

CONSORTIUM ASSER - UCL
Association momentanée

R.C. Schimmelpennincklaan, 20-22
2517 JN DEN HAAG
Nederland

Collège Thomas More
Place Montesquieu, 2, box 5
B - 1348 LOUVAIN-LA NEUVE
Belgique

COMMISSION EUROPÉENNE
General Direction Justice and Home Affairs
Unit A3 Judicial Cooperation in civil matters
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**STUDY ON MATRIMONIAL PROPERTY REGIMES
AND THE PROPERTY OF UNMARRIED COUPLES
IN PRIVATE INTERNATIONAL LAW AND INTERNAL LAW**

**ADDENDUM
IRELAND**

TMC Asser Instituut
Tel 00 31 (0)70 34 20 300
Fax 00 31 (0)70 34 20 359
consultancy@asser.nl

Département de droit international UCL
Tél. 00 32 (0)10 47 47 73
Fax 00 32 (0)10 47 86 14
verwilghen@int.ucl.ac.be

Matrimonial Property Project –Addendum Irish Report: Frank Martin
f.martin@ucc.ie

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Marriage and Matrimonial Property

1. Legal literature

1.1 Internal law

In Ireland, a statutory separation of assets approach has traditionally been adopted under which property rights are not automatically altered by marriage and no automatic interest is conferred on one spouse in the property of the other. Significantly however, in recent decades this basic separate property approach has been eroded to a great extent by equitable trusts law – in the form of ***Equitable Distribution***, which is rooted in a number of recent legislative enactments. These include the **Judicial Separation and Family Law Reform Act 1989**, the **Family Law Act 1995** and the **Family Law (Divorce) Act 1996**. The rationale behind this method of distribution, in comparison to the doctrine of Separate Property as well as the Community Property Regime, is to ensure that the interests of the dependent members of the family are met and a fair division of assets is made according to the contributions of both parties, whether they be of a domestic or financial nature.

1.2 Practical Problems

At the very basic level, there are many problems that arise in legal practice in relation to matrimonial property cases concerning married couples before the cases even reach the courtroom. Buckley has recently drawn attention to a number of these.¹ In any event, she asserts that the scarcity of reported judgements in this area makes it difficult to analyse judicial practice in this area. In the sphere of family law, cases are held *in camera* or in private due to the nature of the issues involved in these cases. Since the issue of matrimonial property comes to the

¹ Buckley Lucy-Ann, Matrimonial Property and Irish law: A Case for Community, [2002] *Irish Journal of Family Law*, p. 39 at p.59.

attention of the court in the event of a dispute² there are few reported judgments in this particular area. Many cases settle before hearing,³ judgments are mainly unwritten and those that are lack any substantive legal analysis, Orders are often consensual and the level of discussion of the legal principles is not very high. Additionally, in cases where there is a written judgement, it frequently fails to list the available assets in the case, thus failing to provide the overall picture. As a result, it proves extremely difficult to determine how exactly property is in fact distributed in practice. Buckley also acknowledges the fact that due to the fact that the relevant legislation is really quite recent in this area, time must be allowed to pass for a settled line of authority to emerge. However, she forwards the view that it would be reasonable to expect a similar interpretation to that given to the equivalent provisions of the 1989 Act.

1.3 Thus, there is a great deal of uncertainty looming in this area of family law. Due to the wide degree of discretion left to the trial judge, it is often hard to predict what way the assets will be divided upon a breakdown of the marriage. As Buckley notes, ‘no spouse can be sure of his/ her rights until the court has spoken’.⁴ Another source of uncertainty that is apparent in the area of divorce and judicial separation, is the fact that Irish Family Law operates under a ‘no clean break jurisdiction’ and under **s22 of the Divorce Act** and **s.18 of the Judicial Separation and Family Law Reform Act 1989**, the court is provided with a power to vary, suspend or terminate earlier orders, excluding only a few situations where limiting block orders may be made.

1.4 Irish law fails to give the right to a defined share to either spouse of the family property. As highlighted by Buckley, it implements a principle that an individuals property is not entirely their own in a family situation, and that it may be redistributed despite the owners wishes or intentions. Thus, the substantive effect

² These cases usually involve one or both of the parties coming to court in pursuit of a judicial separation or a divorce decree which will involve the court making ancillary orders and essentially dividing up the matrimonial assets.

³ Walls and Bergin, *The Law of Divorce in Ireland* (1997), p.101.

