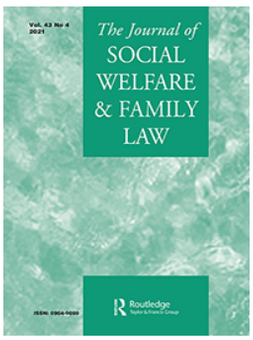

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Spousal maintenance in Ireland: past, present and future

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ABSTRACT

While spousal maintenance laws have come under the spotlight in many common law jurisdictions over the past two decades in particular, there has been little discussion of the topic in academic, legislative or judicial discourse in Ireland. In this context, this article provides a unique, up-to-date analysis of Irish maintenance laws, highlighting the pressing need for reform. It explores the historical context of the governing Irish laws before drawing on available empirical research and the 2021 decision of the Court of Appeal in *N.O v. P.Q.* to highlight the problems which continue to beset the scheme. Having contextualised the key issues which future reform in this area must seek to address, the article then turns to analyse recent proposals for a more formulaic approach to spousal maintenance in Ireland and considers the likelihood of such reform materialising in the medium term.

KEYWORDS

Spousal support; financial provision; marital obligations; divorce; judicial discretion

Introduction

Spousal maintenance remains a topical, if not often controversial, subject across the common law world (Baker 2012, Coulter 2017). On one hand, some jurisdictions have moved away from spousal maintenance with it now, for example, playing 'a very limited role in modern Australian law' (Parkinson 2009, p. 446). On the other hand, many more jurisdictions have sought to retain a basis for spousal maintenance in apposite cases albeit shifting from a discretionary assessment of needs and means towards the introduction of a more formulaic or mathematical framework for the calculation of quantum and duration. In this regard, guidelines and formulae have been introduced with varying degrees of success in many US states[1] and Canada[2] while the potential for such reform also received considerable attention from the Law Commission of England and Wales in its 2014 *Report on Matrimonial Property, Needs and Agreements* (paras.3.121–3.159).

However, while most common law jurisdictions have given some consideration to their approach to spousal maintenance in recent decades, one jurisdiction has thus far largely failed to engage with the issue: namely, Ireland.[3] Limited attention has been focused on the topic in the jurisdiction with it largely being ignored in legislative, judicial and academic discourse. This article seeks to address this lacuna in the literature, highlighting, in particular, the pressing need for the reform of Irish spousal maintenance laws.

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As repeatedly evidenced in empirical research findings reported over the past 15 years, Irish spousal maintenance laws remain highly discretionary, unpredictable and inconsistent. These shortcomings have recently raised the concerns of the United Nations Committee on the Elimination of Discrimination against Women (2017). In its concluding observations of the combined sixth and seventh periodic reports of Ireland published in March 2017, the UN Committee noted it was 'concerned' by the absence of data on the economic consequences of divorce on women and girls and by the fact that '[t]here is no statutory maintenance authority and no amounts are prescribed by legislation, which compels women into litigation to seek maintenance orders' (para.56). As well as recommending the Irish State to:

> Undertake research on the economic consequences of divorce on both spouses, with specific attention to the differences in spouses' earning potential and human capital, which addresses genderbased [sic] economic disparities between spouses … particularly focusing on whether judges take these factors into account in their decisions',

it also recommended that it '[c]onsider establishing a statutory maintenance authority and prescribing amounts for child maintenance' (para.57; the report submitted by the Government of Ireland to the UN Committee in 2016 merely noted at para.276: 'The economic impact of separation and divorce remains a developing area of research and study …').

Indeed, an in-depth analysis of Irish spousal maintenance laws appears particularly timely in light of the stated intention of the Law Reform Commission of Ireland to consider the discretionary approach adopted to ancillary relief provision generally on divorce (note the term 'ancillary relief' continues to be the dominant terminology in Irish jurisprudence and equates with 'financial provision' as more commonly referred to in England and Wales). In its Law Reform Commission of Ireland (2019, p. 16), the Commission states its aim, in particular, to consider 'to what extent any further guidance may be provided in order to ensure a consistency in the approach taken to the exercise of … judicial discretion'. While the review will undoubtedly consider all aspects of ancillary relief under Irish divorce law, the governing maintenance laws, specifically, will likely receive a high degree of attention (note, the need for the reform of the ancillary relief scheme on divorce was also recently highlighted by the Law Society of Ireland 2019).

However, the current problems in this area cannot be fully understood without a deeper appreciation of the historical context of maintenance in Ireland. This article therefore provides a unique, up-to-date analysis of Irish maintenance laws – drawing on various empirical findings – while contextualising the key issues that future reform of this area must address (although the term 'maintenance' is not used, nor is there any reference to 'support', for the purposes of this paper – and as accepted in academic literature, see Crowley 2013, p. 608 – the modern framework for 'maintenance' in Ireland will be viewed in the context of section 13 of the Family Law (Divorce) Act 1996 which deals with periodic payments and lump sum orders).[4] It also analyses recent proposals for a more formulaic approach to spousal maintenance and considers the likelihood of such reform being undertaken.

Part I: evolution of spousal maintenance in Ireland

Spousal maintenance laws have long proved problematic in Ireland with a highly restrictive approach adopted, particularly for much of the twentieth century. Until the mid-1970s, the law regulating matrimonial breakdown in Ireland 'had remained virtually unchanged for over a century'[5] while the situation was compounded by Article 41.3.2° of the Irish Constitution which prohibited legal divorce until 1996.

Historically, Irish law did not, for example, impose a generally enforceable obligation on spouses to maintain each other and their children beyond cases of serious neglect. In this context, the ability to access spousal maintenance was severely limited. Where there was adultery, cruelty or unnatural practices (see Law Reform Commission of Ireland, 1983, pps 1–15 for a discussion of each), a divorce *a mensa et thoro* could be sought and, where granted, the courts could order the payment of 'alimony' and 'interim alimony' by a husband in favour of his wife. However, several bars to a decree existed – including adultery on the part of the applicant – while the expense involved in pursuing a petition for same also proved prohibitive for many vulnerable wives (Duncan 1972). Alternatively, where a husband had deserted his wife and had refused or neglected to maintain his wife and children despite having the means to do so, he too could be ordered to pay maintenance under the Married Women (Maintenance in Case of Desertion) Act 1886.[6] Consequently, if the marriage was breaking down but the husband had not 'deserted' the family, a woman effectively had to 'leave the house as a preliminary to establishing her legal rights'.[7] Again, relief under the 1886 Act was not available to a wife where she was found to have committed adultery and the method of enforcing orders did 'not always [prove] effective' (Duncan 1972).[8] Thus, while it was technically possible to secure financial relief in the form of maintenance on marital breakdown in at least some cases, it could be 'a difficult procedure, emotionally damaging and very often humiliating'.[9] There was, moreover, no scope under either scheme for a court to make property-based orders for the benefit of a spouse with the property rights of landowners enjoying heightened protection.

