



**NULLITY IN IRELAND
2010**

The institution of marriage has always had a particular importance placed on it in Ireland. In fact,

“The State pledges itself to guard with special care the institution of marriage on which the family is founded and to protect it against attack” according to Article 41.3.1 of the Constitution.

Up until the introduction of the Family Law (Divorce) Act 1996, it was not possible for those who wished to remarry to obtain a divorce in Ireland. Their only option was to get a divorce abroad and apply for recognition of that divorce in Ireland under the Recognition of Foreign Divorces Act 1986 or alternatively to apply to the Courts for a civil annulment.

The ability of a couple to afford a foreign divorce may have been the preserve of the wealthier members of society. It is not surprising that if the grounds for a nullity application existed that it was considered a viable option.

Therefore, because of the non-availability of divorce, applications for nullity were often made in order to facilitate remarriage according to Walls & Bergin in the Law of Divorce in Ireland (Jordans, 1998) page 4.

What exactly is a Decree of civil nullity?

A Decree of civil nullity is granted on application to the High Court or to the Circuit Court. It states for reasons which will be outlined below that the marriage is invalid and therefore deems that the marriage never really existed in the first place.

Once a Decree of civil nullity is granted, the marriage is erased, both parties are seen to be single in the eyes of the law and are free to remarry (or more appropriately “marry” as they were never validly married in the first place).

Why would someone prefer a nullity instead of a divorce?

1. Religious or personal reasons
2. On a practical level, where the conditions for granting a decree of divorce have not been satisfied.
3. No ancillary financial and proprietary relief is available to the parties on declaration of nullity being granted.

How do you obtain a Decree of civil nullity?

Up until 1996 one had to apply to the High Court in order to obtain a Decree of civil nullity. However, the introduction of the Family Law Act 1995 gave jurisdiction to the Circuit Court to grant Decrees of civil nullity under Section 38 (2) of the Act. Contrary to common misconception, the grounds to apply for civil annulment have very little to do with the length of time that the parties have been married to each other.

In order to apply for a civil annulment one should understand the grounds on which it is permissible to apply:

Firstly, a marriage may be void or voidable.

A marriage is void (i.e. never actually existed at all) if:

1. The formalities required for the marriage have not been observed. For example, under Section 46 of the Civil Registration Act 2004 there are certain formalities which a couple must comply with. Notably, a Registrar must be notified in writing three months prior to the date on which the marriage is to be solemnised. The lack of compliance with other perhaps more obvious requirements will also invalidate the marriage. In one such case which went before the Circuit Court in 2008 the formality to have both spouses present at the wedding was flouted when one of the foreign national spouse's siblings "stood in" for them at the wedding, which was held abroad.
2. Either of the parties do not have the capacity to consent to a marriage.

There are four grounds which would mean that a person did not have the capacity to consent to a marriage:

- (i) If the marriage was bigamous or polygamous.

If either party to the marriage was already married and is not validly divorced then they cannot legitimately consent to marrying another person. In fact bigamy is a crime punishable by up to seven years imprisonment. Furthermore, in 2004 the Department of Justice introduced a requirement that Muslims seeking naturalisation must sign a form confirming that they had only one wife and would not marry a second one. This is because polygamous marriages are legal in most Muslim countries. Recently, a case went before the High Court of a Lebanese national. He married two women in Lebanon where polygamous marriage is permitted. He entered Ireland with his second wife and claimed asylum with his second wife. His first wife arrived in Ireland much later. The Department of Justice refused to grant a visa to the man's first wife and he challenged this in the High Court under Section 29 of the Family Law Act 1995. The decision of the High Court is awaited.

While the notion of bigamy may call to mind a scheming spouse with the intent to deceive, this is not necessarily always the case. In fact, the majority of cases pleaded on this ground concern circumstances where the previously married spouse is unaware that his or her divorce or annulment was actually invalid. For example, a person who received a Church annulment only is not entitled to remarry in the eyes of the State. If they do then the next marriage, while valid in the eyes of the Catholic Church, is void as far as the State is concerned. Another instance is where a foreign divorce which was obtained but not validly recognised in the State, if that divorcee subsequently remarries in Ireland, that marriage is void.

- (ii) Parties of same sex.

Same sex marriages are not recognised in this jurisdiction. The recently enacted Civil Partnership Act 2009, provides for a civil partnership but not full marriage.

