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Unrecognised Muslim Marriage in Ireland- Incidence and Implications

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Introduction

In recent times, there has been much discussion about the phenomenon of so-called ‘nikah-only’ or unregistered Muslim marriages and the challenges arising where couples who marry according to Islamic traditions later find that their marriage is not legally recognised by the State.¹ Such non-recognition can have very serious implications, leaving financially weaker “spouses” very vulnerable on relationship breakdown or death because parties to unregistered marriages are essentially treated as strangers in law.

Despite a growing Muslim population, little is known about Muslim marriage practices in Ireland. Without empirical research, determining whether Muslim couples are entering into ‘nikah-only’ marriages or the attitude towards legal recognition of marriage within the Irish Muslim community is difficult. This article seeks to bridge the current gap in knowledge by reviewing the relevant provisions of Irish family law to hypothesise about the incidence of unregistered Muslim marriage in Ireland and identify the legal consequences for the parties to such marriages.

An examination of the necessary formalities for legal marriage in Ireland will identify the requirements which a nikah performed in Ireland must satisfy to create a legal marriage. Drawing on the limited information available on Muslim marriage in Ireland, the authors can then hypothesise about the potential incidence of unregistered Muslim marriages in the jurisdiction. It will be seen that, although the formalities for religious marriage in Ireland are not particularly onerous, it is likely that Muslim marriages which do not meet the requirements for legal recognition are occurring. The article will identify some of the legal

¹ See: R.C. Akhtar “Unregistered Muslim Marriages: An Emerging Culture of Celebrating Rites and Conceding Rights” in J. Miles et al (eds) *Marriage Rites and Rights*. Oxford: Hart Publishing, 2015, 193. Note, technically, registration is not required for such marriages in many jurisdictions. However, the practice has developed of referring to ‘unregistered’ marriages as opposed to the more accurate designation of ‘unrecognised’ marriages.

consequences for couples whose marriage is unrecognised, notably, the implications where such marriages are terminated by relationship breakdown or death as well as the implications which arise regarding guardianship of children. Given the severity of the implications of non-recognition, the article concludes by highlighting the need for awareness-raising so that the Irish Muslim community are fully aware of both the significance of seeking legal recognition for their marriages and the challenges inherent in ensuring that their marriage will be legally recognised.

Part I: The Muslim Community in Ireland

Islam represents the third largest religion in Ireland. Ireland's Muslim community grew dramatically over the last two decades. Although only 3,875 persons were recorded as Muslim in 1991, this figure rose to 19,147 in 2002, 32,539 in 2006 and 49,204 in 2011.² The latest official census recorded 63,443 Muslims in Ireland in 2016, representing 1.3 per cent of the population and a 95% increase on 2006 figures.³ The community is quite young relative to the wider population. The average age of Muslims in 2016 was 26.0 years,⁴ with 10,884 children of primary school-going age (5-12 year olds) and 5,480 of secondary school age (13-18 year olds).⁵

Ireland's Muslim community is largely characterised by its diversity. As Scharbrodt notes: "Muslim migration to Ireland has been extremely diverse, without any particular ethnic or cultural group being predominant."⁶ Although most Muslims in Ireland are Sunni there are a number of different sects within this grouping, each sometimes with their own mosque.⁷ Census 2016 reflected these nationality and ethnicity trends. Irish nationals represented the largest nationality group with which Muslims in Ireland identified, accounting for 55.6 per

² CSO *Census 2011 Profile 7: Religion Ethnicity and Irish Travellers* (Dublin: Stationery Office, 2012) 16.

³ Central Statistics Office, *Census of Population 2016 – Profile 8 Irish Travellers, Ethnicity and Religion* available at <http://www.cso.ie/en/releasesandpublications/ep/p-cp8iter/p8iter/p8rnc/> (Accessed: 22 August 2018).

⁴ The State average is 37.4 years: *Ibid.*

⁵ *Ibid.*

⁶ O. Scharbrodt, "Muslim Immigration to the Republic of Ireland: Trajectories and Dynamics since World War II" *Éire-Ireland*, Vol 47, Issue 1, 2012, 221, 231. See also O. Scharbrodt et al (eds) *Muslims in Ireland: Past and Present*, Edinburgh, Edinburgh University Press, 2015, 49-72.

⁷ A.H. Khan et al "Mosque communities and Muslim organisations in Dublin and other Cities" in Scharbrodt et al (eds) *Muslims in Ireland, op. cit.*, 113-138.

cent of the total.⁸ The largest non-Irish group were those of Pakistani nationality (11.4 per cent) followed by UK nationals (3.4%).⁹ Regarding ethnicity, the majority of Muslim respondents declared Asian (42.2%) and African (17.1%) ethnicity, with other notable cohorts citing Irish (6.8%) and “Other White” (10.9%) ethnicity.¹⁰

Although traditionally the Muslim community in Ireland composed “middle- and upper-class educated professionals—most of whom immigrated for educational reasons”,¹¹ a “major transformation” of the community has been observed with the arrival of labour migrants, refugees, and asylum seekers.¹² It has been observed that:

“This gap [between long established professionals and newly arriving refugees] is ... visible in various mosque communities where class distinctions based on social background and educational level are often maintained, with the communal mosque space providing the only forum for limited social interaction.”¹³

Cognisant of these divisions, Scharbrodt explains:

“The term ‘Muslim community’ is ... problematic. The actual diversity of Muslims in Ireland in terms of their ethnic, national, cultural, and linguistic backgrounds, their sectarian and ideological orientations, their different degrees of religious commitment, their educational levels, and their socioeconomic status would suggest the existence of various ‘Muslim communities’.”¹⁴

Given the diversity of the Muslim population in Ireland, it is likely that there are diverse approaches to marriage within the community. Attitudes toward the importance of securing legal recognition of marriage may also vary. As noted above, empirical research is the best

⁸ Central Statistics Office, *Census of Population 2016*, *op. cit* Saudi Arabian nationals accounted for 2.9 per cent of all Muslims (1,775 persons). Bangladeshi Muslims accounted for 2.0 per cent (1,209 persons) and Afghani Muslims for 1.9 per cent (1,160 persons).

⁹ *Ibid.*

¹⁰ *Ibid.* Despite originally coming from the Middle East and North Africa, more recent Muslim immigrants have originated in South and South-east Asia, sub-Saharan Africa and the Balkans. See: O. Scharbrodt, “Muslim Immigration to Ireland after World War II” in Scharbrodt et al (eds) *Muslims in Ireland*, *op. cit.*, 49-72 and Scharbrodt, “Muslim Immigration to the Republic of Ireland” *op. cit.*

¹¹ Among employed Muslims in Ireland (17,543), 23.5% were in “professional occupations”, the largest category recorded in 2016. Medical practitioners accounted for 12% of all Muslim workers. This compares with just 0.7% for the total population: Central Statistics Office, *Census of Population 2016*, *op. cit.*

¹² O. Scharbrodt, “Muslim Immigration to the Republic of Ireland” *op. cit.*, 222.