Conscious of the precarious position of financially vulnerable women and children, in December 1972, the Report of the Commission on the Status of Women was published. Introducing the Report to the *Seanad* (Irish Senate), Senator Robinson described it as 'the most important social document in recent Irish history'.[10] Notwithstanding the ban on divorce, Ireland had, as Robinson put it, 'a very real problem of breakdown of marriage'[11] prompting the Commission to advance numerous recommendations. Among these, the Commission recommended, that in the event of:

> Any dispute coming before the Courts it should be for the Courts to decide whether reasonable arrangements have been made between the husband and wife as to the disposal of family income in respect of (a) their current standard of living and (b) provision for the domestic home, family emergencies and old age.[12]

Two years later, the Committee on Court Practice and Procedure: Desertion and Maintenance (1974) reported that although desertion was 'not a new social problem. in recent years its existence as a growing social evil has come to be recognised, as has the need to do something to alleviate the hardship it causes'. Notwithstanding that statistics concerning desertion were 'difficult to come by', it reported that in the first three years of

operation of the Department of Social Welfare's 'Deserted Wife's Allowances', approximately 4,500 claims were submitted. However, it warned: 'This figure may well represent only the worst cases' (Committee on Court Practice and Procedure, 1974; see also Duncan 1972, who noted that within 15 months of its introduction in 1970, the Deserted Wife's Allowance Scheme saw 1,635 wives and 2,309 dependent children receiving benefits albeit that he also felt this was 'only … the tip of the desertion iceberg' given the 'very stringent means test imposed' and the 'very strict definition' of desertion). Highlighting the difficulties also created by non-existent or sporadic maintenance, the Committee too called for reform. In particular, it recommended updating the basis of an order for maintenance by moving away from desertion and towards an idea of 'family default' which would include 'failure of the spouse who is responsible for the support of the family to provide a reasonable standard of living for them having regard to the means and earnings of that spouse'.[13]

These reports prompted a legislative shift towards a somewhat less restrictive approach to spousal maintenance through the resulting Family Law (Maintenance of Spouses and Children) Act 1976 (the then Minister for Justice noted the 1975 Bill drew 'heavily on the [1974] report').[14] First, the Act sought to ensure that '*both* spouses should have a duty to maintain each other and their children, *independent of any question of desertion*'.[15] In this regard, Minister for Justice Cooney argued that the legislation would 'place the parties of marriage in a legal position which will reflect what is commonly accepted to represent their moral responsibilities to each other and their children'.[16] Second, rather than applying an automatic bar to relief where adultery was committed by an applicant, the 1976 Act allowed judicial discretion on questions of conduct (section 5(3)). Third, notwithstanding that an approach based on judicial discretion was deemed the 'only possible' solution,[17] the upper limits on the maintenance payments capable of being ordered by the courts under the new legislative scheme were significantly higher than those available to that juncture. Thus, pursuant to section 5 of the Family Law (Maintenance of Spouses and Children) Act 1976 the courts were empowered to make an order against a spouse where they had not provided maintenance for the family as was 'proper in the circumstances' having regard to a list of statutory factors and 'all the circumstances of the case'.[18] While maintenance orders made in the District Court under the 1886 Act were capped at £15 per week in the case of a spouse and £5 per week for each dependent child,[19] the amounts capable of being ordered under the new legislation were pointedly higher at £50 and £15 per week respectively.[20] Fourth, in a 'major extension to enforcement procedures',[21] section 10 introduced provisions for the attachment of earnings. This was 'a new concept' in Irish law but one that had been 'sought generally'.[22]

However, notwithstanding the progress made through the 1976 Act, the availability of maintenance where a divorce *a mensa et thoro* was granted remained highly restrictive as highlighted in the Law Reform Commission of Ireland's 1983report on the topic (*Report on Divorce A Mensa et Thoro and Related Matters*). Acutely aware of the constitutional ban on divorce, the Commission proposed that 'a new matrimonial cause of proceedings for legal separation' be introduced (p.58) and the remedy of divorce *a mensa et thoro* be abolished (p.54). Concluding, in particular, that the law on 'alimony' was 'clearly in need of reform' (p.54), it noted the continued discrimination against husbands who could not seek alimony where a divorce *a mensa et thoro* was granted and the unavailability of child maintenance under the existing system. It recommended bringing legal separation in line

with the slightly more liberal approach of the 1976 Act in terms of how it dealt with conduct and the availability of maintenance (p.56).[23] Reflecting on the continued limitation of maintenance orders to periodic payments and the unavailability of property orders as a means of meeting the needs of spouses under Irish law, the Commission (p.56) observed that the law relating to permanent alimony could 'be criticised for being too restrictive'. Consequently, the Commission considered (p.57) 'it desirable for the proposed legislation to permit the Court to make orders for the payment of lump sums and for the transfer of property, with the consent of the spouses, and for related matters'.

In light of the subsequent rejection by the Irish public of the 10th Amendment to the Constitution Bill 1986 which had sought to abolish the ban on divorce, the proposals advanced by the Law Reform Commission on the reform of *divorce a mensa et thoro* gained increased attention as did those proposed in the *Report of the Joint Oireachtas Committee on Marriage Breakdown* in 1985. In addition to advocating for the introduction of a remedy of judicial separation, the latter Committee again emphasised the importance of empowering the court to make a range of orders for ancillary relief provision, rejecting any suggestion of the need to secure the consent of the spouses. These powers, the Committee suggested (para.7.3.8), ought to be exercisable having regard to the best interests of the family as a whole and, in particular, the interests of the children which 'should be paramount during their minority'. On the issue of maintenance, although the Committee accepted that the Family Law (Maintenance of Spouses and Children) Act 1976 had 'operated reasonably well', it was 'not without its faults' (para.7.4.12). While it recommended that the courts ought to be able to make an order under the 1976 Act when granting a judicial separation, it highlighted (para.7.4.16) a number of improvements which were required including the need to ensure 'that the parties ... be under a statutory obligation to provide the court with a statement of their income and assets, to assist the court in determining the level of maintenance to be awarded, if any'.

Many of these recommendations were subsequently introduced through the Judicial Separation and Family Law Reform Act 1989. Codifying various statutes governing the consequences of marital breakdown, the 1989 Act established the grounds for the award of a decree of judicial separation and empowered the court to make a wide range of ancillary relief orders in line with those proposed by the Committee. As well as adopting various provisions contained in the 1976 Act, the 1989 Act also introduced property adjustment orders, pension adjustment orders and lump sum payments such that maintenance, whether for the benefit of a child or spouse, was no longer confined to an order for periodic payments. The Judicial Separation and Family Law Reform Act 1989 was later repealed and replaced by the Family Law 1995 which now governs judicial separation.

