Rethinking Ancillary Relief on Divorce in Ireland: The Challenges and Opportunities

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Introduction

Professor Kahn-Freund remarked in 1955:

‘Since in our societies marriage is the basis for the normal family, it follows that marriage must have a profound effect on the property of the spouse ... It is difficult to imagine any system of law which in its regulation of the impact of marriage on property could completely ignore these elementary social facts, ie confine itself to a strict rule of “separation of property” in the sense that marriage has no effect on the property of the spouse at all.’¹

Yet, in the mid-twentieth century, a separate property approach remained the prevailing matrimonial property regime in many countries across the common law world. Even today in Ireland, it is arguable that marriage still does not have a ‘profound’ effect on property. The property rights of spouses continue to be held on the basis of title and are not automatically altered by marriage. Through the years, however, significant modifications have been made to the prevailing property scheme.

The Family Law (Divorce) Act 1996 which governs the remedy of divorce in Ireland plays an especially important role in this regard.² Central to the 1996 Act are important measures governing the ancillary (financial) relief available on divorce.³ Recognising the constitutional imperative that ‘proper provision’ must exist for spouses and dependent children prior to

² Note many spouses obtain a judicial separation and associated ancillary relief pursuant to the Family Law Act 1995 prior to obtaining a divorce. Given the broad similarities between the remedies on divorce and judicial separation, many of the issues highlighted in this article arise in both contexts. Moreover, the proposal delivered below could, with minimal tweaking, be adopted at both stages. However, a fuller discussion of the issues and challenges arising on judicial separation, specifically, is outside the scope of this article.
³ The financial proceedings which accompany divorce (or judicial separation) cases in Ireland are referred to as ‘ancillary relief’ proceedings. Note, in England, pursuant to the Family Procedure Rules 2010, ‘ancillary relief’ cases have been retitled ‘financial remedy’ cases, see r 2.3 for interpretation.
the award of a decree of divorce, Part III of the legislation affords the courts ‘ground breaking’ redistributive powers. However, while the inclusion of these powers was ‘essential ... both to combat post-separation poverty and to vindicate spousal marital contributions’, the highly discretionary approach adopted in the 1996 Act has given rise to considerable difficulties at a practical level and doubts have been raised as to its appropriateness. In particular, serious concern has arisen in relation to the lack of consistency apparent in judicial outcomes to ancillary relief applications and the levels of uncertainty which exist for spouses seeking to reach a settlement. Moreover, the extent to which the current regime adequately protects financially weaker spouses appears questionable.

Although in light of such concerns and given that marriage breakdown is a ‘significant social issue’ in Ireland, it might be expected that a statutory review would be commissioned, there has been no indication that any review or reform is on the legislative agenda. This reluctance to engage may, in part, be attributable to a mistaken belief as to the viability, or otherwise, of reform of the Irish ancillary relief system. Among the common misconceptions which exist is the belief that Irish law effectively prohibits the adoption of a more rule-oriented approach to the provision of ancillary relief, particularly, in so far as such an approach would apply to matrimonial property, as well as an apparent failure to appreciate the diversity of rule-oriented schemes and their ability to retain important residual discretion. This article seeks to debunk these myths.

The article begins by drawing on the most up-to-date empirical data highlighting the principal difficulties inherent in the Irish ancillary relief system as currently applied and placing the spotlight on the need for reform. It then considers the constitutional parameters which limit any change to the ancillary relief system applied before presenting a detailed proposal for reform. It concludes that although legislative change may be politically challenging, the commonly cited constitutional impediments to reform do not preclude the

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4 See Article 41.3.2° of the Irish Constitution.
7 See Buckley, above n 5; L Crowley, 'Dividing the Spoils on divorce: rule-based regulation versus discretion-based decision' (2012) Int’l FL 388.
adoption of an alternative ancillary relief scheme. Instead, the article argues the adoption of a more rule-oriented approach to ancillary relief provision may better ensure the attainment of ‘proper provision’ in many cases and ought to be afforded serious consideration in Ireland.

**A critique of ancillary relief provision on divorce in Ireland**

A defining feature of the ancillary relief system applied on divorce in Ireland is the way in which judicial freedom to determine the optimum outcome ‘dominates’ asset distribution.⁹

Adopting an approach based on equitable redistribution, the judiciary are empowered to grant a wide range of financial and property orders (including maintenance, lump sum, property adjustment and pension adjustment orders) reallocating assets between spouses.¹⁰

In choosing to exercise these powers they are afforded the widest possible latitude. The provisions of the Family Law (Divorce) Act 1996 are, as Crowley notes, ‘replete with terminology that is designed to maximise the breadth of discretion available to the judiciary in providing for the parties’.¹¹ Although pursuant to section 20 of the 1996 Act the judiciary are directed to a list of legislative factors which they may consider, the list is non-exhaustive and non-hierarchical with the factors operating simply as ‘guidelines’.¹² Moreover, notwithstanding that the judiciary is directed to make ‘proper provision’ for divorcing spouses as a pre-condition to awarding a decree of divorce, Irish divorce law provisions are ‘distinctly silent on the overriding aims of the legislation’¹³ and there exists an absence of legislative or judicially-developed principles guiding ancillary relief provision. The court is ‘the ultimate and only adjudicator’ as to whether an asset ought to be divided and determines the ‘nature and scope of any order to be made’.¹⁴

In theory, it would appear such an approach is especially apt in determining ancillary relief provision on divorce. In the absence of rules or firm principles, the judiciary are afforded the freedom to achieve the optimum outcome in the individual circumstances and devise a bespoke package of relief for each couple. In reality, however, such strengths are merely illusory – few divorcing couples receive such judicial attention with only a small fraction of

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⁹ Crowley, above n 7, p395.
¹⁰ Family Law (Divorce) Act 1996, s 16.
¹¹ Crowley, above n 7, p395.
¹² L Crowley, Family Law (Dublin: Roundhall, 2013) p589
¹³ Crowley, above n 7, p396.
¹⁴ Ibid p395.
cases, perhaps even as low as 10%, contested in a full court hearing.\textsuperscript{15} Moreover, in circumstances where cases do proceed to a full hearing, serious difficulties have arisen in relation to consistency and foreseeability. As Parkinson observed, pursuant to such a highly discretionary system ‘judgments are often intuitive rather than reasoned, subjective rather than principled. And judges of experience and intellectual integrity will frequently vary widely in their intuitive sense of a just outcome, making prediction of the result precarious’.\textsuperscript{16} In an Irish context, this has proven especially apparent with similar cases frequently resulting in vastly different outcomes.\textsuperscript{17}

\textit{Evidence of inconsistency}

Having observed 1,087 unique cases between October 2008-February 2012 in the eight Irish Circuit Courts (where approximately 98% of divorce and judicial separations are heard) and having analysed 40 case files, O’ Shea recently reported high levels of inconsistency throughout the ancillary relief process.\textsuperscript{18} She noted child and spousal maintenance was calculated on ‘a highly discretionary, individualised assessment of evidence and submissions’,\textsuperscript{19} with ‘inconsistent child and spousal maintenance orders … the hallmark of maintenance applications in the Circuit Court’.\textsuperscript{20} She added, ‘During this project there was no evidence of any formulaic approach by the court, rather a rule of thumb pattern for each judge emerged’.\textsuperscript{21} Furthermore, property adjustments orders were made by most judges

\textsuperscript{15} See Court Service, \textit{Family Law Matters} (2007-2009) vol 1(1) 2
www.courts.ie/courts.ie/library3.nsf/pagecurrent/DBF7DEC660A62D3880256DA60052BC9D?opendocument&l=en [Accessed 21 June 2012]. Although the Court Service Annual Reports note considerably higher figures for full hearings, if one aspect of a case goes to full hearing, with all other issues, including property division and the destination of the family home settled, the case will be recorded as being disposed of with a full hearing and a settlement. Therefore, it is likely full hearings in relation to property continue to be quite low. For a detailed analysis of how, when and why people settle in England and Wales, see E Hitchings, J Miles and H Woodward, \textit{Assembling the jigsaw puzzle: Understanding financial settlement on divorce} (2013) http://www.bristol.ac.uk/law/research/researchpublications/2013/assemblingthejigsawpuzzle.pdf [Accessed 08 October 2014].