Accordingly, if two people of the same sex get married, including a transgender person, then that marriage is void. While not related to marriage of transgender people, the recent case of *Lydia Foy -v- An t'Ard Chlaraitheoir and others* [2007] IEHC 470 confirmed that a transgender person is not permitted to be recognised as their "new" sex. Therefore if a transgender woman (i.e. born a man) was to marry a male it is almost certain that their marriage would be void on this ground.

(iii) Parties are within the prohibited degrees of relationship as follows*;

<p><i>A man may not marry within the following prohibited degrees of relationship:</i></p> <p>Consanguinity</p> <ol style="list-style-type: none"> 1. Grandmother 2. Mother 3. Father's sister (aunt) 4. Mother's sister (aunt) 5. Sister 6. Daughter 7. Son's daughter (grand-daughter) 8. Daughter's daughter (grand-daughter) 9. Brother's daughter (niece) 10. Sister's daughter (niece) <p>Affinity (spouses of relatives)</p> <ol style="list-style-type: none"> 11. Grandfather's wife (step grandfather) 12. Father's wife (stepmother) 13. Father's daughter (half sister) 14. Father's brother's wife 15. Mother's brother's wife 16. Son's wife 17. Son's son's wife 18. Daughter's son's wife 19. Brother's son's wife 20. Sister's son's wife <p>Affinity (relatives of spouse)</p> <ol style="list-style-type: none"> 21. Wife's grandmother (grandmother-in-law) 22. Wife's mother (mother-in-law) 23. Wife's father's sister 24. Wife's mother's sister 25. Wife's daughter (step daughter) 26. Wife's son's daughter 27. Wife's daughter's daughter 28. Wife's brother's daughter 29. Wife's sister's daughter 	<p><i>A woman may not marry within the following prohibited degrees of relationship:</i></p> <p>Consanguinity</p> <ol style="list-style-type: none"> 1. Grandfather 2. Father 3. Father's brother (uncle) 4. Mother's brother (uncle) 5. Brother 6. Son 7. Son's son (grandson) 8. Daughter's son (grandson) 9. Brother's son (nephew) 10. Sister's son (nephew) <p>Affinity (spouses of relatives)</p> <ol style="list-style-type: none"> 11. Grandmother's husband (step grandfather). 12. Mother's husband (stepfather) 13. Father's son (half brother) 14. Father's sister's husband 15. Mother's sister's husband 16. Daughter's husband 17. Son's daughter's husband 18. Daughter's daughter's husband 19. Brother's daughter's husband 20. Sister's daughter's husband <p>Affinity (relatives of spouse)</p> <ol style="list-style-type: none"> 21. Husband's grandfather (grandfather-in-law) 22. Husband's father (father-in-law) 23. Husband's father's brother 24. Husband's mother's brother 25. Husband's son (stepson) 26. Husband's son's son 27. Husband's daughter's son 28. Husband's brother's son 29. Husband's sister's son
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* Source: *Family Law Practitioner 2009 ed, edited by Geoffrey Shannon, Round Hall Sweet & Maxwell*

These prohibited degrees of relationship date back to the Marriage Act of 1537. Despite this very little updating has been done apart from one act in 1907 and another in 1921.

The Dail was called upon to update this archaic law in 2006 by a rural Galway man who wished to marry his deceased wife's niece. The man was shocked to find out that he risked criminal prosecution for going ahead with the marriage as it contravened the Marriage Act 1537.

The Deceased Wife's Sister's Marriage Act 1907 permitted a man to marry his dead wife's sister. The Deceased Brother's Widow's Marriage Act followed in 1921 permitting a woman to marry her dead husband's brother. It should be noted that the above legislation only applies where the marriage was terminated by death, not by divorce. This had a direct effect on a Cork couple in 2006. Maura O'Shea wished to marry Michael O'Shea who was her brother-in-law prior to her divorce from John O'Shea. The O'Shea's took their case to the High Court where they were eventually granted permission to have their marriage recognised by the State.

- (iv) Either party is under 18 years of age.

Since Section 31 of the Family Law Act 1995 came into force, unless judicial exemption from requirement has been obtained under Section 33 of the same Act prior to the marriage taking place, the marriage will be considered void if one of the parties is under 18 years of age at the date of the marriage. Just as in contract law, a minor cannot consent to entering a legally binding contract and if they do so it is null and void. In reality, underage marriage appears to be rarely used in applications for nullity.

3. Lack of Consent.

In order to enter into a valid marriage contract both parties must give full, free and informed consent to it. There have been various reasons cited as to why one could not give a full consent:

- (i) Mental incapacity.