The constitutional ban on divorce was finally removed following a second divorce referendum in 1995. Article 41.3.2° of the Irish Constitution now provides for the legal dissolution of a marriage, enumerating the basic criteria to be fulfilled to successfully obtain such a decree. The new constitutional provision was supplemented by the enactment of the Family Law (Divorce) Act 1996, by and large mirroring the approach to ancillary relief and maintenance provision adopted under the 1989 and 1995 Acts. Whether these legislative changes have produced an Irish spousal maintenance scheme which is now fit for purpose, however, still remains highly questionable.

Part II: current spousal maintenance law & practice

Legislative framework for spousal maintenance on divorce

Where an application is *not* being made for judicial separation or divorce, a spouse can continue to seek maintenance pursuant to the Family Law (Maintenance of Spouses and Children) Act 1976 through an application made directly to the local District Court.[24] More commonly, however, where a marriage breaks down the spouses will proceed for judicial separation or divorce in the Circuit Court. As a pre-condition to a decree of divorce, Article 41.3.2° of the Constitution states that 'proper provision' must be made for a dependent spouse or children. To achieve this end, the Family Law (Divorce) Act 1996 empowers the courts to make a wide range of financial and property orders as part of an overall 'package' solution (Scherpe 2012, p. 476).

Section 13 of the 1996 Act deals with periodic payments and lump sum orders, whether for the benefit of a spouse or dependent child.[25] Pursuant to section 13(1), on granting a decree of divorce or at any time thereafter, the court may make a periodic payments order,[26] a secured periodic payments order[27] or an order that either of the spouses shall make to the other spouse a lump sum payment or lump sum payments of such amount or amounts and at such time or times as may be so specified.[28] Lump sum payments may be made as a 'lump sum' or may be made by instalments per section 13(3). The court may also require that these instalments be secured or, continuing the approach originally adopted in the 1976 Act, may make an attachment of earnings order (if the latter, O'Brien 2020, notes the amount of the payment 'should be specified including the times at which these are to be made' with consent orders 'often' providing for increases in accordance with the Consumer Price Index).[29]

In establishing whether an order for maintenance ought to be made or, if so, how quantum ought to be calculated, significant discretion is afforded to the court.[30] As constitutionally mandated, and as noted above, the court must ensure 'proper provision' having regard to the circumstances for a spouse and any dependent children. In this regard, section 20 of the 1996 Act requires the court to consider, 'in particular', a non-exhaustive list of statutory factors.[31] Whether 'proper provision' ultimately requires any order for child or spousal maintenance to be made is thus at the discretion of the court. Moreover, given the holistic nature of any provision made, it is open to the court to make orders, for example, regarding the ownership of property or the exclusive occupation of the family home with such orders sometimes having a quasi-maintenance effect.[32]

As regards the potential duration of periodic payments, section 13(4) provides that such orders 'shall begin not earlier than the date of the application … and shall end not later than the death of the spouse … in whose favour the order is made or the other spouse concerned'.[33] Although pursuant to section 13(2) the court may order a spouse to pay a lump sum to the other spouse to meet 'any liabilities or expenses reasonably incurred' in maintaining the family before the making of an application, it has been observed that 'this seldom occurs' (O'Brien 2020).[34] Section 13(5) provides that upon the remarriage of the spouse in whose favour an order is made for periodic payments or secured periodic payments, such order shall cease to have effect (except as respects overdue payments). Equally if, after the grant of a decree of divorce, either of the spouses concerned remarries, the court shall not make an order under section 13(1) in favour of that spouse. While the Act is silent on the impact of cohabitation on the availability of

orders, it has been suggested that 'a court is unlikely to impose a maintenance payment where a dependent spouse is cohabiting with a new partner in circumstances similar to that of husband and wife' (O'Brien 2020).[35]

Finally, Irish law does not apply a principle of 'clean break' (see Martin 2002, Crowley 2018, Keena 2020)[36]: as O'Brien (2020) notes, although maintenance orders can be limited in duration, they are 'typically open-ended'. Moreover, ample scope is left to spouses to seek variation or review of any provision made indefinitely. Thus, in 'one of the most controversial aspects of the Divorce Act' (Law Society of Ireland 2019, p. 38), section 22 provides that a spouse may return to court at any time with a view to varying a maintenance order, other than a lump sum order payable in full,[37] or apply for a maintenance order in the future.[38] This approach applies notwithstanding any order of the court or any 'full and final settlements' that may have been reached.

Principles guiding the exercise of discretion

While it was clearly a 'deliberate policy decision by the legislators' to afford broad discretion to the judiciary in determining ancillary relief issues (Martin 2005, p. 17), it might have been assumed that the latter would take up the baton and perhaps develop some guiding principles. Such developments have, however, been largely lacking, particularly in relation to spousal maintenance. Despite this, what does appear clear is that notions of fairness play an important role in relation to ancillary relief provision broadly construed. Thus, although the relevant statutory language 'does not erect any automatic or mechanical rule of equality',[39] it has been observed that 'the clear objective is to provide a *fair outcome*, bespoke to the individual and specific circumstances of each case … with the *overarching aim of achieving fairness and justice* between the parties' (cf Herring 2005).[40]

In relation to spousal maintenance, the 'standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses commenced to live apart from one another, as the case may be', a factor to be considered by the court under section 20(2)(c), appears to be of particular importance.[41] As Hogan J explained in *C v C*, 'where it is financially possible to do so, the wife is entitled to receive maintenance as will endeavour to match the standard of living which she previously enjoyed prior to the separation'.[42] However, the 'inevitable reality' that financial needs may be different post separation, thereby affecting the standard of living 'that can realistically be expected to be enjoyed', has recently been acknowledged.[43]

Continued challenges in contemporary spousal maintenance law in Ireland

Unfortunately, despite the comprehensive legislative framework that now exists, evidence from practice speaks to the challenges which continue to beset Irish spousal maintenance laws.

First, notwithstanding the detailed provisions contained in section 13 and the absence of a 'clean break' principle, it appears orders for periodic spousal maintenance remain uncommon in Irish practice. Reflecting on 50 judicial separation and divorce cases which were concluded in six Circuit Court areas during its study in 2018, the Law Society of Ireland found low rates of spousal maintenance.

> In only 11 of the 50 cases, were orders made for spousal maintenance (invariably paid by husband to wife), though there were a further three lump sum payments ordered, and orders relating to other assets in three cases (Law Society of Ireland 2019, p. 23; note, there may have been orders in place from any judicial separations that had been secured that were not reported; see also chapter 3).[44]

These findings tally with various earlier research studies. Mahon and Moore reported findings emerging from 87 cases observed and analysed in 2007 in three diverse Circuit Courts (Mahon and Moore 2011, p. 36; the study involved a large inner city court, a regional court and a rural court). While not providing specifics, they identified a 'lack of spousal maintenance' which they noted 'seems to be a prevalent aspect of divorce settlement cases in Ireland' (p.56).