¹³ *Ibid.*, 241.

¹⁴ *Ibid.*, 222. Consequently, he referenced the “Muslim population” in Ireland. See also, P. McGarry, “What is it like to grow up Muslim in Ireland?” *Irish Times* (28 January 2017).

means of determining both the realities of Muslim marriage practice in Ireland and the attitudes of Irish Muslims towards legal recognition of marriages. However, to date, no such studies have been undertaken.¹⁵ Without such statistics, the authors will review the current formalities for legal marriage in Ireland to examine the likelihood that a marriage performed according to the rites of the Islamic faith would be legally recognised.

Part II: The Legal Formalities for Religious Marriage in Ireland

The Civil Registration Act 2004 (as amended) provides for the Irish legal formalities for marriage. A marriage ceremony which is conducted according to the rites of the Islamic faith in Ireland must comply with these formalities to be legally valid.¹⁶ Intending spouses must both be over 18 years of age.¹⁷ They must also complete the necessary preliminaries for marriage, most notably by complying with the relevant notice requirements set out in the legislation. Intending spouses must provide written notice of their intention to marry at least three months prior to the proposed date for solemnisation of the marriage.¹⁸ This notice must be delivered by both parties in person.¹⁹ Intending spouses must also attend at the registrar's office at least five days (or such lesser number of days as may be determined by that registrar) before the date of the marriage to make and sign a declaration that there is no impediment to the marriage.²⁰ These requirements are "substantive requirements for marriage"²¹, meaning that their non-observance will legally invalidate the marriage.

¹⁵ The diversity of the Muslim community outlined above could pose problems in conducting empirical research. Access to each micro-community would be required to present an accurate picture of current marriage practice within the community.

¹⁶ In Ireland, there are three categories of marriage: religious, civil and secular. The requisite formalities are largely similar across all three categories but there are some important differences, most notably with regard to the choice of venue. See S. Leahy and K. O'Sullivan, "Changing Conceptions of Marriage in Ireland: Law and Practice" *Child and Family Law Quarterly*, Vol 30, Issue 3, 2018, 279.

¹⁷ Section 31(1) of the Family Law Act 1995. Individuals under the age of 18 may marry if they obtain a court exemption to do so. Such exemptions can be granted where the applicant(s) show that it is justified by serious reasons and is in the interests of the intending spouses: *Ibid*, section 33(1). Once commenced, section 45(1)(e) of the Domestic Violence Act 2018 will repeal section 33 of the Family Law Act 1995, abolishing these exemptions.

¹⁸ It is possible to get a court exemption from the notice requirement prior to the marriage under section 47 of the Act. The applicants must show that the exemption "is justified by serious reasons and is in their interests": section 47(2).

¹⁹ Section 46(2). The notice must be accompanied by the prescribed fee and such (if any) documents that are specified by an tArd-Chláraitheoir (Registrar General): section 46(3).

²⁰ Section 46(1)(b).

²¹ Section 46(4).

When the registrar is satisfied that the relevant notice requirements have been met, s/he will complete a marriage registration form (MRF)²² and issue it to the couple.²³ They must present this to the individual who will solemnise the marriage for examination.²⁴ Immediately after the marriage ceremony, the MRF must be signed by: (a) each of the parties to the marriage; (b) two witnesses to the solemnisation of the marriage, and; (c) the solemniser.²⁵ The MRF must be returned to the registrar by either one of the parties to the marriage within one month of the ceremony.²⁶ The registrar will then enter the marriage on the official register.²⁷

Further to the foregoing requirements, religious marriage ceremonies must meet specific criteria if the marriage is to be legally recognised. The marriage must be solemnised by a registered solemniser, that is, an individual who is recognised by the religious body²⁸ and who has been entered on the Register of Solemnisers.²⁹ The solemnisation must take place in a suitable venue, specifically, a “place that is open to the public”.³⁰ Once these basic requirements are satisfied, the religious body and/or the intending spouses can decide where to hold the ceremony. There is no requirement that a venue for a religious marriage be registered with or approved by the civil authorities.³¹

The ceremony must feature certain elements if the marriage is to be legally recognised. A registered solemniser must ensure that the ceremony is in a format which is approved by the Registrar General.³² Both intending spouses must be present,³³ along with two persons over

²² Section 48(1).

²³ Section 48(2).

²⁴ Section 48(3).

²⁵ Section 49(1).

²⁶ Section 49(2).

²⁷ Section 49(3). Once the marriage is registered, a civil marriage certificate may be issued.

²⁸ “Religious body” means an organised group of people members of which meet regularly for common religious worship: section 45(1).

²⁹ Section 51(1). Individuals cannot nominate themselves for entry on the Register of Solemnisers. The Registrar General must approve the nomination. It is unclear whether this approval process is merely a formality or whether criteria are applied to assess suitability and qualifications.

³⁰ That is, a building that is open to the public, or a courtyard, garden, yard, field or piece of ground that is open to the public and lying near to and usually enjoyed with such a building, see section 51(2A).

³¹ See Department of Employment Affairs and Social Protection, “Getting Married”, available at: http://www.welfare.ie/en/Pages/Getting_Married.aspx (Accessed: 22 August 2018).

³² Section 51(3)(a). The Registrar General is the individual with overall responsibility for managing the civil registration system in Ireland.

³³ Section 51(2)(a).

the age of 18 years who act as witnesses.³⁴ The solemniser must be satisfied that the intending spouses understand the nature of the marriage ceremony and the relevant declarations which must be made.³⁵ These declarations are that neither party knows of any impediment to the marriage and each accepts the other as his/her spouse.³⁶ The intending spouses must make these declarations in the presence of each other,³⁷ the solemniser and the witnesses. The foregoing requirements for the marriage ceremony are also stated to be “substantive requirements for marriage”,³⁸ that is, the legal validity of the marriage depends upon adherence to these formalities.

The Likelihood of Compliance with Legal Marriage Formalities within the Irish Muslim Community

As noted already, without empirical research on Muslim marriage in Ireland, it is difficult to determine whether such marriages are complying with the legal formalities. There is evidence of registration of at least some Muslim marriages in the State albeit that the numbers of such marriages appear unsettled: although 89 Muslim marriages were registered in 2015, this figure fell sharply to 14 marriages in 2017 before recovering slightly with 21 Muslim marriages registered in 2018.³⁹ Further, it is possible that Muslim couples who opt for a nikah which is not conducted in accordance with the relevant statutory formalities for a religious marriage, also undergo a separate civil ceremony, thereby ensuring that their marriage is legally recognised. Official statistics on marriage in Ireland cannot give us an insight into whether this is occurring or not. However, there is cause for scepticism about the likelihood that all (or even most) Muslim marriages conducted within Ireland are conforming to the legal formalities. Research from other jurisdictions, in particular Ireland’s closest neighbouring jurisdiction of England and Wales, demonstrate the potential for Muslim marriages, whether by accident or design, to be performed in a manner which fails to comply

³⁴ Section 51(2)(b).

