In Brief

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Hayes solicitors

Pictured left to right:: Rachel Rodgers, Stephen McGuinness, Yvonne Joyce, David Phelan, Mary Hough and Louise O'Rourke

Welcome

I am pleased to welcome you to this edition of In Brief, my first time to do so since taking over as Managing Partner at the start of May. What better opportunity then to start straight away and thank you, our loyal clients, for your on-going support.

It is my pleasure to introduce you to new members of our team. I am delighted to announce two internal promotions, that of Louise O'Rourke as Partner to our Healthcare Department and Rachel Rodgers as an Associate to our Property & Private Client Department. I am also extremely pleased to announce three new additions to the firm, which strengthens us and allows us, boast the largest healthcare team in the country, namely, Mary Hough as Partner who joins us from the State Claims Agency and Stephen McGuinness and Yvonne Joyce who join us as Solicitors.

Although generally the business climate remains extremely difficult and uncertainty continues to overshadow our economy, I am encouraged by the success, dynamism and determination of our clients. Many of you are leading the way in terms of adapting and reacting to changing circumstances. We also have had the privilege of being involved with many successful start-up businesses over the last few years. It is fantastic to witness entrepreneurial spirit alive and kicking despite the trying times.

As I embark on my new role as Managing Partner my focus in the coming years will be to look for the opportunities which come with these challenges and seek to offer you a rapid solution driven response to all your legal needs. I look forward to leading our team to meet and surpass your expectations.

David Phelan
Managing Partner

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APPOINTING THE IDEAL CHAIRPERSON?

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While the Companies Acts do not specify any particular statutory role for a chairperson of a board of directors over and above the general responsibilities of the chair in his/her role as a director, we recognise the difference it makes when our corporate clients have an effective chairperson. It is a truism that an effective chairperson can make an enormous difference to the performance of the board of directors.

The key aspect is the leadership the chairperson can provide to the board and to the organisation. The critical function is to create an effective board of directors. The chairperson must also provide personal leadership, direction, and support to the chief executive in leading and managing. S/he must have the ability to resolve issues, differences, and conflicts both between directors, and also between the chief executive and management. Maintaining stakeholder and public confidence in the organisation is also an essential part of the chairperson's role.

An effective chairperson will be experienced in and understand the governance role. S/he will demonstrate integrity and have the time to keep in touch with the organisation on a day-to-day basis to maintain an awareness of key issues.

A successful chairperson is open and relaxed, has good inter-personal relationship skills, is equal rather than superior and demonstrates a high level of integrity, both in word and action. The style of an effective chairperson is usually that of a dynamic organisational leader, rather than that of a passive director.

The chairperson's time commitment is significantly greater than that of other directors. The chairperson must prepare for and attend board and committee meetings, and have the time to interact with the chief executive, to meet with other staff and directors, and carry out external functions with stakeholders outside the organisation.

An ideal chairperson should:

- have the time to devote to the role and duties of chairperson;
- be a leader with a proven track record in leadership and governance, showing strong leadership skills such as persuasion, motivation and good interpersonal relationships;
- be capable of leading board processes, demonstrating objectivity and independence;
- have the will and ability to challenge individual board members, as appropriate. The chairperson must also have the standing, skills and self-confidence to lead and control the more forceful directors on a board;
- be capable of establishing and maintaining appropriate personal relationships with the chief executive;
- have a good understanding of, and board experience in, the organisation's particular sector;
- be a clear and innovative strategic thinker;
- have a clear strategic vision for the organisation, including its culture;
- have the intellectual capacity to work with sophisticated, analytical and decision-making techniques;
- recognise the difference between governance and management; leaving the chief executive to his or her job;
- be an effective communicator both inside and outside the organisation;
- encourage participation and be a good listener;
- be able to clarify issues and impartially summarise view points;
- demonstrate personal integrity (not politics) and respect;
- demonstrate common sense and realism;
- exercise good judgement and discretion;

Not-For-Profit Organisations

There are some specific aspects to consider in selecting a chairperson for a not-for-profit organisation. There is a lot more to being an effective chairperson of a not-for-profit than simply having your heart in the right place! In the charity sector, a chairperson generally serves diverse constituencies and stakeholders. An understanding of the culture of the organisation and sector is key so that the chairperson will quickly recognise and understand problems and have greater credibility with the constituents and stakeholders.

You know you have made the right appointment when, like what was said of Alan Greenspan, it is said of your chairperson "I agree with what the Chairman said...whatever it is he did say..."

For advices on corporate governance issues and the legal duties of directors, please contact Breda or any member of our Commercial Team.

Carol Fawsitt

ARE YOU BEING WATCHED?

SURVEILLANCE OF EMPLOYEES AND THE DISCIPLINARY PROCESS

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Employers should have a clear written policy for any lawful surveillance of employees. Surveillance should only be carried out to give effect to a stated purpose. Surveillance of employees at work involves "data processing" and is covered by the Data Protection legislation.

Employees have privacy rights and those rights are protected under the European Convention of Human Rights and the Constitution. Monitoring an employee's email, telephone and internet use may breach an employee's rights to privacy. Employers do so with the expectation that they can use any information obtained against an employee with impunity. But can they do so lawfully? And what of social networking sites? Users putting information on social networks like Facebook do so at their peril. Employers can and do access social network sites for information on employees and prospective employees. Access is open to all unless the user restricts access. What of employees who harass co-employees on the company's intranet, e-mail/mobile and the networks? Clear written policies on acceptable use of IT resources by staff are essential. Spelling out the consequences for unauthorised usage is a "no brainer" for employers unless they wish to fall foul of privacy rights, Employment and Data Protection legislation and to leave themselves exposed to claims for damages for breach of their duty of care to employees.