\textsuperscript{17} See G Durcan SC, ‘Reimagining the Family Court System’ delivered at the \textit{Seminar on Family Law Courts}


\textsuperscript{19} Ibid p131.

\textsuperscript{20} Ibid p131-132.

\textsuperscript{21} Ibid p131-132.
without reference to any starting point or presumption of equal sharing, rather dealt with on
a ‘case by case basis’.\(^{22}\) As a result, she concluded:

‘[T]he wide discretionary powers applied by the judiciary on separation and divorce,
resulted in a considerable variation of approach and outcome. Rather than finding
consistent decision making patterns, it was difficult to identify consistency of
approach. The outcome was wholly dependent on the individual judge...’\(^{23}\)

Similar inconsistency was noted by Buckley in her research conducted in 2002 and based on
an analysis of 89 case file questionnaires completed by 44 practicing family law solicitors.\(^{24}\)
She observed, ‘family property provisions are not being applied uniformly on a national
basis. It seems clear that judges have different views on the provision that is “proper” in
family situations, and that there are prevailing local trends’.\(^{25}\) In particular, having
considered the outcomes of contested cases in Dublin, Cork and Galway, she noted the
emerging differences ‘seemed sufficiently consistent to consider Cork judges likely to be
more redistributive than judges in the other two venues’.\(^{26}\)

**Effects of inconsistency**

Such a high level of inconsistency in relation to ancillary relief provision creates two serious
problems. First, notwithstanding that it is a ‘clearly stated objective’ of the legislative
scheme,\(^{27}\) it raises important questions as to the fairness of the approach. If consistency is,
as Miles notes, itself ‘an aspect of fairness’,\(^{28}\) the Irish scheme, though clearly seeking ‘to
prioritise the principle of fairness in the individual circumstances’,\(^{29}\) appears to be failing to
attain this most important principle at a more general level. As Crowley explains:

‘[W]hile Irish lawmakers might argue that the avoidance of strict rules facilitates the
delivery of individualised justice and thus ultimately promises a greater likelihood of
a fair outcome for the parties involved, equally it can be asserted that such an open-

\(^{22}\) Ibid p261. Of the 13 judges observed, only three clearly worked from the presumption of 50/50
sharing.

\(^{23}\) Ibid p266.

\(^{24}\) Buckley, above n 5. Of the 44 solicitors, 13 were Legal Aid solicitors. Participating solicitors were
invited to examine a number of their most recently completed divorce and separation files and to
provide data for a detailed questionnaire.

\(^{25}\) Ibid p78.

\(^{26}\) Ibid p68.

\(^{27}\) T v T [2002] 3 IR 334 at 413 per Fennelly J.

\(^{28}\) J Miles, ‘Charman v Charman (No 4)–Making Sense of Need, Compensation and Equal Sharing after

\(^{29}\) Crowley, above n 7, p397 (emphasis added).
ended system of regulation, lacking in principle and purpose, is excessively unbounded and simply operates to facilitate unfairness.\(^{30}\)

The vagaries of the Irish ancillary relief scheme are highlighted especially clearly in the Dublin Circuit Family Court which has a number of sitting judges. There, one family law solicitor admitted, ‘When the legal diary goes on line each evening practitioners will eagerly check and be relieved or concerned depending on whether they act for the husband or the wife and see which judge is sitting for their case.’\(^{31}\) What provision is made between the spouses may vary quite substantially depending on how the case is scheduled.

Second, at a practical level, the lack of consistency in the Irish scheme creates significant uncertainty for the vast majority of divorcing spouses who seek to reach a settlement. Admittedly, practitioner experience may mitigate the uncertainty to some extent where local judicial trends and preferences are well established. Indeed, Buckley noted on the basis of her research that knowledge of the presiding judge appears ‘crucial’ in Ireland.\(^{32}\) However, she noted that this may not be ‘easy’ and ‘practitioners appearing outside their own locality are disadvantaged’. \(^{33}\) Furthermore, economic considerations result in a considerable portion of settlements being reached in the absence of any legal representation. Although recent data appears to suggest that the uptake of Alternative Dispute Resolution has been quite low in Ireland to date,\(^{34}\) it has nevertheless been highlighted that ‘a significant percentage of applicants or respondents’ are now self-represented in family law proceedings.\(^{35}\)

In this context, it would seem the uncertainty inherent in the discretionary ancillary relief scheme applied weighs especially heavily on financially weaker spouses who appear to be in a particularly precarious bargaining position. As Scherpe has highlighted: ‘Where no rule is in

\(^{30}\) Ibid p397. She adds at p400 that ‘inconsistent rulings in relatively in relatively similar circumstances cause immense dissatisfaction with the overall regime and can prompt discontent amongst those it seeks to regulate’.


\(^{32}\) Buckley, above n 5, p78.

\(^{33}\) Ibid 78.

\(^{34}\) O’ Shea, above n 18, p271 noted that in her research mediation was the only form of Alternative Dispute Resolution referred to in the courts and discovered it ‘is a very rare phenomenon at any stage of the process post the break-down of the marriage’.

\(^{35}\) Ibid p205.
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."36 Yet, the ability to benefit from judicial discretion is often no more than a ‘theoretical possibility’.37 If a spouse chooses to self-represent, the outcomes appear to be quite poor38 and, as Coulter has observed, ‘the capacity or otherwise of individual litigants to state their case cogently can have a bearing on the outcome of their cases’39 However, the effect of represented litigation on costs has been described by one Irish judge as ‘a deterrent to any but the rich, the courageous and the foolhardy’.40 Moreover, where legal representation is engaged in reaching a settlement, a premium is placed on the quality of the legal advice obtained and the experience and local knowledge of the retained solicitor. In this environment, where difficulties in accessing justice are combined with high levels of uncertainty, Parkinson observed, ‘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.’41

Finally, although it might be expected that the vulnerability of financially weaker spouses to such offers would be mitigated somewhat in Ireland by the constitutional pre-condition of ‘proper provision’ for a decree of divorce, it appears again that judicial approaches to reviewing settlements and ensuring the pre-condition is satisfied are also highly inconsistent. Coulter observed on the basis of her empirical research conducted from 2007-2009 in the Irish Circuit Courts that some judges considered a settlement made with legal advice automatically constituted proper provision.42 Similarly, Buckley noted that during her research judges ‘informally expressed their anxiety ... not to disturb or investigate a

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38 See O’ Shea, above n 18, chapter 11.
40 Peart J ‘Mediation – Alternative Dispute Resolution – the Future?’ (delivered to Mediation Solutions North West, 24 February 2012) (emphasis added). Therefore, while it is broadly considered that a low level of contested cases shows a well-operating system, the reality for many financially weaker spouses is that a court application is not an option due to the expense it involves. Although Legal Aid is still currently available to individuals whose disposable income is less than €18,000 in Ireland, many spouses in lower paid jobs will be ineligible, see Coulter, above n 39, p112. See also O’ Shea, above, n 18, p206.
41 Parkinson, above n 16.
42 Ibid p94.
settlement unless manifestly inappropriate’. More recently, O’ Shea reported that while some judges ‘carefully examined’ the paperwork in consent cases and requested evidence to satisfy the constitutional requirements, others never heard evidence for consent cases in relation to ‘proper provision’.

Need for reform

In light of the foregoing analysis, it is submitted that the Irish legislature needs to rethink the current approach to ancillary relief provision adopted in Ireland. Despite Maine’s belief that rigidity is the mark of a primitive legal order, it is increasingly clear that a more rule-oriented approach may be required to offset the significant shortcomings which have emerged in the equitable redistribution scheme applied. In direct contrast to the highly discretionary approach which currently prevails, the adoption of an alternative system incorporating a more rule-oriented flavour could, if framed appropriately, better promote consistency in judicial decision-making and better facilitate private ordering on divorce. The adoption of such a scheme would also strengthen the position of financially vulnerable spouses on divorce by establishing ‘actual rights in the property on behalf of both parties rather than the mere expectation that the court may divide the property in an equitable manner’. As a practical matter, as Brake observed, it would achieve ‘more desirable results in the vast majority of cases, while minimising the expenses involved in dividing property’. However, before considering how such reform might be framed, the constitutional parameters within which any reform would take place must first be considered.