³⁵ Section 51(2)(d). These declarations are set out in section 51(4) and are described below.

³⁶ Section 51(4)

³⁷ Section 51(3)(b).

³⁸ Section 51(5)

³⁹ Source: CSO request. Moreover, only 114 Islamic marriages were registered in Ireland between 2010 and 2013, see: Registrar General, *Annual Report of an tArd-Chláráitheoir to the Minister for Social Protection under Section 11 of the Civil Registration Act 2004 for the year 2013*, para 39.

with the legal formalities for marriage.⁴⁰ Thus, it is necessary to consider whether this trend is also a feature of Muslim marriage in Ireland.

Although the Irish formalities for religious marriage are relatively straightforward, the likelihood of compliance with them largely centres on the information which is provided to the couple and the involvement of a registered solemniser. Once a couple is aware of and complies with the notice requirements and involves a registered solemniser, it seems highly likely that their marriage will be legally recognised, particularly since a registered solemniser is under an obligation to ensure that the ceremony is in a format approved by the General Registrar. Moreover, section 69(10)(c) of the 2004 Act provides that it is an offence for a person who is a registered solemniser to solemnise a marriage without a MRF having been given to him/her before the solemnisation for examination. Thus, where an imam (or other representative from the Muslim community) is a registered solemniser, there is a heavy onus upon them to ensure that the relevant formalities are followed. Further, unlike other jurisdictions where issues may arise about validity due to the choice of marriage venue,⁴¹ in Ireland once the basic requirements are met (i.e. public venue) then any venue from a mosque to a hotel should suffice. This makes satisfaction of the location criteria very straightforward. The only issue which could arise here is where a marriage was conducted in a private location (e.g. at the home of one of the intending spouses).⁴² However, whilst in principle compliance with the legal formalities appears uncomplicated, in practice, there are a number of potential obstacles in securing legal recognition.

First, there is a general lack of public awareness about the legal formalities required for Muslim marriage in Ireland. An investigation of the primary websites for the Islamic community in Ireland highlights this information deficit. The authors' internet searches identified only one website (that of the Islamic Cultural Centre of Ireland) which references

⁴⁰ See: R.C. Akhtar, "Unregistered Muslim Marriages: An Emerging Culture of Celebrating Rites and Conceding Rights", *op cit.* For an early investigation of the phenomenon, see: S. Shah-Kazemi, *Untying the Knot, Muslim Women, Divorce and the Shariah*, Nuffield Foundation, 2001, 31.

⁴¹In England and Wales, a requirement that Mosques must be registered for marriage ceremonies has proven quite problematic: J. Eekelaar, "Marriage, A modest proposal" (2013) (1) *Family Law Journal* 83, 84.

⁴² For the implications of this scenario, see below.

the civil requirements for marriage in its matrimonial section.⁴³ Admittedly, for the majority of couples intending to marry in a Muslim ceremony, their most likely source of information will be their imam. Indeed, State resources on marriage formalities advise that for religious marriages, couples should contact the authorities of the religious body for advice on how to proceed.⁴⁴ However, it seems that a majority of imams in Ireland are not actually registered solemnisers. The Irish Council of Imams estimates that there are approximately 35 imams in Ireland.⁴⁵ However, the official Register of Solemnisers records only five imams in the jurisdiction: two in Dublin, two in Cork and one in Galway.⁴⁶ Four imams were registered when the Civil Registration Act 2004 commenced in September 2007. Since then, only one more imam has been registered (in 2015), despite the rapid growth of the community during this period.⁴⁷ The limited accessibility of imams who are registered solemnisers is illustrated by that fact that although 47.3% of the entire Irish Muslim community were recorded as living in County Dublin in 2016,⁴⁸ only two imams are recorded as registered solemnisers for this district. Thus, the potential that a Muslim couple intending to marry might approach an unregistered imam is quite high. In this instance, the couple might not receive complete or accurate information about the legal formalities for marriage or the fact that the imam in question is not eligible to carry out a ceremony which will satisfy the requirements for a legally valid marriage.⁴⁹ Indeed, the imam himself may not be aware of such formalities.

⁴³ <https://islamireland.ie/facilities-services/matrimonial/> (Accessed 12 December 2018). While the Islamic Foundation of Ireland contains details on funerals, there is no information on marriage: <http://islamicfoundation.ie/services/> (Accessed 12 December 2018). The Al-Mustafa Islamic Centre Ireland also contains no information on marriage in Ireland, their section on marriage being blank at the time of writing: <http://www.islamiccentre.ie/> (Accessed 12 December 2018)

⁴⁴ The central State resource for information on getting married in Ireland recommends that “[p]ersons wishing to get married by religious or secular ceremony should approach the authorities of the religious denomination or secular body concerned for advice on how to proceed, and also make an appointment to attend their local Registrar”: Department of Employment Affairs and Social Protection, “Getting Married”, *op. cit.* The national Citizens Information website offers similar advice: http://www.citizensinformation.ie/en/birth_family_relationships/getting_married/different_legal_ways_of_getting_married.html (Accessed 12 December 2018).

⁴⁵ It is probable that this figure is actually higher as not all imams or Islamic associations are affiliated with the Irish Council of Imams.

⁴⁶ See Register of Solemnisers, available at <https://www.welfare.ie/en/downloads/RegisterOfSolemnisers.pdf> (Accessed 11 December 2018). The geographical clustering of these registered officiants is also interesting in light of the dispersed nature of the Irish Muslim community. Approximately 34 mosques and prayer halls are listed across Ireland on the Islamic Foundation of Ireland website, see <https://islamicfoundation.ie/services/mosques-and-prayer-rooms/> (Accessed 12 December 2018).

⁴⁷ Between 2006 and 2016, the Muslim community in Ireland almost doubled, increasing by 95%, see: Central Statistics Office, *Census of Population 2016*, *op. cit.*

⁴⁸ The CSO notes that the Muslim community in Ireland is “highly concentrated in urban areas with only 2.1 per cent in rural areas”: *Ibid.*

⁴⁹ See: S. Leahy and K. O’Sullivan, “Recognition of Muslim Marriage Ceremonies: An Analysis” in K. O’Sullivan (ed), *Minority Religions under Irish Law: Islam in Irish and International Context*, Leiden, Brill, (2019).