⁴ Supra n. 1 at p.58.

of the latter provisions is to treat the separate assets of the parties as a fund, from which limited amounts may be awarded to either party.⁵

2 Cohabitees and the Division of Property

2.1 Internal law

The Constitutional enshrinement of the family based on marriage has led to a judicial bias against the unmarried cohabiting couple which is reflected both in case law and equitable doctrines. It has been acknowledged that in cases involving cohabiting couples who are separating, 'there is a tendency to rely on the relationship itself rather than the proprietary rights to secure them.... their enjoyment of the property'.⁶ As Mee notes these difficulties 'are compounded by the fact that in most jurisdictions, there is no established legal structure within which to resolve property disputes between cohabitees'.⁷ Mee notes that the majority of claimants in these cases are female.⁸

2.2 Practical Problems

Mee identifies a number of problems that apply to Matrimonial Property disputes whether they apply to married/ unmarried couples. However, problems arising specific to the situation of an unmarried couple include the fact that when applying the rules of equity to unmarried rather than married couples, there is a danger that assumptions deriving from the matrimonial property cases will be unquestioningly be applied to the new situation.⁹ The beginning of cohabitation is less likely to have a clearly identifiable starting point, unlike a marriage. Thus the uncertainty in this regard makes it difficult to determine when the house was purchased which was intended to be the family home for life. The home of an unmarried couple may well have been purchased at an earlier point in time and with an intention entirely unrelated to the relationship which eventuated.¹⁰ There is also a danger that the judiciary may well assimilate all cohabitations with the

⁵ Ibid. at p. 68.

⁶ Allen v. Snyder [1977] 2 NSWLR 685, 688 PER glass JA.

⁷ Mee J., *The Property Rights of Cohabitees*, (Hart Publishing, Oxford, 1999) 3.

⁸ Ibid.

⁹ Ibid. at p.21.

¹⁰ Ibid. at p.22.

familiar model of marriage, assuming that the couple intended the relationship to have the same degree of permanence as a marriage.

2.3 In relation to same-sex relationships, Mee asserts that it is likely that homosexual cohabitee will face special difficulties in attempting to claim a share of his/ her partner's property after the relationship has broken down. He asserts that this won't necessarily arise from the equitable doctrines in this area themselves, but more so from the way in which the judiciary will apply them in the context of homosexual cohabitation. It must be reiterated that the rules that apply in equity to cohabitee are the same as those which apply to mere strangers.

2.4 Homosexual Cohabitees

In terms of homosexual cohabitees, Mee notes that for a number of reasons they may suffer discrimination on a practical level. He submits a number of possible reasons for this. These include the fact that the judges themselves may subconsciously conclude that the law should not get involved in a dispute arising out of a 'questionable relationship and should allow the property rights to remain as they are; he also asserts that judges may fail to take the level of commitment seriously that is involved in these unions. Thus, there may be a possibility of a judge underestimating the extent of the contributions and sacrifices of a homosexual claimant or would refuse to have regard to them as having been undertaken on the basis of the relationship.¹¹ He also refers to the possibility that the fate of claims by same sex partners may be influenced by judicial stereotypes of male and female roles. Another practical problem which Mee suggests may arise, is that judges dealing with these particular cases may be less sure of themselves in dealing with the unchartered territory of a same sex relationship.¹²

3. Case law on Matrimonial Property Law¹³

3.1 Internal law

¹¹ Ibid. at p. 28.

¹² Ibid at p.30.

¹³ See www.bailii.org

Cases involving the division of matrimonial property most frequently arise in the context of judicial separation or divorce cases. The following cases are representative of recent judicial thinking in the area. Ireland currently operates under a 'no clean break jurisdiction' in the context of divorce cases, thus providing no financial finality between the parties upon the granting of a divorce. Despite this however, some members of the judiciary have indicated that in some cases where the matrimonial property may amount to what can be termed ample resources, it may be possible to allow the parties to enjoy some of the benefits of a clean break in Ireland.

3.2 **D.T. v. C.T.** [Supreme Court Unrep. 14 Oct 2002]

The Facts

This Supreme Court case arose out of an appeal from a judgment of the High Court under Lavan J, in proceedings brought by the applicant brought under the **Family Law Divorce Act 1996**.

The Respondent worked in junior hospital appointments until 1979 and then worked as a General Practitioner in a country area until September of that year. She then went on to do a Postgraduate degree. At the time of the marriage, she owned a 4 bed-roomed semi-detached house, which was eventually sold and the proceeds were used for the benefit of the family. They moved to another town but in 1994 the applicant left the family home. He had built up a successful practice in the town and carried it on initially in the family home. The respondent changed her plans to become a GP and assumed the responsibilities of marriage and a family and took up a post as an area medical officer for a health board. When they were first married, the respondent acted as her husband's (the applicant's) unofficial receptionist to save the applicant expense. She furnished the offices from her own resources and cleaned it for many years.

