Financial Provision and Property Allocation on Divorce - A Critical Comparative Analysis of the Irish Decision-Making Policy and Process

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I confirm that this thesis is entirely my own work and it is submitted as a result of my own research and investigation. Other sources are acknowledged by explicit references.

Louise Crowley

30-03-2010

I hereby certify that this thesis has not been submitted nor accepted in substance for any other degree or award, and further certify that it is not being submitted concurrently in candidature for any degree or other award.

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Summary of thesis

The aim of this thesis is to assess the Irish regulatory approach to asset and wealth distribution upon marital breakdown, and to highlight the implications arising from the failure to articulate the social policy aims of such regulation. Whilst the main body of the thesis considers the regulatory approach of four distinct jurisdictions, it commences with a critical overview of the rules versus discretion debate in order to illustrate the nature and impact of different approaches to law-making. Thus chapter one incorporates both a theoretical examination of rule-based and discretion-based regulation and an examination of the significance of such regulatory approaches in the context of asset distribution on divorce. Chapter two provides a historical account of the elevated status of the marital family under Irish law and the implications for the manner in which the remedy of divorce was eventually enacted. Chapter three provides a critical analysis of the content and workings of the Family Law (Divorce) Act 1996, which in granting extensive and infinite judicial powers to secure justice and proper provision, has evaded the responsibility for identifying the objectives of such state intervention, creating a legal and social policy vacuum and a system which lacks legitimacy, predictability and fairness. In order to fully illuminate these shortcomings and ultimately inform the Irish lawmakers as to the need for, and nature of reform, a detailed and comparative analysis of the governing regimes of three distinct jurisdictions, California, Scotland and New Zealand is presented in chapters four to six respectively. Particular attention will be focused upon the willingness of these law-makers to enunciate the social and legal policy objectives of their governing laws. Ultimately it will be argued that effective governance demands that regulatory processes, howsoever structured, exist within a considered and articulated legal and social policy context.

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Introduction

1 Introduction

The aim of this thesis is to assess the framework adopted to regulate the distribution of assets upon marital breakdown in Ireland. This analysis considers the historical context of family law regulation in Ireland and the manner in which the remedy of divorce (and to a lesser extent judicial separation) has been enacted and applied. This demands an explanation of the Irish regulatory process, critically outlining the regulatory structure currently in place, and the consequences of the approach adopted. Effective analysis inherently requires the identification and assessment of different approaches to regulation, necessitating both a theoretical examination of rule-based and discretion-based regulation and an examination of the significance of such regulatory approaches in the context of asset distribution on divorce. The assessment of the Irish regulatory approach will be followed by a detailed and comparative analysis of the approaches of three distinct jurisdictions, in order to fully illuminate the underlying critical examination of the Irish approach and ultimately inform the Irish lawmakers as to the need for, and nature of reform in this context. Whilst the available views of academic commentators are intensely explored and relied upon throughout this thesis, significant emphasis is placed on primary materials throughout, most especially upon the governing legislative and judicial pronouncements and the typically well-informed consultative process that has resulted in the particular regulatory approach. In exploring the mechanics of reform in each jurisdiction considered, this thesis seeks to understand the need and identify the best approach to the reform of the Irish regulatory process on divorce.

2 Why does the current Irish regulatory approach to asset distribution on divorce warrant consideration?

The regulation of asset distribution upon the dissolution of marriage is greatly influenced by the policy aims and underlying purpose of state regulation. The absence of any such express policy goals to structure or direct the very wide discretion given to judges under Irish law has created a system which lacks legitimacy, predictability and fairness. This reluctance and consequential failure to identify the aims of the regulatory process,

coupled with the open-ended powers created by the laws, has resulted in the exercise of broad judicial powers within a legal and social policy vacuum. The aim of this thesis is to demonstrate these shortcomings within the Irish regulatory structure and identify those aspects in need of reform. Such considerations and deliberations will be informed by the detailed comparative analysis of approaches adopted by other jurisdictions, as detailed below.

3 How are the weaknesses of the Irish regulatory process to be appraised?

One of the fundamental issues considered in this thesis is the manner in which regulatory processes can be structured and the consequential impact of particular choices. The thesis essentially utilises a theoretical framework based on the use of rules and/or discretion in law-making, considered within a comparative analysis of doctrinal law using jurisdictions whose individual regulatory approaches can be placed upon a rules/discretion continuum.