An employer is a Data Controller under the Data Protection Acts and must abide by the requirements of the legislation if it wishes to use personal data such as CCTV footage of an employee in the course of a disciplinary process. If a dispute arises in relation to such data gathered and used for disciplinary purposes, an employee could lodge a complaint with the Data Protection Commissioner and seek to obtain an enforcement notice preventing the use of such information. Caution therefore must be exercised in ensuring that CCTV footage has been fairly gathered, retained and used correctly in accordance with the legislation, particularly if the footage is to be used as grounds for dismissal.

The use of recording mechanisms to obtain data without an employee's knowledge is unlawful. Thus the taping of meetings without an individual's knowledge and agreement would be unlawful. The recent case involving the use of a private investigator by a school Principal to carry out surveillance work and follow the plaintiff teacher in a car to ascertain what she was doing during her working day, albeit that it was without the consent or knowledge of the employer Board of Management, was criticised by the High Court as inappropriate and constituting serious harassment. The employer in that case was ordered to pay €75,000 in damages to the employee for breach of its duty of care as a prudent employer, of which €5,000 represented aggravated damages.

Aside from the good sense and practical protection which having a written policy provides, the specific purpose for which any surveillance is being used must be clearly stated. If employees are told cameras are being installed for the purpose of preventing theft in the workplace, the employer cannot subsequently use footage from such surveillance as evidence in an unrelated disciplinary matter. If surveillance material is to be used to identify disciplinary issues relating to employees, the employees must be informed of this before the cameras are used for these purposes. Employers/ Data Controllers cannot use personal information captured on CCTV systems for just any purpose or a broad range of purposes. The use of CCTV has continued to give rise to regular complaints before the Data Protection Commissioner. In a case involving the use of CCTV installed in the students' toilets of a secondary school, the Commissioner ordered their removal and also commented on the complaints by staff about use of the CCTV to monitor their movements. He indicated that such monitoring was "rarely proportionate" under the Data Protection legislation.

Are you an exposed employer? Are you running risks using unlawfully obtained surveillance data to discipline employees? Are you leaving yourself open to being prosecuted by the Data Protection Commissioner? As an employee are you aware that your rights to privacy are being breached? What protections and safeguards are in place? Whatever about the workplace where clear policies can provide direction and obviate problems arising, what about the collection of surveillance data via the social networks? Cyberstalking on the internet is a growing phenomenon. Unfortunately the law lacks the tools to address rapid technological change and does not always provide effective remedies. Witness the recent ineffectiveness of the super-injunction in the Ryan Giggs case. It is equally unclear for example how an Employment Appeals Tribunal today will deal with information obtained by an employer in breach of Data Protection legislation or an employee's rights to privacy, and lifestyle in particular. Proactive steps such as adapting and implementing clear policies in the workplace will assist in alleviating problems and providing some protection and safeguards for both employer and employee.

Aoife Nally

CHILDREN OF JEHOVAH'S WITNESSES – A CONFLICT OF RIGHTS?

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Every patient who is not incapacitated by reason of age or mental disability has the right to refuse a blood transfusion. This well established principle must be borne in mind when dealing with Jehovah's Witness patients who generally refuse the primary components of blood, red cells, platelets and plasma. While such a decision might be unpalatable to those dedicated to saving lives, the rejection of blood is a deeply held core value and is one which must be respected by clinicians when dealing with a competent adult with full capacity to make the decision. Clinicians can however be faced with a legal and ethical dilemma when managing bleeding in children of Jehovah's Witnesses.

In Ireland, a child's parents, at least when they are married to each other, possess considerable rights under the Constitution and are entitled to raise their children by reference to their own views, including religious views. Article 42.5 of the Constitution however makes clear that this right is not absolute and the State can intervene "in exceptional cases where the parents for physical or moral reasons fail in their duty towards their children".

For some time it was uncertain whether the courts viewed the refusal of Jehovah's Witness parents to consent to blood transfusions on behalf of their child as falling within the category of exceptional cases where they had failed in their duty to their child. In the past ten years however hospitals have been obliged to resort to the courts on several occasions and a number of emergency orders have been granted. While it has been clear therefore that the judiciary play a central adjudicative role in determining issues of medical consent involving children, such Orders have rarely been followed by written judgments and this has lead to some uncertainty as to when exactly the court will intervene.

In early 2011 the High Court issued a comprehensive judgment on this issue and this development is to be welcomed as it provides some written clarification of the law. The judgment arose out of an emergency Order granted in the early hours of 27 December 2010 authorising the administration of a life saving blood transfusion to a critically ill baby (baby AB) against the wishes of the child's Jehovah's Witness parents.

Baby AB was born in autumn 2010 and became very unwell due to acute bronchiolitis on Christmas Day. By 9pm on 26 December, his haemoglobin level was on a downward spiral and had reached the point where a transfusion was absolutely necessary. Earlier that day Baby AB's parents had consented to the use of certain blood products however it became clear that these products would not be sufficient and a transfusion was urgently required. Baby AB's parents, as committed Jehovah Witnesses, opposed a transfusion.

In the circumstances, the Hospital applied to the High Court for an Order authorising a transfusion and an emergency hearing was held in Mr Justice Hogan's home at 1am on 27 December. In making the Order sought by the Hospital, Mr Justice Hogan ruled that the religious freedom of the parents and their autonomy as a constitutionally protected family gave way to the need to protect the life of the child. He noted that the right of the State to intervene was expressly circumscribed by Article 42.5 which provides for intervention where there has been a failure of duty on the part of the parents.