The applicant had also conducted a number of extra-marital affairs. At the time of the initial hearing he had been in a relationship for 2 years and had a child from that relationship. He is to marry the new partner on the granting of the divorce decree.

At the time he left the family home, the applicant continued to operate a joint bank account from which the respondent drew upon for a period of 8 months. The applicant then closed the account and opened one in the respondent's name. He pays approx. £400 per week by way of maintenance for the children of the marriage as well as other outgoings and expenses. (The High Court ordered that the applicant should pay £800 to the respondent in respect of the youngest child until 18 years old and that payment should continue while he is in third level education up until the age of 23).

3.3 The Applicants Assets

On leaving the family home, the applicant transferred his interest in it to the respondent. There were some valuable items in the house, some of which he left. He also transferred a house in the Sandymount area to the respondent. The applicant now lives in a house worth £140,500.00, in which he practices, on a farm of 48 acres. He owns the old house where he carried on the practice, a house in Ballsbridge, some apartments and an office block. He also has shares in a number of companies. He estimated his taxable income from practicing as a solicitor at £208, 479.00. He also gets income from his other properties and his total income is estimated at £1,006, 812. The office block was bought in 1996 for £4,300,000 and now its net is 11,450,000 and represents a significant proportion of the assets held by the applicant.

3.4 Respondents Assets

The respondent has been a sole practitioner since 1998 but found it difficult to build up her practice. In 1998/99, she estimated that her income from her practice was worth £7,223.00.

3.5 High Court Judgment

The trial judge approached the case on the basis that provision should be made for the Respondent by way of lump sum, rather than by way of periodic payments or a combination of both.

The Respondent asserted that she should be entitled to between 1/3 and 1/2 of the applicant's assets. On the basis that his assets were worth £15m, it was submitted that the Respondent should be entitled to between 4.4m and 7m.

3.6 The provisions of the High Court judgment which form the subject of the appeal are the requirements that:

- The applicant paid to the Respondent a lump sum of £5m
- 55% of the benefits accrued to the applicants pension are to be paid to the Respondent. Initially he said this should be divided 49% to the applicant: 51% to the Respondent. However, he took into account the applicant's conduct and adjusted it accordingly. Council for the applicant argued that this conduct was not such as to render it 'unjust' to disregard it within s20 (2)(i) of the 1996 Act. He submitted that the test was that laid down by Lord Denning in **Wachdel v. Wachdel** that the conduct must be 'obvious and gross' to be captured by such a provision.
- The sum of £5m is to be paid as follows:
 - £1m on/ before the 31st of Dec 2001
 - £2m to be paid on/before the 30th Sept 2002
 - £2m to be paid on/ before the 30th June 2003.

3.7 Parties Submissions

On behalf of the Applicant:

- The judge failed to have regard to the following matters:
 - The assets to which the parties were entitled
 - The income of Respondent.
 - The financial needs of parties
 - The office block, a significant portion –80%- of the applicant's assets had been acquired after the separation. The court should have had regard to the assets available at the time of the separation and not at the time of the proceedings and therefore the office block should not have been taken into account.
 - The fact that 30% of the Applicants assets were transferred to the Respondent at the time of the breakdown
 - The new relationship entered into by the applicant and it's responsibilities.

- The judgments of White and Cowan – ‘big money cases’ shouldn’t have been applied by the Trial judge as they were decided on the basis of English legislation which allows a clean break jurisdiction unlike Ireland, where Irish Legislation allows a dependent spouse to be financially supported throughout his/ her life by the other spouse. The Trial Judge didn’t seem to acknowledge the fact that as long as she remained unmarried, that she would be entitled to return to the court to seek further financial provision. Also the Trial Judge failed to indicate as to what weight he was according to the factors in s 20(2) of the 1996 Act.
- 55% of the benefits accrued to the applicants pension are to be paid to the Respondent. Initially he said this should be divided 49% to A: 51% to the Respondent. However, he took into account the applicant’s conduct and adjusted it accordingly. Council for the applicant argued that this conduct was not such as to render it ‘unjust’ to disregard it within s20 (2)(i) of the 1996 Act. He submitted that the test was that laid down by Lord Denning in Wachdel v. Wachdel that the conduct must be ‘obvious and gross’ to be captured by such a provision.

3.8 On behalf of the Respondent:

- The Trial Judge was entitled to give weight to the fact that the parties had been married for quite a time and that in the case of the respondent; these were years of primary importance to her, being the years in which her children were born and reared.
- The court must apply the statutory criteria under Article 20(2)
- The traditional role of women should not be valued lower than the role of the breadwinner.
- Council submitted that in ‘ample money cases’ such as the present, while equality of division was not required, it was a yardstick against which it was appropriate to assess the contribution made by the spouse who was endowed with significantly greater assets. The Respondent’s relinquishing of her medical career and her commitment to her family and children meant that that Applicant had considerable time to devote to the development of his practice.