Should the couple proceed with the ceremony, they will, perhaps unknowingly, be entering into a marriage which would not be legally recognised.⁵⁰

Part III: Void or Valid? The Implications of Non- Compliance with the Legal Formalities for Marriage in Ireland

The basic rules of Irish nullity law provide that where the legal formalities for marriage are not complied with, a marriage is void (i.e. held never to have existed). However, this simplistic articulation of the law belies some complexities inherent in the rules in this area which suggest that non-compliance with formalities may not *always* lead to a marriage being declared void. The intricacies of the law in this area can be traced to the judgment in *IE v WE*.⁵¹ In this case (which was decided on the law which prevailed prior to the introduction of the 2004 Act), the parties married in a Lutheran church in Dublin. When ceremony occurred, the church was not registered for the solemnisation of marriage as was then required. Further, no statutory licence or certificate was issued to authorise the ceremony and no banns were published. Neither of the parties to the marriage were aware that the legal formalities for marriage (as set out in section 49 of the Marriages (Ireland) Act 1844) had not been complied with. Murphy J held that the marriage was not void, noting that:

“It seems...settled law that to invalidate a marriage for non-compliance with any of the provisions contained in s. 49...it is necessary to establish not only that there should have been a conscious disregard of the provisions of the section but that both parties to the apparent marriage should have been aware of the defect.”⁵²

Consequently, prior to the enactment of the 2004 Act, it appears that non-compliance with the legal formalities for marriage would only render a marriage void where both parties were aware of the defect. This rule was subsequently approved and re-iterated in *DC v NM (falsely known as NC)*⁵³ but the judge distinguished *IE* on the facts. In *DC*, the bride was under 21 years of age and, under the law at the time, required parental consent to marry. The couple

⁵⁰ Indeed, there is anecdotal evidence to suggest that mediation practitioners in Ireland have experiences of couples party to a nikah-only marriage approaching them on relationship breakdown.

⁵¹ [1985] ILRM 691.

⁵² *Ibid*, 695.

⁵³ [1997] 2 IR 218.

forged the bride's father's consent. Geoghegan J held that the statutory provision requiring parental consent was "directory only". Absence of a father's consent alone could not invalidate a marriage. This case suggests a certain hierarchy within the formalities of marriage under the regime which prevailed prior to the 2004 legislation such that even a knowing breach of certain formalities may not have had any impact on the legal validity of a marriage. Commenting on the law at the time, Shatter suggested that "[a]s a general rule, it is submitted that unless a defect is said expressly to invalidate a marriage, the marriage is completely valid".⁵⁴

Irish family law experts generally contend that the precedent set in *IE* still applies to the current formalities regime. For example, Crowley suggests that whilst non-compliance with age or notice requirements renders a marriage null and void (unless the relevant exemptions have been obtained from the courts), "[t]he general principle outside these requirements is that the non-observance of or a defect in any of the other prescribed formalities does not invalidate a marriage unless both parties were aware of it at the time of the ceremony".⁵⁵ This argument is questionable. It is correct to exclude the age and notice requirements from what can be referred to as the "knowledge rule". Section 46(4) of the 2004 Act clearly states that they are substantive requirements for marriage. However, these are not the only substantive requirements for marriage in the legislation. Section 51(5) clearly states that the requirements for solemnisation of marriages listed above (i.e. that the ceremony be performed by a registered solemniser, with both parties and witnesses present, in a public venue, where the relevant declarations are made) are also "substantive". Consequently, the "knowledge rule" should similarly not apply where a putative marriage does not satisfy these criteria.

It will not be possible to reach definitive conclusions on this until a case on non-observance of the current legal formalities for marriage comes before the Irish courts. Nonetheless, since all of the formalities discussed above are now referred to as "substantive", it seems logical that they should all be treated equally and that non-compliance with any of these requirements would render a marriage void. Moreover, it is questionable whether the

⁵⁴ A.J. Shatter, *Family Law*, 4th edn, Dublin, Bloomsbury Professional, 1997, 174.

⁵⁵ L. Crowley, *Family Law*, Dublin, Round Hall, 2013, 58.

“knowledge rule” would be applied to a consideration of non-compliance with the formalities under the current regime. The legal rules which prevailed at the time of the judgment in *IE* were considerably more complex than the current legal position. Judges may not exercise the same degree of understanding towards a failure to comply with the formalities should a similar case arise under the current law.

Given the uncertain nature of the law in this area, it is impossible to definitively state whether Muslim marriages which do not comply with the legal formalities would be void. Undoubtedly, where age or notice requirements were not adhered to, the marriage could not be valid but the same outcome would seemingly apply where the marriage ceremony does not comply with the legal formalities for solemnisation of marriage (e.g. where the imam who performed the ceremony was not a registered solemniser or where the ceremony was held in a private location). The outcome in the latter instance would depend upon whether the “knowledge rule” was applicable. If it applied, it would protect individuals who were unaware that their marriage ceremony failed to adhere to the formal legal requirements. For the reasons outlined above, it seems probable that the courts will be restrictive in their application of this rule, thereby minimising the likelihood that such marriages would be legally recognised.

Part IV: The Implications of Not Securing Legal Recognition of a Marriage

All things considered, it is quite likely that a Muslim marriage which does not comply with the legal formalities for marriage will be void, regardless of whether the couple were aware of such non-compliance or not. The negative implications of being party to an unrecognised Muslim marriage under Irish law are extensive with such “spouses” effectively only cohabitants in legal terms. Although legislative initiatives over the past decade have mitigated some of the harshness associated with this status in Ireland, the protections afforded to cohabitants is still somewhat less than the equivalent protections which are available to legally recognised spouses.⁵⁶ The non-recognition of a Muslim marriage can pose serious difficulties for the parties to such marriages, particularly, creating the potential of financial

⁵⁶ For more on the elevated position of the marital family under Irish law, see: S. Leahy and K. O’Sullivan, “Changing Conceptions of Marriage in Ireland”, *op cit*.

vulnerability on relationship breakdown or death, as well as raising potential issues regarding guardianship of children. Each of these potential difficulties are addressed below.

Financial Vulnerability on Relationship Breakdown

Where a marriage ends in judicial separation or divorce, the Family Law Act 1995 and the Family Law (Divorce) Act 1996, respectively, govern the provision of ancillary relief. Wide discretion is afforded to the judiciary to make “proper provision” for financially weaker spouses through the use of orders relating to maintenance, property adjustment and pension adjustment.⁵⁷ Where a marriage is not legally recognised, such protection is unavailable.⁵⁸ A party to an unrecognised marriage may, however, be able to seek redress pursuant to the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

The scheme of protection applied under the 2010 Act is presumptive, that is, it applies once the couple meet the criteria for relief. The Act defines a “cohabitant” as:

“one of two adults (whether of the same or the opposite sex) who live together as a couple⁵⁹ in an intimate⁶⁰ and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other”.⁶¹

The cohabitants must have lived together for a period (a) of two years or more, in the case where they are the parents of one or more dependent children⁶², or (b) of five years or more,

⁵⁷ See Part III of the Family Law (Divorce) Act 1996. The requirement to make “proper provision” is constitutionally mandated on divorce although no definition of what this might mean is provided.

⁵⁸ This is unlike in England and Wales where parties to a void marriage may seek ancillary relief under sections 23 and 24 of the Matrimonial Causes Act 1973.