It is hard to avoid the moral overtones implicit in overturning a parental decision. This was recognised by Mr Justice Hogan who was anxious to stress that baby AB's parents were deeply concerned for their child's welfare but steadfast in his religious beliefs. He stated that the use of the term 'failure' in the Constitution was "somewhat unhappy" however the test as to whether the parents had failed in their duty was an objective one judged by the secular standards of society in general and the Constitution in particular.

In his judgment Mr Justice Hogan was careful to reiterate the fact that the right of a properly informed adult with full capacity to refuse medical treatment, whether for religious or other reasons, is constitutionally protected.

The decision in the baby AB case is a welcome one insofar as it clarifies by way of a written judgment the position the courts will adopt in circumstance where a life saving blood transfusion is required for a child in the face of parental opposition. There remain however a number of unanswered questions. By way of example, one obvious question is how the court would decide a case in which a mature teenager of the Jehovah Witness faith refuses a blood transfusion. Such a case would give rise to a difficult judgment call and a significant balancing exercise in terms of the various competing rights. Given the plethora of possible scenarios one could envisage arising and which remain unexplored, it seems inevitable that the legal boundary between parental autonomy and a child's welfare in medical consent matters will continue to trouble both clinicians and the courts.

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Justin Spain

COHABIT WITH CARE!

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New rights and obligations relating to couples that cohabit have been introduced pursuant to the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 ("the Act") which came into law in January 2011. The rights and obligations for cohabitants in the Act are a radical departure from the pre-existing position whereby cohabiting couples had little or no rights or obligations as against each other. It is important for couples living together to understand their possible new rights and obligations but it is also important for such couples to be aware that it is possible to contract out of the Act as it relates to cohabiting couples.

In order to qualify as a cohabitant, a couple, whether same sex or opposite sex, must be living together in a committed relationship for five years, or two years if they have children together. It is important to note that the Act does not confer any automatic rights on such a couple but rather provides a redress scheme, allowing a financially dependant party to the relationship to apply to Court for relief in the event that the relationship breaks down or the other party dies. Previously such a party had no recourse if not married and could therefore be left in a very vulnerable position financially even if the couple had been in a committed relationship for many years.

The Act provides a welcome safety net for cohabitants left in a financially vulnerable position following the end of the relationship. However, on the other hand for a non dependent cohabitant the Act can mean that such a partner (or former partner) in the relationship may, unknown to him or her, have significant obligations to his or her financially dependant cohabitant if the relationship were to break down or if he or she (the non dependant cohabitant) were to die. It is important therefore that couples living together are aware of the new provisions and of their ability to contract out of the Act by means of a Cohabitation Agreement.

The Act makes provision for the recognition of Cohabitation Agreements. Such agreements can deal with issues such as what happens in relation to property, maintenance and other financial aspects of a relationship in the event the relationship breaks down or one party dies. Previously parties could only enter into an agreement in relation to property – now the agreement can deal with all of their financial affairs. Such agreement are only enforceable if they are in writing and if both parties have received independent legal advice and the terms must be negotiated on the basis of full financial disclosure by both parties. The Act does allow a Court the power to undo such an agreement if it is in the interests of justice to do so, although it is arguable that it is possible to contract out of this provision also!

Awareness of the new provisions contained in the Act for cohabiting couples is therefore vital. However, it is equally important that couples are aware of their right to contract out of the Act and to agree between them how to regulate their obligations and rights to one another by means of a Cohabitation Agreement in the event that the relationship ends or one party dies. For many couples it would be far more preferable to be in control of their legal obligations and rights to one another in such circumstances rather than leaving such rights and obligations to be imposed at the discretion of a Judge.

Joe O'Malley

EXPERT WITNESSES BEWARE

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The luxury that has been afforded to expert witnesses and their enjoyment of immunity from civil suit in relation to their participation in legal proceedings has come under further scrutiny as a result of the decision of the UK Supreme Court earlier this year in the case of Jones v Kaney [2011] where the majority judgment of the UK Supreme Court removed the immunity from civil liability arising over alleged negligence of an expert witness. In that case, Ms. Kaney, a consultant psychologist, issued two medico-legal reports which affirmed that Mr. Jones suffered from post traumatic stress disorder. However, in a joint report, Ms. Kaney conceded that Mr. Jones did not suffer from post traumatic stress disorder and Mr. Jones alleged that he was required to compromise his proceedings for a substantially lower sum than he would have received had Ms. Kaney not subscribed to this joint report. Ms. Kaney, indicated that she had been put under pressure to agree the joint report by the opposing expert. The upshot of this important judgment is that Ms. Kaney could not rely upon the traditional immunity from civil suit as a result of her participation in these legal proceedings. The position as now adopted by the UK Supreme Court clearly has far reaching consequences in relation to all expert witnesses in all types of legal proceedings including ordinary civil proceedings, family proceedings and criminal proceedings, although it should not affect an experts's immunity from defamation claims arising from their evidence at trial..

In considering the position of expert witnesses and their potential vulnerability to liability as a result of their participation in legal proceedings in this jurisdiction, it is useful to note our Supreme Court pronouncements in this area in the case of EOK v DK [2001] where it was reaffirmed that expert witnesses enjoy immunity from suit in relation to their participation in legal proceedings unless they have acted in a manner which clearly amounted to an abuse of their position or with some malicious purpose.

The fact that our Constitution seems to be at the root of this long established principle of law would seem to suggest that the recent position adopted by the UK Supreme Court is unlikely to be followed in this jurisdiction. However, in highlighting the issue of immunity for expert witnesses, the UK Supreme Court should serve as a useful reminder that such immunity is not an automatic right that prevails in all circumstances and that there is a corresponding duty on the part of expert witnesses under Irish law to act in a manner which does not constitute an abuse of their position or to act in a manner which can be deemed malicious.

