Title: The Legacy Continues: Ancillary Relief on Divorce in Ireland


Author: Dr Kathryn O’Sullivan (LLB, PhD)

Author Affiliation: School of Law, University of Limerick, Ireland

Postal Address: School of Law, Foundation Building, University of Limerick, Castletroy, Co Limerick, Ireland

Email Address: Kathryn.osullivan@ul.ie
Title: The Legacy Continues: Ancillary Relief on Divorce in Ireland

Abstract:

On the 20th anniversary of the introduction of the Family Law (Divorce) Act 1996 in Ireland, this paper provides a descriptive account of the ancillary relief scheme applied in the jurisdiction on divorce and its critics. Part I presents a brief overview of the context in which divorce was introduced in Ireland – notably the pre-existing ban on divorce formerly found in Article 41.3.2° of the Irish Constitution – before outlining key aspects of the resulting 1996 legislation governing the provision of ancillary relief. Part II then describes the difficulties which have arisen in the application of this legislation, underlining, in particular, the unacceptable level of inconsistency apparent in judicial decision-making and the lack of overriding principles. Part III finally places the spotlight on the lack of foreseeability for couples seeking to reach an out-of-court settlement and highlights the need for reform.

Key words:

Ancillary relief; financial provision; divorce; Ireland; property division
The Legacy Continues: Ancillary Relief on Divorce in Ireland

Introduction

In 1984, Walsh J aptly referred to the “troublesome” nature of family law in Ireland (foreword to Binchy, 1984, vi). In the intervening years, this area of law has grown increasingly complex and, arguably, ever more bothersome. One aspect of Irish family law which has generated particular controversy and debate over the years is that governing marital breakdown. Exactly 20 years ago, the Family Law (Divorce) Act 1996 was introduced, facilitating the termination of marriage by a decree of divorce. The introduction of the 1996 Act followed the passing of a 1995 referendum to amend the Irish Constitution and remove the pre-existing ban on divorce formerly found in Article 41.3.2°. However, the legacy of both the 1995 referendum and the prevailing social and political climate of the early to mid-1990s continues to be felt today. To increase the attractiveness of the constitutional amendment to the Irish electorate, the Irish legislature developed quite a conservative Divorce Bill which was published prior to the referendum. This restrictive approach in drafting had a considerable impact on various aspects of the current divorce regime now applied pursuant to the 1996 Act, none more so, arguably, than in relation to the provision of ancillary relief.

As we mark the 20th anniversary of the introduction of the 1996 Act, it is worthwhile to reconsider the ancillary relief scheme applied on divorce and highlight the need for reform. Part I of this article provides a brief overview of the context in which divorce was introduced in Ireland and the key provisions of the resulting 1996 legislation governing the provision of ancillary relief. Part II then presents a descriptive account of the difficulties which have arisen in the application of this legislation, underlining, in particular, the unacceptable level of inconsistency apparent in judicial decision-making and the lack of over-riding principles. Part III places the spotlight on the lack of foreseeability for couples seeking to reach an out-of-court settlement and the need for reform. It argues for the adoption of a more rule-oriented approach to ancillary relief provision.

Part I: Ancillary Relief on Divorce in Ireland – Then and Now

- **Historical context**

Following the formation of the Irish Free State, a ban on divorce was introduced by the Second Constitution of Ireland published in 1937.¹ Attempting to ensure the firm foundation of a Roman Catholic state for a predominantly Roman Catholic population, the ban represented a clear ideological and social divergence from the English position. In the absence of divorce, the options for spouses on marital breakdown were essentially restricted to two possibilities: entering into a separation agreement which constituted a private arrangement or availing of a divorce a mensa et thoro. The latter, however, was only
available on the grounds of adultery, cruelty or unnatural practices and did not affect a
dissolution of the marriage or allow the parties to remarry. Spousal support represented the
only ancillary relief open to the court.

However, by the early 1980s, the increasing frequency of marital breakdown was proving
ever more problematic. In 1983, the Irish Government commissioned an investigation into the
difficulties associated with marital breakdown and a Joint Oireachtas Committee was
assigned the task of reporting on the issue. Presenting its conclusions in April 1985, the
Committee recommended the holding of a referendum to abolish the ban on divorce noting
the law was “not comprehensive nor … reactive to the current changes in society and in
personal attitudes to the family and marriage” (p.30). The resulting referendum on the 10th
Amendment to the Constitution Bill 1986 was rejected by almost two-thirds of the population.