- While the doctrine of clean break did not apply in Ireland, in a case where the resources are ample so as to render possible the provision of a large sum, there was no reason to anticipate future applications of the Respondent for maintenance/ support.
- In relation to the Office Block, the court was entitled to have regard to the fact that it was a result of the profits generated by his practice, which in turn reflected the Respondents commitment to the marriage, and support that she gave to Applicant in his career. Also the language of the article 20(2) says that the court will have regard to property and other resources which a spouse 'is likely to have in the foreseeable future'.

3.9 The Law

Article 41 of the Constitution – as amended by the 15th Amendment.

S 5(1) of the Family Law (Divorce Act) 1996 –Provides for the granting of a decree of Divorce.

Part III – Variety of Orders relating to the financial position of the Spouses- periodic payments and lump sum orders, Property Adjustment Orders, Financial Compensation Orders and Pension Adjustment orders.

S 20(2) –Factors Affecting the Distribution of the Marital Assets

S 20(3) – The court must in making the orders concerned have regard to the terms of any separation agreement which has been entered into by the parties concerned and is still in force –there is none in the present case.

3.2.1 Keane C.J

The Irish Divorce Act is based to a large extent on the English. The main and most important difference is that the English Act allows the court to provide that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable- Clean Break principle as laid down in **Minton V. Minton [1979]**. The Irish Act is significantly

different in that it has a variation order under S22 which allows the court to vary/ discharge periodical orders or lump sum orders if it considers it proper to do so, having regard to a change in circumstances/ new evidence.

‘It seems to me, that, unless the courts are precluded from so holding by the express terms of the Constitution and the relevant statutes, Irish Law should be capable of accommodating those aspects of the ‘clean break’ approach which are clearly beneficial. As Denham J observed in *F v. F (Jud Sep)* [1995] 2IR 354, certainty and finality can be important in this and in other areas of law.....I do not believe that the Oireachtas, in declining to adopt the clean Break approach to the extent favoured in England, intended that the courts should be obliged to abandon any possibility of achieving certainty and finality and of encouraging the avoidance of further litigation between the parties’. P22.

Keane CJ respectfully disagreed with the approach adopted by McGuinness J in **J. D v. D.D.** [1998] where in the High Court she commented that the Oireachtas has made the situation clear that a ‘clean break’ situation is not to be sought and that, if anything, financial finality is virtually to be prevented...finality is not and never can be achieved...since finality would be contrary to the policy and provisions of the legislation. The statutory policy is totally opposed to the concept of the ‘clean break’.

He noted that while the legislation is careful not to go as far as the English legislation in adopting ‘clean break’, not least because of constitutional constraints, it is not correct to say that the legislation goes so far as virtually prevent financial finality. A reasonable latitude is left to the Trial Judge in terms of exercising his discretion in reaching what he considers is a just resolution under the circumstances.

The first task of the court will be to determine what the financial needs of the spouses and the dependent children are. In some cases, no more than basic subsistence requirements can be met. At the other – substantial assets and income will be available and the court will be concerned with proper distribution of the available assets so as to ensure that proper provision is made.

One cannot assume the roles now occupied by H and W, where one spouse alone is working and as a result, a significantly greater responsibility has devolved on the other. The court must take this into account under s20 (f) and under g, the court must have regard to the financial consequences for either sp of his/ her having relinquished the opportunity of remunerative activity to look after the home and the family.

He referred to White where the House of Lords rejected that the reasonable requirements of both spouses was a determinant factor in arriving at a just result in such cases. Lord Nicholls of Birkenhead –the judges decision more often, means that one party will receive a bigger share than the other-but before making an order along these lines, a judge would be well-advised to check his tentative views against the yardstick of equality of division...Equality should be departed from if, and only to the extent that, there is good reason for doing so...the need to ensure the absence of discrimination. This is not to introduce a presumption of equal division. He rejected the fact that equality should be a starting point in these cases.

In England, the courts are concerned with dividing assets as fairly as possible between the parties rather than making proper provision for the spouse and dependent children.

He also found that the value of the assets should be assessed at the date of the hearing.

He noted Wachdel v. Wachdel Lord Denning- where the conduct of the spouses is ‘both obvious and gross’ so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone’s sense of justice. Keane acceded to this view.

He asserted that ‘having regard to the provisions of s22. of the 1996 Act, neither party will be entitled to a variation of the amount of the lump sum itself, even should circumstances change: the extent of the variation would appear to be as to the payment of the lump sum by instalments’. It will not be possible for the court to provide for a periodic sum for the Respondent by way of maintenance, since the power of the court is confined to varying/ discharging an order already in place.