The seminal authority on duties and responsibilities of an expert witness in legal proceedings is set out in the UK case of National Justice Compania Naviera SA v Potential Insurance Company Limited, the "Ikerian Reefer" [1993] where Mr. Justice Creswell's list of duties and responsibilities of an expert witness have been cited with approval by numerous Irish judges in the Superior Courts. It is important to appreciate that the availability of immunity may depend upon an expert's conformity to such duties and responsibilities.

The Creswell principles are summarised as follows;
(i) Expert evidence presented to the Court should be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
(ii) An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise.
(iii) An expert witness should state facts or assumptions on which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
(iv) An expert witness should make it clear when a particular question or issue falls outside his expertise.
(v) If an expert's opinion is not properly researched because he considers insufficient data is available then this must be stated with an indication that the opinion is no more than a provisional one.
(vi) If after the exchange of reports an expert witness changes his view on the material having read the other side's expert report or for any reason, this change of view should be

communicated (through legal representatives) to the other side without delay and if appropriate to the Court.
(vii) Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

There is no strict requirement that an expert must belong to one of the traditional professions and it is actual expertise, knowledge and qualifications which place an individual in the position of an expert. Indeed, in the case of McFadden v Murdock [1867], a shopkeeper was treated by the Court as an expert in view of his evidence as to the amount of waste that might be generated by a grocery store! That the UK Supreme Court has placed such persons exposed to liability in relation to their role as an expert witness in circumstances where it may be not possible for such persons to obtain professional indemnity insurance is nothing short of an extraordinary development.

Ms. Justice Macken stated at a legal conference on 23 June 2011 "I like to see expert witnesses coming into court and also like to see them admit they don't know the answers to everything.". One is reminded in that context of the proverb by Levi Strauss: "An expert knows all the answers - if you ask the right questions.".

Laura Fannin

PAID PRODUCT PLACEMENT – A WELCOME ADDITION FOR BOTH BROADCASTERS AND ADVERTISERS

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Irish television programme makers could soon appear a lot more brand conscious as the Broadcasting Authority Ireland (BAI) has recently allowed paid product placement for the first time on Irish Television. This is seen as good news for both broadcasters and advertisers, in that it will produce revenue for broadcasters and will allow advertisers to reach viewers who avoid advertisement breaks.

The new rules introduced by the BAI will allow brands place their products in Irish programmes in return for payment. Programmes that contain product placement must meet all of the following requirements;

(a) content shall not be influenced in such a way as to affect the editorial independence of the broadcaster and the placement of the product should be editorially justified;

(b) the scheduling of the programme shall not be influenced in such a way as to affect the editorial independence of the broadcaster;

(c) they shall not directly encourage the purchase of products or services or make special promotional references to those products or services;

(d) they shall not give undue prominence to the products or services in question.

In addition broadcasters must display a "PP" logo before and during a programme to signal that it contains product placement and must list names of companies which have provided products and services to the programme in its closing credits.

A ban on paid product placement will remain for some types of programmes, including news, documentaries, children's programmes and any talk shows where news and current affairs accounts for more than 20% of the content on a regular basis.

Davnet O'Driscoll

FACEBOOK FIRED

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Facebook, Bebo and similar social networking sites give us an insight into social and personal lives. Even if a person takes their Facebook page off-line, there will still be a record of what they had posted on the internet, which remains accessible via search engines for the future. Undoubtedly searches of social media including blogs and forums can be useful tools to find out what current or prospective employees are up to in their private lives and consider how the record of this activity might impact on their organisation.

As social networking develops, we can see its impact in a wide range of areas. For example, a former juror was recently convicted in the UK of "Contempt of Court" for contacting the accused in the case (in which she was part of the jury) on Facebook.

Employees should be alert to the fact that the information they put on the internet may affect them and their employment prospects into the future. The fact that privacy settings are used does not mean that the posts are protected by confidentiality.

Information put on social networking sites may also be used for purposes other than that intended.

In addition, postings on social networking sites of text, videos and pictures can be used as evidence against the individuals involved. For example, in a personal injury claim if a claimant says that he has a serious back complaint from an injury which prevents him working and on the person's Facebook page, there are contradictory pictures of the person break-dancing or salsa dancing, this can be used in evidence against the claimant. In the US, online evidence from the networking site Facebook is being used by divorce lawyers, employers and schools to determine the 'goings on' of spouses, workers, students and teachers.

But is it legal to fire staff for conduct on social networking sites?

This will depend on the types of restrictions put in place by employers in their social networking policies for employees on using the internet at work, in their internet use policy and the type of misconduct which arises.

In Taylor V Somerfield Limited 2007 [UK] an employee was dismissed for posting a video on YouTube of play fights with plastic bags in a warehouse. The Employee was dismissed by the Company for bringing the Company into disrepute. The Employment Tribunal found subsequently he was unfairly dismissed. There had been no investigation by the Company into what publicity the video had received to establish whether the Company had in fact suffered any damage to reputation. The Company could only be identified from the colour and pattern of the uniforms so it was quite difficult to identify the Company from the video. The video was also removed after 3 days. The Employment Tribunals look at the fairness of a dismissal and whether a sanction is proportionate to the misconduct committed in considering an unfair dismissal's claim and found in this case there was no evidence of any damage to the Company's reputation from this misconduct.

In the Irish case of Kiernan v A Wear Ltd [UD643/2007] a customer of A Wear complained about a post on the Bebo site by an employee about a manager of A Wear. The commentary was critical of the manager and used asterisks for some bad language. The manager was not named.

A Wear has an official presence on Bebo, as did the branch where the employee worked. There was no previous history of disciplinary issues with the employee. The Company did not accept the employee's argument that the comments were private as they were published on a site accessible by the public. The Company accepted there was no damage to their reputation. The employee was suspended and subsequently dismissed. However, the Employment Appeals Tribunal found the dismissal was a disproportionate sanction, although it was a fair disciplinary process. It found the employee had contributed to her dismissal and so she was awarded only €4,750.00.