Notwithstanding this failure, the Government did make certain progress in legislating for
marital breakdown with the successful enactment of the Judicial Separation and Family Law
Reform Act 1989 which marked a “watershed in Irish family law” (Shatter, 1997, p.383). In
addition to establishing the grounds for the award of a decree of judicial separation, the 1989
Act empowered the court for the first time to make a wide range of ancillary relief orders
including property adjustment orders. Key provisions of the 1989 Act governing ancillary
relief on judicial separation were subsequently repealed and replaced by Part II of the Family
Law 1995 which continues to apply today.²

However, the need for effective divorce legislation remained pressing. By the early 1990s,
the incidence of marital breakdown and its associated complications was growing ever more
serious. While 37,245 “separated” individuals were recorded in the 1986 census (Central
Statistics Office, 1987), this number had swelled by almost 50% to 55,143 persons by 1991
(Central Statistics Office, 1993). Building on the publication of the “comprehensive
proposals” of the White Paper on Marital Breakdown in September 1992 (Ward, 1994), the
Government held a second referendum in 1995 to consider the amendment of Article 41 of
the Irish Constitution, providing for divorce and enumerating the basic criteria to be fulfilled
to successfully obtain such a decree.³ This time the Government adopted a more focused pro-
reform campaign to ensure its success (see Gallagher, 1996, pp 92-93 who noted that unlike
1986, all the major parties – the coalition government of Fine Gael, Labour and Democratic
Left, as well as the main opposition party Fianna Fáil – supported the 1995 referendum).
The referendum passed with the support of 50.28% of the electorate – a majority of just 9,114
votes. The Family Law (Divorce) Act 1996 subsequently came into effect on February 27th,
1997, supplementing the new constitutional provision and empowering the judiciary to order
a decree of divorce.

Throughout much of this period, issues relating to the provision of ancillary relief on judicial
separation and divorce were especially contentious. In particular, the “central role” which the
issue of property division played in the 1986 referendum was noted (Ward, 1993, pp.26-27).
As Ward (1993) explained:
“The anti-divorce lobby argued that the introduction of divorce would ultimately threaten the integrity of the family farm as the courts would inevitably be given power to distribute property as they saw fit. The image of the disintegration of holdings which have passed intact through generations proved to be quite an emotive one” (pp.26-27).

Fears were also expressed in relation to the vulnerability of financially weaker spouses, particularly women. Pre-referendum polls indicated that 64% of women as opposed to 46% of men intended to vote against divorce (Ferriter, 2008, 198). Considering the “acrimonious debate” preceding the 1986 referendum, Ferriter (2008) noted

“…divorce was frequently depicted as something that would specifically damage women and their rights, reflected in the infamous comment of Fine Gael TD Alice Glenn that ‘women voting for divorce is like turkeys voting for Christmas’” (p.198; see also Duncan, 1988).

Conscious of these competing concerns, the 1989 Act adopted a conservative approach to ancillary relief provision based on equitable redistribution, placing considerable discretion in the hands of the judiciary to determine the nature and extent of any provision made for a dependent spouse and children. The regime was subsequently replicated in the 1995 and 1996 Acts, albeit subject to limited refinement: welfare entitlements were extended to first and second wives while clean break was virtually eliminated with ancillary relief provision made reviewable subject to limited specified conditions.