‘The approach of the trial judge seems to have effected a ‘clean break’ between the parties in financial terms in so far as that is permissible having regard to the Constitution and legal provisions and given, the desirability of avoiding future litigation between spouses whose marriages have irretrievably broken down’.

He did not agree with the decision of the Trial Judge to alter the pension order on account of the applicant’s conduct.

3.2.2 Denham J

Article 41.3.2 of the Constitution as well as the 1996 Act clearly require that value be placed on the work of a spouse caring for dependents, the family and the home-consistent with the express recognition within the Constitution of the work done by women in the home.

3.2.3 In Re: Clean Break principle:

The clean Break principle is not part of Irish law –there is not provision providing for a single payment to a spouse to meet all financial obligations. Rather the fundamental principle is one of ‘proper provision’. However, the absence of clean break does not exclude a lump sum order. Certainty and consistency are at the core of the legal system, but these are subject to the necessity of fairness. Thus, each case must be considered on its own facts to achieve a just result.

3.2.4 Lump Sum

There is nothing in the Constitution or in law that prohibits the making of a lump sum order as part of a financial ancillary order. It may form proper provision for a spouse. The fact that it may exclude/ greatly limit any further financial order does not make the provision improper/ unfair. The underlying principle of the Divorce Act is fairness. A lump sum arrangement may bring a fair financial decision and certainty to the financial affairs of the family.

She also:

- Affirmed that the assessment of assets must be at the date of the trial/ Appeal.
- Asserted that the scheme is one of proper provision and not division.

- Agreed with the lump sum of £4.6m.
- Stated that -Recognition was given to the earning capacity of R as well as the financial needs of A. She would not interfere with the discretion exercised by the Trial Judge.

In relation to the conduct of the applicant:

The facts as to the applicant's affairs and ultimate relationship and child outside marriage do not equate with a concept of conduct under S20 (2)(i) which has an element of penalty. *'It is unfortunate that the circumstances of the family are such as they are but the Act of 1996 does not seek to establish a fault system. Also cites Wachdel and the fact that the conduct must be both obvious and gross.*

3.2.5 Conclusion

The Trial Judge should have referred to each of the provisions *ad seriatim* and to give reasons for the relevance and weight attached to these.

She upheld the provision for a lump sum and allowed the appeal for the pension order to be reduced to 49%: 51% to R.

3.2.6 Murphy J conducted a review of the English case law in the area.

White v. White –the issues in the present appeal concerns the extent to which the principles laid down by House of Lords in the latter case for the interpretation of the UK **Matrimonial Causes Act 1973** should be applied in the interpretation of the 1996 Act, which is very similar in terms of its provisions to the English Act.

White involved a Husband and Wife, who were both farmers, who after their marriage in 1961 farmed substantial holdings together under the terms of a written partnership Agreement. Upon separation in 1994, their combined assets totalled £4.6m of which £1.6m belonged to W. In the High Court –Holman J held that the reasonable requirements of the wife would entail buying and equipping of a suitable house which he estimated would cost £425,000 and an income which he capitalised at £555,000.

Certain pensions fell to be deducted and the judge awarded to the Wife £800,000 in total on a clean break basis.

The Wife appealed to the Court of Appeal and was awarded £1.52m. They both then appealed to the House of Lords, where they were both dismissed. Lord Nicholls of Birkenhead, with whom the rest of the court agreed, rejected the principle of equality/ the ascertainment of 'reasonable requirements' of either spouse as being determinative of the amount to be paid to a spouse on the making of a divorce decree. S25 of the English Act required the court to have regard to a list of factors in deciding how to make financial provision and property adjustment orders. The latter is virtually identical to s20 of the Irish Act. *'Implicitly the objective must be to achieve a fair outcome...to enable a court to make fair financial provision on/ after divorce in the absence of agreement between the former spouses'. With the objective of fairness in mind, the division of assets should not be biased in favour of the money earner against the home-maker and child carer. It would sometimes happen that a judge would reach a conclusion which would involve a more or less equal division of the available assets. Before reaching the latter conclusion, the judge must be well advised to check his tentative views against the yardstick of equality and division. As a general rule equality should be departed from only if, and to the extent that, there is good reason for doing so.*

To treat the principle of equality as the starting point was rejected in relation to the division of assets of Husband and Wife.

Keane C.J noted that in **K. (M) v. P. (J) (Orse K. (S) [unrep Sct, 6th Nov 2001]** McGuinness J stated that the Irish Courts have a considerable amount of discretion under the 1996 act but that this must be exercised in accordance with the factors set out in S20.