So how can Companies protect their organisations from employees' actions?

Employers should have a simple clear policy setting out the conduct they expect from employees on social networking sites where the employee is identified as a member of the Company. The Company should specify when access to the internet is allowed by employees for personal use or whether computers and internet access at work are to be used for business purposes only. Employees should be reminded where personal videos, pictures and postings are uploaded onto social networking sites that there will be a record of these into the future and these may have an impact on their work, as they may breach requirements around confidentiality or other issues which may affect the Company's business and the Company's reputation.

Companies should retain a record signed by employees acknowledging receipt of the organisation's social networking policy and agreeing to its terms.

This is a summary of recent legal developments, and specific advice should be sought in each case. If you have any queries in relation to the above, please contact Davnet or any member of our Employment Team.

Eugene Davy

EUGENE DAVY CALLS FOR THE END TO OUR TWO-STEP DIVORCE LAW

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In Ireland we have a two step separation and divorce law which is enshrined in article 41.3 of the Constitution and section 5 of the Family Law (Divorce) Act 1996. Under such provisions divorce proceedings cannot be commenced until a couple have been living apart from one another for a period of, or periods amounting to, at least four years during the previous five years.

Consequently, when a marriage breaks down couples are confined to regularising and legalising issues relating to property, finances, children and other matters in the context of either a negotiated Separation Agreement or a Decree of Judicial Separation obtained in court. If matters are resolved in the context of a separation and if one or both parties subsequently want a divorce, further proceedings must be issued. However, they cannot be issued until the couple have been living apart from one another for four years.

Whilst some divorce cases do proceed with cooperation and agreement from both parties, there are many cases which become very protracted and which proceed in a very contentious manner. Quite often, such divorce cases are preceded by a contentious and protracted judicial separation case some years before.

In some of them there is an appeal of the judicial separation case before the divorce case is heard. At present there is a judgment pending in the High Court relating to a divorce case which was heard over a period of 31 days in circumstances where there had been a previous judicial separation hearing in 2005, also heard over a period of several weeks. Furthermore in this particular case there was an appeal of the judicial separation case to the Supreme Court which took several years to come before that court due to the huge backlog of appeals pending before the Supreme Court.

The ongoing nature of contentious and protracted litigation in matrimonial cases has a very damaging effect on the health and wellbeing of the parties involved and on their children. Pre-existing problems are exacerbated and invariably individuals cannot get on with their own personal lives. In addition to the very emotional and personal consequences of such litigation, the financial resources of individuals and their families can be substantially depleted by costly litigation.

In addition to the problems caused by this two step separation and divorce law and procedures problems and injustices arise from the requirement that the spouses must satisfy the Court that they have been living apart for a period of, or periods amounting to, at least four years during the previous five years prior to the commencement of the proceedings.

Consideration should be given by the Government to reforming our present law by abolishing our two step approach to separation and divorce. It should consider introducing a divorce law whereby couples could be entitled to apply for divorce on the grounds that their marriage has been irretrievably broken down for in excess of one year. Alternatively a system could be introduced whereby a separation could automatically transcend to a divorce after a certain period following a legal separation.

There are various ways in which our present separation and divorce law could be reformed to ensure that if matters are going to be contested there would be one contested case rather than two contested cases: a separation case followed some years later by a divorce case. One way or another, an amendment to the Constitution is essential to facilitate any substantive legislative change to the present Act of 1996.

The Government has already indicated its intention to have several referenda to amend a number of articles of the Constitution including articles relating to the Seanad, children's rights and judges' pay. Now is an opportune time to have a referendum to amend the provisions of the Constitution relating to divorce.

In this regard it is suggested that the provisions of the Constitution relating to divorce should simply be deleted altogether. This would enable our legislators to introduce, debate and enact divorce legislation which would be more conducive to bringing about a greater degree of finality for couples and which would allow for couples doing so in a far more dignified manner than at present.

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Matthew Austin

NEW MEDIATION RULES FROM EUROPE

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> A Judge can adjourn cross-border disputes in civil and commercial matters to refer the dispute to mediation.

The European Communities (Mediation) Regulations, 2011 ("the Regulations") have been in operation since 18 May of this year. The Regulations introduce into our national law the provisions required on foot of the EU Mediation Directive 2008/52/EC. The Regulations form part of a suite of changes in the law over the last two years which aim to encourage mediation as a form of dispute resolution outside of the normal court process. In 2009 the Circuit Court rules were amended to allow judges adjourn Circuit Court cases to facilitate the resolution of the dispute by means of mediation, conciliation or arbitration. Similar rules were put in place in relation to High Court disputes in late 2010.

The first point of note in relation to the Regulations is that they relate to cross-border disputes in civil and commercial matters only. However, as mentioned, previous changes to the Circuit and High Court rules are relevant for domestic disputes.

The Regulations allow a judge to refer the dispute to mediation. The judge can do this of his/her own motion or can do it following an application by one of the parties to the dispute. The judge cannot compel the parties to mediate the dispute but he/she can give directions regarding the conduct of the mediation where the parties do elect to mediate the dispute.

The need for confidentiality of the mediation process is recognised in the Regulations by the provision which prevents a mediator being compelled to give evidence in subsequent court or arbitral proceedings which relate to the same dispute. However the mediator can be compelled to give evidence where it is contrary to public policy for such evidence to be withheld or if it is necessary for implementing or enforcing a binding agreement reached by the parties following mediation. Furthermore the parties to the mediation can execute a written agreement to the effect that the mediator can be compelled to give evidence in subsequent proceedings if called upon to do so.