The opening chapter of this thesis will present an overview and critical analysis of the contrasting rules and discretion-based approaches to regulation, both abstractly and with reference to their impact on divorce. This theoretically-based examination of marital regulation forms the backdrop for the subsequent analysis of the four jurisdictions considered in the course of this work. Thus in advance of the description and critique of the individual regulatory approaches of Ireland, California, Scotland and New Zealand, the opening chapter will outline the issues arising from differing approaches to the creation and application of laws. In particular, in the course of this overview, the concepts of democracy, fairness and predictability will emerge as the three key criteria for assessing the impact and effect of various laws and processes. Both generally and in the context of divorce, it will become apparent that the manner in which regulation is structured will determine whether a particular process results in a democratic, fair and predictable regime.

The significance of the various regulatory choices upon the processes adopted forms a central part of the analysis. It will demonstrate the manner in which the preferences and priorities in respect of the criteria of democracy, fairness and predictability impacts upon

that jurisdiction's choice of regulatory process. For example, what a particular jurisdiction regards as fair, be it certainty of outcome or conversely individualised justice in the circumstances, will greatly influence the form and approach of its laws. Equally, each jurisdiction's view of the respective roles of the judiciary and the legislature determines the way in which responsibility for law-making is allocated. Thus it will be shown that it is the context within which these laws and powers are applied that can impact most significantly upon the chosen regulatory process. Ultimately it will be argued that effective governance demands that regulatory processes, howsoever structured, exist within a considered and articulated legal and social policy context. The thesis will demonstrate that the underlying policy aims and objectives can carry greater significance than the regulatory approaches adopted in any jurisdiction.

4 Alternative approaches to asset distribution – comparative study of the regulatory approaches adopted in California, Scotland and New Zealand

Motivated by the need to identify alternative approaches to the open-ended discretionary regime enacted under Irish law, this thesis relies significantly upon a comparative study of the regimes in operation in California, Scotland and New Zealand. Each jurisdiction is considered individually, with a detailed description presented of its governing regime and the impact of its particular regulatory choices. This description pays particular attention to reforms adopted in each jurisdiction, as a means of identifying perceived shortfalls in each jurisdiction and the solutions developed by lawmakers.

The choice of jurisdictions considered represents a divergence of approaches to that adopted in Ireland; the rule-based equal division regime of California and the policy-driven regulatory processes of Scotland and New Zealand. The approaches in Ireland and California represent contrasting extremes along a rules/discretion continuum, with Ireland's individualised discretion-based approach at one end and California's precise rules at the other. The reliance by New Zealand and Scotland upon a mix of presumptions, principles, standards and discretion places those jurisdictions at various, more central points on that continuum. This more moderate approach by Scotland and New Zealand will be shown to reflect their preference for the combined role of the

judiciary and legislature in law-making, and an awareness of the extent to which policy goals can explicitly drive the regulatory system. Such an approach will ultimately be regarded as more likely to secure the identified aims of democracy, fairness and predictability.

5 Conclusion

A key question posed throughout this work, is whether an optimum approach to regulation can be identified. In attempting to resolve this question, the form that rules take and the manner in which discretion is exercised will be assessed, and over the course of the work these issues will be examined with reference to each of the four jurisdictions considered. It will become apparent from the varying approaches to regulating asset distribution on divorce that assessing the outcome and success of different approaches will depend upon the larger context within which they operate and the capacity of each regime to achieve the legal and social goals of the jurisdiction under consideration. Ultimately what will be shown is that the clear exposition of the policy goals of the process is of greater importance than whether the regulatory approach exists more towards the rules or discretion end of the continuum. In fact it will become apparent that all systems require a mix of rules and discretion if they are to achieve both predictability and fairness whilst equally satisfying the criterion of democratic law-making. Irrespective of whether rules or discretion form the basis of a regulatory process, its application ultimately depends upon clarity of purpose on the part of the law-maker and law-enforcer. Such clarity of purpose, through the identification of regulatory principles and purposes allows for a clearer understanding of the 'correct' result to be achieved and facilitates the laws, howsoever formulated, to be applied to that end.

Chapter 1 - Rules v Discretion

1 Introduction

> "Law and discretion are not separated by a sharp line but by a zone, much as night and day are separated by dawn."[1]

Hawkins notes the almost unavoidable interplay between rules and discretion in the legal process. He is of the view that whilst "the use of rules involves a considerable degree of discretion, the exercise of discretion, is largely guided by rules".[2] In the immediate context of asset distribution on divorce, despite the significant variations in processes adopted in different jurisdictions evident throughout this work, all jurisdictions considered appear to incorporate some mix of rules and discretion in their regulatory process. Whilst it is difficult to ascertain definitively whether an optimum approach exists, the varying configurations of legal regulation serve to demonstrate the workability of more than one approach to the 'rules versus discretion' dichotomy. The legislative emphasis on resolving issues by reference to the 'particular' facts before the court is equally prevalent in many areas of family law, no less so in divorce cases.[3] The greater the extent to which a process places emphasis on the particular facts of a case and the need for individualised justice, the less likely that such a process will, in any significant way, depend on fixed rules.

