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## **The legal complications of separating**

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IRELAND IS highly unusual in that we have a two-stage divorce regime, the result of the delayed introduction of divorce.

Following the defeat of the first divorce referendum in 1986, a comprehensive law was introduced that allowed married couples to separate and regulate all matters relating to the children, the family home, other property and maintenance. It differed from divorce only in that the couple remained legally married and could not marry anyone else.

A judicial separation granted by a court, or a legal separation which is negotiated by lawyers, can be obtained a year after a couple separate, and even less if exceptionally bad behaviour can be proved on the part of one of them. In practice, the vast majority of judicial or legal separations are granted following a year of separation.

The Constitution was amended by the narrowest of margins in 1995 to permit divorce, but only on the basis of a clause inserted into the Constitution requiring living separately for four out of the previous five years, and “proper provision” being made for all concerned.

This has produced a situation where in many cases couples whose marriages break up obtain either a judicial or a legal separation, whereby custody of, and access to, children, as well as arrangements concerning the family home, the allocation of other property and maintenance for the children and the dependent spouse are all sorted out.

Three or more years later, especially if one party is in a new relationship and wants to marry, they may go to court seeking a divorce.

Until recently, in the majority of cases, such divorces were largely formalities, turning the existing arrangement into a decree of divorce.

However, given that the Constitution requires “proper provision” be made before granting a decree of divorce, the court must be satisfied this is indeed the case and can examine what that provision is and, if it sees fit, amend the provisions.

This gave rise to a small number of “second bite” cases, where one party sought to alter the terms of the separation agreement or judicial separation. The High Court ruled that such an alteration could occur only if there was a significant change in circumstances.

With the recession, however, there has been a big increase in the number of cases where the circumstances have indeed changed dramatically since the separation was concluded, and one or other party wants the terms altered to reflect the new reality.

Most of these cases take place in the Circuit Court, and, due to the *in camera* rule, whereby the media cannot report details, we do not know what these courts have decided. There has been a small number in the High Court, where anonymised written judgments are issued, and which set the parameters of the law in this area. A number of such judgments are awaited at the moment.

Every year the courts also report a small number of applications for marriage annulments – a statement from the court that the marriage never existed due to a defect in the circumstances surrounding it, for example a severe mental health problem.

An annulment means that none of the legal protections available to spouses can be claimed, and the courts are very reluctant to grant one, especially if they feel it is being used by one party (typically a man with considerable resources) to avoid his financial obligations.