The Regulations provide that the parties can apply to court to make any agreement reached following mediation, a rule of court. In other words, that agreement will then be equivalent to, and have the same force as, a court order.

Finally, the Regulations provide that the time involved in the mediation process shall not be counted with regard to any limitation periods provided for in the Statute of Limitations, 1957 (as amended).

The practical upshot of the Regulations, as a follow-on to the recent changes to the Circuit and High Court rules, is that mediation is now a very real option for parties to a wide variety of civil and commercial disputes even where one or other of the parties has taken steps to litigate the dispute through the courts. Mediation is usually a cheaper, and more efficient, method of dispute resolution. It can avoid the acrimony and delay associated with Court disputes. It can also facilitate the resolution of a dispute by a mediator skilled in the particular field as opposed to a judge who is a lawyer by trade.

Rachel Rodgers

WELCOME REFORM OF MANAGEMENT COMPANIES

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Many of us who own an apartment or house in a managed estate will be aware of the ongoing problems that can be experienced with Management Companies. The Multi- Unit Developments Act 2011 ("the Act") which became operational on 1 April 2011, is an attempt to address some of these problems. It seeks to regulate Management Companies and the behaviour of developers and to establish a fair and effective management system for controlling the companies themselves and the manner in which they operate. The legislation itself is a very welcome development in a previously unregulated area and is an acknowledgement that Management Companies are, by their very nature, different from any other companies in existence and regulated by the Companies Acts 1963 – 2010.

The Act itself has varying provisions to deal with existing and future developments. The Act applies only to Management Companies that manage residential estates and the provisions do not extend to commercial developments.

Very often when buying or selling a property, the failure of the developer to transfer the common areas can be an issue. The Act provides that as regard existing estates, the common areas must be transferred by 1 October 2011. Unfortunately, there are no sanctions for failure to transfer common areas, however the fact that people can now, on foot of the Act, refer disputes to the Circuit Court will mean that residents themselves have much more leverage as against a developer who is refusing to co-operate.

The Act is most radical in terms of the effect it has on new developments. In the present economic climate, we may not see too many new apartment developments being constructed in the near future. However, the Act provides that a developer cannot sell a residential unit unless the Management Company has already been established, the

common areas have been transferred, the Management Company is issued with a fire safety certificate for the development and that an agreement is signed between the developer and the management company setting out the manner in which the estate will be completed.

The Act also provides that in future developers cannot reserve loaded voting rights in favour of themselves so they effectively retain control of the Management Companies. The Act provides that each unit holder in new developments will have one vote of equal value in the Management Company and no other person is to have voting rights.

The Act, while it does not change voting rights for existing developments, states that where any person seeks to exercise a loaded voting right it must seek the permission of the Circuit Court before doing so to ensure that they are acting bona fides and not promoting self interest over the interests of the estate as a whole.

The Act states that all Management Companies must now establish a sinking fund which will cover refurbishment, improvement and maintenance of a non recurring nature. Each unit holder must contribute at least €200 per unit per year to this sinking fund unless it is already agreed by the members of the Management Company.

Going forward, directors will be limited to acting for a period of three years after which time the position must be rotated.

Of late, there have been problems where Management Companies have been struck off the Companies Registration Office Register for failure to file returns. In the ordinary course, where a company has been struck off for more than one year, the Registrar of Companies cannot restore the company to the register and a costly application must be made to the High Court to have the company restored. This has led to problems for people in the sale and ongoing management of their property. The Act provides that where an application is made to restore a management company to the register, the Registrar of Companies may restore the company for a period of six years from the date of strike off.

In general, the changes introduced by the Multi-Unit Developments Act, 2011 must be welcomed. Until now, the area has been notably unregulated and the developments introduced by the Act can only strengthen the position of property owners in the future.

For more information on this area please contact Rachel or any member of our Property and Private Client Team

Anne Lyne

WORKING AT HOME AND ABROAD

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The relocation of staff abroad can provide an unrivalled experience for employees and practices and skills learnt can give a business a dynamic edge over competitors on their return

Being flexible during testing economic times is vital for all businesses to survive and remain commercially competitive. The ability to relocate employees abroad on a permanent or temporary basis can add volumes to a company's strategy and vision, as well as helping to resource subsidiaries with trained and skilled employees.

The relocation of staff abroad provides unrivalled experience for employees. The different methods, work practices and skills used in other countries can be fed back to the employer on return, giving that business a dynamic edge over competitors.

There are a number of different legal arrangements that can be used to best suit the parties. However, what works best for a multi-national may not suit a smaller business and a different arrangement can be put in place to suit the business needs. Factors relevant to both the business and the employee should be taken into account including:

- Is there a clause in the employee's contract of employment permitting transfer or a secondment abroad?
- is a work permit required?
- Will the employer change with the transfer? Does issuing a new contract of employment suit or would a secondment arrangement allowing control to remain with the home country be a better option?
- Employment rights differ depending on the country. Employers must be aware of practical issues such as changes in entitlements to holidays, working hours, local public holidays etc.
- Depending on the host country or duration of the transfer tax planning attractive to both employer and employee may need to be put in place

While the above covers some of the more basic points in relation to transferring an employee abroad or into Ireland, there are many more equally important factors which should be taken into consideration. The most important however is that there is complete understanding between the employer and employee as to the nature and effect of the transfer. Detailed consideration of all the issues prior to transfer will give the employee certainty and security whilst allowing the employer flexibility and to control matters. If planned well it will enable the employer to secure the best out of the employee while abroad and when they return home.