Constitutional parameters

43 Buckley, above n 5, p73 (emphasis added).
44 O’ Shea, above, n 18, pp92-3. While situations may arise which could operate to the detriment of the financially stronger spouse, such as where the financially stronger spouse’s wish to divorce is more urgent thereby making them more vulnerable to a big pay-out, even there the financially stronger spouse may be aware of the judges tendency not to review settlements and work on this basis and/or the financially weaker spouse’s financial needs may simply prohibit them from pursuing the case to seek the exercise of judicial discretion.
45 Sir Henry Maine, Ancient Law (1875) 63.
46 More predictability would be provided by the judicial development of clear principles, see L Crowley ‘Irish Divorce Law in a Social Policy Vacuum – From the unspoken to the unknown’ (2011) 33(3) JSW& FL227 and Coulter, above n 39, p107. However, ideally, it is submitted more radical legislative reform would be preferable to ensure a coherent and comprehensive scheme exists.
48 Brake, above n 47, p763.
Article 41.3.2° of the Irish Constitution demands ‘proper provision’ must be made for spouses and children as a pre-condition to the award of a decree of divorce. Therefore, the question arises: to what extent does this constitutional requirement preclude the introduction of a more rule-oriented approach to ancillary relief provision? Does the Article 41.3.2° mandate individualised justice in all cases? On one hand it appears it might. After all, the terminology ‘proper provision’ was specifically chosen in the Constitution to pave the way for the introduction of the current equitable redistribution scheme. However, it is submitted it does not necessarily follow that the equitable redistribution scheme which was subsequently introduced on divorce is the only system of ancillary relief provision which is capable of fulfilling the constitutional pre-condition. Indeed, it may easily be doubted whether the constitutional pre-requisite of ‘proper provision’ is, in fact, currently being met in Ireland in many cases prior to the award of a decree of divorce. The adoption of a more rule-oriented approach to ancillary relief, on the other hand, could potentially ensure more fundamental protection, particularly to vulnerable, financially weaker spouses, than the current scheme and better meet the constitutional criterion in the majority of cases. Furthermore, although residual judicial discretion would certainly have to be retained to satisfy the constitutional limitation, the adoption of a more rule-oriented scheme would also promote greater judicial consistency and better facilitate the majority of divorcing spouses engaged in private bargaining.

The second issue which arises is the extent to which Ireland can introduce a more rule-oriented approach to property division, specifically. Although it has long been argued that Ireland ought to adopt a rule-based approach to the division of property, the viability of such reform has been subject to considerable doubt. This uncertainty arose primarily due to the constitutional failure of the Matrimonial Home Bill 1993. Section 4 of the 1993 Bill provided that where a spouse was the sole owner of the matrimonial home on the
commencement date, or became a sole owner thereafter, the beneficial interest in the property would vest in both spouses as joint tenants. However, when referred to the Supreme Court pursuant to Article 26 of the Constitution, the Bill was unanimously held to be unconstitutional. Although the Supreme Court noted the social utility of such legislation, it found the Bill amounted to an unjustifiable and disproportionate interference with the decision-making rights of spouses. Consequently, a fear that any general rule in relation to the ownership or, by extension, the division of matrimonial property would fall foul of a constitutional challenge, gained traction.

Nevertheless, such fears may be unduly pessimistic. Although clearly the adoption of an immediate community of property style approach would appear likely to require a further constitutional amendment to overcome the issues identified on the referral of the Matrimonial Home Bill, the adoption of a system operating on a deferred basis seems to pose no such threats. Assets would remain held on the basis of title while a marriage subsists – only on divorce would such assets be subject to division. While it may be argued that even the division of matrimonial property on divorce would constitute an unjustified intrusion on the autonomy of the family, such intrusion would be committed in the pursuit of making ‘proper provision’ for spouses, as constitutionally mandated by Article 41.3.2°: since property adjustments orders are accepted as constitutionally-sound on this basis, so too would the division of assets pursuant to a deferred community of property style scheme.

Additionally, although it might be suggested that the imposition of a rule of property division on divorce could be deemed an unjustified assault on the property rights of a wealthier spouse, this again cannot survive scrutiny. Pursuant to the current scheme, the property rights of a wealthier spouse are much more subject to attack with all property up for grabs and no limitation on the judiciary as to what inroads would be made on them.

54 See Article 40.1.1° of the Irish Constitution.
56 What the required triggering event(s) would be would be a matter for the legislature to specify.
57 See Buckley, above n 52, p71; Buckley, above n 6.
58 Note the legitimacy of the current redistributive powers was confirmed in TF v Ireland [1995] 1 IR 321 and again in LB v Ireland [2006] IEHC 275, [2008] 1 IR 134.
A tentative proposal for reform

In seeking to reform the highly discretionary ancillary relief scheme currently applied in Ireland, broad proposals advocating the incorporation of rules or quasi-rules for the sharing of property have received considerable support at a theoretical level. However, notwithstanding that the introduction of a more rule-oriented approach to property division would appear to be a viable option for reform if framed correctly, and would certainly represent a welcome development in Irish law, it is clear that such reform would, without more, be unlikely to afford sufficient protection for financially weaker spouses, notably women.

It is increasingly evident that the application of a strict equal (property) division rule can, in fact, sometimes lead to the further impoverishment of women, worsening their condition in respect of men and widening the income gap between the genders. In particular, such an approach may provide an insufficient remedy to counteract the economic disparity which often exists between spouses at the point of divorce. Unfortunately, it appears such a threat is especially acute in Ireland. Recent research which analysed work patterns of male and female partners in couple households (including though not limited to married couples), highlighted that despite the shift away from the traditional male breadwinner work pattern, characterised by male partner full-time work and female partner joblessness or part-time work, the male breadwinner model continued to exist in 38% of couple households.

Female breadwinner households, although increased, were much less common and only recorded in 9% of couple households. Crucially, the financially inferior position of many women arising from this reduced labour market participation is compounded by the considerable challenges they face when seeking to return to the workforce, particularly after a period of full-time caring, and the negative effect this reduced participation has on their

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59 Although this proposal draws inspiration from a number of sources, most notably past and present regimes applied in British Columbia, Canada (see the Family Relations Act 1996 and the Family Law Act 2011) the proposal is novel and does not replicate any existing regime.

60 See above n 52.

61 For an early argument to this effect, see L Weitzman, The Divorce Revolution (Free Press, 1985) pp70-109. Although in the interim her statistics have been subject to some criticism, Crowley, above n 7, p391 notes ‘it appears well-established that the economic consequences of divorce are significantly worse for long-term homemakers and their children than they are for the breadwinner spouse’. See also L Weitzman and M Maclean (eds), Economic Consequences of Divorce (Oxford: Oxford University Press, 1992).


63 Ibid p27.
earning capacity.\textsuperscript{64} Thus, to ensure a more substantively equal economic outcome on divorce than mere equal property sharing would permit,\textsuperscript{65} wider issues such as spousal support must also be considered in devising any scheme for reform.

At present, Ireland adopts what Scherpe describes as a ‘holistic’ or ‘package’ approach to ancillary relief.\textsuperscript{66} No clear distinction exists between division of property, spousal support and other financial remedies on divorce – the remedies ‘are not determined individually, but seen as a coherent whole, so the outcome is a “package solution” aiming at the overall objective of… “proper provision”’.\textsuperscript{67} A desire to meet spousal needs or to compensate financially weaker spouses for relationship-generated loss is often indistinguishable from any notions of sharing or partnership in the overall financial and/or property settlement ordered. Where such issues are mingled, however, it can lead to a lack of clarity for spouses as to the basis on which provision has been made, sometimes resulting in considerable dissatisfaction with the outcome\textsuperscript{68} and fuelling uncertainty. Furthermore, in an Irish context, it seems to result in the outward prioritisation of need in many cases while simultaneously eclipsing any notion of entitlement on the basis of partnership or joint efforts.

