Ancillary Relief on Divorce in Ireland (Pensions)

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Introduction

- Discretionary equitable redistribution regime
- Family Law (Divorce) Act 1996
- ‘Proper provision’
- Limitations? Principles?
Reality

• ‘Shadow of the law’?
• High % of settlements
• Empirical research
  – Carol Coulter (2009)
  – Róisín O’ Shea (2014)
  • General trends? Inconsistency
  • Judicial supervision?
• Safeguards?
Vulnerability on divorce

• Common perception of men + women as financially equal....

• Celtic Tiger (mid-1990s to mid-2007)
  – Rise in female employment rate
  – 40% (1993) to 60% (2007)
Vulnerability on divorce

• Recession: ‘downward levelling in terms of gender gap in participation rates’

• Female breadwinner households, characterised by female partner full-time work and male partner joblessness or part-time work, almost doubled between 2004 and 2010
Vulnerability on divorce

- Survey on Income and Living Conditions
  - 64% of men in couple households worked full-time; 35% of women did likewise.
  - 22% of women engaged in part-time work; 8% of men did so
  - Traditional male breadwinner work pattern existed in 38% of couple households (9% had female breadwinner)
Vulnerability on divorce

• In that context, the potential impact of divorce (long term and short term) is huge...

• Pillars of support (Scherpe; Miles) vs Irish ‘package’ solution
Pensions

- England and Wales:
  - Hilary Woodward & Mark Sefton, *Pensions on Divorce* (Nuffield Foundation 2014)
Pensions

• Has attracted very little attention in Ireland

• Some practitioner specialists; some ‘survival guides’ for practitioners...

• Law is very dense and complicated
Pensions

• Section 17 of the 1996 Act breaks pensions down into two categories:
  – ‘Retirement benefits’:
    • payable post-retirement
  – ‘Contingent benefits’:
    • payable on the occurrence of a particular contingency eg if the member dies while still working
Pensions

- Two approaches that the courts may take in making a pension adjustment order are:
  - ‘Earmarking’
  - ‘Pension splitting’

- Court consider the ‘period of reckonable service’... Flexible approach
Pensions

- Other aspects:
  - Some PAOs can be made in favour of the other spouse or for a dependent member; others can be made in favour of both

- Differences in the limitation periods for applications depending on the PAO sought
Pensions

– On remarriage of a spouse, some PAOs end automatically (payment of a contingent benefit)

– Section 17(23)(b) provides PAOs are to be considered as a last resort
Pensions

• PAOs only made if property adjustment orders or maintenance orders deemed inappropriate
  – Consciously included (see section 16 of the 1996 Act re. life assurance policy)
  – Reverse policy for cohabitants!
Practice

• (Note: Nothing focusing exclusively on pensions)
• Carol Coulter, Family Law in Practice: A Study of Cases in the Circuit Court (2009)
  – 2006/2007 legal year
  – Analysed the outcomes in 240+ case files
  – Attended Circuit Court
Practice

- Coulter:
  - ‘[o]nly a minority’ of spouses utilized the legislation to deal with the allocation of pensions
  - ‘a significant proportion’ sought only ‘nominal pension adjustment orders’....
  - Why? Reading between the lines... role of offset...
Practice

- Róisín O’Shea, *Judicial Separation and Divorce in the Circuit Court*
  - Observed 1,087 unique cases between October 2008-February 2012 in the eight Irish Circuit Courts and analysed 40 case files.
  - Reported high levels of inconsistency throughout the ancillary relief process
Practice

• O’Shea
  – Pensions were often the ‘primary “assets”’... Homes in negative equity
  – ‘Where the court dealt with pensions in a contested case, the approach of the court was to put that asset into the **marital pot for a division of assets** on a 50/50 basis’
• O’Shea
  – Serious confusion across the board
  – ‘Where any question arose around pension adjustment orders, most of the judges deferred to counsel or sought clarification from counsel.’

• Official statistics?
Practice

• Practitioner voice?

• Cahill and Dixon
  – Practitioners tend to ‘avoid dealing with pensions if possible’
  – Errors have ‘the potential to have disastrous consequences’
  – Practitioners worry that it could lead to a ‘professional negligence claim’
Practice

- Pensions Ombudsman
  - Role of offset
- Problems with disclosure
- A lot of common threads with findings in England and Wales
Need for reform

• At a base level, numerous technical issues
  – PAOs can only be granted by the court
  – No ability to obtain a zero PAO.
  – Contingent benefit PAOs cannot be varied or discharged
Need for reform

- Why does the legislation require pension adjustment orders to be considered last on divorce?
  - Clean break?
  - Worked out on the eve of the divorce referendum?
  - No good example to copy?!
Need for reform

- How are pensions really viewed in Ireland? Treated like ‘assets’?
  - D v D [2015] IESC 16
    - HC/SC focus on ‘liquidity’ of wife’s public sector pension (worth €700-900,000)
    - Did not fall into the ‘pool of assets for division’
  - Other jurisdictions...
Conclusion

• 2001 Review by Department of Justice and the Pensions Board
  – No report or recommendations published

• Technical problems are only half the story
  – Bigger question: What are we sharing and why are we sharing it?