Terence Moran

ORGAN DONATION AND TRANSPLANTATION

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In 2002, a good friend of mine, Fergus Goodbody, died tragically young from a mercifully rare but mercilessly fatal condition, lung fibrosis, otherwise ideopathic pulmonary fibrosis. Afterwards, his wife, Nicky, Professor Jim Egan, lead physician in the Mater Hospital Transplant Unit, and I decided to honour Fergus' memory by founding ILFA, The Irish Lung Fibrosis Association. The Association's principal aims are to fund research into this condition, to educate the public and to support both sufferers and their families.

As part of the Association's work, we have been involved in lobbying Government and the Health Authorities on issues regarding organ donation and transplantation. There has been a fair amount of debate around donation issues and the "opt-in/opt-out" alternatives. For example, in Austria, doctors can remove organs from every adult who dies unless that person has registered to opt-out. This applies even if relatives know that the deceased would object to donation but had failed to register this during his/her life. At the other end of the spectrum is the current practice in Ireland and the U.K. where doctors can remove organs from adults who have opted-in with the normal practice that the relatives are consulted before organ removal proceeds.

It is, of course, very important to bear in mind sensitivities surrounding this issue of organ removal and transplantation, in particular where the heart and lungs are involved. For what it is worth, ILFA's position on this issue is that we support a "soft opt-out" under which doctors can remove organs from every adult who dies unless the person has registered to opt-out while recognising that it is good practice for doctors to ask the relatives for their agreement at the time of death.

I was pleased recently to lead a delegation to meet the Minister for Health, Dr James O'Reilly, and a number of his officials. Included in our party was Senator Feargal Quinn who has taken a particular interest in organ donation/ transplantation and introduced a Bill to the Seanad a couple of years ago.

While indicating our position on the opt-in/ opt-out debate, we stressed that this debate should not be allowed to dominate the whole issue and that emphasis should be placed on a number of other points.

These include the current low rate of utilisation of donated organs. In our case, this is particularly important as there is a short window of time to transplant donated lungs (or heart and lungs) when compared, for example, to the possible interval for donation of kidneys which can be anything up to 24 hours.

Another topic we discussed with the Minister was the recent establishment in Ireland of a Transplant Unit. This has been set up in order to comply with an EU Directive which requires each Member State to establish a transplant authority by August 2012. While the Association welcomes the setting up of this Transplant Unit and the appointment of Professor Jim Egan as its Clinical Lead, we impressed on the Minister the importance of ensuring that this Unit is given adequate status and resources to be effective in co-ordinating transplantation procedures between the transplant centres and the hospital intensive care units throughout the country.

Finally, there is an ongoing need for education of the public and the dispelling of myths surrounding the area of organ donation and transplantation.

Unfortunately, time is not on the side of those suffering from pulmonary fibrosis. Fergus waited for the call to say that they thought they had a suitable set of lungs. This call never came.

Ciaran O'Rorke

MEDICAL NEGLIGENCE LITIGATION AND MEDIATION: IF THE CAP FITS….

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The Minister for Enterprise, Jobs and Innovation, Richard Bruton recently announced radical proposals to overhaul medical negligence litigation in Ireland in order to reduce State expenditure on legal fees and resolve disputes in a more efficient and non-adversarial manner. Mooted among such measures is the establishment of a State agency modelled on the Personal Injuries Assessment Board whose remit would include the assessment of damages in medical negligence claims.

There are existing cost and time saving alternatives to traditional litigation however. One of the fastest growing such alternatives is mediation which is a facilitated process by which a confidential and consensual settlement is sought. The modus operandi of mediation is that the parties engage with each other in a non adversarial setting that they reach their own negotiated settlement. It should be considered at any stage of a dispute, even if proceedings have already issued and ideally well before the dispute escalates to frantic and costly settlement negotiations on the steps of the Four Courts.

The main proven advantages of mediation over litigation are lower costs, expedient resolution, the level of control or ownership that the parties can retain over the process, the flexibility of potential remedies, confidentiality and the potential for a continuity of relationship between the parties.

While not all types of dispute are amenable to resolution by mediation, it is arguable that certain medical negligence cases are. Costs can be significantly reduced as a result of the consultative nature of mediation. The key issues in a case are quickly narrowed to those actually in dispute and those capable of being agreed upon. Even if talks break down, this has the potential to significantly enhance the efficiency with which any subsequent proceedings are conducted and therefore reduce costs.

The adage 'justice delayed is justice denied' can be particularly relevant in the context of medical negligence claims. At the moment the length of time between issuing of proceedings and handing down of judgements can range by anything between 3 and 6 years. In contrast, according to figures released by the Centre for Effective Dispute Resolution, 75% of cases brought to mediation in the UK settle on the day.

The vast majority of claims brought against medical professionals in the State are done under the tort of negligence. The chief remedy available to litigants is therefore restricted to damages. It is often the case that in medical negligence actions a plaintiff desires a much wider range of redress such as an apology, an explanation or indeed an undertaking to overhaul a particular clinical or administrative process so that the circumstances that led to the complaint cannot recur. The remedies available in mediation are limited only to the imaginations of the parties. In addition the parties are free to choose the mediator who for example could be an expert in the particular field of medicine which is the subject matter of the dispute.

The fact that there is active participation in the mediation process by all parties ensures that significant control is retained, and this can give the parties a vital sense of ownership of the process. This leads to a more sustainable outcome and can be especially relevant in an area of litigation in which high levels of suspicion and even animosity can be a feature.

While any legislative reforms that enhance the efficiency of the legal system are to be welcomed, it is worth remembering that mediation offers an existing and readily accessible alternative to often costly, time consuming and emotionally fraught litigation and not least in the sphere of medical negligence disputes.

As Lord Justice Ward succinctly put it:

> "The skills are now well developed. The results are astonishingly good. Try it more often"

Challenges facing property lawyers...