Albeit relative, the presence of dependent children, however, appears to potentially increase the likelihood of spousal maintenance being awarded. Based on her research in the Irish Circuit Courts in 2006–2007, Coulter concluded that although 'there were a few cases where wives in long marriages that came to an end, and who were past working age, received ongoing maintenance', maintenance for spouses 'was infrequent and very rare where there were no dependent children' (Coulter 2009a, p. 64; see also Courts Service/Coulter, 2007–09). She reported, for example, that in only 5% of divorces and judicial separations granted in the Dublin Circuit Family Court in October 2006 did the wife receive ongoing maintenance payments (Courts Service/Coulter, 2007a, p.28; namely seven cases out of the 154 divorces and judicial separations granted). Moreover, reporting on 65 analysed cases of the Eastern Circuit Court from October 2006, maintenance for children was made an order of the court in only half the cases that had dependent children (Courts Service/Coulter 2008, p. 41). In only two cases was maintenance for both a wife and children agreed and made an order of the court, while in just three cases, 'all involving older couples', was maintenance for a wife made an order as part of the consent.

Similarly, in Buckley's (2007) analysis of 89 case file questionnaires completed by 44 practising family law solicitors in 2002, notwithstanding that 'maintenance' for the purposes of the research was considered as any periodic payments, whether for the benefit of the recipient spouse *or* children, the relative importance of such payments for the benefit of children again came to the fore.[45] She reported (pp. 63–64) that there were dependent children in 31 of the 34 marriages where periodic payments were agreed, while dependent children were also present in 21 of the 26 cases where periodic payments were ordered. As such payments were most common in short marriages, this too, it was surmised, spoke to the need to support dependent children (pp. 69–70).

While it remains open to question as to whether spousal maintenance is the optimal way to address gender-based economic disparity post-divorce, such payments remain essential in many cases to cushion the economic shock of separation, particularly for women (see Fisher and Low 2016). Indeed, the importance of such payments in preventing or alleviating post-separation poverty has long been recognised in Ireland. In considering lower income groups in their study, Mahon and Moore (2011, p. 52) noted 'families are very dependent on the residential mother and maintenance payments were a crucial element in avoiding poverty'. Likewise Buckley (2007, p. 77) reported 'wives are much more reliant on maintenance and social welfare, and hence are more in need of financial assistance on marriage breakdown'. Consequently, the low rates of spousal maintenance evidenced in the various studies considered above are liable to potentially entrench the gender-based economic

inequalities which already exist between men and women in Ireland (O'Sullivan 2016a, Holland 2021; see generally, Miles and Hitchings 2018, Ellman 1989). Moreover, the fact that maintenance for spouses appears to correlate somewhat with the presence of dependent children is a further cause of concern. Despite Irish family law policy ostensibly seeking to promote an approach aiming at a 'fair' outcome for all parties concerned – with fairness presumably including the need to address post-divorce economic disparity between former partners, particularly where attributable to joint decisions made during a marriage – at least a certain cohort of the judiciary seem to continue to view spousal maintenance as primarily an indirect means of relieving economic hardship for children (similar findings were reported in England and Wales, see Miles and Hitchings 2018).

Second, where spousal maintenance is ordered or agreed, empirical studies also show high levels of inconsistency in how it is calculated in Ireland. O' Shea (2014) observed 1,087 unique judicial separation and divorce cases between October 2008-February 2012 in the eight Irish Circuit Courts and analysed 40 case files. She reported that the courts determinations as to maintenance payments 'did not use any set criteria or formulae' (p.261) with child and spousal maintenance calculated on 'a highly discretionary, individualised assessment of evidence and submissions' (p.131). As a result, she found that 'inconsistent child and spousal maintenance orders . . . [were] the hallmark of maintenance applications in the Circuit Court' (pp.131–132). Similar inconsistency was reported by Buckley (2007, p. 78 noting the varying approaches of the judiciary to the determination of 'proper provision' and concluding that 'family property provisions are not being applied uniformly on a national basis') and Coulter (2009a; see also Courts Service/Coulter, 2007–09). Although, based on the judicial precedents noted above, a consideration of the marital standard of living ought to be a key factor in determining eligibility and guiding calculations, whether this factor receives adequate attention in practice appears dubious. Buckley, for example, noted that '[t]he effect of marital responsibilities on earning capacity was . . . not much referred to, nor was the parties' standard of living prior to the breakdown of the relationship' (Buckley 2007, p. 73).[46]

In addition to the uncertainty this unstructured approach creates in predicting judicial outcomes, it also ensures there is little 'shadow of the law' under which private bargaining in relation to spousal maintenance may take place. The arbitrary nature of maintenance calculations and its impact on settlement negotiations has been highlighted in recent times by O' Shea (2014, p. 261) and the Law Society of Ireland (2019, p. 30). This is particularly concerning given the high settlement rate in Irish divorce practice (Courts Service/Coulter 2007a, 2007b, 2007c). Moreover, while the vulnerability of financially weaker spouses could be offset by the potential protection afforded by the constitutional mandate to ensure 'proper provision' as a pre-condition to a decree of divorce, it appears many courts are reluctant to disturb a settlement reached with legal representation (Buckley 2007, O'Sullivan 2016b; cf Law Society of Ireland 2019).

Analysis

Irish spousal maintenance laws have come a long way in the past 30 years. Yet while a much less restrictive approach is now adopted (at least at a legislative level), serious weaknesses still remain. Admittedly, given the lack of in-depth data on the precise financial positions of the parties involved in the above empirical research projects, it is

impossible to say whether or to what extent proper, fair or adequate provision was made for financially weaker spouses involved. Moreover, it is important to recognise that the low rates of periodic spousal maintenance may be partly attributable to offsetting or restructuring whereby property adjustment orders, in particular, may be awarded (or adjusted upwards) in lieu of maintenance. Mahon and Moore (2011) identified the 'quasi-maintenance effect' of some property settlements, citing cases where, for example, the equity in the home was transferred to the wife in lieu of, notably, child maintenance (p.45; Miles and Hitchings 2018 raised their concerns about this so-called 'present bias' phenomenon which has also been reported in England and Wales). Similar trends were also observed by Fahey and Lyons (1995), Buckley (2007) and Coulter (2009a; see also Courts Service/Coulter, 2008) albeit that the manner in which an aggregated value for child or spousal maintenance is arrived at in such circumstances remains obscure.

Notwithstanding these caveats, however, the trends emerging from the studies outlined here remain worrying and no doubt contributed to the concerns raised by the UN Committee on the Elimination of Discrimination against Women (United Nations Committee on the Elimination of Discrimination against Women 2017). Given the highly discretionary nature of Irish ancillary relief law, the apparent reluctance of many courts to award spousal maintenance and the general difficulty in predicting the outcome in any contested case, financially vulnerable spouses may be discouraged from making a claim. The inherent unpredictability of Irish spousal maintenance laws also creates further difficulties for those seeking to reach a settlement out of court: as Baker (2012) notes, '[w]ithout sufficient guidance on what an award might be, many women – even those in fairly long-term marriages – forego even attempting to secure alimony because bargaining for it is too difficult'.