It is the degree of competence necessary to have the capacity to enter a marriage. You have to be mentally competent to have the capacity to enter a marriage.

According to common law, a marriage void if either party lacks the mental ability to understand the nature and responsibilities of marriage. This lack of capacity could result from mental illness. Therefore, if it can be proved that one of the parties to the marriage at the time of the marriage ceremony was suffering from a psychiatric or mental conditions which would render them incapable of validly consenting to the marriage, that marriage can be deemed as void.

The strangely named Marriage of Lunatics Act 1811 says that a marriage entered into by someone who is found to be a lunatic by inquisition or any lunatic or person under a frenzy is void because the so called lunatic does not have the capacity to consent.

- (ii) Intoxication.

This is rarely used as a reason to claim lack of consent in this jurisdiction. The party must be intoxicated that they were wholly incapable of consenting. One suspects that the American jurisdiction of the state of Nevada may have a higher incidence of this particular pleading!

- (iii) Fraud, mistake and misrepresentation.

It has not always been the norm, however the Courts have accepted in limited circumstances that fraud, mistake or misrepresentation concerning a spouses nature and character can deem a marriage void.

Successful applications have been made to the Courts seeking nullity on the grounds that one of the spouses was in fact homosexual and non-disclosure of this amounted to inadequate knowledge to give consent.

Since P.F. -v- D.O'M [2001] 3IR1, it appears that misrepresentation can only be used in very limited circumstances. This decision was upheld in the Supreme Court decision of LB -v- T.MacC [2009] IESC,21 unreported Supreme Court March 6 2009 which was delivered by Kearns J. In this case the Petitioner wife claimed her husband had misrepresented to her that he was a wealthy successful businessman who got on very well with his family. After the marriage it transpired that none of this was true. The business was a failure, he was estranged from his family and within one year he had to sell the family home to pay his debts. Kearns J declined to grant an annulment as he found that the grounds related to the conduct of the husband not his character.

Mistake of misrepresentation as to a person's sexual orientation has been allowed as a ground to invalidate a marriage. For example, in F -v- F [1991] 1IR348 where the Respondent concealed the fact that he was gay from the Petitioner wife. The wife would never have consented to the marriage had she known.

(iv) Duress and undue influence.

Traditionally, this was one of the main grounds for an application for civil annulment.

If one is forced or put under pressure to enter a marriage by a spouse or any other parties then the marriage can be declared void for lack of free consent. In decades past, the vast majority of these cases would have concerned an unmarried pregnancy or "shotgun" weddings.

One of the most well known cases on the point was that of Griffith -v- Griffith [1944] IR35. In this instance, the male Petitioner was warned to marry the pregnant 17 year old female Respondent. He was told that if he did not the Gardai would be informed of his unlawful carnal knowledge. Under this duress, he married the woman. After his marriage, the Petitioner learned more about the facts of life and it transpired that he had never actually had sexual intercourse with the Respondent before the marriage. Naturally, it also transferred the Petitioner therefore was not the father of the child. On these grounds, a Decree civil nullity was granted.

In N (O/WK) -v- K [1986] 6ILRM, the Petitioner was 19 years old and the Respondent was 20 at the time of the marriage. She was pregnant and their respective parents forced the couple to get married. The marriage was found to be as a result of external pressures and such pressures were found to negative consent.

Duress can be in the form of pressure arising from the emotional ties from one party to another. For example, P.W. -v- A.O,C [1992] ILRN536, the Respondent told his then wife to be that he would kill himself if the wedding did not go ahead.

In a 2004 Circuit Court case, a Decree of civil nullity was granted where a spouse threatened violence on the female Petitioner and her family if she did not agree to marry him after she indicated to him that she wanted to get out of the engagement.

(v) Limited purpose marriage.

A limited purpose marriage is marriage to achieve some other end result. The most common form of limited purpose marriage or “sham marriage” is to gain residency or to prevent deportation.

It has recently been reported that the Garda National Immigration Bureau are investigation over 100 sham marriages in Ireland where EU nationals who have residency entitlement are being paid to marry non-EU nationals so that they might retain an Irish residency card. Sham marriages have been deemed by the Courts as void.

4. Voidable.

Voidable marriages are valid until a Decree has been granted to invalidate the marriage. Once it is granted, the marriage is deemed to be void ab initio. i.e. it is deemed retrospectively invalid (unlike a void marriage which was never actually valid in the first place). There are two grounds for a Decree of nullity in a marriage which is deemed voidable:

(i) Inability to consummate the marriage.

