

Ancillary Relief & Private Ordering: The vulnerability of financially weaker spouses

By Dr Kathryn O’Sullivan (LLB, PhD), School of Law, University of Limerick

Introduction

2016 marks the 20th anniversary of the introduction of the Family Law (Divorce) Act 1996. In conjunction with the Family Law Act 1995, the 1996 Act plays a leading role in regulating the consequences of marital breakdown in Ireland, governing, specifically, the remedy of divorce.¹ Notwithstanding, as the Supreme Court recently pointed out, that the range of issues which can arise in matrimonial proceedings is ‘wide and varied’,² one of the major areas of contention on marital breakdown is often that of ancillary relief provision. Pursuant to Part II of the Family Law Act 1995 and Part III of the 1996 Act, considerable discretion is placed in the hands of the judiciary to effect an equitable redistribution of property on judicial separation or divorce which makes ‘proper provision’ for a dependent spouse and children.³ Mitigating the harshness associated with the prevailing separate property regime and in theory allowing the judiciary the flexibility to achieve the optimum outcome in any individual case, the scheme provides potentially important protection for financially vulnerable spouses.⁴

Despite its positive attributes, however, significant shortcomings in the approach currently adopted in Ireland have emerged. Unfortunately, the lack of legislative (or judicial) guidance on what might constitute ‘proper provision’, in addition to the apparent inconsistency of judicial decision-making in the area, are liable to severely hamper the ability of spouses to reach a fair settlement in private ordering. Moreover, although as Eekelaar suggested, ‘it seems essential to responsible negotiation for both sides to know how far they are accepting a deviation from the default outcome’,⁵ such awareness is generally lacking in an Irish context. This article briefly considers the difficulties inherent in the Irish ancillary relief scheme and highlights the vulnerability of financially weaker spouses, particularly women, at the point of divorce. The article calls for a comprehensive review and reform of the ancillary relief scheme applied.

¹ For an analysis of the context in which divorce was introduced in Ireland see, L Crowley, ‘Irish Divorce Law in a Social Policy Vacuum – From the unspoken to the unknown’ (2011) 33(3) JSWFL 227.

² *MD v ND* [2015] IESC 16 at [4.1] per Clarke and MacMenamin JJ (joint judgment).

³ ‘Proper provision’ is also constitutionally mandated, see Article 41.3.2° of the Irish Constitution. Equitable redistribution was first introduced in Ireland almost 30 years ago in the Judicial Separation and Family Law Reform Act 1989.

⁴ Dewar, ‘Reducing Discretion in Family Law’ (1997) 11 AJFL 309 argued that reliance on judicial discretion in family law was first reflective of ‘technocratic liberalism’ meaning ‘a reposing of faith in the ability of experts, when armed with sufficient information, to arrive at optimal solutions for the parties, with “optimal” for these purposes being cast in economic or therapeutic, rather than moral or ethical, terms’. However, he was sceptical about the ability of a court to know what is best in any case.

⁵ J Eekelaar, ‘Financial and Property Settlement: A Standard deal?’ (2010) Fam Law 359, 359.

Weaknesses of ancillary relief scheme

Notwithstanding the undoubted malleability of equitable redistribution regimes and their inherent ability to facilitate the provision of individualised justice,⁶ the weaknesses of the specific approach applied in Ireland through the Family Law Act 1995 and the Family Law (Divorce) Act 1996, appear to outweigh its positives.