Although it may be argued that the door was ajar on the introduction of the 1995 and 1996 Acts to reconsider the type of ancillary relief regime which ought to apply, any change in legislative direction was extremely unlikely. As noted, the 1996 Act was released in a Bill format in advance of the referendum to show the direction the legislature intended to take if the referendum passed. The 1995 Act was also specifically designed to account for this potential eventuality.⁴ Retaining the vague, ambiguous and highly discretionary approach first introduced in the 1989 Act to deal with the thorny issue of ancillary relief provision remained politically convenient. In the absence of fixed rules, landowners, while still wary of the potential ‘disintegration’ of their holding, were at least somewhat appeased that their property would not automatically be divided with their spouse on divorce. Campaigners were also reassured that provision would be made for financially vulnerable spouses which would not be limited to equal sharing. Moreover, in light of the constitutional failure of the Matrimonial Home Bill 1993 – section 4 of which 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 – there was a fear that any general rule of fixed application, such as automatic equal sharing of family property on divorce, would be constitutionally challenged (this fear was over-stated, see O’Sullivan, 2016).⁵ Indeed, even if it was not challenged and was constitutionally secure, doubts could easily be raised in the minds of the electorate by opponents of the referendum. Any ensuing debate could pose a distraction from the substantive issue of divorce itself. Retaining the vague, highly discretionary, equitable redistribution regime with which people
had become familiar since 1989 allowed the Government to avoid such difficulties. This ancillary relief scheme was thus replicated in the 1995 Act and in the draft Divorce Bill. By the time the 1995 referendum came round, the fears in relation the economic consequences of divorce which had dominated in 1986 had been significantly allayed (see Fahey, 2012). As noted, this time the referendum passed and the Family Law (Divorce) Act 1996 was enacted. The ancillary relief scheme adopted on divorce pursuant to the 1996 Act continues to apply today.

- **Provisions on divorce**

Part III of the Family Law (Divorce) Act 1996 provides the courts with “ground breaking” redistributive powers on divorce (Buckley, 2007). Adopting an approach based on equitable redistribution, the judiciary are empowered to grant a wide range of financial and property orders with the objective of ensuring that “proper provision” is made for a dependent spouse and children. The “unique requirement” under Irish law to make “proper provision” is both legislative and constitutional in nature and is a pre-condition to the award of a decree of divorce. Although in the absence of a statutory definition of the term its exact scope remains unclear, “proper” has been held to be akin to “fit, apt or suitable” or ”correct or in conformity with rule.”

Notwithstanding that the judiciary are afforded considerable discretion in determining whether or not to grant ancillary relief to an applicant spouse, and what form that relief, if granted, may take, the legislation does enumerate certain statutory factors to be considered by the court. These factors include, among others, the financial and property resources of the spouses; the needs, obligations and responsibilities of each of the spouses; the age of the spouses; the duration of their marriage; the contribution the spouses have made or are likely in the foreseeable future to make to the welfare of the family; and the accommodation needs of the spouses. The legislation does not attach specific weight to any of the factors enumerated in the legislation but rather allows the judiciary the freedom to exercise their discretion in evaluating the importance or otherwise of each. It has been observed that while the courts are required to have regard to the factors, “it is for the trial judge to decide what weight, if any, is to be given to them in the individual circumstances” (Crowley, 2013, p.642). Moreover, as Shatter (1997) explains:

“…none of [the factors] stand alone nor should any one factor, of itself, determine the outcome of any particular application. They are all factors to be globally taken into account by the court as forming part of the circumstances which must be considered in determining the ancillary relief, if any, to order” (p.932).

In addition, although the list of factors appears to be non-exhaustive, the court is prohibited from making any order unless “it would be in the interests of justice to do so”. Once these factors are considered, the court is empowered to make a comprehensive range of ancillary relief orders, adjusting the property or pension rights of spouses, ordering the exclusive occupation of the home or ordering a wide range of financial payments.
Part II: Discretionary redistribution in the Irish Courts

Despite the strengths of discretionary equitable redistribution regimes in regulating ancillary relief provision, specifically their flexibility to allow the court to tailor-make provision in any given situation, the weaknesses associated with such schemes have long been acknowledged. Unfortunately, the vague, highly discretionary and excessively broad approach currently applied in Ireland, exemplifies these shortcomings.