⁵⁹ Cohabitants do not have to physically live together in the same house at all times. Periods of living apart, (e.g. due to work commitments) will not affect a determination that the couple are cohabitants: *MW v DC* [2017] IECA 255, para 29. The key factor for the court is the intention of the parties and whether they continue to view themselves as cohabitants.

⁶⁰ A relationship does not cease to be an intimate relationship merely because it is no longer sexual in nature: section 172(3).

⁶¹ Section 172(1).

⁶² A “dependent child” is any child of whom both the cohabitants are the parents who is: (a) under the age of 18 years, or; (b) 18 years of age or over and is (i) receiving full-time education or instruction at any university, college, school or other educational establishment and is under the age of 23 years, or (ii) incapable of taking care of his or her own needs because of a mental or physical disability: section 171.

in any other case.⁶³ The party seeking relief must, moreover, demonstrate that the relevant time period was an unbroken period of time (i.e. not for a number of periods amounting to two or five years).⁶⁴ Further, in determining whether or not the couple are cohabitants, the court shall take into account all the circumstances of the relationship and in particular shall have regard to: (a) the duration of the relationship; (b) the basis on which the couple live together; (c) the degree of financial dependence of either adult on the other and any agreements in respect of their finances; (d) the degree and nature of any financial arrangements between the adults including any joint purchase of an estate or interest in land or joint acquisition of personal property; (e) whether there are dependent children; (f) whether one of the adults cares for and supports the children of the other, and; (g) the degree to which the adults present themselves to others as a couple.⁶⁵

A Muslim couple whose marriage is void but who have been living together as spouses should, provided they have lived together for the requisite period of time, easily satisfy the criteria to be viewed as cohabitants for the purposes of the legislation.⁶⁶ However, in order to seek financial relief or property division pursuant to the 2010 Act on the breakdown of a relationship, further hurdles must be surmounted: specifically, a cohabitant seeking such relief must also satisfy the court that s/he is “financially dependent on the other cohabitant and that the financial dependence arises from the relationship or the ending of the relationship”.⁶⁷ Even then, the court has a discretion whether to grant relief and will only exercise this discretion if it is “satisfied that it is just and equitable to do so in all the circumstances”.⁶⁸ In making this determination, the Act stipulates a number of factors which the court should consider.⁶⁹ These include the existing or future financial circumstances,

⁶³ Section 172(5). The scheme of protection for cohabitants became operative on 1 January 2011: S.I. No. 648/2010 - Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Commencement) Order 2010. Cohabitants can apply for redress under the scheme if the relationship ended after that date. However, the time during which two people lived as a couple before the commencement date is included for the purposes of calculating whether they are eligible for protection within the scheme: section 206.

⁶⁴ *MW v DC* [2017] IECA 255, para 25.

⁶⁵ Section 172(2).

⁶⁶ The only hurdle to such recognition is where one of the cohabitants is still legally married to someone else. An individual cannot be legally recognised as a cohabitant until they have lived apart from a spouse for four of the preceding five years (i.e. they satisfy the legal requirements to qualify for a divorce under Irish law): section 172(6). Thus, in a situation involving religious polygamy, where one of the individuals is legally married to someone else, their subsequent nikah-only marriage would not qualify for protection under the 2010 Act.

⁶⁷ Section 173(2).

⁶⁸ *Ibid.*

⁶⁹ Section 173(3).

needs and obligations of each cohabitant and the rights and entitlements of any: spouse or former spouse; civil partner or former civil partner, or of; any dependent child or of any child of a previous relationship of either cohabitant. The court must also take into account the length of the relationship, the basis on which the parties entered into the relationship and the degree of commitment of the parties to one another, as well as the contributions that each of the cohabitants made or is likely to make in the foreseeable future to the collective or individual welfare of the cohabitants⁷⁰ and any contributions made by either of them in looking after the home. Importantly, the court must also consider the effect on the current and future earning capacity of each of the cohabitants of the responsibilities assumed by each of them during the period they lived together as a couple.⁷¹ Finally, the court will have regard to any physical or mental disability of either cohabitant, and the conduct of each of the cohabitants, if the conduct is such that, in the opinion of the court, it would be unjust to disregard it.

Given the dearth of reported cases in this area,⁷² it is impossible to state with any degree of certainty what level of financial vulnerability is necessary to satisfy the threshold criteria of “financial dependence”. However, once financial dependency has been established, the court can make whatever order is just and equitable in the circumstances using a wide array of orders involving property adjustment,⁷³ compensatory maintenance,⁷⁴ and/or pension adjustment.⁷⁵ Such order can “go far beyond rectifying an applicant’s financial dependency as no limitation on the court’s power is stipulated in the legislation”.⁷⁶

The limited reported case law makes it difficult to say what level of provision would be provided in any given circumstance. However, akin to the needs-oriented approach adopted

⁷⁰ This includes contributions to income, earning capacity or property and financial resources.

⁷¹ Of particular relevance here would be the degree to which a cohabitant has given up the opportunity of paid employment in order to look after the home.

⁷² The redress scheme has not been used very often since its inception. Walsh and Fraser note that only 80 cohabitation cases were initiated in the Dublin Circuit Family Court in the Dublin region in the period 2011-2015. The figure for divorce applications in the same region for that period was 6,823: Walsh and Fraser, “The Odd Couple” (2016) *Irish Law Society Gazette* 36, 39.

⁷³ Section 174.

⁷⁴ Section 175.

⁷⁵ Section 187.

⁷⁶ B. Tobin, “The regulation of cohabitation in Ireland: achieving equilibrium between protection and paternalism?”, *Journal of Social Welfare & Family Law*, Vol 35, Issue 3, 284.

to ancillary relief provision on divorce in Ireland (albeit mitigated marginally by the constitutionally mandated requirement that “proper provision” be made for spouses and children as a pre-condition to an award of a decree of divorce),⁷⁷ needs are equally likely to play an important role in determining the level of provision ordered on the breakdown of a cohabiting relationship. This creates considerable disadvantages for individuals whose marriage is not legally recognised. Only those who are “financially dependent” will be considered “qualifying cohabitants” for the purposes of securing redress. However, it is precisely this category of vulnerable applicant who may be least well positioned to finance such litigation.⁷⁸ Moreover, even if a financially vulnerable “spouse” who is party to an unrecognised marriage secures the status of “qualified cohabitant”, any provision made will be at the court’s discretion with needs likely playing a significant role in determining the quantum of any resulting provision ordered: ideas of sharing or compensation, if considered at all, will likely remain a secondary consideration.⁷⁹

Alternative civil remedies, although perhaps no more cost-effective in practice, may be preferable in seeking to avoid the vagaries of the 2010 Act. On the breakdown of an unregistered marriage, an unrecognised Muslim “spouse” may, for example, make a claim in equity. In this regard, two key remedies exist. First, where the family home is in the sole-name of one party – or in the joint names of both parties – the other party (the applicant) may wish to claim a share of the beneficial ownership of the property under what is known as the purchase money resulting trust.⁸⁰ First applied in *Heavey v Heavey*,⁸¹ an equitable interest may be generated through either direct or indirect contributions. Direct contributions capable of generating a beneficial interest include contributions to the purchase price of a property,

⁷⁷ It has been noted that the Irish approach to ancillary relief on divorce “appears much more strictly needs-based” than the other equitable redistribution schemes: J. Scherpe, “Marital Agreements and Private Autonomy in Comparative Perspective” in J. Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective*. Oxford: Hart, 2012, 465.