The overriding difficulty of the Irish regime is the extremely wide discretion afforded to the judiciary in the exercise of its powers. Although certain parameters do exist, in particular the legislative and constitutional duty to make 'proper provision' for a dependent spouse and children, and the requirement to consider certain statutory factors enumerated in the legislation, the practical effect of these limitations in restricting or guiding the exercise of judicial discretion appears in many cases to be marginal.⁷ Unsurprisingly in this context, serious inconsistency has emerged in judicial decision-making. Not only is this weakness evident in reported judgments, but it is becoming more and more apparent with the findings of each new empirical research project conducted. In 2007, Buckley reported inconsistent outcomes on the basis of her analysis of 89 case file questionnaires completed by 44 practicing family law solicitors in 2002.⁸ Similar inconsistency was noted by Coulter in her empirical research conducted in the Irish Circuit Courts from 2007-2009⁹ and again by O'Shea in 2014 in her analysis of 40 case files and observation of 1,087 unique cases in the eight Irish Circuit Courts between October 2008 and February 2012.¹⁰

Where there is such extensive discretion vested in the judiciary, the ability of parties to reach an out-of-court settlement in the 'shadow of the law' is also severely compromised. As Crowley observed, 'in essence parties are effectively negotiating... in the dark'.¹¹ The difficulties created for both lawyers and their clients in such circumstances are considerable. It has been noted elsewhere:

'If the law appears to offer only the prospect of the exercise of an unfettered judicial discretion based on no discernible principle, a lawyer's advice will inevitably be speculative and clients may feel that their affairs are out of their control. They may feel that they are drawn into a free-for-all of haggling in which one side makes an inflated claim and the other tries to beat it down. Much may be thought to depend on which judge might decide the case and the lawyer's knowledge of the judge's propensities. Such a process does not facilitate the settlement of property matters by restrained and orderly negotiation. It increases

⁶ For a relatively recent discussion of some of the strengths of discretionary family justice regimes, see Lord Wilson of Culworth, 'Family Dispute Resolution' (2012) 42 Fam Law 289. See also SJ Brake, 'Equitable Distribution vs Fixed Rules: Marital Property Reform and the Uniform Marital Property Act' (1982) 23(3) BCL Rev 761.

⁷ See section 16 of the Family Law Act 1995 and section 20 of the Family Law (Divorce) Act 1996. See L Crowley, *Family Law* (Dublin: Roundhall, 2013) Chapter 11 for analysis.

⁸ LA Buckley, 'Irish Matrimonial Property Division in Practice: A Case Study' (2007) 21 Int'l JL Pol & Fam 48.

⁹ C Coulter, *Family Law in Practice: A Study of Cases in the Circuit Court* (Dublin: Clarus Press, 2009). See also the associated Courts Service, *Family Law Matters Series (2007-2009)* <www.courts.ie/courts.ie/library3.nsf/pagecurrent/DBF7DEC660A62D3880256DA60052BC9D?opendocument&l=en> accessed 21 June 2012.

¹⁰ R O' Shea, *Judicial Separation and Divorce in the Circuit Court* (Unpublished PhD Thesis Waterford Institute of Technology, 2014) available at <http://repository.wit.ie/2825/> [Accessed 29 September 2014].

¹¹ L Crowley, 'Dividing the Spoils on divorce: rule-based regulation versus discretionary-based decision' (2012) IFL 388, 400.

animosity and bitterness between the parties and in the parties' attitudes to the law and lawyers.'¹²

The effects of such a highly discretionary regime and the attendant uncertainty weigh particularly heavily on financially weaker spouses who are in a very precarious bargaining position.¹³ As Parkinson notes:

'The system invites litigation from risk-takers. It is also 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.'¹⁴

In considering who may be vulnerable to such offers, it appears that Irish women are liable to be particularly 'risk-averse' at the point of divorce. Recent sociological data seems to bear this out.

Continued economic disparity between men and women

Drawing from the Survey on Income and Living Conditions for 2010, work patterns of male and female partners in couple households, including though not limited to married couples, were recently analysed.¹⁵ A number of trends emerged which illustrate the potentially precarious financial position of many women on divorce. First, although the male inactivity rate in couple households in 2010 was 28%, the female inactivity rate was more than 50% higher at 43%. Second, male and female partners differed greatly in relation to full-time work: while 64% of men in couple households worked full-time, only 35% of women did likewise.¹⁶ By contrast, women were much more likely to engage in part-time work with 22% doing so in comparison to a mere 8% of men.¹⁷ Moreover, 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.¹⁸ Female breadwinner households, although increased, were much less common and only recorded in 9% of couple households.¹⁹

¹² The British Columbia Law Reform Commission, *Property Rights on Marriage Breakdown* (Working Paper No. 63–1989) V(D)(1)(f) quoting the Australian Law Reform Commission (citation omitted).