A key challenge appears to be the confusion or ambiguity regarding the purpose of Irish spousal maintenance laws. On one hand, the importance of the standard of living test (at least at a principled level), coupled with the fact that periodic maintenance payments must cease on the remarriage of the recipient spouse, suggests a relatively strong 'non-compensator' or needs-based focus. In this regard, it is the needs of dependent *children* which appear to play a determining role in many cases: the ability to secure *spousal* maintenance, in and of itself, still appears quite limited.

On the other hand, recent case law hints at a more modern, less restrictive approach coming to the fore which views the purpose of maintenance, not just as a means of relieving the economic hardship of children, but as also playing an important role in addressing post-separation economic inequalities between spouses.[47] In particular, the 2021 decision of the Court of Appeal in *N.O. v P.Q.* is of significant importance.[48] Representing a rare examination by the Superior Courts of the issues specifically arising vis-à-vis spousal maintenance, the case highlights various problems with Irish spousal maintenance laws and, in addition to identifying a generous basis of provision, brings further attention to the need for reform.

Part III: *N.O. v P.Q.* [2021] IECA 177

N.O. v P.Q. concerned the judicial separation of a couple who had been together for 23 years and were parents to three children, two of whom suffered a disability.[49] At the initial High Court hearing in 2017, the children were all dependent. The family had lived

together on the family's dairy farm which had an agreed valuation of €1.1million and was held in the sole name of the husband.[50] The husband also had an income potential 'in excess of €100,000 gross annually'.[51] Throughout the marriage, in addition to completing the housework and providing for the care of the children, the wife worked on the farm.[52] While she had completed some off-farm courses during the marriage, she did not obtain employment as a result. After the couple separated, she obtained a 'once-off work opportunity' for 9 weeks at approximately minimum wage level.

Prior to the 2021 hearing, the wife had received €320,000 in two lump sum payments, and her husband's pension, worth approximately €55,000, was transferred to her. Child maintenance of €1,200/month had been ordered for the children's remaining dependency (due to expire in 2020) with spousal maintenance of €800/month (equivalent to €184.75/week) ordered by the High Court, albeit time limited to a period of four years. The wife appealed the provision made with the appeal centring on the issue of spousal maintenance. She contended that the trial judge failed to make 'proper provision' for her in both the quantum and duration of the spousal maintenance ordered. Her appeal was successful.

As well as finding there was a 'significant overestimation' by the High Court of the future likelihood of the wife earning an income,[53] the Court of Appeal placed considerably more weight on the need to compensate, or 'properly value', the appellant for her 'significant contribution . . . made to the successful dairy enterprise on the farm'.[54] Further emphasising the compensatory basis for the updated order, the Court concluded that it was not:

> . . . adequately weighed in the balance by the trial judge that the wife's negligible earning capacity was a direct result of the marriage and the *parties' joint decision* . . . that she should devote her life to being primarily a wife and a mother actively assisting in the operations of the family farm . . .[55]

Focusing on the non-compensatory aspects of the claim, the Court noted that 'insufficient weight' was attributed to the continuing disabilities of the children and 'the appellant's ongoing and likely future obligations in regard to same – both legal and moral'.[56] Each of these factors, the Court held, 'required appropriate consideration and represented highly salient circumstances of the case in the context of her maintenance application'.[57] As a result, the Court found a considerably more generous basis for provision and doubled the spousal maintenance ordered to €1,600/month (€369.23/week). The Court also dispensed with the term limit previously placed on the maintenance order.[58]

Throughout the judgement, the court laid down a number of important principles. It highlighted the need to differentiate between 'cogent evidence' of established earning capacity on the part of a claimant and 'mere contentions' advanced by a respondent.[59] In a long marriage, the court held, 'it is insufficient to rely on employment experience that either pre-dated the marriage or pre-dated the birth of children in the marriage or otherwise was of short duration',[60] while '[w]ork experience during the marriage or short-term activities are not to be confused with evidence of capacity to find remunerative employment'.[61] In setting out a relatively stringent test to determining earning capacity, a court, it explained,

> Must be satisfied that the prospect of stable employment is *real*, and endeavour to assess the *likely* nature and extent of the income to be derived from it and the *availability or likely availability* of ongoing employment in that field within a *reasonable* distance of the place of residence of the dependant spouse before ascribing an earning capacity amounting to self-sufficiency and reducing or denying periodic spousal maintenance payments *in futuro*.[62]

In addition, the Court of Appeal set a high bar vis-à-vis the adoption of term orders for maintenance holding that,

> Where a court considers building into a maintenance order a future automatic reduction or "step-down" in the level of periodic payments within a specified time, or where a court contemplates imposing a term upon the order, it must be based on a *high degree of confidence and certitude* that by the contemplated date the dependant spouse will be in a position to obtain adequate employment at a specific level of remuneration *of a permanent and stable nature.* [63]

Finally, the Court highlighted the importance of ensuring transparency in the process:

> It is important that the trial judge engages with the subcategories in a checklist manner and carries out the exercise of evaluation rigorously, clearly identifying those subcategories that are . . . considered relevant . . . and identifying the reasons for the determination in each case. It is of *critical importance* in the making of ancillary relief orders, which potentially will have far reaching and lifelong repercussions for both parties, that the *checklist evaluation is transparent and reflects a clear rationality*.[64]

Thus, while there may be debate as to the ongoing relevance of spousal maintenance in some jurisdictions (Shakargy 2021), the decision in *N.O.* appears to represent a clear restatement by the Irish Superior Courts of the importance it continues to play – or *ought* to play – in apposite cases in an Irish context. In addition to exemplifying the weaknesses of adopting such a highly discretionary approach to spousal maintenance, the judgement identified quite a generous basis for support. Reiterating the need to appropriately value the contribution of the non-owning spouse, highlighting the impact of parties' joint decisions on the earning capacity of the financially weaker spouse and recognising the ongoing obligations of the appellant spouse in relation to the adult children of the marriage, the decision could result in a less restrictive approach being adopted towards spousal maintenance claims going forward.

Part IV: learning from international experience and the viability of reform in Ireland

The judgement in *N.O.* is to be welcomed in providing some much needed clarity on the relevant factors which may influence a court in making an order for spousal maintenance and for establishing key principles and tests. Despite this, however, it unfortunately does not provide any concrete guidance as to how exactly spousal maintenance should be calculated in appropriate cases. Moreover, the potential for the case to be distinguished on its facts could further undermine its long term impact. In this context – and given the momentum that appears to be building for a review, if not reform, of the overall ancillary relief scheme – the question might be asked whether more could be done to improve this aspect of Irish ancillary relief laws.

Spousal support advisory guidelines: an overview

There remains a pressing need for Irish spousal maintenance laws to be examined comprehensively having regard to the problems highlighted by the ever-growing body of empirical research and as exemplified in *N.O.* Internationally, much attention has been placed on the Spousal Support Advisory Guidelines developed in Canada (see, for example, Law Commission of England and Wales 2014). Canadian courts are empowered to make orders for spousal support under the federal Divorce Act 1985.[65] Section 15.2(6) sets out four objectives for spousal support, namely to

'(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

(b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time'.