However, there is an increasingly strong argument that issues of spousal support ought, as a default, to be dealt with separate from property division, at both a conceptual and practical level. As was highlighted in Canada 25 years ago:

\begin{quote}
‘Requiring that [the need for economic independence and self-sufficiency] be taken into account when dividing family property blurs the distinction between property
\end{quote}

\begin{enumerate}
\item[[64]] Ibid p11. The ‘strong negative effects’ of the presence of pre-school children on the probability of participation of the mother continue to be observed, see H Russell, F McGinnity, T Callan and C Keane, \textit{A Woman’s Place: Female Participation in the Irish Labour Market} (Dublin: Equality Authority and Economic and Social Research Institute, 2012), p39. As Miles, above n 28, p391 explained, ‘formal equality … neglects the parties’ respective earning capacities - 50% plus substantial earning power is self-evidently better than 50% and no earning power.’
\item[[65]] Or perhaps is currently achieved.
\item[[66]] Scherpe, above n 36, p476.
\item[[67]] Ibid p476.
\item[[68]] See SD v BD [2007] IEHC 492 and T v T [2002] IESC 68. See also E Moore, ‘The Significance of “Home-maker” Contributions upon Divorce’ (2007) 10(1) UJL 15 who noted that although ‘the judiciary recognises the role of the women in the home, this recognition has different implications for women with different levels of education. The beneficiaries were women who were in a position to adopt a professional working life. However, women with fewer educational advantages, who will remain in the home after marital breakdown, are not rewarded equally by the judiciary.’ Therefore, poorer outcomes for home-makers appeared to be attributed to a failure to value domestic contributions rather than issues connected with relationship-generated loss and compensation.
\end{enumerate}
rights and maintenance obligations. One may easily question whether [this factor] has any relevance in determining entitlement to property.\textsuperscript{69}

Moreover, as Scherpe and Miles note, the European Union Maintenance Regulation may push jurisdictions currently adopting a ‘holistic perspective’ to financial orders on divorce, such as Ireland, to consider ‘a more explicitly principled/pillared approach’ akin to that applied in civil law continental Europe and adopted in varying formats in a number of common law jurisdictions.\textsuperscript{70}

Whatever the impetus for reform, it is arguable that the incorporation of clear and distinct ‘pillars’ of relief would provide greater transparency to divorcing spouses in Ireland. It would, furthermore, potentially provide a more solid framework within which court orders and, particularly, private settlements could be reached in the run-of-the-mill cases. In this manner, such an approach would simultaneously promote greater consistency in judicial decision-making, better facilitate private ordering and, if framed correctly, strengthen the position of financially weaker spouses. In this proposal, three discrete pillars are considered: property sharing, spousal support and allocation of the family home.

\textit{Property sharing.}

The development of a more rule-oriented approach to property division at the point of divorce would be welcome in Ireland, from both a practical and a symbolic perspective. In addition to vesting financially weaker spouses with an \textit{entitlement} to a share of family assets and providing much greater predictability, the adoption of pre-defined equal sharing would give greater effect to the view that marriage is a partnership and better recognise the joint efforts of the couple. In devising what assets ought to be captured in the community for sharing, these rationales must be reflected. However, other needs must also be considered in determining how the community for sharing ought to be classified. In particular, the need

\textsuperscript{70} J Scherpe and J Miles ‘Property and Financial Support between spouses’ in J Eekelaar and R George (eds) \textit{Routledge Handbook of Family Law and Policy} (Oxford: Routledge 2014) p145 referring to Council Regulation (EC) 4/2009 which was transposed into Irish law with European Communities (Maintenance) Regulations 2011. For more, see Crowley, above n 12, pp767-773. For an overview of how such a pillared approach operates in practice, see A Dutta, ‘Germany’ in Scherpe (ed) above n 36, pp158-200, especially pp158-166. To some extent, a similar approach also seems to apply in certain Canadian provinces, see for instance the Family Law Act 2011 applied in British Columbia.
for simplicity and clarity: divorcing spouses need to know, in the simplest terms, what assets fall into the community to be divided.71

Prioritising simplicity and clarity while broadly reflecting the rationales of partnership and joint efforts, a community of acquests model has considerable appeal. All assets acquired during the marriage are shared, except those received by gift or inheritance – pre-acquired assets are not subject to division. Through such a model, clear lines may be drawn delineating what assets are subject to sharing and which are not. However, despite its simplicity and apparent popularity,72 such an approach is not without its shortcomings. In its purest format, pursuant to such a regime, joint contributions are presumed to merit equal sharing in all cases, with no regard to the duration of the relationship or even the existence of such contributions. Moreover, the family home, though central to the marital partnership, may be excluded if pre-acquired, gifted or inherited. From an Irish matrimonial property perspective, in particular, such a limitation would appear unacceptable.73 It is at least arguable, therefore, that a more nuanced and complex approach to asset categorisation may be required to better reflect the rationales for sharing advanced.

One way in which greater theoretical consistency might be achieved would be by viewing the rationales as distinct and independent with each justifying the sharing of two different categories of assets. The entitlement to a share in one category of assets might arise as a consequence of marriage (reflecting partnership), while the rationale for sharing another category of assets might be contribution-based (reflecting joint efforts). What constitutes a ‘family asset’, shared as a consequence of marriage, could perhaps be determined by a functional test based on whether the asset was ordinarily used for a family purpose.74 Pursuant to such an approach, and as befits its special position in other areas of Irish matrimonial property law, the family home would automatically fall within this category.75

71 These influencing factors were clearly implied in the Law Commission for England and Wales report, above n 31, Chapter 8.
72 For a list of Civil law jurisdictions adopting such an approach, see Scherpe, above n 36, p449. A similar scheme is also applied in a number of US states and Canadian provinces and was mooted by the Law Commission for England and Wales, Matrimonial Property, Needs and Agreements - A supplementary consultation paper (SCP No. 208–2012).
73 See below.
74 A similar category of assets is also subject to sharing in Austria, Singapore, New Zealand and, albeit to a lesser extent, Scotland, see Scherpe, above n 36.
75 Special protection is already afforded to the family home by s 56 of the Succession Act 1965 which allows for the appropriation of the home by the surviving spouse on the death of the owner-spouse in certain circumstances and s 3 of the Family Home Protection Act which restricts the unilateral disposition of the home, see below. See also Law Commission for England and Wales, above n 31, para 8.32.
Moreover, building on recent studies in England and Wales which have shown that how money is held and under whose name is not necessarily determinative of the intentions of the parties’, bank accounts used for a family purpose would also be shared. The date or method of acquisition of these assets would be irrelevant as it is contended that ordinarily using property for a family purpose demonstrates the central importance of the asset to the martial partnership and is subject to division on that basis.

Notwithstanding its apparent simplicity, however, such an approach has faced opposition in recent times. One of the key concerns which has been raised is that such a scheme could cause spouses to shield assets from use to prevent their sharing should the marriage flounder. However, it is submitted that by specifying certain assets which are considered to be at the heart of the matrimonial consortium and which will be presumptively subject to sharing, such as the family home, in the majority of cases such shielding will be irrelevant—in the ‘average’ case, the core assets of the partnership will be captured automatically within the community for sharing. A second issue which has been raised is that difficulties could be encountered in the application of a functional test for characterising such assets. Despite this, it is arguable that many of these problems could be offset at the outset through the inclusion of legislative guidelines to aid in the identification process. The guidelines could specify the date on which an asset ought to be characterised and when the asset ought to be valued. They could also provide guidance in relation to the length of ‘use’ required and what it might consist of, what would happen where there is more than one function of the property or where there is an unrealized intention. The onus of proof could, moreover, be placed on the person claiming that the asset in question is not a family asset.

In the second category of community assets, where direct or indirect contributions such as savings through effective management of household or child rearing responsibilities are made by the non-owning spouse, business assets and/or pensions could be recharacterised as ‘quasi-family assets’ subject to division. To avoid confusion, and developing on the legislative equalisation of contributions effected in the Family Law (Divorce) Act 1996, the

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77 See Law Commission for England and Wales, above n 31, paras8.51-8.56.