In **Cowan, Thorpe J** noted that the TJ must apply such criteria as are to be found in s25. The expressed objective of the exercise is to arrive at a fair solution. There should be no discrimination as to the traditional role of the woman in the home and the man as breadwinner.

In Ireland, there must be proper provision irrespective of by whom it is provided. What that will amount to in any particular case will depend upon an examination of the factors under s 20 and the exercise of judicial discretion within the application of those principles.

In Ireland the courts are concerned with making proper provision and not a division of the assets. Division of property is ancillary to any periodic payments for the disadvantaged spouse.

If there is a surplus beyond proper provision, I see no reason why the party entitled to that surplus should not retain it.

3.2.7 Murray J

The discretion on the court is broad –they are given full reign in ample resources cases.

'If the law permitted a spouse to cut themselves adrift of a marriage on divorce without any continuing obligation to their former spouse, it would undermine the very nature of the marriage contract itself and fail to protect the value which society has placed on it as an institution'.

The Constitution is a contemporary document- it implicitly recognises the value of a man's contribution in the home as parent. The spouse, wife, should not be disadvantaged by reason of the fact that all or nearly all of the assets and income in the Marriage are those of the other spouse. Where there are substantial assets belonging to one spouse which greatly exceed any conceivable needs of either spouse, whatever their standard of living, those assets should not as a matter of course remain with the spouse who owns them with the other spouse being confined to periodic payments. Proper provision should seek to reflect the equal partnership of the spouses.

Agrees with Keane C.J, there is nothing in the Act which prohibits the making of lump sum payments to a spouse when the court is exercising its jurisdiction in relation to these matters. In ample resource cases, the payment by one spouse of a very

substantial sum maybe the appropriate manner in which to ensure that proper provision is made. There is no reason why a non-earning spouse should be confined to periodic payments. A court has power to direct the payment of lump sum payments where this is considered an appropriate means of making proper provision for one or other spouses.

Also agrees that the wealth accrued after separation was rightly considered in the current case.

3.2.8 Fennelly J

Agreed with Keane CJ that the absence of specific machinery for the making of a clean break provision should not preclude the court from seeking to do so in appropriate cases. In the present case, where the amplitude of resources makes it possible, the desire of the parties for financial finality should not be frustrated.

The Trial Judge was correct in holding that the assessment of assets must be at the date of trial.

4 MK v. JP (Orse) S.K and M.B [2001] 3.IR 371

The parties got married in 1963 and had 6 children none of whom were dependent. The family returned to Ireland in 1972, settling in a provincial town. Marital difficulties began in the late 70s and the couple entered into a separation agreement in 1982. The respondent at all times honoured the terms of the agreement. The wife retained residence in the family home and had custody of the children. Maintenance was agreed and was index-linked and the husband was to pay the mortgage.

In 1998 the wife issued divorce proceedings in which she sought ancillary relief by way of increased financial payments from the respondent having regard to his current assets.

At this stage the husband was in a second long-term relationship. He had obtained a divorce in Haiti in 1995 and married his partner in the US, where they resided at the

time of the proceedings. They lived as man and wife and held their property jointly. After the breakdown of his first marriage, the husband embarked on a successful business career and had become quite wealthy.

In 1998, by way of interim order, the wife was awarded maintenance of £86 per week on top of that which she was awarded under the Separation Agreement. After the conclusion of the divorce action, the High court-Lavan J, *ex tempore*, ordered the transfer of the entire legal and beneficial interest in the family home to the Wife, payment to her of half his annual salary and a lump sum of £1.5m, which represented half the property of the husband and his new partner. 80% of his pension was later made payable to the wife. Her maintenance would cease upon her re-marriage. There was also a mutual renunciation of succession rights.

In the High court the Trial Judge seemed unimpressed by the husband's corporate attitude and the manner in which he obtained the Haitian divorce, which was seen as an attempt to ignore the Irish law.

He applied the provisions of the **White** case which he said made equality applicable to all 'big money cases'. He also referred to the 'fundamental rules that have been in existence for nearly 200 yrs in determining whether a wife is entitled to be maintained according to the style of her husband.

The Respondent appealed to the Supreme Court. It was argued that the Trial Judge had failed to have any due regard to the provisions of s 20 of the Family Law (Div) Act 1996 and in particular, under s20 (3), to the existence of the separation agreement operated by the parties since 1982.

4.1 Held by the Supreme Court: (Murphy J, Murray J and McGuinness J)

- In allowing the appeal and returning the case to the High court –The Family Law (Div) Act 1996 left considerable discretion to the court in making proper financial provision for spouses. This discretion was not to be exercised at large, but in accordance with express mandatory criteria set out under S.20 in the context of ancillary orders for relief in Div Proceedings.