⁷⁸ Although legal aid may be available in Ireland, applications are characterised by long delays and means and merit tests are applied.

⁷⁹ Sharing or compensatory principles remain significantly underdeveloped in ancillary relief provision in Ireland. In one of the few reported decisions in this area, a Circuit Court judge awarded a female cohabitant 10% of her former partner’s €26 million assets. M. Tighe, “Judge awards woman 10% of former partner’s €26m fortune”, *Sunday Times*, 26 April 2015. While this provision clearly went beyond meeting the applicant’s needs, exactly what factors influenced the court in making such provision remains unclear.

⁸⁰ For more, see Hilary Biehler, *Equity and the Law of Trusts in Ireland*, 6th edn, Dublin: Thomson, 2016, 197-228.

⁸¹ *Heavey v Heavey* (1974) 111 I.L.T.R. 1.

whether in an outright purchase or financed by mortgage repayments.⁸² Indirect contributions such as contributions to a family fund while a mortgage is being repaid⁸³ and contributions through unpaid work in the homeowner's business have also been held sufficient to generate a beneficial interest in the home.⁸⁴ Indirect contributions such as unpaid work in the home, however, do not generate a beneficial interest.⁸⁵ This shortcoming represents the single most significant weakness of the purchase money resulting trust.⁸⁶ In light of *W. v W.*, it is also well established that making or paying for improvements to property will not generate an equitable interest under the purchase money resulting trust⁸⁷ - unless such improvements were financed by a mortgage.⁸⁸ Finally, where contributions are sufficient to generate a beneficial interest, the extent of such interest will be calculated having regard to the proportionate interest principle.⁸⁹

The jurisdiction of the court to resolve disputes in relation to the beneficial ownership of marital property is found in section 36 of the Family Law Act 1995, which states “[e]ither spouse may apply to the court in a summary manner to determine any question arising between them as to the title to or possession of any property”.⁹⁰ For the purposes of the section, “spouse” includes a party to a void marriage.⁹¹ Where a Muslim applicant, party to an unrecognised marriage, is successful in their claim under section 36 and found to have generated a beneficial interest in the home, the protection afforded is considerable. The beneficial interest is deemed an overriding interest pursuant to section 72(1)(j) of the Registration of Title Act 1964 or, alternatively, may be considered an interest which is protected under the doctrine of constructive notice when coupled with actual occupation of

⁸² See *C v C* [1976] I.R. 254, (1975) 111 I.L.T.R. 133 and *W v W* [1981] I.L.R.M. 202.

⁸³ See *W v W* [1981] I.L.R.M. 202 and *McC v McC* [1986] I.L.R.M. 1. Note, it was also held in this case that the *de minimus* principle applies in relation to all contributions made.

⁸⁴ See *N v N* [1992] 2 I.R. 116.

⁸⁵ See *L v L* [1989] I.L.R.M. 528, [1992] 2 I.R. 77.

⁸⁶ U. Woods, “The Matrimonial Home Bill 1993 – Should the Government try again?” (2001) *Irish Journal of Family Law*

⁸⁷ *W. v W.* [1981] I.L.R.M. 202. See A. Shatter, *Family Law, op cit.* para.15.209. Where an applicant seeks to rely on such contributions, they may instead try to avail of the doctrine of equitable estoppel, see below.

⁸⁸ See J. Mee, “The End of the Affair—The Equitable Rights of Cohabitees” (2001) *Conveyancing & Property Law Journal*, Issue 6, Vol 2, 43

⁸⁹ *K v K* (1978) 114 ILTR 50

⁹⁰ Section 36(1).

⁹¹ Section 36(8). Time limits apply where the marriage is void. Where a marriage is annulled, a section 36 application shall not be made by either of the spouses more than three years after the date of the annulment: section 36(7)(a). Where a marriage is void but has not been so declared under the law of the State or another state, a section 36 application cannot be made by either of the spouses more than three years after the parties have ceased to be ordinarily resident together: section 36(7)(b).

the property.⁹² This means that the “spouse” is recognised as a co-owner of the property with their occupation of the home receiving more robust protection.⁹³ Unfortunately, however, particularly in light of the lack of recognition afforded to unpaid work in the home, many financially dependent Muslim “spouses” may be unable to demonstrate sufficient financial contributions and will fail to generate such an interest. Moreover, section 36 “can assist only in resolving the legal position as to ownership, and does not address the loss of entitlements which may be suffered by a spouse whose marriage is annulled”.⁹⁴

The second, albeit less commonly used, equitable remedy which may be relied on to provide some financial relief is that of proprietary estoppel. A spouse may be able to succeed in a claim under the doctrine where a representation is made to them that they are or would become entitled to an interest in the home and they acted to their detriment because of that expectation. Such detriment could, having regard to facts of the case, include unpaid work in the home. Moreover, unlike with the purchase money resulting trust, in satisfying an equity the court is not limited to awarding a proprietary interest in the property and may order financial compensation if more appropriate.⁹⁵ However, akin to the purchase money resulting trust, equitable estoppel is not a redress scheme. Thus, a party to a void marriage who is in a financially weak position due to not having his/her name on property and perhaps having foregone earning opportunities outside the home to take on a full-time homemaking or child-rearing role will often continue to face significant adverse consequences when a marriage is declared void.⁹⁶

⁹² This would be especially important for unrecognised marriages because a non-legal title holding “spouse” would not benefit from the protection against unilateral disposition of the home afforded by section 3 of the Family Home Protection Act 1976.

⁹³ An application for sale or partition of co-owned land will be taken under section 31 of the Land and Conveyancing Law Reform Act 2009.

⁹⁴ Law Society of Ireland, *Nullity of Marriage: The Case for Reform*, Dublin, Law Society, 2001, 46.

⁹⁵ See Biehler, *Equity and the Law of Trusts in Ireland*, *op cit*, chapter 18.

⁹⁶ In England and Wales, leading activist Aina Khan noted that vulnerable financially weaker women “cannot often afford to recover their rights under Trusts law so they have to give up their claims”: Available at: <http://www.prweb.com/releases/2014/01/prweb11483339.htm> (Accessed 10 September 2018).