¹³ Note, although practitioner knowledge of a local judge's preferences and trends may offset some of the uncertainty in trying to reach a settlement, this will only apply where there the known judge is guaranteed to be hearing the case and experienced local legal representation is secured. Such knowledge will not be available to parties seeking to reach a settlement without legal representation, where a non-local or inexperienced legal practitioner is retained or where there are multiple judges sitting on a rotational basis such as in the Dublin Circuit Family Court.

¹⁴ P Parkinson, 'Reforming the Law of Family Property' (1999) 13 AJFL 117. See also J Scherpe, 'Marital Agreements and Private Autonomy in Comparative Perspective' in J Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Oxford: Hart, 2012) p476.

¹⁵ F McGinnity, H Russell, D Watson, G Kingston & Elish Kelly, *Winners and Losers? The Equality Impact of the Great Recession in Ireland* (Dublin: Equality Authority and the Economic and Social Research Institute, 2014), pp25-26.

¹⁶ Ibid pp25-26.

¹⁷ Ibid pp25-26.

¹⁸ Ibid p27.

¹⁹ Ibid p27.

Irish women's reduced participation in the labour market has, in particular, long been influenced by the presence of children.²⁰ Factors including 'a lack of affordable childcare, comparatively low governmental provision for combining work and caring ... welfare and tax systems that support male breadwinner household arrangements and traditional attitudes about gender roles' have all contributed to low labour market participation rates among mothers.²¹ As a result, although the activity rates of women with young children increased over the period of the economic boom, considerable differences in participation rates according to the age and number of children have remained. In particular, the 'strong negative effects' of the presence of pre-school children on the probability of labour market participation of the mother continue to be observed.²² It has been suggested that the presence of pre-school children reduces the likelihood of participation of the mother by between 17% and 20%, with the presence of children between 5 and 12 years old reducing the probability by between 7% and 9%.²³ In addition to the immediate effect this has on labour market activity rates, the impact of such child care can also have longer term negative effects on the carer's ability to return to the labour market, especially after a period of full-time caring.²⁴

Finally, statistics released by the Equality Authority and the Economic and Social Research Institute in October 2014 demonstrate that women in couple households were significantly harder hit by Government austerity policies since 2008 than their male counterparts.²⁵ The statistics showed that women's individual incomes were reduced by more than men's incomes for each income group.²⁶

Consequently, the financial vulnerability of married women, particularly married mothers, at the point of divorce often remains acute and this gender dimension, despite being reduced, ought not to be discounted. Not only are they more likely to have reduced savings due to decreased labour market activity and the differential impact of Government austerity policies, they are also less likely to have Personal Retirement Savings Accounts or private pensions.²⁷ Moreover, they are liable to

²⁰ H Russell, F McGinnity, T Callan and C Keane, *A Woman's Place: Female Participation in the Irish Labour Market* (Dublin: Equality Authority and Economic and Social Research Institute, 2012) p17. Although the presence of children may also negatively affect the probability of men being engaged in the workforce, the impact on women appears more pronounced, see the Central Statistics Office, *Women and Men in Ireland 2011* (Stationery Office 2012) p22.

²¹ H Russell, F McGinnity, T Callan and C Keane, *A Woman's Place: Female Participation in the Irish Labour Market* (Dublin: Equality Authority and Economic and Social Research Institute, 2012) p17.

²² *Ibid* p39.

²³ *Ibid* p38.