78 This would appear to reflect current Irish policy. Crowley, above n 12, p631 notes: ‘The courts have shown themselves willing to make orders in respect of a business or farm owned by one spouse, or at least award a share of the value of the business to the non-owning spouse based on the spousal contributions in the course of the marriage.’ Vis-à-vis pensions, see O’Shea, above n18, p69. A similar test was applied in British Columbia, Canada pursuant to s 59(2) of the Family Relations Act 1996.
legislation could include an explicit statement that work in the home creates a rebuttable presumption that an indirect contribution was made to the pension/business. In this category, if the asset was acquired before marriage or was a gift or inheritance, it is arguable that only the increased value of the asset ought to be subject to division. In addition, reflecting the fact that ‘the actual value of most non-pecuniary contributions, especially homemaking, is implicitly linked to duration’, the sharing of quasi-family assets pursuant to such a system could be subject to temporal accretion. Drawing on empirical research elsewhere in support of such an approach, the regime could be tailored to ensure equal sharing of quasi-family assets would only be achieved after five years of marriage with a spouse accruing a 10% share each year until the fifth year. The main benefits of adopting such a scale would be to minimise the applications to court for a departure from equal sharing where the marriage was short on the basis that equal sharing is unfair and, simultaneously, to retain certainty in the default rules.

Notwithstanding their presumptive application, however, it is arguable that residual judicial discretion ought to be retained to allow for departures from these ‘rules’ where necessary. To this end, building on the fundamental distinction in the rationales for sharing family and quasi-family assets, clear and justifiable grounds for departing from equal sharing may be designed to respond to situations where a reapportionment of shares may be appropriate. For instance, in order to avoid the danger of assuming domestic contributions are in every case equal, quasi-family assets ought to be subject to reapportionment where the temporal

79 No link would need to be evidenced between the actual indirect contributions and the business. However, contributions would be subject to the de minimus principle.
80 The exclusion of such assets is ‘becoming increasingly common in common law jurisdictions’, see J Scherpe and J Miles in Eekelaar and George (eds) above n 70, p144. Moreover, in an Irish context, inheritance can be a factor in whether or not assets ought to be divided, see C v C [2005] IEHC 276, although it is usually only relevant where assets exceed needs.
82 Having an incremental scale (for quasi-family assets) would seem to fit with the approach of the Irish courts as identified by O’ Shea, above n 18, p121 where she noted ‘The Circuit Court did generally recognise the contributions of the wife, in accordance with Article 41.2.1., where there were children and a long-term marriage.’ Note, although this approach would also fit with the contribution-based rationale for sharing assets pursuant to this proposal, it would not be appropriate in the sharing of family assets which is justified by the partnership view of marriage.
84 Somewhat similarly, albeit in reverse, see s 9 of the Family Law (Scotland) Act 1985 which expressly identifies statutory criteria which must be satisfied in order to justify making any financial order as discussed in Crowley, above n 7, pp391-394.
accretion model gives rise to a result which is ‘clearly unfair’ having regard, for instance, to the extent of the contributions made.  

The inclusion of an explicit rationale for sharing may also be used to justify not departing from equal sharing in certain circumstances. If the entitlement to equal shares of family or quasi-family assets is afforded on the basis that it gives effect to the partnership rationale or in recognition of contributions, the reapportionment of such assets on the basis of a spousal ‘need’, at least as a default measure, might not appear appropriate. Nevertheless, given the broad gamut of family situations which exist, residual discretion ought, perhaps, to be vested in the judiciary to divide any assets (community assets or otherwise) where not to do so would, again, be ‘clearly unfair’ having regard to specified criteria.

Admittedly, a dual-categorisation approach such as that proposed here does not represent the most straightforward method of categorising assets falling into the community for sharing and undoubtedly prioritises the need for theoretical consistency at the expense of simplicity. However, although more user-friendly approaches do exist, notably the community of acquests regime, such a model can be both over- and under-inclusive. The adoption of the approach presented here, by contrast, would better ensure justifiable grounds for sharing, and departures therefrom, are established. It would, moreover, when used in conjunction with proposed guidelines, better facilitate consistent judicial decision-making where sought and represent a more transparent approach to asset division.

Finally, while it is submitted that spouses ought to be capable of contracting out of any such regime on obtaining independent legal advice, the constitutional pre-condition of ‘proper provision’ for a decree of divorce would require that where an opt out is availed of, the

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85 See E Cooke, ‘Miller/McFarlane: Law in Search of Discrimination’ (2007) 19 CFLQ 98, 101. However, it is submitted in most cases such contributions would be considered equal.

86 What these criteria are would have to be carefully considered and would, no doubt, be reflective of the overall policy direction of any such reform. One ground for departure which is included in a number of jurisdictions is if there was a considerable disparity in the value of the assets held by each spouse at the end of the relationship.

87 Although the scope of the community for sharing might, in larger value cases, appear somewhat conservative, it is submitted that such an approach is more in line with the development of matrimonial property law in Ireland to date which has been built on incremental progress towards entitlement-based provision. For general discussion of the movement of family law from a welfare based approach to an entitlement based approach, see Eekelaar, above n 81.

88 An opt-out clause is already in place in Irish matrimonial property law as it is possible to contract out of an entitlement to the legal right share, see s 113 of the Succession Act 1965.
current equitable redistribution scheme would once again come into play to ensure such provision is made for a dependent spouse.\(^9\)

**Spousal support**

The second issue or ‘pillar’ which must be considered is that of spousal support. As noted, it has become increasingly apparent that mere equal sharing of assets often proves insufficient to respond to the economic vulnerability of financially weaker spouses on divorce and may fail to ensure an economically just outcome is achieved. Where the economic vulnerability of one spouse, often the wife, arises by virtue of the greater workload taken on in the home and in caring for children, it ought, in particular, to be addressed.\(^9\)

Therefore, the question arises: if spousal support ought to be considered separately from issues of property division, how should it be calculated? In determining such issues and establishing for how long such support might endure, there has been a trend across the common law world towards the adoption (or at least investigation) of guidelines or formulae based on income-sharing rather than an individualised assessment of need. To this end, the approach adopted in Canada represents an especially attractive template.

Pursuant to the federal Divorce Act 1985, Canadian courts are empowered to make orders for spousal support.\(^9\) In this regard, a ‘fairly open-ended’ approach is adopted in determining issues relating to entitlement, amount and duration of such support.\(^9\) Although section 15.2(6) enumerates four objectives for spousal support,\(^9\) ‘[m]uch of the real work of determining spousal support awards is left to judicial interpretation’.\(^9\) However, by the turn of this century it was increasingly clear the broad discretion vested in the court had resulted in spousal support law which was ‘confused, uncertain and controversial’, with lawyers and

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\(^9\) Pursuant to s 91(2) of the Constitution Act 1867, marriage and divorce are within federal jurisdiction in Canada.


\(^9\) Spousal support orders ought 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’.

\(^9\) Rogerson and Thompson, above n 92, p247.
judges ‘desperate for guidance’ in what had become ‘one of the most difficult areas’ in Canadian legal practice at the time.  

Reacting to the widespread confusion, the Department of Justice commenced a research project in 2001 investigating the possibility of introducing guidelines to better clarify the position in relation to spousal support. The final version of the Spousal Support Advisory Guidelines (SSAG) was subsequently published in July 2008 with the guidelines introduced on a non-legislative basis. Based on an income-sharing formula, and devised having regard to dominant patterns in typical cases in the jurisdiction, the SSAG have been described as ‘the most ambitious and comprehensive scheme of spousal support guidelines to have been implemented to date in the common law world’.  

Reflecting both the ‘merger over time’ theory as well as compensatory and non-compensatory (needs-based) principles, cases are categorised by whether or not there are dependent children and a formula is then applied. Where there are no dependent children, the principal contributing factors are the length of the marriage and the income differential between the spouses. By contrast, where there are dependent children and thus child support obligations, additional factors intervene including the age of the children and the length of the post-divorce child-rearing period. When computed, a financial range within which spousal support ought to fall is extracted. However, discretion also remains to depart from the ranges produced where certain specified ‘exceptions’ apply.

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96 The guidelines were the result of a seven year project directed by Prof Carol Rogerson and Prof Rollie Thompsohn.