We all appreciate the difficult task our property law colleagues face in establishing title to lands. We think that this property lawyer from New Orleans deserves special mention for the efforts he went to in asserting his clients rights …

A New Orleans lawyer sought a Federal Housing Association (FHA) loan for a client as part of the re-building of New Orleans. He was told the loan would be granted if he could prove satisfactory title to a parcel of property being offered as collateral. The title to the property dated back to 1803, which took the lawyer three months to track down. After sending the information to the FHA, he received the following reply:

(Actual reply from FHA):

"Upon review of your letter adjoining your client's loan application, we note that the request is supported by an Abstract of Title. While we compliment the able manner in which you have prepared and presented the application, we must point out that you have only cleared title to the proposed collateral property back to 1803. Before final approval can be accorded, it will be necessary to clear the title back to its origin."

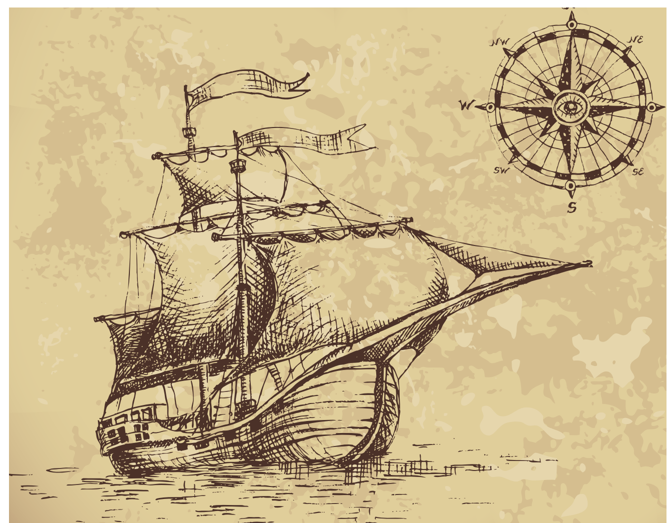
Annoyed, the lawyer responded as follows:
(Actual response):

"Your letter regarding title in Case No.189156 has been received. I note that you wish to have title extended further than the 206 years covered by the present application.

I was unaware that any educated person in this country, particularly those working in the property area, would not know that Louisiana was purchased by the United States from France, in 1803 the year of origin identified in our application. For the edification of uninformed FHA bureaucrats, the title to the land prior to U.S. ownership was obtained from France , which had acquired it by Right of Conquest from Spain. The land came into the possession of Spain by Right of Discovery made in the year 1492 by a sea captain named Christopher Columbus, who had been granted the privilege of seeking a new route to India by the Spanish monarch, Queen Isabella.

The good Queen Isabella, being a pious woman and almost as careful about titles as the FHA, took the precaution of securing the blessing of the Pope before she sold her jewels to finance Columbus's expedition...Now the Pope, as I'm sure you may know, is the emissary of Jesus Christ, the Son of God, and God, it is commonly accepted, created this world. Therefore, I believe it is safe to presume that God also made that part of the world called Louisiana. God, therefore, would be the owner of origin and His origins date back to before the beginning of time, the world as we know it, and the FHA. I hope you find God's original claim to be satisfactory. Now, may we have our loan?"

The loan was immediately approved.



Relationships Ireland

Photo right: Eugene Davy, Partner, Hayes solicitors and Minister for Children, Frances FitzGerald keynote speakers at the recent launch of Relationships Ireland.

Relationships Ireland re-launched its organisation (MRCS) in the presence of Minister for Children, Frances FitzGerald. Hayes solicitors proudly sponsored the event in the Davenport Hotel, with our partner, Eugene Davy making a key-note speech. The Minister, in formally launching Relationships Ireland, noted that such organisations are the backbone of the community, providing some 7,300 hours counselling to over 1,500 people in Ireland. The Minister highlighted the opportunity for early intervention in relationship breakdown, and the stability which this brings for many families. Eugene Davy, who is to the forefront of Family Law in Ireland, said that the service that Relationships Ireland provides is "absolutely vital". Eugene highlighted the benefit of attending such counselling at an early stage, as too often in Eugene's experience, a couple in difficulty turn to a solicitor by which stage it is inevitably too late to reconcile difficulties.

Hayes is delighted to have sponsored the launch of Relationships Ireland, given its clear benefits to the wider community.

Jeremy Erwin
Trainee Solicitor

The Firm

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Firm News

FOUR WEDDINGS AND A BABY

Marie O'Riordan tied the knot with James Todd in Mount Merrion Church in May. A wonderful time was had by all at the reception in Rathsallagh House, Wicklow. Marie and James spent their honeymoon in South East Asia.

Next in line is Martha Wilson when she and David O'Dwyer will get married in Meath in August.

Since our last newsletter the engagement bug has been catching. Laura Fannin has become engaged to Gareth over the Christmas holidays whilst Aoife Nally said yes to her fiancée Daniel in Paris last April.

Joe O'Malley and his wife Aisling are the proud parents of baby Aoibheann born in May. Joe has had to retire from the firm football team as the serious business of nappy changing takes over.

Our fund raising efforts on Daffodil day were a great success with €750.00 raised in support of the fine work of the Irish Cancer Society. The specially commissioned cupcakes were a big hit in the canteen.

The firm's tag rugby and football teams have begun their annual pursuit of glory and silverware in the firm's name. Great things are hoped for but if past performance is any indicator of future return then we won't be holding our breath.

Disclaimer: The contents of In Brief do not constitute legal or commercial advice but are merely indicative of current developments in the law. Readers should seek specific advice, preferably from Hayes solicitors (!) before making any decisions. Editor of In Brief: Ruth Shipsey