- **Inconsistency of outcomes**

A major problem with the current Irish regime is the lack of foreseeability inherent in it and the inconsistency of outcomes at a national level. As Martin (2001) noted, “Unpredictability is the key characteristic of the outcome of contested divorce cases” (p.6). O’Shea (2014) recently reported high levels of inconsistency throughout the ancillary relief process based on her observation of 1,087 unique cases in the eight Irish Circuit Courts between October 2008 and February 2012 and having analysed 40 case files. As well as observing that property adjustment orders were dealt with on a “case by case basis”, she noted that an “ad hoc process” was adopted in assessing spousal support “involving what appeared to be arbitrary percentage redistribution of equity” (p.261). She also found that there was “significant variation” in the approach of judges to the statutory and constitutional requirements on divorce (p.92). Similar findings were reported by Buckley (2007, who, in particular, saw worrying regional variations) and Coulter (2009) on the basis of their empirical research in the area. “Significant inconsistency” in family law decision-making at Circuit Court level more generally was also recently noted by the Law Society of Ireland (2014) which added that it was, “regrettable” that the spectrum of decisions was “so wide” (p.10). It added: “It is clear to practitioners that different judges approach cases in very differing ways” (p.10, for more practitioner feedback see Durcan, 2013; Walls, 2013). Although in the absence of more detailed empirical research it is not possible to conclude that the outcomes reached in individual cases are necessarily unfair, the potential for unfairness would appear tacit. Indeed, insofar as consistency is in itself “an aspect of fairness” (Miles, 2008, p.387), the fairness of the scheme at a national level appears dubious.

- **Contributing factors**

A number of factors have combined to give rise to this situation. First, a system based on discretionary justice is uncertain by nature. The central premise of such a regime is that each case is taken on its own merits and provision is designed to best meet the facts in question: regard to previous case law or a desire to ensure a level of coherency between decisions is less important than making the optimum provision in the case at hand. Second, notwithstanding that some fetters are placed on the exercise of judicial discretion in Ireland, the vague constitutional direction to ensure “proper provision” is essentially meaningless since in achieving this objective the legislature simply chose to refer the courts to unweighted statutory factors. As Crowley (2012) explains:

“Judicial freedom to determine the best outcome in the circumstances dominates the Irish approach to asset distribution on marital breakdown. The open-ended judicial
powers exercizable to secure the vague goals of justice and fairness underpin a regime reliant upon subjective judicial adjudications, subject only to the over-riding ‘proper provision’ requirement and statutory guidelines to which the court need merely have regard” (p.395).

Third, serious difficulties have emerged in relation to a lack of reporting which adds further to the unpredictability. The problems posed by the in camera rule have been somewhat eased by the introduction of both section 40 of the Civil Liability and Courts Act 2004 which permits limited access to the family courts by bona fide family law researchers and the Courts and Civil Law (Miscellaneous Provisions) Act 2013 which facilitates media reporting on family law proceedings according to strict conditions. Yet, difficulties still remain. One major weakness is that few judgments are actually recorded. The vast majority of all divorces are decided in the Circuit Court, with a very small percentage initiated in the High Court. In 2014, while 2,612 divorces were granted in the Circuit Court, only 26 were granted in the High Court (Courts Service). In general, Circuit Court judgments are not written and there is, with some limited exceptions, no stenographic record of what happens. This is, in turn, exacerbated by the fact that judgments that are reported generally deal with big money cases or complex issues of law in the High Court or the Supreme Court and are, therefore, of limited, if any, value in the majority of “typical” family law cases. Furthermore, with certain notable exceptions, many cases that are reported from the superior courts are not reasoned and make minimal reference to case law or legal principles (see Martin, 1998; O’Shea, 2014, p.89 noted that case law was “rarely” referred to).

Emerging trends and lack of principles

Although it is possible to make some general observations on how the courts tend to view applications for ancillary relief, the trends, such as they are, serve to merely highlight the confusion which prevails. First, it appears that although “proper provision” is a pre-condition to a decree of divorce, this may not equate with “property division”. In the Supreme Court decision of T v T, Murray J noted that property adjustment orders, which “to some extent may have the appearance of division of property”, are, in reality, simply ancillary to the periodic payments which will ordinarily represent proper provision (however, see Buckley, 2004, p.11 who argues: ‘[T]here is no meaningful practical distinction between “provision” and “division”’).15

