‘Ancillary relief on divorce in Ireland: Challenges and opportunities’

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Overview

• Three main parts
  – Part I: Current ancillary relief regime in Ireland
  – Part II: Apparent myths which have acted as obstacles to review/reform
  – Part III: Future?
Ancillary Relief Provision in Ireland

• ‘Proper Provision’: pre-condition of divorce
• Family Law Act 1995
• Family Law (Divorce) Act 1996
  – Highly discretionary
  – Wide range of possible orders
  – Non-exhaustive and non-hierarchical list of factors
    – ‘guidelines’?
  – Limitations?
Ancillary Relief Provision in Ireland

• Strengths?
  – The court can respond to the individual circumstances of each case
  – The court can devise a bespoke package of ancillary relief for each couple
Ancillary Relief Provision in Ireland

• Weaknesses?
  – % benefitting from judicial discretion?
  – Consistency and foreseeability?
  – Trickle-down effect - the shadow of the law?

• Empirical data:
  – Róisín O’ Shea; Carol Coulter; Lucy Anne Buckley
Ancillary Relief Provision in Ireland

• Effect of inconsistency:
  – Weighs especially heavily on financially weaker spouses
  – ‘Where no rule is in place and the remedies are entirely at the discretion of the court, the burden falls on those who are arguing for sharing (or a greater share), compensation for marriage-related disadvantages, and even needs.’ (Scherpe)
Ancillary Relief Provision in Ireland

– They are also in a particularly precarious *bargaining* position

– ‘The system ... is ... 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.’ (Parkinson)

– Review of settlements: safety net of ‘proper provision’?
Ancillary Relief Provision in Ireland

• Who is vulnerable to these types of offers?

• The gender gap in the rate of labour market participation has narrowed... but....
  – Survey on Income and Living Conditions for 2010
    • Work patterns of male and female partners in couple households
    • Male bread-winner households: 38%
    • Female bread-winner households: 9%
Possibility of Reform?

• A more certain, perhaps rule-oriented, approach to ancillary relief, would be better but...

• Legislative disengagement with the issues

• Why? Myths in relation to matrimonial property division...
Possibility of Reform?

• Myth 1: The Irish legislature chose a system of equitable redistribution for the division of assets on marital breakdown following careful consideration of the alternative options available...

– Did the legislature see equitable redistribution as the optimum method for achieving economic justice on marital breakdown?
Possibility of Reform?

• Myth 2: The Constitution prohibits the introduction of fixed rules regulating matrimonial property division.
  – Source: Failure of Matrimonial Home Bill 1993
  – Solution: Deferred community of property regime
  – Unjustified intrusion on the autonomy of the family? No – ‘proper provision’ is constitutionally mandated by Article 41.3.2°
Possibility of Reform?

- Myth 3: The constitutional requirement for ‘proper provision’ on divorce requires the provision of individualised justice in all cases.
  - Why was terminology chosen?
  - Is equitable redistribution the only regime capable of meeting the criterion?
  - Residual flexibility can be retained
Possibility of Reform?

• Myth 4: The adoption of a community of property approach would be at odds with the separationist ethos of Irish matrimonial property law.

  – Succession Act 1965
  – Family Home Protection Act 1976
  – Matrimonial Home Bill 1993
Future?

• We seriously need to look at the possibility of introducing a more certain and predictable approach

• Hybrid scheme of rules and discretion for asset division
  – What would be included in the pool?
Future?

• Will that be sufficient to combat the post-divorce economic disparity which exists?
• ‘Significant redistribution’ of wealth is often required (Miles)
• ‘Pillared approach’ (Scherpe)
• An entitlement to a share of property on its own is not the perfect solution…
Conclusion

• We need to review and reform our ancillary relief regime
• We must debunk the myths in relation to the viability of a more rule-oriented approach to matrimonial property division
• We need to consider the wider issues arising on divorce and better seek to address post-divorce economic disparity