While not the most frequently used, this is possibly one of the more commonly known grounds for which a civil annulment is available. Consummation is deemed to have occurred where at any time subsequent to the marriage ceremony the married couple engage in an act of sexual intercourse which is “ordinary and complete, not partial and imperfect” according to D-e -v- A-g [1849] 1Rob. Eccl.279@279.

The inability to consummate can be from physical or psychological impotence.

What is surprising is that while the couple may have engaged in a sexual relationship before the marriage ceremony, as long as no sexual relations were had after the marriage, a nullity be granted on the grounds of impotence of one or the other parties. Finally, it was found that it is possible to obtain a Decree of nullity on foot of one’s own impotence in W -v- W [1981 ILRM] 2002.

(ii) Inability to enter and sustain a normal marital relationship

This ground first succeeded in the case of R.S.J -v- J.S.J [1982] ILRM263. In this matter it was found that because of the Petitioner’s schizophrenia he lacked the capacity to form a caring and considered relationship with his spouse. It was found that the grounds for annulment were validly established because of this incapacity.

Before this ground was introduced, impotence or non-consummation of marriage was the only ground to render a marriage voidable.

It is important that the incapacity exists at the time of entering the marriage.

In the Supreme Court matter of U.F (otherwise C) -v- J.C. [1991] 2IR330 the Petitioner sought an annulment on the basis that her husband was homosexual. This was unknown to her at the time of the marriage. She claimed therefore that he lacked capacity to enter and sustain a normal marital relationship. Finlay CJ confirmed that inability to enter a normal marital relationship was indeed a ground for nullity and that the reason for this incapacity could be from a mental illness or from an involuntary characteristic. Presumably, homosexuality would be deemed to be an involuntary characteristic.

It should be noted that nullity will not be granted because of the general immaturity of a party. In HS -v- JS [1992] 2SamLJ33 the Petitioner claimed that she had simply been infatuated with her Respondent husband and too immature to commit to marriage. Her Petition was refused, the Trial Judge stating that "immaturity is not a ground for nullity, unless it exists to such a degree as to prevent a person from giving full consent".

What exactly constitutes an inability to enter and sustain a normal marital relationship can be very much a subjective opinion to be decided by the Trial Judge. In the alternative, it may be found that there is an over-reliance on psychiatric evidence which is par for the course in nullity applications.

It is of concern that applications on such a general ground as inability to sustain a normal marital relationship would be granted solely or mainly on the basis of a psychiatric report. However, thankfully Judges have been seen to exercise their prerogative in deciding to put less weight on the expert evidence of psychologists where they deem it appropriate. For example in PC -v- CM, 11 January 1996 High Court (unreported) the psychiatrist giving evidence for the Petitioner believed she suffered from an immature personality disorder and therefore lacked the empathy to form a mature relationship. Psychiatrist for the Respondent gave evidence to the contrary. Laffoy J said that the issue which was to be decided was whether or not the Petitioner was capable of entering and sustaining a normal married relationship because of some inherent involuntary characteristic. He clarified that this decision was ultimately for the Court and not for the psychiatrist. In this instance the Decree was refused as Laffoy J found that the conduct of the Respondent was wilful and voluntary.

If the above is proved, what would act as bar to a decree of nullity being granted?

There are a number of matters which will prevent the Court from granting a decree of Civil Nullity;

(i) Appropriation

If the Petitioner had accepted the marriage in some way even though he or she knew that they would have been entitled to a Decree of nullity then they are deemed to have accepted the marriage, for example in the case of W -v- W 1952 P152, the Petitioner brought an application for nullity on the basis that the Respondent was impotent. Even though the Petitioner knew about the impotence she and the Respondent adopted a child together. This was held to be appropriation and therefore the Decree was refused.

(ii) Delay

In short, the quicker post-marriage an application for nullity is brought the better. However, delay is not an absolute bar to nullity but the Court will look for a reason as to why the delay occurred.

(iii) Collusion.

This has been defined by Baron JNE.P -v- M.C.1985 [5ILRM34] as an agreement between the parties so that the true case is not presented to the Court. This rule is to ensure that parties who wish to have their marriage annulled but for some reason do not meet the requirements for an annulment in order to prevent them from presenting an untrue case to the Courts in order to be granted that Decree.

(iv) Consequences of a Decree.