Where it is accepted that property redistribution is appropriate, notwithstanding that equal division of assets is a possible outcome, no principle or policy of equality exists. As Fennelly J asserted in T v T, the relevant statutory language “does not erect any automatic or mechanical rule of equality”.16 Moreover, Denham J stressed, “[I]t is not a question of dividing the assets … on a percentage or equal basis.”17 Although in conducting her research, O’Shea (2014) found that some judges tended to favour equal sharing where there was a long marriage and worked from a presumption of equality, they were in the minority (p.261, only three of the 13 judges observed in her study “clearly worked from the presumption”). The vast majority observed “did not appear to start with any presumption and approached division of assets on a case by case basis” (p.261; see also Coulter, 2009, p.105).
Moreover, it is not clear what precise assets ought to be included in any redistribution. Pursuant to section 20(2)(a) the court must consider all wealth both earned and received, coupled with all the available assets of the spouses thereby ensuring any property purchased, inherited or acquired through other means, prior or subsequent to the marriage, which are consequently vested in a spouse may be subject to a property adjustment order. Although to date the Irish scheme has not developed in any meaningful way towards the categorisation of “marital” or “non-marital” assets, how the asset was acquired may be taken into consideration at the discretion of the court and there are tentative signs that such classification of assets may be becoming more important (the law in England and Wales has developed a somewhat clearer policy in this regard, see the Law Commission for England and Wales, 2014; Murray, 2015; Scherpe, 2013). \(^{18}\)

Finally, further compounding the confusion, considerable ambiguity also continues to surround the importance of key principles such as need, compensation or sharing in Irish ancillary relief provision. Where the resources of a couple are limited, it does appear that need remains the over-riding consideration with the courts looking to the future rather than dwelling on the past. Drawing on her empirical research conducted in the Irish Circuit Courts from 2007 to 2009, Coulter (2009) noted:

> “Overall, what emerges … is that judges are guided by an essentially pragmatic consideration of how the parties to a marriage can proceed in the aftermath of a marriage breakdown. Rulings are forward looking, and the history of the marriage is mainly of relevance in assisting the judge to make proper provision for the parties and dependent members of the family into the future” (p.106; see also Buckley, 2002, p.61).

Consequently, it has been observed that the Irish approach to ancillary relief “appears much more strictly needs-based” than the other equitable redistribution schemes (Scherpe, 2012, p.465). \(^{19}\) At the other end of the spectrum, however, notwithstanding as the Supreme Court noted in *G v G* that “the requirement is to make proper provision … it is not a requirement for the redistribution of wealth”, \(^{20}\) where assets exceed liabilities, it now appears that provision is not limited to meeting needs. This was acknowledged in the Supreme Court in *T v T* \(^{21}\) and reiterated in *GB v AB*. \(^{22}\) In the latter case, the court instead referred to the “overall yardstick of parity”. \(^{23}\)

One way in which greater consistency could be facilitated – and much of the confusion above offset – would be through the judicial development of a more principled approach to ancillary relief provision as has arisen to some extent in England and Wales. \(^{24}\) According to Martin (1998):

> “[I]t is highly desirable, particularly in a common law system like ours, to codify and reduce judge-made family law decisions to a tolerable and flexible legal method that adheres to the rule of law maxim. Regrettably we cannot codify that which does not exist” (the only principle that can really be said to exist is the “no clean break” principle, see Martin, 2002).
Notwithstanding the passage of almost 20 years since this indictment was made, it remains true today. Two opposing arguments may be advanced which seek to explain the lack of judicially developed principles in Irish practice. On one hand, it is arguable that the judiciary do not feel they have a mandate to develop general principles (see Parkinson, 2005). After all, it has been observed:

“The Irish process is very much temperate in its influence and essentially confirms the power, if not duty, of the court to decide each case with primary and almost absolute reference to the individual circumstances of each case before the court” (Crowley, 2013, p.641, emphasis added).

On the other hand, however, it is possible such a development has been shunned by the judiciary as potentially introducing an unwanted fetter on the discretion of the court. The importance of retaining broad discretion in granting ancillary relief has been reiterated a number of times in the Irish courts. As O’Higgins J remarked, “The widely different circumstances from one case to another … make it desirable that there be considerable discretion vested in the court of trial”. Whatever the reason, the failure of the judiciary to develop a principled approach to guide the exercise of judicial discretion has exacerbated the weaknesses already inherent in the legislative scheme.