²⁴ F McGinnity, H Russell, D Watson, G Kingston & Elish Kelly, *Winners and Losers? The Equality Impact of the Great Recession in Ireland* (Dublin: Equality Authority and the Economic and Social Research Institute, 2014) p11. This is especially important as 'the extent of downward mobility for those who move out of the labour market even for a short period is greater for today's women than it was for previous generations', as noted in See Jo Miles and Rebecca Probert 'Sharing Lives, Dividing Assets: Legal Principles and Real Life' in Jo Miles and Rebecca Probert (eds), *Sharing Lives, Dividing Assets* (Hart Publishing 2009) p20. Although this comment related to another jurisdiction, the point is equally likely to be true in Ireland.

²⁵ C Keane, T Callan & J Walsh, *Gender Impact of Tax and Benefit Changes: A Microsimulation Analysis* (Dublin: Equality Authority and the Economic and Social Research Institute, 2014).

²⁶ *Ibid* pp42-43. This fall was largely attributable to cuts in child benefit (which the report allocates to the mother as the usual recipient) and social welfare payments.

²⁷ See the Irish Longitudinal Study on Ageing, 'Fifty Plus in Ireland 2011' http://tilda.tcd.ie/assets/pdf/glossy/Tilda_Master_First_Findings_Report.pdf [Accessed 28 April 2014] pp233-234. See also D Price, 'Pension Accumulation and Gendered Household Structures: What are the Implications of Changes in Family Formation for Future Financial Inequality?' in J Miles and R Probert (eds), *Sharing Lives, Dividing Assets* (Hart Publishing 2009).

face considerable challenges when seeking to return to the workforce if they have engaged in a period of full-time caring.

Need for reform

In the absence of large scale empirical data analysing settlements reached informally in Ireland, it is not possible to say definitively that financially weaker spouses, husbands or wives, are not achieving economically just outcomes in private ordering pursuant to the current ancillary relief regime. However, the probability that these spouses are in a weaker bargaining position vis-à-vis their financially stronger spouse appears highly likely, with financially weaker spouses seemingly at the mercy of Parkinson's 'low "take-it-or-leave-it" offer'.²⁸ Furthermore, although in theory the court is constitutionally required to ensure proper provision is made for a dependent spouse prior to granting a decree of divorce, evidence suggests that the provision made in out-of-court settlements is not always reviewed to ensure compliance with this requirement prior to a decree being granted.²⁹

Conscious of these shortcomings, a number of commentators have called for reform of the Irish ancillary relief scheme.³⁰ A common denominator in the proposals for reform advanced is the need to ensure a more transparent, predictable and consistent approach to ancillary relief provision. One way in which this could be achieved could be through the introduction of a deferred community of property scheme adopting a hybrid rule-based/discretionary approach.³¹ While spouses could, as a default, share the community fund equally on divorce, residual discretion could nonetheless remain with the court to order a reapportionment of assets between spouses where equal sharing would be clearly unfair, having regard to specified criteria.³² Moreover, an income-sharing formula akin to that applied under the Spousal Support Advisory Guidelines in Canada could be adopted to address issues regarding spousal support.³³ Explicit objectives of the overall regulatory process could also be

²⁸ See above. The costs of pursuing litigation are often considered prohibitive and such action may not be a viable alternative for financially weaker spouses. Although Legal Aid is currently available to individuals whose disposable income is less than €18,000, some contributions are still required and serious delays may be incurred. Moreover, many spouses will not be eligible but may still be in a financially vulnerable position.

²⁹ See K O'Sullivan, 'Rethinking Ancillary Relief on Divorce in Ireland: The Challenges and Opportunities' (2016) 36(1) *Legal Studies* 111.

³⁰ See *ibid*; L Crowley, 'Dividing the Spoils on divorce: rule-based regulation versus discretionary-based decision' (2012) *Int'l FL* 388; LA Buckley, 'Matrimonial Property and Irish Law: A Case for Community' (2002) 53 *NILQ* 39; F de Londras, *Principles of Irish Property Law* (Dublin: Clarus Press, 2nd edn, 2011) p242. For earlier proposals advocating for the adoption of a community of property approach to family property, see P O' Connor, *Key Issues in Irish Family Law* (Roundhall 1988) who suggested the introduction of a system of immediate community of property. See also Report of the Commission on the Status of Women (Stationary Office 1972) 175.