How these objectives are achieved in any given case is left to judicial discretion with a 'fairly open-ended' approach adopted for issues concerning entitlement, amount and duration of spousal support (Rogerson and Thompson, 2011-12, p.246). To assist both practitioners and the judiciary, a research project – led by the Department of Justice – sought to develop guidelines to better clarify issues regarding spousal support. The resulting Spousal Support Advisory Guidelines [SSAG] were published in 2008 and were introduced on a non-legislative basis (Department of Justice Canada 2008). The Revised User's Guide, an update to the original SSAG, was subsequently published in 2016 (Department of Justice Canada 2016).

The guidelines, which are based on an income-sharing formula, were devised by having regard to dominant patterns evidenced in typical spousal maintenance cases across Canada.[66] Pursuant to the guidelines, cases are categorised depending on the presence or otherwise of dependent children, before a formula – which seeks to reflect both the 'merger over time' theory as well as compensatory and non-compensatory (or needs-based) principles – is subsequently applied. In the absence of dependent children, the main contributing factors are the income differential between the spouses and the length of the marriage.[67] Alternatively, where child support obligations arise, extra factors including the age of the children and the length of the post-divorce child-rearing period are taken into consideration. In either scenario, once the formula is applied, a financial range within which spousal support ought to fall is produced. While the guidelines reduce the scope for the exercise of judicial discretion, they do not eliminate it entirely. Thus, within the guidelines, discretion nevertheless remains to depart from the ranges computed where certain specified 'exceptions' apply.[68]

Despite their non-legislative status, the guidelines have had a significant impact on family law practice in Canada and are now 'widely accepted and used by both lawyers and judges across the country' (Rogerson 2014, p. 162). As well as allowing for the development of more consistent judicial decision-making, the guidelines have also exposed so-called 'outlier' cases, decisions which would be regarded as 'at odds with

nationwide trends', demanding change or explanation (Rogerson and Thompson, , p.263). In particular, the guidelines have been accredited with raising the level of spousal support awards in those areas where such awards were 'noticeably lower and out of keeping with general patterns across the country' (Rogerson 2012). Consequently, it has been observed that practitioners are now more likely to make spousal support claims for lower-income recipients given that, without the need for 'sophisticated argument', presiding courts will 'generally award at least the low end of the ranges' (Rogerson and Thompson, , p.262).

Prospects of adopting comparable guidelines in Ireland?

The advantages of adopting a more formula-oriented approach in Ireland akin to that devised in Canada appear clear. Any ranges in quantum devised thereunder would be based on existing judicial outcomes while such reform would also retain important discretion to depart from the ranges where necessary to ensure 'proper provision'. Despite the 'homogeneity' of fact situations in families with children (Department of Justice Canada 2016, p. 31), for example, the importance of context is also implicitly recognised in the guidelines, impacting on a variety of elements of the SSAG including in establishing eligibility, in determining the initial ranges and the location in the range, in the exceptions to the guidelines and in the potential for review. Thus, rather than disregarding the unique features of each case, the guidelines instead provide a more nuanced and structured approach to taking a range of factors into account in determining spousal maintenance. However, despite the fact that such reform would appear to be supported by the Law Society of Ireland (2019, pp. 12–13) as well as by various academics in the field (Crosse 2015, O' Shea 2014; O'Sullivan, 2016b) – and would be in line with broad recommendations from the Oireachtas Joint Committee on Justice and Equality's 2019 *Report on Reform of the Family Law System* (p.47) – the feasibility of pursuing such reform in Ireland at this juncture remains less than clear.

On one hand, the development of the law towards the adoption of a more formulaic approach to spousal maintenance would appear to be eminently viable. First, unlike in England and Wales where the issue has proved contentious (see Law Commission of England and Wales 2014), Irish ancillary relief law already expressly recognises the ongoing obligations of spouses to one another.[69] Second, such a development would be in line with the judiciary's seemingly increased recognition of the need for transparency in ancillary relief proceedings as reiterated in *G v G*[70] and more recently in *N.O.*[71] Third, a more predictable formula-oriented approach would align neatly with the Law Reform Commission's desire to identify reforms aimed at guiding the exercise of judicial discretion with a view to better facilitating settlements on marital breakdown (Law Reform Commission of Ireland 2019, para.1.45). Fourth, while in the past it may have been suggested that the highly discretionary 'package' approach to ancillary relief provision could act against the introduction of a more structured approach to spousal maintenance (almost all jurisdictions applying a formula based approach to spousal maintenance do so in the context of a relatively structured property division regime), such concerns appear to carry ever less weight. Although at present all assets may be subject to division on marital breakdown under Irish law, recent decisions have started to adopt a more organised definition of 'family assets' possibly available for redistribution.[72] The potential

for the imminent introduction of a more formulaic approach to child maintenance in the not-too-distant future (see the recent establishment of the Department of Social Protection's *Child Maintenance Review Group* in 2020) would also appear likely to introduce important structure to the Irish ancillary relief process, better preparing it for reforms akin to those considered here. Nor, it must be added, are issues of property division and spousal support completely divorced in Canada. Pursuant to the SSAG, one of the factors to influence the position in the range is the amount of property division that has been made (Department of Justice Canada 2008, p. 47). In addition, in jurisdictions such as British Columbia, the governing property division legislation empowers a court to make a reapportionment of property where the spousal support objectives have not been met by the spousal support ordered.[73] The ability to consider the provision made, in the round, has thus not been removed. The potential for restructuring – once quantum and duration were determined – would also remain.

Nevertheless, the introduction of any such formula-oriented reform in Ireland would not be straightforward. The lack of exposure to such approaches in the jurisdiction, even in relation to child maintenance calculations, would potentially make the introduction of invariably more complex formulae for spousal maintenance determinations more challenging. Moreover, although the SSAG guidelines were drawn from case law reviews and reported judgements, it is questionable whether a) there is a sufficient body of reported judgements to draw on to be able to be to devise such guidelines in an Irish context and b) there is sufficient consistency in those that have been reported to be able to create average ranges or identify norms. Indeed, even if such guidelines were somehow developed and introduced, for such reform to be effective in practice there would have to be a culture shift in terms of the formality of divorce proceedings and negotiations. For example, as O' Shea (2014, p. 131) has highlighted, serious questions may be raised vis-à-vis the laissez-faire approach adopted to the seemingly widespread use of inaccurate affidavits of means. Such issues, likely emblematic of the unstructured approach taken to the determination of all provision on divorce, would have to be addressed at a legislative level as a precursor to the successful introduction of any more formula-oriented approach.[74]

Yet, while there may be challenges in undertaking any equivalent reform in Ireland – and conscious that at least some segments of the judiciary would likely vehemently oppose any such intervention (the importance of retaining broad judicial discretion has often been reiterated by the courts, for example, see *T. v. T.*,[75] while judges across the Irish Sea appeared to be strongly against such reform also, see Law Commission of England and Wales 2014, paras. 3.132–3.142) – now might be an opportune time to gently get the ball rolling. As the Law Commission of England and Wales has pointed out (Law Commission of England and Wales 2014, para. 3.154), it 'would take a great deal of work to develop a formula generating a range of outcomes in each case'.[76] However, the seemingly imminent establishment of a long awaited family division within the Irish courts system[77] – a development which, in itself, will hopefully see the emergence of specialist judges and allow for the better development of precedent in family law proceedings – could be viewed as representing a prime opportunity to put in place the structures to allow for the better recording of outcomes and practices in relation to ancillary relief provision, in general, and spousal maintenance, in particular. The increased focus on judicial training since the enactment of the Judicial Council Act 2019, and subsequent establishment of the

Judicial Studies Committee, could also be harnessed to further aid in ensuring greater transparency in outcomes, thereby better facilitating the development of guidelines.