98 C Rogerson, ‘Child support, spousal support and the turn to guidelines’ in Eekeelaar and George (eds) above n 70, p159.

99 For a detailed discussion of the various principles which may underpin spousal support provision, see Law Commission for England and Wales, above n 31, chapter 3.

100 The amount and duration of support increases incrementally with the length of the marriage.

101 The need for software causes specific problems for those litigants who do not have legal representation. However, solutions are being sought as noted in Rogerson and Thomson, above n 92, p266, however it is hoped free online software will become available to complete these calculations.

102 These may include illness, disability, disproportionate losses or gains in a short marriage, et cetera.
Despite their non-legislative status, the SSAG have proven remarkably successful. The guidelines, which recognise ‘a very generous basis for spousal support’, are now ‘widely accepted and used by both lawyers and judges across the country’. The guidelines have facilitated the development of more consistent judicial decision-making and by identifying ‘outliers’ – decisions deemed ‘at odds with nationwide trends’ which had formerly been ‘covered’ by the wide discretion afforded to the judiciary – has effectively exposed such outcomes ‘forcing change or explanation’. The introduction of the SSAG also appears to have been particularly useful in better ensuring adequate provision for financially vulnerable spouses and reducing, where possible, the damaging economic consequences of divorce.

It has been observed, ‘[i]n some areas where spousal support awards were noticeably lower and out of keeping with general patterns across the country, the SSAG have raised the level of awards’. It is also clear that ‘lawyers for lower-income recipients now make spousal support claims, when they might not have in the past, as the courts will generally award at least the low end of the ranges with little need for sophisticated argument’. Moreover, the scheme goes a long way towards shaping client expectations and framing negotiations. Considering the merits of the Canadian guidelines, as well as the equivalent American Law Institute recommendations on spousal support, it has been observed:

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103 Rogerson and Thompson, above n 92, p242.
104 Rogerson, above n 98, p162. Only 8 months after the release of a draft version of the guidelines in 2005, they were described as a ‘useful tool’ by the British Columbia Court of Appeal, one of the largest provinces in Canada, see Yemchuk v Yemchuck [2005] BCCA 406 per Prowse J. For a recent analysis of the guidelines, see R Thompson ‘To Vary, To Review, Perchance to Change: Changing Spousal Support’ (2012) 31 Canadian Fam L Q 355.
105 Rogerson and Thompson, above n 92, p263.
106 Note, it has been observed, ‘Canadian law has been shaped by the public policy goal of ameliorating the negative economic consequences of separation and divorce experienced primarily by women and children.’ C Rogerson, ‘Child and Spousal Support in Canada: The Guidelines Approach Part 2’ (2012) 1 UFL 18. For a clear exposition of the challenges faced by women on divorce in Canada, see R Leckey, ‘Families in the Eyes of the Law: Contemporary Challenges and the Grip of the Past’ (research paper prepared for the Institute for Research on Public Policy) http://irpp.org/research-studies/choices-vol15-no8/ [Accessed 08 January 2015]. Similar challenges appear to exist in Ireland, see above.
107 Rogerson, above n 106.
108 Rogerson and Thompson, above n 92, p262. Prior to the introduction of the guidelines, it was observed: ‘The lack of certainty, predictability and consistency in the law, not to mention realities such as clients’ limited resources, lack of legal aid and personal circumstances such as an imbalance in bargaining power, made spousal support claims frequently unadvisable or impractical in some regions.’ See Canadian Bar Association, ‘Spousal Support Advisory Guidelines’ [May 2007] https://www.cba.org/cba/submissions/pdf/07-29-eng.pdf [Accessed 08 January 2015] p2.
109 For a full analysis of the strengths and weaknesses of the SSAG, see Rogerson and Thompson, above n 92.
110 The Canadian guidelines are preferred here to the American Law Institute’s equivalent due to the more flexible format of the former, see American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations (2002). For example, the Canadian guidelines result in a
'These approaches to the quantification of spousal support ... offer a very useful tool for parties seeking to settle their cases out of court'.\textsuperscript{111} As the Law Commission for England and Wales explained in its 2014 Report on Matrimonial Property, Needs and Agreements, such a formulaic approach ensures ‘parties can negotiate, knowing at least that they are “on the right lines”’.\textsuperscript{112}

Cognisant of these practical benefits, it is submitted that the Irish legislature ought to also seriously consider adopting such an approach, ideally at a statutory level.\textsuperscript{113} Similar guidelines, founded on equivalent research as to the range of appropriate outcomes in the jurisdiction, would be especially welcome in providing more robust protection to vulnerable financially weaker spouses while simultaneously presenting a more transparent, consistent and settlement-friendly approach to spousal support.\textsuperscript{114} In determining what precise guidelines ought to be adopted, ‘trade-offs between simplicity and efficiency, on the one hand, and more finely tuned justice on the other hand’\textsuperscript{115} would, necessarily, be required. However, the adoption of a more formulaic approach premised on the provision of ranges of outcomes, with the simultaneous retention of judicial discretion to achieve a different outcome where appropriate, would avoid the charge that such prescribed formulae are too rigid while nonetheless ensuring that settlements may be better reached in the shadow of the law.\textsuperscript{116}

Unlike England and Wales, such an approach founded on the provision of on-going support would be in line with current judicial practice in Ireland. A principle of ‘clean break’, which

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suitable range of outcomes while the American Law Institute guidelines produce a single figure outcome.
\end{quote}

\textsuperscript{111} Scherpe and Miles, above n 70, p149.
\textsuperscript{112} Law Commission for England and Wales, above n 31, para.1.29.
\textsuperscript{113} Although in Canada, the Spousal Support Advisory Guidelines are non-statutory in nature, they have received appellate court approval and are widely applied. However, in an Irish context, it is suggested that given the cautious approach adopted by the judiciary vis-à-vis ancillary relief and the attachment of many of the judiciary to wide ranging discretion, it would be better to have such guidelines on a statutory basis.
\textsuperscript{114} Note also O’Higgins J in MP v AP [2005] IEHC 326 did note ‘although the maintenance agreed between the parties was adequate, it would be wrong to ignore the huge disparity in income between the parties’ (emphasis added).
\textsuperscript{115} O’Shea, above n 18, p510 found that where an on-going payment was made, 60% had €50/wk spousal maintenance, suggesting trends may be apparent in the courts. Moreover, the inclusion of guidelines akin to those in Canada, incorporating the ‘merger over time’ theory, notably where there are no children, would fit with the temporal accretion model proposed for quasi-family assets.
\textsuperscript{116} Rogerson, above n98, p157.
promotes the cessation of financial ties between spouses, does not currently exist in the jurisdiction and the Irish judiciary have, in many cases, actively discouraged any such development.\textsuperscript{117} Notwithstanding the viability of such on-going support, however, periodical payments might not be appropriate or desirable for former spouses in every case. Consequently, while the above scheme would provide much greater clarity in the quantification of spousal support, where spousal support is inappropriate, perhaps due the possibility of non-compliance or a desire for clean break, it is strongly suggested that it ought to be possible to convert spousal support into an interest in property or lump sum payment. This could give rise to an unequal division of assets, notably the family home, albeit not by virtue of a reapportionment per se but rather a reconfiguration of the overall package.\textsuperscript{118}