**Part III: Private Bargaining and Legislated Litigation**

The ambiguity of the legislative scheme and the inconsistency of judicial decision-making have resulted in a serious lack of predictability in the current system. In particular, there now exists a “very high degree of uncertainty” for couples trying to reach an out-of-court settlement on marital breakdown (Shannon, 2008). At a practical level, this presents a serious problem. In light mainly of the exceptionally high costs associated with represented litigation, few – perhaps as little as 10% – of all marital breakdown disputes are fully contested (see Court Services, 2007). Moreover, consensual orders are strongly encouraged by the judiciary with a “huge premium in family law cases where parties resolve matters between themselves” (Court Services, 2009; O’Shea, 2014, p.258 also reported that six out of 13 judges she observed “strongly encouraged settlement discussions”).

However, notwithstanding the prevalence of private bargaining in Ireland and the judicial encouragement for out-of-court settlements, the ancillary relief regime applied pursuant to the Family Law (Divorce) Act 1996 is clearly premised on adversarial values. The Irish regime envisions judicial intervention in every case to determine all ancillary relief disputes with little guidance, either legislative or judicial, afforded to parties to enable them to resolve such issues themselves. Out of court settlements are further impeded pursuant to the Irish regime in light of the lack of recognition afforded to pre-nuptial agreements in the jurisdiction (see Report of the Study Group on Pre-Nuptial Agreements, 2007). At almost every turn in the ancillary relief process, party autonomy is restricted while the importance of judicial discretion and oversight is reinforced (albeit that judicial oversight, where merited, such as in protecting financially weaker spouses from improvident settlements, is not always present, see Buckley, 2007; Coulter, 2009; for more on party autonomy in Irish family law, see Report
of the Study Group on Pre-Nuptial Agreements, 2007; see also Crowley, 2004). Unfortunately, this model has aptly been described elsewhere as one of “legislated litigation” (this term was used to describe British Columbia’s family justice system, albeit that the Family Relations Act 1996 which formerly regulated property division in the province retained significantly less discretion than that currently applied in Ireland, see British Columbia Justice Review Task Force, 2005, p.12). In such an environment, innovations such as mediation and collaborative law, despite being “worthy and welcome”, remain “add-ons to what is still, essentially, an adversarial format” (British Columbia Justice Review Task Force, 2005, p.13).

Conscious of the move towards private bargaining on marital breakdown across the common law world, various jurisdictions are now actively seeking to reform their ancillary relief laws to reflect this new dynamic, providing a clearer “shadow of the law” in which couples can bargain. Considering its own equitable redistribution scheme, the Law Commission for England and Wales (2014) recently noted:

“...the current statutory framework for financial orders assumes that a bespoke package will be devised by a judge for each couple; but in an environment where legal advice is not easy to access, and the court system cannot provide tailor-made justice for all. New approaches are required to enable and empower people to devise fair solutions for themselves or to use other methods of dispute resolution” (at para.1.05; see also, Family Justice Review Panel, 2011, p.178).

Similarly, in British Columbia, Canada, the Justice Review Task Force recommended in its 2005 report, A New Justice System for Families and Children, “that the law more overtly support co-operative rather than adversarial approaches [to family dispute resolution] and that it more closely reflect the reality that the vast majority of family disputes settle short of trial” (p.81). Sweeping reform of the property division scheme applied in the province – reducing the role of judicial discretion and further clarifying the precise pool of assets subject to division – was introduced in the resulting Family Law Act 2011.

The Irish legislature too needs to react, in particular, to better facilitate the vast majority of divorcing spouses who seek to reach an out-of-court settlement. It is widely considered we need to move away from the current vague, court-centred, equitable redistribution model, instead adopting a more predictable, perhaps more formulaic, approach to ancillary relief provision (see O’Sullivan, 2016; Crowley, 2012; de Londras, 2011, p.242; Buckley, 2002; for earlier proposals advocating for the adoption of a community of property approach to family property, see O’ Connor, 1988; Report of the Commission on the Status of Women, 1972, p.175).