Where a marriage is void it never really existed. If a marriage is voidable once the Decree is obtained the marriage is void ab initio.

What is the difference between a Church Nullity and a Civil Nullity?

This report does not intend to dissect the complexities of an ecclesiastical nullity. While a form religious nullity is available in most religions, for the purpose of this report we will discuss nullity within the Roman Catholic Church as it is the most commonly sought church nullity in this jurisdiction.

It should always be remembered that an ecclesiastical nullity is entirely different to a civil nullity. Church law is not state law and if the church grants an annulment then the couple are still very much legally married. In fact, in a civil case no credence is paid whatsoever to the fact that a church annulment has been granted.

There are very well defined canonical grounds for marriage annulment. Once these have been established marriage annulment can proceed.

According to Canon Law of the Roman Catholic Church (and it has to be said, similar to civil law) in order to be valid marriage requires the proper intention at the time that vows are exchanged. The church accepts every marriage as valid until proven otherwise according to Canon 1060.

The church has two meanings for marriage, one is unitave which means the formation of an indivisible union. The other is procreative which is to produce new human life. If either of these two elements are excluded by the will of either spouse then no marriage is made on the wedding day according to Canon 1096.

A nullity will only be granted if it can be proved that on the day that vows were exchanged one of the essential elements for marriage was lacking. For example if one of the parties never intended to procreate.

An Ecclesiastical decree of nullity is granted by a church tribunal. Not unlike a court the tribunal process involves submitting the facts of the marriage with witnesses to the diocesan marriage tribunal. The tribunal evaluates the application and makes a judgement on the validity of the marriage. A neighbouring diocese acts as a second tribunal. Its role is to verify the judgment. Finally the Bishop approves it.

If either party disputes the result the decision may be appealed to the Roman Rota which is the highest appellate tribunal of the Roman Catholic Church.

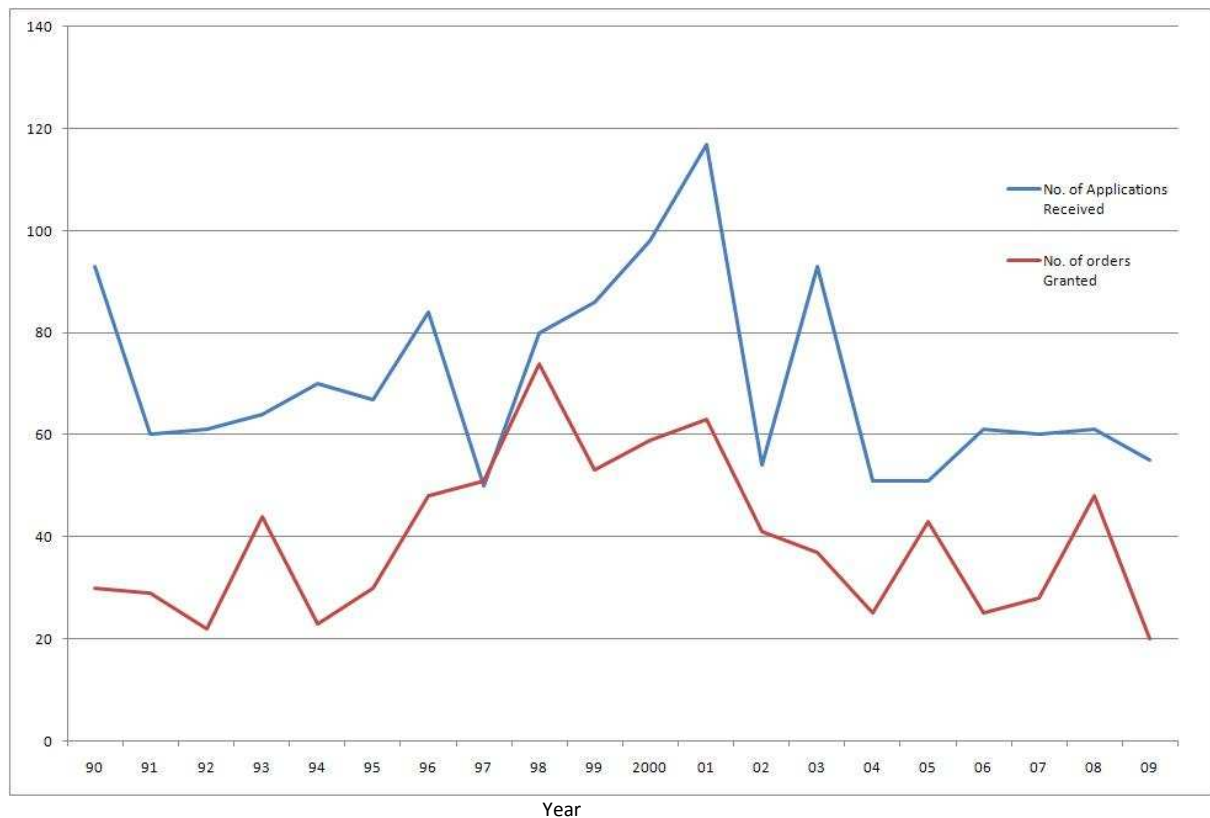
Expectedly a church nullity very much centres around good faith, high morals and honesty. If a person uses deceit to obtain a church annulment then it is seen as a sin. That person who fraudulently obtained a decree in order to remarry would commit adultery by remarrying.