- That the principles of Irish Law regarding the division of assets between spouses were based on principles of fairness and not equality. The Act of 1996 further laid down a system where a clean break was neither permissible/possible. The approach of the courts had been to give credit for a wife's contribution through her work in the family home.
- Having regard to the statutory guidelines and discretion vested in the court regarding ancillary relief to a divorce application, a judge should give reasons for the manner in which he has exercised his discretion.
- Obiter –that it was not a rule of common law that assets must be divided equally between spouses.
- In remitting the matter back to the High Court, the Supreme Court doubted the existence of any common law rule of equal division of resources between husband and wife, which at any rate has always been governed by statute.
- They deemed the **White** case misapplied if the High court judge thought it to have introduced an equality rule. As confirmed in *Cowan*, it only endorsed an equality yardstick as a corrective to a needs-based approach, which was often detrimental to the interests of wives. It was not suggested that the individual circumstances of the case or the statutory guidelines be ignored –the overall objective should be fairness.
- The Supreme Court stated that the kind of capital payment to a wife as part of a 'reasonable requirement' division, as was used in England, never applied in Ireland as it was akin to a 'clean break' between the spouses, which is not permitted here under the 1996 Act.
- The Court commented that the '96 Act gave the court much discretion which was to be exercised in accordance with the statutory guidelines. In this particular case, the failure of the Trial Judge to do the latter led to it being remitted as, in the absence of such consideration, an appellate court could not decide if judicial discretion had been properly exercised.
- The failure to consider the separation agreement, as mandated by statute was seen as unsatisfactory.

4.2 Conor Power suggests that the Supreme Court is possibly attempting to ensure that judges give more precise reasons on which they make ancillary relief. He also asserts that the standard of 'reasonable requirements' from *White* is not altogether

different from that mandated by the 1996 Act. However, Lord Nicholls in White observed that the reasonable requirements standard was discriminatory, in particular against wives who fulfilled the traditional role of wife and mother throughout a long marriage.

McGuinness J –The concept of a single capital payment to the wife to meet her reasonable requirements for the remainder of her life has never formed a part of Irish law. There are 2 reasons for this –such a capital payment is inevitable part of a clean break, and the approach of the Irish Courts has always been in accordance with Art. 41.2 and the statutory guidelines to give full credit to the wife’s contribution through her work in the home as mother to her children.

The case was reverted back to the High Court to O’Neill J in K v.K [unrep O’Neill J-HCt. Jan 24th 2003.

Mr Justice O’Neill reduced the award given considerably and justified the judgment on the basis of a detailed reference to the legislation.

He ordered husband to provide the cost of a home in Dublin for the wife, who is now studying and wishes to be close to her children and her grandchildren, as well as hand over his interest in the family home in a provincial town. Together these are worth approx. one third of his assets, independent from those of his second wife. He was also ordered to pay €40,000 per year in maintenance, representing about ¼ of his income. O’Neill J stated that the existing separation agreement failed to make adequate provision for the applicant.

5. **C.F v.J.D. F [unrep 16th May 2002]**

O’Sullivan J - Judicial Separation Case

5.1 Facts

The applicant was a beautician and had her own business in Kilkenny which expanded to Dundrum and Leeson St, Dublin. The respondent worked with Bank

Nova Scotia as a trader since he was 16. The couple met in 1984/5 and they became friendly. The respondent took over the management of the applicant's business. They enjoyed a good lifestyle. The applicant sold a house she owned in '85 which yielded £26,000. She spent 12,000 of this on a house in Marlboro Rd, Donnybrook, Dublin; the balance was spent on her business. The respondent bought the property for £30,000 and it was refurbished at considerable expense. It was sold in '96 for 160,000. The respondent also bought a property from an aunt in Spratstown, Co. Wicklow in 88 for £29,000. They visited it at weekends and eventually moved there. They had 2 children and Spratstown became the Family home. A left the family home and has been living in rented accommodation since. The respondent continued to work in Nova Scotia. He also developed a studfarm interest at Spratstown. It took him time to develop good quality stock and has now produced a profit. The land adjoining it belongs to his father. The applicant sold her businesses, that at Dundrum being sold to respondent's sisters.

The applicant became aware in 98 that her name was not on the family home/' her own car and she became worried. The respondent, at that time became concerned that his father would not leave him the farm in light of the deteriorating relationship between him and the applicant. He tried to persuade her to renounce her rights in the family home and any possible expectations she may have in relation to the farm. She refused. The respondent lost his job in 1998. Proceedings were initiated in 2000. The respondent is now living in the family home. The applicant has met somebody else.