Notwithstanding, as Dewar (1997) explained, that “[d]iscretion and rules are sometimes portrayed as opposites locked into some zero sum relationship”, it is now increasingly clear that ostensibly rule-oriented approaches may still retain important residual discretion. As Crowley (2012) observes, a number of “tools” such as principles, policies and presumptions may be adopted which “place parameters on the nature and scope of the adjudication process”
and which, in turn, should “greatly assist any inter-partes negotiations” (p.400). Such reform would appear particularly apt for Ireland in better facilitating the attainment of “proper provision” in the vast majority of cases. As this author has argued elsewhere, reform based on the adoption of a rule-oriented approach to ancillary relief provision incorporating a presumption of equal sharing over certain categories of family assets – while simultaneously retaining residual judicial discretion exercisable in only tightly circumscribed circumstances – has much to recommend it (O’ Sullivan, 2016).27 Moreover, notwithstanding, as the Supreme Court recently observed, that “[a]ll elements of potential provision are, to a greater or lesser extent, interconnected”,28 the adoption of a more “pillared approach” to ancillary relief provision would also appear highly attractive in overcoming the weaknesses of the current regime (see Scherpe, 2012, pp.443-518; Scherpe & Miles, 2014, pp.138-152). Although at present, the 1996 Act does not differentiate between the division of property, spousal support or other financial remedies on divorce, with all remedies combining to produce a “package solution” (Scherpe, 2012, p.476), it is submitted such elements of provision ought to be viewed as distinct (O’ Sullivan, 2016). The introduction of such “pillars”, a new concept in Irish ancillary relief, would radically reduce the vagueness of the overall regime, promote greater certainty and ensure much greater transparency in ancillary relief provision.

Conclusion

Irish family law is now viewed as “one of the most rapidly developing in Europe” (Scherpe, 2012, p.6). However, it is equally true that much of the current divorce law applied in the jurisdiction is explained by its “social, historical and constitutional background” (Scherpe, 2012, p.464). Nowhere is this more evident than in the adoption of the highly discretionary ancillary relief regime applied pursuant to the Family Law (Divorce) Act 1996. As Parkinson (2005) noted, “[t]he conferral of a broad discretion on judges … [is] a convenient way of shifting responsibility for hard policy choices by delegating that responsibility to the courts” (p.166) In an Irish context, choosing to pass the controversial issue of ancillary relief provision (in particular, family property division) onto the judiciary was a particularly convenient method of dealing with the economic consequences of divorce in the mid-1990s without drawing the ire of an electorate who were none-too-keen on facilitating the introduction of divorce legislation in the first place.

Twenty years later, however, the practical weaknesses of the scheme are proving increasingly evident. The ambiguity, inconsistency and lack of foreseeability inherent in the current scheme appear to weigh particularly heavily on the very many spouses seeking to reach an out-of-court settlement. Justices Clarke and MacMenamin delivering a joint judgment in the recent Supreme Court decision of MD v ND observed: “The consequences of marital breakdown can be difficult enough for parties without complex, protracted and consequently expensive litigation.”29 Yet litigation – likely in many cases to be complex, protracted and expensive – is precisely what the Family Law (Divorce) Act 1996 legislates for in relation to ancillary relief provision.
Although it is accepted that “‘best practice’ in respect of regulatory approach is difficult to identify definitively” (Crowley, 2012, p.401), the need to develop a more structured approach to Irish ancillary relief provision is becoming ever more obvious. As Cooke (2007) explains, albeit in relation to England and Wales,

“[I]t is particularly important that the principles of ancillary relief be clear enough to be operated without recourse to litigation. In particular, the answer to a given problem should not depend upon the perceptions of an individual judge, but should rest on factors which individuals can work out for themselves, or with help from mediators and lawyers” (p.98).

On this, the 20th anniversary of introduction of the Family Law (Divorce) Act 1996, the time must surely have come to engage in a long overdue review and reform the law governing ancillary relief provision on divorce in Ireland. Let us hope the opportunity will now finally be grasped.