Conclusion

Irish spousal maintenance laws have come a long way in the last fifty years. However, although detailed provisions now exist in Irish divorce law in this regard, periodic payments for the benefit of financially weaker spouses remain uncommon. While this may in part be attributable to the holistic approach adopted to ancillary relief provision on divorce in Ireland or to restructuring, it is also possible that the uncertainty surrounding the extent of maintenance obligations ensures vulnerable spouses may be reluctant to pursue a spousal maintenance claim in legal proceedings or successfully negotiate such provision in any settlement reached. Indeed, although the recent decision in *N.O.* goes some way towards providing greater clarity, the general ambiguity surrounding the quantification and duration of spousal maintenance remains a particularly serious challenge for those struggling to secure such payments in an out of court settlement (as Parkinson 1999, has pointed out, highly discretionary ancillary relief regimes are 'weighted against the risk-averse and those who cannot afford to litigate. These people are at the mercy of the low "take-it-or-leave-it" offer'.). Yet, exactly ten years ago, reflecting on the situation in England and Wales, Eekelaar (2013) highlighted the 'increasing pressure for people to resolve matters [arising on divorce] themselves'. Although Ireland already has a high settlement rate (potentially approaching 90%) (Coulter 2009b), it appears a matter of Government policy to encourage even more divorcing couples to follow such trends and avoid litigation. In its 2019 *Report on Reform of the Family Law System*, the Joint Committee on Justice and Equality (p.49), for example, argued:

> Although family law proceedings arouse very strong feelings amongst the parties, the Committee believes the parties should be advised at the outset that they would be exposed to less stress, cost, time and risk if they could *reach a settlement amongst themselves* rather than persisting with an adversarial process . . .

The need to ensure the structures are in place to guide parties in settling issues related to ancillary relief issues in general, and in relation to maintenance, in particular, therefore gains heightened importance.

As far back as March 1976, the then Minister for Justice, Patrick Cooney, observed that further legislative initiatives might be required in the future to provide 'more specific guidelines to the courts' on issues of maintenance as then exclusively laid down in the 1976 Act.[78] Such initiatives were not forthcoming. Instead, the highly discretionary approach adopted under the 1976 Act was extended in the 1989, 1995 and 1996 Acts to ancillary relief provision beyond issues of maintenance.

Despite this, learning from international experience, it is clear that steps could be taken to devise guidelines which could better guide the exercise of discretion vis-à-vis spousal maintenance and, in turn, provide the much needed consistency, transparency and shadow of the law which is so sorely missing at present. It is to be hoped that the groundwork for the development of such guidelines will commence in Ireland sooner rather than later.

Notes

1. See the American Law Institute's *Principles of the Law of Family Dissolution*.
2. See the Spousal Support Advisory Guidelines discussed further below.
3. While broader empirical research projects have shed some light on Irish spousal maintenance practice, there has been little (if any) focused academic consideration of the topic. The issue has, moreover, received no legislative attention since the introduction of divorce while few written judgements explicitly address the issues arising in relation to spousal maintenance, the most notable exception being *N.O. v P.Q.* [2021] IECA 177 discussed below.
4. Until recently, judicial separation which was available under the Family Law Act 1995 after two years of separation remained popular. However, with the passing of the Thirty-Eighth Amendment to the Constitution in 2019, section 5(1) of the Family Law (Divorce) Act 1996 (as amended) now also applies a two year separation period for divorce applications (reduced from four years). Consequently, the Courts Service Annual Report 2020 at pp.56–57 shows a 48% decrease in applications for judicial separation while divorce applications rose by 29%. This article will therefore focus primarily on maintenance in the context of divorce.
5. Dáil Éireann debate, *Private Members' Business. – Judicial Separation and Family Law Reform Bill, 1987: Second Stage* (Tuesday, 2 February 1988) Vol. 377 No. 3 per Shatter. Note, however, the Guardianship of infants Act 1964.
6. See below for caps applied to District Court orders. No upper limit was set on the amount of maintenance that could be ordered in the High Court.
7. Dáil Éireann debate, *Family Law (Maintenance of Spouses and Children) Bill, 1975: Second Stage* (Tuesday, 22 July 1975) Vol. 284 No. 1. She could thus argue she was 'constructively deserted'.
8. Note whether a decree of divorce *a mensa et thoro* was granted or an order made under the 1886 Act, a separate cause of action pursuant to the Guardianship of Infants Act 1964 would also have to be pursued to secure child maintenance.
9. Seanad Éireann debate, *Commission on the Status of Women: Motion* (Wednesday, 25 July 1973) Vol. 75 No. 7 per Senator Halligan.
10. Seanad Éireann debate, *Commission on the Status of Women: Motion* (Wednesday, 25 July 1973) Vol. 75 No. 7.
11. Seanad Éireann debate, *Commission on the Status of Women: Motion* (Wednesday, 25 July 1973) Vol. 75 No. 7.
12. It also proposed the adoption of a community of property for the ownership of assets.
13. Dáil Éireann debate, *Family Law (Maintenance of Spouses and Children) Bill, 1975: Second Stage* (Tuesday, 22 July 1975) Vol. 284 No. 1.
14. Dáil Éireann debate, *Family Law (Maintenance of Spouses and Children) Bill, 1975: Second Stage* (Tuesday, 22 July 1975) Vol. 284 No. 1.
15. Dáil Éireann debate, *Family Law (Maintenance of Spouses and Children) Bill, 1975: Second Stage* (Tuesday, 22 July 1975) Vol. 284 No. 1 (emphasis added).
16. Dáil Éireann debate, *Family Law (Maintenance of Spouses and Children) Bill, 1975: Second Stage* (Tuesday, 22 July 1975) Vol. 284 No. 1.
17. Dáil Éireann debate, *Family Law (Maintenance of Spouses and Children) Bill, 1975: Second Stage* (Tuesday, 22 July 1975) Vol. 284 No. 1 per Minister Cooney.
18. Section 5(4).
19. Per section 18 of the Courts Act 1971.
20. The 1976 Act did not give jurisdiction to the court to order lump sum payments which were only available under the Act by agreement of the parties.
21. Seanad Éireann debate, *Family Law (Maintenance of Spouses and Children) Bill, 1975: Second Stage* (Wednesday, 10 March 1976) Vol. 83 No. 12.
22. Dáil Éireann debate, *Family Law (Maintenance of Spouses and Children) Bill, 1975: Second Stage* (Tuesday, 22 July 1975) Vol. 284 No. 1. Note, there was also a pre-existing 'procedure for reciprocal enforcement of maintenance orders' with the United Kingdom to address what Senator Noel Browne coined, the 'Irish divorce', namely, where husbands left their families and bought a one-way ticket to England.