5.2 Law

The applicant is entitled to half the value of the family home including the 22 acres. The applicant claimed €500,000 + 10% to enable her to purchase an alternative family home. She is claiming a lump sum to discharge her debts including the bank loan. The Court should not only provide for the needs of the applicant but also should reach a just award even if this is greater than her specific needs –assuming that there is sufficient to make provision. O'Sullivan J followed the approach adopted in J.D v. DD where McGuinness J stated 'On a practical level, this Marriage was a lengthy partnership of complementary roles and it seems to me that it should result in a reasonably equal division of the accumulated assets'.

The respondent acknowledged that the applicant is entitled to ½ of the Family Home. ‘I consider that their material well being in the 1st decade of their relationship was dealt with on the basis of equality. She contributed to the house directly /indirectly, both contributed to their lifestyle. She remained at home with the children whilst he worked full time away from the home –the assets and income available to the parties should be divided on the basis of ‘reasonable equality’ to use the phrase of McGuinness J in **JD v. DD**’.

The respondent also had the benefit of a bloodstock business. Given that the source of some of the monies came from a jointly owned account in the Isle of Man and also the fact that the business was commenced and developed in its early years when the applicant by her contribution allowed the respondent to devote a lot of time and energy to it. He added €50,000 to the applicant’s lump sum. The respondent was to remain in the family home. The fact that the applicant must go to the trouble of finding a new one-€30,000 should be made available to her for her inconvenience. She should continue to have the benefit of the children’s allowance and maintenance from her husband -€800 per child and €500 for herself- thus €2,500 per month. The applicant got 50% of the benefit of the entire pension period. He took account of the fact that the respondent will have considerable security in the family farm. The applicant has a reasonable expectation of inheritance from her mother. Mutual Succession rights extinguished.

6 C.F v. C.F [unrep 11th June 2002]

The parties were married in 1982, their children were born in 1984 and in ’86 and then they moved into a substantial residence of the applicant’s father –he would continue to have a right of residence in a portion of the home until his death. The property was divided, the respondent spent £111,000 on some of the home, and the applicant’s father spent some also. The parties still reside in the home; the applicant lives in the part where her father lived. The parties have lead separate lives since 1997 in the same large substantial residence.

6.1 Assets

The applicant’s earnings have not totalled more than £14,000 in any one year.

The respondent has a busy practice and has handled a handful of very significant matters. He has also invested in property and in share dealing. He has also gone through a period of substantial financial strain. He has lost a lot from the share market. He won £80,000 from libel actions.

6.2 Claims

The applicant claims ownership of the family home, taken in her name at the time of the transfer from her father in 1986. She said that the entire value of the home will satisfy her claims in respect of it as well as her future security and the payment of a sum/ sums by way of maintenance. She claims that MF should live with her and therefore she needs more maintenance.

The respondent claims that he is beneficial owner of the property and he seeks an order giving him legal title thereto. He accepts that a payment must be made to the applicant of a sum up to half the value of the home to satisfy her interest therein and if appropriate further orders for maintenance. A formal order of maintenance in respect of MF is not necessary as she has been well looked after and will continue to be.

The applicant alleged that the respondent had set up a bank account in the island of Anguilla which has been kept secret from the revenue into which he has salted away money undisclosed. She made another allegation in relation to a bank account in Switzerland. The judge said she failed to prove this- he accepted the respondent's evidence in preference to hers.

6.3 Family Home

The respondent has contributed the vast share of the money paid for the purchase and up grading of the family home. However, he was engaged in full-time work outside the family home whereas the applicant to a significant extent partially suspended her career and downgraded her practice as an architect in order to look after their daughter and manage the family home. The applicant submits it should be sold to get its true value. The respondent wants to live in and continue his business in the house.

6.4 Held: The balance of fairness between the parties requires in my opinion that I make a property Adjustment Order whereby the legal and beneficial title in the family home will be vested in the respondent, subject to the payment by him to the applicant of her entitlement.

In assessing the periodic sum for maintenance of the applicant payable by the respondent, Trial Judge first had to identify the Respondents available income, then the applicant's available income, then the likely disbursements made by the respondent in favour of the child and a fair amount of periodic payments. He looked at all the provisions of s16 of the 1995 Act and decided on periodic payments of €20,000 should be made by the respondent to the applicant. He also made an order for €100 to be paid for the child every week. The lump sum for the wife amounted to €950,000 and was for the future security of the applicant. I consider that the payment of the lump sum should be made in full satisfaction of the applicant's interests in the family home and the mutual claims of the parties in respect of their estates should also stand.

7. Private International law

7.1 Legal literature

There would appear to be no legal literature specifically related to the Private International Law aspects of Matrimonial Property Law.

7.2 Case law

Case law in this area would appear to be particularly rare and are thus not available for this addendum.