**Reference List**


1 Such a ban did not form part of the First Constitution of the Irish Free State in 1922.
2 Judicial separation does not terminate a marriage or legally dissolve it, merely recognising the right of the parties to live apart. As it is available one year after separation, spouses often obtain a judicial separation and associated ancillary relief before later seeking a decree of divorce. Although it is not within the scope of this article to consider in detail the ancillary relief regime applied on judicial separation, specifically, many of the difficulties with the regime applied on divorce discussed below also arise on judicial separation in light of the almost identical regime applied under the 1995 Act.
3 These conditions include a) that at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the five years; b) that there is no reasonable prospect of a reconciliation; and c) that proper provision exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law.
4 Given the shorter separation period required for an order of judicial separation, it was always likely spouses would first have recourse to the 1995 Act for ancillary relief provision even if the Divorce referendum passed. Therefore, the ancillary relief provisions of the 1995 Act were also specifically drawn up to reflect the approach which it was proposed would be taken if divorce was introduced.
5 See *Re Article 26 of the Constitution & in the matter of the Matrimonial Home Bill, 1993* [1994] 1 ILRM 241. The retrospective effect of the provision and its infringement on the constitutionally protected authority of the family were the main factors in the finding of unconstitutionality.
6 *MD v ND* [2011] IESC 18 at [21].
7 *WA v MA* [2005] 1 IR 1, [2005] 1 ILRM 517. Hardiman J however noted it is “in fact a word of peculiar difficulty”.
8 See section 20(2). In addition, section 20(4) of the 1996 Act enumerates seven factors to be considered by the court when deciding whether to make any ancillary orders in favour of dependent members of the family other than the spouse.
9 Section 20(5) of the 1996 Act. In *EH v AH* [2014] IEHC 688 at [43] White J explained: “The Court has to consider the overriding principle of fairness and proportionality in making proper provision and in dealing with the fair allocation of the assets of the parties.”
10 See sections 12-19 of the 1996 Act. Preliminary orders such as barring orders are also available section 11 of the 1996 Act.
The in camera rule, which ensures cases are heard in private, was first introduced for family law cases by the Judicial Separation and Family Law Reform Act 1989 to protect the privacy of the families involved.

Moreover, even High Court judgments may not fully elaborate on the relevance of the factors. The desirability of the court approaching the exercise of its discretion with specific reference to the statutory factors was recently reiterated in the Supreme Court in MD v ND [2015] IESC 16 at [4.14] per Clarke and MacMenamin JJ (joint judgment).

Similarly, see MP v AP [2005] IEHC 326.

In PB v AB [2012] IEHC 616, for example, the court recognised the semi-inherited nature of the husband’s business assets and held that on the basis of previous case law, notably YG v NG [2011] 3 IR 717, it should be wary of redistributing them when basic needs are met. For more, see also C v C [2005] IEHC 276; SD v BD [2007] IEHC 492.

Unfortunately, there has been no judgement to date which fully details the appropriate balance to be struck where the resources of the parties are insufficient to meet their competing needs.


However, Buckley “‘Proper Provision’ and ‘Property Division’: Partnership in Irish Matrimonial Property Law in the wake of T v T” (2004) 3 IJFL 9, at 11 argues: “[T]here is no meaningful practical distinction between ‘provision’ and ‘division’”.


Similarly, see Lucy-Anne Buckley “‘Proper Provision’ and ‘Property Division’: Partnership in Irish Matrimonial Property Law in the wake of T v T” (2004) 3 IJFL 9.


See for example, MD v ND [2011] IESC 18 at [30].

Any reform to ameliorate the current difficulties on divorce, could also be modified to facilitate adoption vis-à-vis ancillary relief provision on judicial separation.

MD v ND [2015] IESC 16 at [4.2] per Clarke and MacMenamin JJ (joint judgment).

MD v ND [2015] IESC 16 at [1.1] per Clarke and MacMenamin JJ (joint judgment). Here the Supreme Court sought to reduce conflict in relation to ancillary relief provision on marital breakdown by devising suggested good practice guidelines. They proposed at [4.7] that “in any but the most straightforward of resources cases”, the court be presented with “a single and simple schedule ... a list of all of the assets which either side contends should be taken into account by the court in its overall assessment of proper provision”. They added at [4.12], “each party should specify what it says would be proper provision in the light of the overall picture of the assets and other resources which emerges from the relevant schedule or schedules”. The best practice set out by the SC was considered in the subsequent High Court decision of PD v RD [2015] IEHC 174. Keane J noted at [80] that it “reflects an obvious concern for the fair and reasonably expeditious conduct of litigation".