An interesting point to note is that while the couple are free to remarry, if the condition which led to the invalidity of the marriage still exists, then the person who had that condition is still incapable of marriage.

What have the trends been for Civil Nullity Applications?

According to the Courts Service Annual Report 2009 there were 55 applications received for Civil Nullity in 2009. This compares to 3,716 Divorce applications and 1,627 Judicial Separation applications in the same year.

Below is a graph which has been compiled using data from the Law Society's Reform Committee Report 2001 and the Annual Courts Service Report 2009.



Is the Law of Nullity going to be reformed?

In October 2001, the Law Society's Law Reform Committee prepared an in-depth report entitled Nullity of Marriage: The Case for Reform. The purpose of the Law Reform Committee is to identify and focus upon specific areas of the law in need of update and reform; clearly the law of Nullity was deemed to be a priority for reform in 2001 and unfortunately this remains to be the case in 2010.

Some of recommendations of the Law Reform Committee are reproduced below;

1. *The concept of a voidable marriage should be abolished and the grounds which make a marriage voidable, including impotence and the inability to enter and sustain a normal marital relationship should be abolished. Cases which could be pleaded on those grounds should instead be pleaded under the divorce jurisdiction.*
2. *All restraints of marriage based on affinity should be abolished and legislation should be introduced to render void any marriages between a grand uncle and grand niece and grand aunt and grand nephew, a parent and an adoptive child, and between adoptive brothers and sisters. The prohibition against such marriages should apply even where the adoption order for some reason ceases to have effect.*
3. *The Marriage of Lunatics Act 1811 should be repealed as being over-inclusive and rendering incapable people who would be capable of marriage (in a lucid period) under the common law.*
4. *A Court should be enabled to appoint a relative or friend or statutory body on that person's or body's application, to protect the legal interests of a person suffering from an incapacity by challenging the validity of a marriage to which the incapacitated person is a party.*
5. *Limited ancillary relief on an equitable basis should be available as part of nullity decrees. Financial provision by way of ancillary relief should be finite and should have the objective of enabling the financially weaker spouse to attain financial independence where possible. It should be based on criteria similar to those used in the divorce legislation, subject to the finite nature of any award.*
6. *In relation to the family home, a court should have discretion to permit a previous "spouse" (a party to a void marriage) to continue in residence in the family home until property adjustment or other financial orders are carried into effect and their consequences realised, for example, partition of the property and sale.*
7. *The courts should be enabled to order that a right of residence in the family home should continue for a specified time.*

Conclusion

Despite the introduction of Divorce in this jurisdiction almost 15 years ago, the statistics and trends for nullity applications and orders granted have remained steady and actually increased in some years. This is of concern and could indicate that people are choosing to go down the route of applying for an annulment when it is not a genuine case of nullity. There may be a number of reasons for this;

Currently if a couple wish to get divorced they must be living separate and apart for four out of the previous five years of the marriage. This may be a factor which might entice people to apply for nullity as spouses do not have to be living separate and apart for any particular period of time.

There are no ancillary reliefs (for example maintenance and property adjustment orders) granted with a Decree of Nullity. Some applicants may seek a Decree of Nullity in to avoid ancillary reliefs which would be granted on Divorce and Judicial Separation. If clean break Divorce was introduced in certain circumstances, for example in a marriage of short duration with no children, perhaps it would solve this problem.

The law of nullity is archaic and badly in need of update. There is a general lack of awareness in the distinction between Civil Nullity and Church Nullity. However, the option of Nullity should be retained for genuine cases; perhaps with more clarity in the law in the form of specific legislation.