23. While adultery automatically disentitled a wife from obtaining an order for maintenance on the granting of divorce *a mensa et thoro*, the 1976 Act allowed judicial discretion on the matter, see section 5(3).
24. The District Court can award maintenance of up to €500 per week for a spouse (or civil partner) and up to €150 per week per child. For higher amounts, an application must be made to the Circuit Court.
25. See also section 8 of the Family Law Act 1995.
26. Section 13(1)(a).
27. Section 13(1)(b).
28. Section 13(1)(C)(i).
29. Section 13(6)(a). Note also section 13(6)(b).
30. As applications for judicial discretion or divorce may only be initiated in the Circuit Court or High Court there is no limit on the level of maintenance which may be ordered.
31. See also section 16 of the Family Law Act 1995. These factors include the length of the marriage, the financial needs, obligations and responsibilities of the spouses, the contributions of the spouses et cetera.
32. See below.
33. Note also section 21.
34. For Maintenance Pending Suit, see section 12.
35. Whether payments already ordered would cease to have effect in those circumstances, however, seems doubtful.
36. However, as noted in *G. v. G.* [2011] IESC 40 at [22] it may be considered 'a legitimate aspiration'.
37. Note, a lump sum order payable by instalments may be subject to review.
38. Provided, as noted above, they have not remarried.
39. *T. v. T.* [2002] IESC 68, [2003] 1 ILRM 321 per Fennelly J. Note also, Denham J explained in *G. v. G.* [2011] IESC 40, 'the requirement is to make proper provision and it is not a requirement for the redistribution of wealth.'
40. [2021] IECA 177 at [60] (emphasis added).
41. See *G. v. G.* [2011] IESC 40.
42. *C. v. C.* [2016] IECA 410 at [37]. See also *Q.R. v. S.T.* [2016] IECA 421 at [106] per Irvine J. Thus, the focus appears to be based on the marital standard of living rather than ensuring an equal standard of living. It is also becoming increasingly clear that, in general, inherited assets will not be treated as assets obtained by both parties in a marriage, however, '[t]he distinction in the event of separation or divorce will all depend on the circumstances.' Per Denham J in *G. v. G.* [2011] IESC 40.
43. *N.O. v P.Q.* [2021] IECA 177 at [103].
44. Note, until 2012, the Court Service Annual Reports were another, albeit vague, source of information as to the type and frequency of maintenance orders that were being made. The 2012 Report, p49, highlights the number of periodic payments made 'to a spouse' and 'to a child' on judicial separation and divorce. If the periodic payments 'to spouse' were 'for' the benefit of that spouse, it would suggest that spousal maintenance was ordered in 19.6% of judicial separation cases and in 12.9% of divorce cases. If lump sum payments 'to spouse' are included, these figures rise to 37% and 22% respectively. How reliable these figures are, however, remains open to speculation.
45. The research involved 32 divorce files, 53 judicial separation files and 4 separation files.
46. Although this study was prior to the decisions in *G. v. G.* [2011] IESC 40 and *C. v. C.* [2016] IECA 410 which reiterated the importance of standard of living test, the importance of considering the standard was originally established in *R.H. v. N.H.* [1986] ILRM 352 at 354 and 355. Note, more recently, the standard of living did not appear to be a key feature of the decision in *N.O. v P.Q.* [2021] IECA 177.
47. *N.O. v P.Q.* [2021] IECA 177 discussed below
48. [2021] IECA 177.

49. [2021] IECA 177. Although the case concerned an application for judicial separation, the court held the jurisprudence arising from section 20 the of the Family Law (Divorce) Act 1996 was relevant.
50. The farming business was trading as a private limited company and the husband was the sole shareholder.
51. At [33].
52. At [9].
53. At [91].
54. At [93]. See also discussion from [61]-[71] where the court reiterated the constitutional importance of affording appropriate value to contributions made in the home. Article 41.2 provides:

    '1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

    2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.'
55. At [95] (emphasis added).
56. At [94].
57. At [96].
58. At [120] it held that the amount ought to be reviewed downwards when the wife becomes entitled to any pension payments. The Court at [122] also ordered the husband to pay private health insurance for the wife indefinitely, not for a period of four years as originally ordered by the trial judge.
59. At [76].
60. At [75].
61. At [75].
62. At [76] (emphasis added).
63. At [82] (emphasis added).
64. At [58–59] (emphasis added).
65. See section 91(2) of the Constitution Act 1867.
66. Prof. Carol Rogerson and Prof. Rollie Thompson undertook a seven year project investigating spousal support practice which contributed significantly to the development of the guidelines.
67. The amount and duration of support increases incrementally with the length of the marriage.
68. For example, illness, disability, disproportionate losses or gains in a short marriage et cetera.
69. See above. This aspect of Irish law was also re-emphasised in the high threshold set for term orders in *N.O. v P.Q.* [2021] IECA 177.
70. [2011] IESC 40.
71. *N.O. v P.Q.* [2021] IECA 177 at [58].
72. As noted above, *N.O. v P.Q.* [2021] IECA 177 and *G. v. G.* [2011] IESC 40 have clarified the position vis-à-vis inherited assets.
73. Section 95(3) of the Family Law Act 2011.
74. The definition of income for the Spousal Support Advisory Guidelines is that applied under the Federal Child Support Guidelines, which, in turn, apply strict mandatory disclosure provisions. Similar provisions ought to be adopted and enforced in Ireland both to provide a more accurate basis for calculations at present and to better facilitate the implementation of guidelines in the future.
75. [2002] IESC 68, [2003] 1 ILRM 321 at p 365.
76. It highlighted the need for empirical data at para. 3.155, the need for that evidence 'to be studied and work carried out by an interdisciplinary team' at para. 3.156 and concluded at para. 3.157 'the project would need time', estimating approximately 5 years.
77. See the General Scheme of the Family Law Bill 2020. Various calls for such a development have been made over the past 30 years with the (Law Society of Ireland 2019), p.6 most recently adding its voice to the campaign.

78. Seanad Éireann debate, *Family Law (Maintenance of Spouses and Children) Bill, 1975: Second Stage*, (Wednesday, 10 March 1976) Vol. 83 No. 12.

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