\textit{Family home}

Once issues in relation to property division and spousal support have been resolved, it is then often necessary to determine how the actual assets are divided, whether the family home is to be sold or, if not, to whom the property is allocated. In this regard, it is highly possible a dispute may arise. Indeed, in supporting a form of deferred community of property, Buckley noted, ‘The most worrying issue relates to children, as an equal division of assets may preclude the retention of the family home by the primary carer’.\textsuperscript{119} To avoid this injustice, it is submitted that the powers currently vested in the Irish judiciary including the power to grant exclusive occupation of the home and defer its sale should continue. In this regard, and reflecting the current legislative stance, the first priority ought to be the needs of the dependent spouse and children.\textsuperscript{120} This would represent a practical method of responding to needs,\textsuperscript{121} especially where resources are limited, and would accord with the

\begin{itemize}
  \item \textsuperscript{117} See \textit{JD V DD} [1997] 3 IR 64. See also Murray J in \textit{T v T} [2002] 3 IR 334 at 407. However, see \textit{G v G} [2011] IESC 40 where the Supreme Court noted that although ‘Irish law does not establish a right to a “clean break” … it is a legitimate aspiration’.
  \item \textsuperscript{118} This ability to reconfigure the overall package is important in light of empirical evidence which demonstrates the desire of many Irish couples to include some element of clean break, by capitalising the value of the support or pension payments or converting such relief into an interest in property where possible, see Courts Service, above n 15. See also Buckley, above n 5. Such ‘restructuring’ is also possible in Canada, see \textit{Rogerson}, above n106.
  \item \textsuperscript{119} Above n 52, p74. This fear was also highlighted by Dewar, above n37, p309.
  \item \textsuperscript{120} See \textit{Family Law (Divorce) Act 1996}, s 15(2)(b).
  \item \textsuperscript{121} Where there are dependent children, the award of exclusive occupation, as Miles notes, is really ‘an aspect of provision for the child rather than for the spouse’, see Law Commission for England and Wales, above n 31, para3.45. Where there are no children, but a spouse wishes to remain in the home, such an order could be made in full or partial satisfaction of the recipient spouse’s entitlements under the proposal. In order to ensure an accurate valuation of the benefit arising from the order, actuarial calculations would have to take place. Alternatively, if such an order was made \textit{in addition to} the spousal support and property entitlements of the recipient spouse, and not as part of a reconfigured package, it would represent additional provision on the basis of need.
\end{itemize}
clear popularity of such orders in the Irish courts.\textsuperscript{122} Although such an approach would again vest discretion with the judiciary, the inclusion of a welfare objective ought, in theory, to ensure a clear line of authority emerging from the courts which would in turn lend itself to facilitating separation agreements and post-separation arrangements for the family home.

\textit{Should residual discretion vest in the court?}

While the adoption of the scheme presented here, or a variant thereof, would ensure a more comprehensive, transparent and, ideally, consistent approach to financial provision and property division on divorce, it is still possible that given the great variety of family circumstances which exist the overall suite of entitlements and remedies may not achieve economic justice in certain outlier cases. Therefore, it is arguable that residual discretion ought to reside in the judiciary to adjust the overall provision made between spouses pursuant to the above regime. To this end, a number of objectives of the overall regulatory process may be enumerated against which financial and property settlements are, at the final stage, judged.\textsuperscript{123} Where these objectives are not met, discretion may be exercised to achieve more individualised justice.

What these objectives ought to be will naturally be a matter of debate and policy choice. Although the adoption of a formulaic spousal support scheme such as that suggested here involves a relatively strong compensatory element, given the somewhat mechanical nature of such an approach, it may be felt that residual judicial discretion ought to be retained to ensure the regime effectively achieves this goal where required. Moreover, while an ancillary relief regime such as that proposed emphasizes the role of the payee as a deserving claimant rather than a ‘needy supplicant’, and notwithstanding the desire to prioritise compensation over need which has emerged in academic literature,\textsuperscript{124} it is arguable that (for both practical and political purposes) limited residual discretion may also be required to be vested in the judiciary to respond in certain cases to need not captured by spousal support nor offset by the entitlements provided. As a result, the inclusion of both need and compensation-based objectives may be considered necessary.

\textbf{Advantages of the proposal}

\textsuperscript{122} O’Shea, above n 18, p175. Crowley, above n 12, p632 notes ‘it is well settled that where there are younger children and where it is financially permissible, that the parent with custody should remain in the family home’.

\textsuperscript{123} For analysis of the importance of objective-driven discretion, see Crowley, above n7.

\textsuperscript{124} See Ellman, above n 90; Miles, above n 28.
The adoption of a proposal, akin to that presented, would carry with it a number of advantages, from both a practical and a theoretical perspective.

**Better facilitates consistency, predictability and the attainment of ‘proper provision’**

A key advantage of this proposal is that, if framed appropriately, such reform should allow for greater consistency and predictability in the provision of ancillary relief in Ireland. As Parkinson has noted:

‘Predictability in the law is important in order to ensure that lawyers can confidently give advice on the likely outcome of a case if it is litigated. As Birks (citation omitted) wrote in another context: “It is essential in modern society that the law be closely and cogently reasoned. Access to the courts is hugely expensive. An expensive palm tree is no use to the people. The law must be so stated as to facilitate prediction and advice. It is impossible otherwise to plan with confidence. And it is impossible to know when to litigate.” The fewer the palm trees in family law, the better.’

In particular, such reform would place financially weaker spouses in a much stronger position in court applications and, especially, in private ordering, while simultaneously better ensuring fairness in a general sense. Moreover, despite incorporating important rules and frameworks in the division of property and the calculation of spousal support, the proposal retains important discretionary powers for the judiciary at key stages of the process, thereby retaining essential flexibility. Although it may be argued that the inclusion of even residual discretion would be liable to undermine the certainty on which such a regime would be founded, the inclusion of a clear objective(s) to which the judiciary would be required to have regard in exercising this discretion would better ensure a clear line of authority emerging from the courts. The overall aim of such a proposal would be to better facilitate the attainment of ‘proper provision’ in the vast majority of cases than appears to be the situation pursuant to the current scheme despite, perhaps, no longer placing such provision as the explicit objective.

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125 P Parkinson ‘The Yardstick of Equality: Assessing Contributions in Australia and England’ (2005) 19 Int’l JL Pol & Fam 163, 174. Moreover, see Miles, above n 28, p389 notes: ‘[I]n ordinary cases, the fact that the parties’ needs will be determinative may make notionally starting at 50:50 appear pointless. Even here, however, there may be something intangible (and, more concretely, an enhancement of bargaining position) to be gained from the idea that each party is prima facie entitled to an equal share of the capital and that a non-owner applicant is not merely a “needy supplicant”.’ (Emphasis original).
Second, the proposal gives greater practical effect to Article 41 of the Constitution which pledges to protect the family and, in particular, recognise the contributions of the mother in the home. At present, despite this apparent constitutional safeguard, ancillary relief provision in Ireland continues to be heavily influenced by the needs of dependent spouses and children and there exists a lack of clarity as to importance of sharing, partnership or joint efforts.\(^{126}\) The Supreme Court observed in *T v T* that ‘proper provision’ does not equate with ‘property division’\(^{127}\) and in *G v G* subsequently noted that the requirement to make proper provision ‘is not a requirement for the redistribution of wealth’.\(^{128}\) Such pronouncements would appear, on initial analysis, to ‘rule out participation in any marital acquest and/or compensation’.\(^{129}\)

However, it is increasingly apparent that provision ought not to be limited to meeting need. Justice Murray, albeit in the minority in *T v T*, adopted a strikingly communitarian interpretation of proper provision:

‘Proper provision should seek to reflect the equal partnership of the spouses. Proper provision for a spouse who falls into the category of a financially dependent spouse ... should seek, so far as the circumstances of the case permit, to ensure that the spouse is not only in a position to meet her financial liabilities and obligation, continue with a standard of living commensurate with her standard of living during marriage but to enjoy what may reasonably be regarded as the fruits of the marriage so that she can live an independent life and have security in the control of her own affairs, with a personal dignity that such autonomy confers, without necessarily being dependant on receiving periodic payments for the rest of her life from her former husband.’\(^{130}\)

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\(^{126}\) While needs are legitimately prioritised in many cases, the entire provision made can be interpreted as being needs-based, diminishing the value of the marital partnership or the contributions made. This proposal seeks to rectify this perception.  

\(^{127}\) [2002] IESC 68, [2003] 1 ILRM 321. This seems to fly in the face of ‘the almost universal understanding that certain assets should be shared equally on divorce’, as noted in Sherpe and Miles, above n 70, p152. See also LA Buckley, “‘Proper Provision’ and ‘Property Division’: Partnership in Irish Matrimonial Property Law in the wake of *T v T*” (2004) 3 IJFL 9, 11.  

\(^{128}\) [2011] IESC 40 [22]. The court went on to explain at [25], ‘Proper provision means that the provision is reasonable in all the circumstances.’  

\(^{129}\) Scherpe, n 36, p465. See also, Crowley, above n 89, p210.  