The Irish Law Society notes that that “[t]he social injustice of this situation is evident and is commonly acknowledged by the practice of agreeing financial settlements in nullity cases prior to the hearing of the case, so that the court may be told that a financial settlement has been reached and provision has been made for the financially weaker party, although not required by the court or legislation”: *Nullity of Marriage*, *op cit*, 45. Note, there is some evidence that the Irish courts have used section 36 to provide for orders which resemble those which might be awarded on divorce or judicial separation, for example, orders for transfer or sale of the family home: Crowley, *Family Law*, *op. cit.*, 53. Crowley here is drawing on Circuit Court statistics from the period

A further civil law alternative would be to seek relief in contract law. An applicant may seek, in particular, to enforce the payment of the *mahr* – the consideration for the marriage contract payable by the groom to the bride and considered “an indispensable part of every Islamic marriage.”⁹⁷ However, this will only be appropriate where the *mahr* is a specified monetary amount and has not already been paid in full. As Akhtar explains:

“Mahr can be deferred, or paid in full at the time of the contract. As it is deemed to be the property of the wife, any deferred mahr is payable if the marriage should end, through divorce or death.”⁹⁸

Although to the authors’ knowledge such an application has not yet come before the Irish courts, such a contractual claim could possibly be upheld.⁹⁹

For some members of the Muslim community in Ireland, these civil law remedies may provide viable avenues in seeking relief. However, in light of the ever more diverse socio-economic background of the community, there may also be some particularly vulnerable Muslim spouses for whom the civil law route may prove unappealing and/or unrealistic.¹⁰⁰ At least some members of the Muslim community in Ireland may potentially prefer to seek relief under Sharia law.¹⁰¹ Depending on the type of divorce obtained, financial relief may be available. If, for example, a husband initiates a *talaq* divorce, or the wife secures a *fashq* divorce, the wife may be entitled to the payment of any outstanding portion of the *mahr* and

2010 to 2012. However, it is very unclear how section 36 is being used to support these orders and there is no evidence that this is common practice.

⁹⁷ A. Buchler, “Islamic family law in Europe? From dichotomies to discourse - or: beyond cultural and religious identity in family law” (2012) *International Journal of Law in Context* 196, 202. Boucher notes at 202: ‘The *mahr* serves to assure the wife a degree of financial independence and to act as a deterrent against arbitrary divorce by repudiation. Given its deep roots in Islamic legal tradition, the *mahr* is very common among Muslims in Europe as well.’

⁹⁸ Z. Akhtar, “Prenuptial agreements, Muslim marriages and UK law” [2013] *IFL* (March) 63, 64.

⁹⁹ In England and Wales, such a claim has been upheld by the Court of Appeal: *Uddin v Choudhry* [2009] *EWCA Civ 1205*. For a study of civil courts’ approaches to enforceability of mahr. see: P Fournier, *Muslim Marriage in Western Courts: Lost in Translation* Ashgate: Farnham, 2010.

¹⁰⁰ It may prove unrealistic where the likelihood of success is low and/or where the costs to pursue a civil claim would be high, see Khan, *op cit*.

¹⁰¹ In England and Wales, it has been noted the attraction of obtaining relief under Sharia law extended across the socio-economic spectrum: see Shah-Kazemi, *Untying the Knot, op cit*, 18.

limited other payments during the *iddat* period.¹⁰² Whether such relief would be available in Ireland, however, remains uncertain. Having regard to the British experience, Sarder Ali observed that Sharia Councils were established “on the premise that they are manifestations of the Muslim diaspora’s need for forums adjudicating on Islamic law, in particular Islamic family law”.¹⁰³ To date, there is no evidence to suggest that such councils have been established by the Muslim diaspora in Ireland although it may be the case that certain imams are granting such dissolutions and orders on an ad hoc basis. While the presence of Sharia Councils in the United Kingdom has generated significant controversy,¹⁰⁴ their apparent absence in Ireland may leave financially vulnerable “spouses” party to an unrecognised marriage especially vulnerable, bereft of both legal and religious protection.

Financial vulnerability on death

The Succession Act 1965 provides spouses in Ireland with relatively generous provision on death. Section 111 of the Act provides that where a person dies testate (i.e. leaving a will), and is survived by a spouse and children, the surviving spouse is automatically entitled to one-third of the deceased’s estate. Where the deceased is survived by a spouse and no children, the surviving spouse is entitled to one-half of the estate. Alternatively, where a person dies intestate (without a will), section 67 provides that a surviving spouse is entitled to two-thirds of the estate where the deceased is also survived by children or the entire estate where there are no surviving children.

Parties to an unrecognised Muslim marriage receive significantly weaker protection with no *automatic* entitlements arising. Under the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, “qualified cohabitants” are entitled to relief in the event of death in the form of an application for provision from the net estate¹⁰⁵ of the deceased cohabitant. Significantly, eligibility in this context is not dependent on proving financial

¹⁰² For discussion of the different methods of terminating a Muslim marriage and available relief, see K. O’Sullivan and L. Jackson, “Muslim Marriage (Non)-Recognition: Implications and Possible Solutions” (2017) *Journal of Social Welfare and Family Law*, Vol 39, Issue 1, 22.

¹⁰³ Shaheen Sardar Ali, “Authority and authenticity: Sharia councils, Muslim women’s rights and the English courts” (2013) *Child and Family Law Quarterly*, Vol 25, Issue 2, 113, 113. For the origins and operation of Sharia Councils in Britain, see 125-127.

¹⁰⁴ *Ibid.*

¹⁰⁵ See section 194(11).

dependence.¹⁰⁶ Section 194(1) provides that an application must be made within six months of a grant of probate or grant of administration issuing to the estate under the Succession Act 1965.¹⁰⁷ An applicant must notify the personal representative of the deceased, any spouse or civil partner of the deceased and to any other persons that the Court may direct.¹⁰⁸ In deciding whether to make the order and in determining its provisions, the Court shall have regard to any representations made by any of those persons.¹⁰⁹ Section 194(3) provides that:

“The court may by order make the provision for the applicant that the court considers appropriate having regard to the rights of any other person having an interest in the matter, if the court is satisfied that proper provision in the circumstances was not made for the applicant during the lifetime of the deceased for any reason other than conduct by the applicant that, in the opinion of the court, it would in all the circumstances be unjust to disregard.”

In considering whether provision should be made for the applicant, the court must have consider any provision which has already been made for the applicant, either orders made under the 2010 Act in his/her favour or any devise or bequest left to him/her by the deceased.¹¹⁰ The court must also consider the interests of the beneficiaries of the estate and the same factors which are considered when considering whether to making an order for ancillary relief on relationship breakdown.¹¹¹ Where the Court orders provision for the applicant, the total value of such provision cannot exceed the share to which the applicant would have been entitled as a legal right or under the rules of distribution on intestacy had the couple been married.¹¹²

¹⁰⁶ *DC v DR* [2015] IEHC 309, para 18.

¹⁰⁷ Where the relationship between the parties ended two years or more before the death of the deceased, a qualified cohabitant cannot apply for provision from the estate unless s/he was already in receipt of periodical payments from the deceased or an application for an order or to vary an order under the 2010 Act was pending or had not yet been executed at the time of the death: section 194(2).

