. Without regard to the location of any property affected by this agreement, this agreement shall be interpreted and enforced under Irish law. In the event that any portion of this agreement shall be held invalid or unenforceable, it is the intent of the parties that all provisions of this agreement be regarded as separable, and that all remaining provisions remain in full force and effect. It is further the desire of the parties that all provisions of this agreement be considered as evidence of their intentions by any court, arbitrator, mediator, or other authority which seeks to divide their estate, and that their intentions be respected whatever the legal status of this agreement or any of its terms.

10. This Agreement and the exhibits attached hereto contain the entire agreement of the parties. This Agreement may only be amended by a written document duly executed by both parties.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_

\_\_\_\_\_  
Fiancée

\_\_\_\_\_  
Fiancé

Signed in the presence of:

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Witness

### **Post-Marital Endorsement**

The parties, having entered into this prenuptial agreement in advance of their wedding, which was held on the \_\_\_\_ day of \_\_\_\_\_, 200\_\_, hereby reaffirm that they entered into this agreement voluntarily, free from coercion, duress, or pressure, with the benefit of the advice of independent counsel of their own choosing, and continue to believe this agreement to be fair and to represent their intentions with regard to their assets and to any estate that shall result from their marriage.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_

\_\_\_\_\_

Husband

\_\_\_\_\_

Wife

Signed in the presence of:

\_\_\_\_\_

Witness

\_\_\_\_\_

Witness

This prenuptial agreement is to be used for illustrative purposes only. Legal advice must be sought in order to determine the content of this agreement.

(source:[http://www.expertlaw.com/library/family\\_law/prenuptial\\_agreement\\_form.html](http://www.expertlaw.com/library/family_law/prenuptial_agreement_form.html))