More recently, Hogan J held in *LB v Ireland and the Attorney General and PB* that in ordering ancillary relief for a financially weaker spouse,

‘the State was doing no more than giving effect to that which is inherent in the nature of marriage. Marriage, after all, involves mutual giving and sacrifice. In practical terms this means the sharing of outgoings, expenses and, in some respects, at least, the capital assets of the parties.’\(^\text{131}\)

Consequently, as Buckley observes, it is becoming clearer that the justification for the delimitation of property rights in the marital breakdown context lies ‘in the nature of the family itself rather than on the connected but distinct social policy objective of combatting hardship and consequent social ills in the post-marital breakdown context’.\(^\text{132}\) The inclusion of provisions entitling spouses to a share of community assets, on the basis of partnership and/or contributions, therefore, builds on this developing judicial recognition and better supports the constitutional protection of the family.

**Better ensures theoretical consistency**

Finally, the adoption of a more rule-oriented approach to ancillary relief provision would provide much needed theoretical consistency to the overall matrimonial property scheme applied in Ireland. Although, at first blush, Irish law appears to be strongly separationist, as exemplified by the equitable redistribution scheme applied on divorce, communitarian principles actually pervade many other areas of Irish matrimonial property law.

Unlike the majority of common law jurisdictions, Ireland operates a regime of forced heirship on death pursuant to the Succession Act 1965. Significantly curtailing a testator’s freedom of disposition, section 111 provides that where a testator leaves a spouse and no children, the surviving spouse has an automatic right to one-half of the entire estate. Alternatively, where the testator leaves a spouse and children, the spouse is entitled to one-third of the estate. Moreover, the comprehensive protection afforded to non-owning spouses pursuant to the Family Home Protection Act 1976, restricting the unilateral disposition of the family home, is another feature regularly associated with civil law, communitarian regimes and is again founded on communitarian principles.\(^\text{133}\) Although the

\(^{131}\) [2012] IEHC 461 at [13].  

\(^{132}\) Buckley, above n 6, p86 (emphasis added).  

\(^{133}\) Pursuant to s 3, the written consent of the non-owning spouse is required for the conveyance of any interest in the family home, subject only to limited exceptions. Indeed, demonstrating the general feeling at the time, upon the introduction of the Family Home Protection Bill, Senator Robinson
impetus for the introduction of these legislative enactments may have been support/protection based, their overall effect is no doubt to incorporate communitarian principles during a relationship and on death.

Despite subsequently falling at the constitutional hurdle, the Matrimonial Home Bill 1993 was also ‘specifically predicated on partnership ideals’ and followed much support for a more communitarian approach to the ownership of matrimonial property, particularly the family home, in the Irish legislature. The introduction of some form of community of property was first mooted with the Succession Act 1965 and subsequently reiterated by the Report of the Commission on the Status of Women in 1972. The desirability of a regime founded on a community of property was raised again in 1993 in the Report of the Second Commission on the Status of Women. Consequently, as Senator Gallagher explained, the 1993 Bill was considered by the Commission and the Minister as ‘a first step in providing a suitable régime of marital property’. The protection of the matrimonial home was, she noted, a ‘matter of priority’ in this regard.

Indeed, notwithstanding the lack of a legislatively or judicially-developed principle of equality, a scheme based on equitable redistribution, similar to a community of property approach, also facilitates sharing out of a community fund on marriage dissolution and is based on the view that marriage is a partnership. However, there is a spectrum of interference in matrimonial property regulation giving effect to the view of marriage as a partnership and recognising the joint efforts of the couple. The two approaches are at different points on that spectrum. Irish law has been inching further along the continuum described it ‘as an interim measure on the road to a proper and just system of co-ownership of the matrimonial home’. Seanad Deb 1 July 1976, vol 84, col 923. For more, see K O’Sullivan, ‘Protection against the Unilateral Disposition of the Family Home: An Irish perspective’ (2013) 27(3) Int’l J L Pol & Fam 399.


135 Buckley, above n 127. However, s 7 of the 1993 Bill permitted a married couple or a couple contemplating marriage to opt out or exclude the application of s 4.

136 (Stationary Office 1972) 175.

137 (Stationary Office 1993).


139 Seanad Deb 27 October 1993, vol 137, col 1540.

140 See Report of the Second Commission on the Status of Women, above n 137, p39. See also Buckley, above n 52, p68.

141 See Dewar, above n 37.
since the introduction of the Succession Act 1965 and it is submitted it is time to continue the journey.\textsuperscript{142}

**Conclusion**

The political difficulties of tampering with family law have long been observed. Maclean and Eekelaar note, ‘As society becomes more fluid and more diverse, the chances of creating a new family law which will not offend the private values and expectations of a significant number of potential voters become slimmer and slimmer.’\textsuperscript{142} Moreover, in the specific area of ancillary relief, it has been noted, albeit in relation to Australia, ‘how difficult it can be to change the law ... and how attached family law professionals are to the now traditional technique of wide-ranging judicial discretion’.\textsuperscript{144}

Yet, notwithstanding the political challenges involved in effecting change in relation to ancillary relief provision, it is clear such reform (or, at minimum, a comprehensive legislative review) is required as a priority in Ireland. It has been observed:

‘Family Law functions in a paternalistic and patriarchal way by intervening in the private sphere of the family in order to protect vulnerable members of that family unit, particularly when the family unit begins to break down. Here, there are two defined protective roles: physical protection and economic protection.’\textsuperscript{145}

Unfortunately, it is evident from the above that there are clear shortcomings in the highly discretionary approach to ancillary relief applied in Ireland pursuant to the Family Law (Divorce) Act 1996 which appear to be leaving financially weaker spouses potentially void of such ‘economic protection’. In order to overcome these weaknesses, while simultaneously promoting consistency in judicial outcomes and facilitating parties reaching a fair settlement in an informal setting, what we need in Ireland are a priori declarations about the rights and responsibilities to which marriage gives rise, encapsulated within a more rule-oriented system of ancillary relief. However, although the Irish Government clearly supports the

\textsuperscript{142} Therefore, despite development of a sharing principle in England and Wales since *White v White* [2001] 1 AC 596, the Irish system, overall, may in fact be closer to a community of property style regime than our neighbours across the Irish Sea.


\textsuperscript{144} J Dewar, ‘Property and Superannuation Reform in Australia: A Danger Averted, or an Opportunity Missed?’ (2000) 3(1) JFL 2.

development of Alternative Dispute Resolution in the family law sphere,\textsuperscript{146} whether this will actually translate into reform initiatives to better achieve these aims, akin to those suggested above, appears doubtful. In particular, it has been noted,

‘The likelihood of a legislative initiative by government to provide for a regime of community of property in the future is minimal. While a system of community of property is in force in a variety of forms in a number of States, the practical and legal difficulties involved in superimposing such a system on a common law jurisdiction in which a regime of independent property ownership has been in operation for over a hundred years would be enormous’.\textsuperscript{147}

It is contended much of this scepticism as to the viability of reform on the basis of a more rule-oriented approach is due to a fundamental misunderstanding of the constitutional parameters which limit ancillary relief reform in Ireland and, equally, the ability to retain important flexibility in an otherwise rule-oriented system.

Buckley noted in 2002: ‘To date, the focus in Ireland has been on ameliorating existing rules, rather than on revising the nature of the system itself – on remedying individual instances of injustice, rather than on providing a prescription for the just ownership of marital property.’\textsuperscript{148} As we approach the 20\textsuperscript{th} anniversary of the introduction of divorce in Ireland, it is strongly argued the time has come for a comprehensive rethink about how we address ancillary relief in the jurisdiction and how we intend to overcome the significant shortcomings which have emerged in the application of the Family Law (Divorce) Act 1996. In this exercise, it is contended we must afford serious consideration, perhaps for the first time, to the opportunities presented by a more rule-oriented approach to ancillary relief provision.

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\textsuperscript{147} Shatter, above n 53, p836. However, these comments were directed at the \textit{Report of the Second Commission on the Status of Women}, above n 137 which sought an automatic joint ownership of family home.

\textsuperscript{148} Buckley, above n 52, p71.