¹⁰⁸ Section 194(6).

¹⁰⁹ *Ibid.*

¹¹⁰ If one party leaves a bequest in a will to the other, inheritance tax will apply, meaning that any gift over €16,604 is liable for Capital Acquisitions Tax at 33%. This threshold and tax rate applies for inheritances received after 6 December 2012. For historic thresholds and tax rates, see: Office of the Revenue Commissioners, *Capital Acquisitions Tax (CAT) thresholds, rates and aggregation rules*, available at: <https://www.revenue.ie/en/gains-gifts-and-inheritance/cat-thresholds-rates-and-aggregation-rules/what-are-group-thresholds-rates-and-aggregation-rules.aspx> (Accessed: 22 August 2018). Some relief may be available to cohabitants under the dwelling house tax exemption where certain criteria are met. Spouses, on the other hand, do not pay inheritance tax.

¹¹¹ That is, the factors listed in section 173(3). See above: text to note 71.

¹¹² Section 194(7). An order must not affect the legal right of a surviving spouse: section 194(10).

Guardianship and Maintenance of Children of the Relationship

Contrary to the steep financial consequences which may accrue where a marriage is void, the parties' relationship to their children is largely unaffected where a marriage is not legally recognised. The primary concern in this situation would be that the father's guardianship status might be impacted. Under Irish law non-marital fathers are not automatic guardians of their children.¹¹³ However, the guardianship status of a father who is party to a void marriage will not be affected where he reasonably believed¹¹⁴ the marriage was valid: (a) where the ceremony occurred before the birth of the child, at some time during the period of ten months before that birth, or; (b) where the ceremony occurred after the birth of the infant, at the time of that ceremony.¹¹⁵ If these criteria are not satisfied, the rules on guardianship for cohabitants will apply. Thus, pursuant to the Children and Family Relationships Act 2015, automatic guardianship rights are afforded to non-marital fathers where the father has cohabited with the child's mother for at least 12 consecutive months including at least three consecutive months after the birth of the child.¹¹⁶ Muslim couples who have lived together as spouses despite not being legally married are likely to satisfy these criteria and thus the father should qualify for automatic guardianship. For any couples to whom this provision does not apply, the father can obtain guardianship status by formal agreement with the child's mother¹¹⁷ or via a court application.¹¹⁸ Thus it is highly likely that a father whose marriage is not recognised by the State would still be regarded as a guardian of his child. As regards maintenance, fathers have an obligation to support their children whether they were born within a marital relationship or not.¹¹⁹ Further, all children (marital or not) have equal succession rights.¹²⁰

¹¹³ Marital parents are automatic joint guardians of their children: section 6(1) of the Guardianship of Infants Act 1964. In Ireland, a guardian has parental responsibility for the child. In *RC v IS*, guardianship was defined as "encompass[ing] the duty to maintain and properly care for a child and the right to make decisions about a child's religious and secular education, health requirements and general welfare": [2003] 4 IR 431. The powers, responsibilities and duties of guardians are articulated in section 6C(11) of the Guardianship of Infants Act 1964 (as inserted by section 49 of the Child and Family Relationships Act 2015).

¹¹⁴ It is presumed that the man reasonably believed that the marriage was valid: section 2(3)(b) of the Guardianship of Infants Act (as amended).

¹¹⁵ Section 2(3)(a)(ii) of the Guardianship of Infants Act 1964 (as amended).

¹¹⁶ Section 6B of the Guardianship of Infants Act 1964 (as inserted by section 49 of the Child and Family Relationships Act 2015). The three months' cohabitation can occur at any time after the birth of the child. However, this facility for automatic guardianship does not apply to parents who have cohabited prior to the commencement of this provision (i.e. 18 January 2016).

¹¹⁷ Section 2(4) of the Guardianship of Infants Act 1964 (as amended).

¹¹⁸ *Ibid*, section 6A.

¹¹⁹ The only difference is in the legislation which is relied upon to secure such maintenance. Spouses rely on the Family Law (Maintenance of Spouses and Children) Act to apply for maintenance for children either while the

Conclusion

Despite the limited available information about Muslim marriage practice in Ireland, the foregoing review of the current formalities for legal marriage and the general statistics on marriage practices in Ireland suggest that nikah-only ceremonies are most likely occurring in this jurisdiction. If this is so, the discussion of the Irish laws of nullity offered here demonstrates a high likelihood that such marriages will not be legally recognised. Whether parties to such marriages are aware of this status or its implications in an Irish context is unknown. Empirical research which uncovers the reality of the Irish Muslim community's approach to marriage and the desire (or otherwise) within the community for legal recognition for these unions is vital to accurately develop the knowledge-base in this area. Given the diversity of the Muslim community in Ireland, it is likely that within each micro-community different norms, different socio-legal and socio-economic considerations, as well as different normative religious influences are influencing marriage practice.

It is equally clear that the implications of being party to an unrecognised Muslim marriage in Ireland may be quite serious. Although reasonable protection appears to exist in relation to guardianship, financially weaker Muslim "spouses" appear to be especially vulnerable where a relationship breaks down or ends in the death. Whilst some legal remedies may exist as discussed above, redress is not guaranteed with the potential for financial hardship quite obvious.

In this context it seems that in addition to developing information about marriage practice in the Muslim community, it is also necessary to consider how to generate awareness about the requirements for legal marriage and the legal consequences arising from non-recognition

marriage is subsisting or as part of ancillary relief on judicial separation or divorce. For non-marital children, section 11(2)(b) provides that the court can order a parent to pay maintenance for a child.

¹²⁰ Where a parent dies testate, a child can apply to court for a share in his/her parent's estate. Section 117(1) of the Succession Act 1965 provides that where "the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just". Where a parent dies intestate, children are entitled to the entire estate divided equally between them if the parent is not married or his/her spouse is already dead. Alternatively, where the deceased parent is married and his/her spouse is still alive, the children are entitled to a third of the estate.

within the Irish Muslim community. Admittedly, without a proper understanding of the potentially heterogeneous attitudes towards the importance of legal marriage within the community, determining how best to impart such information is challenging. However, as a start, some straightforward information on legal marriage could be shared in relevant on-line fora or distributed to mosques so that imams (who might not be registered solemnisers) are aware that this option is available to them and that nikahs they are currently performing may not be legally recognised in Ireland. While this would by no means be a solution to the current knowledge deficit in this area, it would be a useful first step and begin the process of ensuring that Muslims in Ireland who wish for their marriage to be legally recognised know how to achieve this.¹²¹

¹²¹ For a consideration of the challenges in addressing the issues in Ireland, also S. Leahy and K. O’Sullivan “Recognition of Muslim Marriages Ceremonies in Ireland: An Analysis” in K. O’Sullivan (ed) *Minority Religions under Irish Law: Islam in National and International Context*. Brill, 2019, 108