³¹ A full analysis of this proposal is outside the scope of this article. For more, however, see K O'Sullivan, 'Rethinking Ancillary Relief on Divorce in Ireland: The Challenges and Opportunities' (2016) 36(1) *Legal Studies* 111.

³² What would constitute the pool of assets to be divided would have to be carefully considered. In addition to, perhaps, assets used for a family purpose, it may also include pension contributions made during the marriage, thereby redressing the imbalance noted above. For a fuller discussion of what the community of assets might encompass, see K O'Sullivan, 'Rethinking Ancillary Relief on Divorce in Ireland: The Challenges and Opportunities' (2016) 36(1) *Legal Studies* 111.

³³ See the Department of Justice Canada, *Spousal Support Advisory Guidelines* (July 2008) http://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/spag/pdf/SSAG_eng.pdf [Accessed 02 October 2014].

developed, with residual discretion resting with the judiciary to adjust the overall provision made between spouses pursuant to the above regime having regard to these stated objectives.³⁴ Although doubts would undoubtedly be raised as to the viability of such reform, particularly from a constitutional perspective in light of the failure of the Matrimonial Home Bill 1993,³⁵ it is submitted such a proposal could be drafted in a manner to best ensure its constitutional compliance.³⁶ Such reform would bring much needed certainty to the ancillary relief scheme applied in Ireland while retaining important flexibility for the closely circumscribed situations where the exercise of judicial discretion is warranted.

Conclusion

Notwithstanding that, to date, there has been no discernible interest at a legislative level in Ireland in tackling the serious weaknesses associated with the ancillary relief scheme applied in the jurisdiction, the need for a more certain approach, ensuring greater foreseeability and consistency, is undeniable. Considering the equitable redistribution scheme applied across the Irish Sea, Professor Cooke, former Law Commissioner for England and Wales, observed:

‘[F]ar too high a value is being placed upon the supposed ability to do individual justice, and insufficient value on predictability. The cost, to divorcing couples, of flexibility must be greater than the cost of clear principle.’³⁷

As this article demonstrates, the ‘cost of flexibility’ appears to be particularly heavily incurred by financially weaker spouses seeking to reach an out-of-court settlement. In light of the high level of uncertainty which currently prevails, financially vulnerable spouses in Ireland are liable to find themselves in a very weak bargaining position and potentially void of meaningful protection. In particular, on the basis of the research considered above, it appears women may be in an especially vulnerable position at the point of divorce.

As we mark the 20th anniversary of the introduction of the Family Law (Divorce) Act 1996, it would seem an appropriate time to undertake a comprehensive review of the ancillary relief scheme applied in Ireland with a view to reform. Let us hope the opportunity will finally be grasped.

(Note, this research was published as ‘Ancillary Relief and Private Ordering: The vulnerability of financially weaker spouses’ (2016) 19(1) *Irish Journal of Family Law* 3-6).

For analysis, see C Rogerson and R Thompson, ‘The Canadian Experiment with Spousal Support Guidelines’ (2011-12) 45 Fam L Q 241.

³⁴ Another aspect of provision could be in relation to the family home. For more, see K O’Sullivan, ‘Rethinking Ancillary Relief on Divorce in Ireland: The Challenges and Opportunities’ (2016) 36(1) Legal Studies 111.

³⁵ See *Re Article 26 of the Constitution & in the matter of the Matrimonial Home Bill, 1993* [1994] 1 ILRM 241

³⁶ See K O’Sullivan, ‘Rethinking Ancillary Relief on Divorce in Ireland: The Challenges and Opportunities’ (2016) 36(1) Legal Studies 111.

³⁷ E Cooke, ‘Miller/McFarlane: Law in Search of Discrimination’ (2007) 19 CFLQ 98, 106.