The four jurisdictions considered in this thesis can be placed upon the 'rule versus discretion' spectrum where absolute rules are placed on the extreme right and absolute judicial freedom exists on the extreme left. Whilst none of the four jurisdictions would sit at either extreme end of the spectrum, California and Ireland would be found on alternate ends of that spectrum whereas New Zealand and Scotland would be located more closely

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[1] Davis K *Discretionary Justice A Preliminary Inquiry* (Greenwood Press) (1969) at 106.
[2] Hawkins K *The Uses of Discretion* (Oxford) (1992) (ed. Hawkins K) Preface, with reference to chapter 1.
[3] Garrison has noted that divorce law in particular "has traditionally relied upon judicial wisdom to achieve fair results. Instead of bright-line rules, legislatures have typically given judges in the divorce court almost unlimited discretion, bounded only by indeterminate standards or lists of factors that may be considered." Garrison M "How do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making" 1995-1996 74 NCL Rev 401.

towards the mid-point. In setting out the regulatory approach of each of these four jurisdictions in individual chapters, this thesis will provide a detailed and critical illustration of each regulatory framework with a view to identifying and assessing the choice and effect of the regulatory systems adopted.

This chapter will focus upon the two fundamental issues of the creation and application of law. In this regard, the manner in which the law can be formulated, whether based on rules, discretion or both will be critically examined, in order to ascertain the impact and workability of alternative approaches to legal regulation. Over the course of the chapter, three key benchmarks will be identified; democracy, fairness and predictability, and these will form the backdrop for the analysis and critique of the regulatory approaches of Ireland, California, Scotland and New Zealand in the remainder of this thesis. By considering the issues, both in the abstract and in the context of the regulatory approaches in these jurisdictions, it is hoped that an insight might be provided into workable structures for the regulation of asset distribution on marital breakdown.

2 How can the law be framed?

Davis suggests that whilst rule making is generally to be regarded as a superior procedural approach in the context of complex subject matter, rules can never provide all the answers in advance.[4] Even though his preference for rules is premised upon the view that rules usually make for even-handedness, he admits that the best system operates at the middle of the rules/discretion scale, thereby including an element of discretion which is limited as necessary by rules, principles or other guiding factors.[5] Similarly Schneider acknowledges the primacy of rules but argues that discretion remains both inevitable and invaluable. One cannot be systematically preferred to the other; Schneider ultimately

[4] *Supra* n. 1 at 67. Davis concedes that notwithstanding the superiority of rules, their use should never go so far as to eliminate the development of law and policy through case-by-case adjudication.

[5] *Ibid.* Davis in the preface to his book does acknowledge the significant limitations of a discretion-based system, referring to the injustice that arise from it. "Most frequent injustice occurs at the discretion end of the scale, where rules and principles provide little or no guidance, where emotions of deciding officers may affect what they do, where political or other favoritism may influence decisions, and where the imperfections of human nature are often reflected in the choices made." Similarly in the courtroom environment Wilentz CJ has noted the limitations on the judiciary regarding rule-making. "It is also quite difficult for a court to formulate policy. The talent and resources for that exercise often lie more readily with the legislature." Wilentz RN CJ "Judicial Legitimacy" (1997) 49 Rutgers L. Rev. 859 at 883.

concludes that the choice is not rules or discretion, but rather, which *mix* of rules or discretion.[6]

2.1 Rules

Fundamentally, Fuller defines law as "the enterprise of subjecting human conduct to the governance of rules".[7] Rules, as a traditional means of regulating society and societal behaviour, aim to establish and impose obligations on parties, and to provide penalties and remedies for any infringement of those pre-determined obligations. Pound recognises favourably the fundamental role of the rule in the tradition of the legal process, and the associated strict practice of the imposition of rules to circumstances.[8] Similarly Dworkin confirms the 'all or nothing' nature of rules, noting that "if the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision."[9] In differentiating rules from principles,[10] this explanation highlights the strict nature of a rule-based system.[11] Hughes accepts that in contrast to standards and principles, "rules are fairly concrete guides for decisions geared to narrow categories of behaviour and prescribing narrow patterns of conduct".[12] In addition, where rules are utilised to create legal parameters, there exists the presumption of "a precisely defined fixed consequence to a definite detailed fact or state of facts".[13] Thus rules, if properly developed, should not only establish legal rights and obligations, but should also identify the consequences for any breach of those rules.

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[6] Schneider CE "Discretion and Rules: A Lawyer's View"; *supra* n. 2, chapter 2 at 49-50.
[7] Fuller L *The Morality of Law* (Yale University Press) (1964) at 106.
[8] Pound R "Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case" 35 NYULR 925 at 925, 926. Yet Pound recognises the limitations of rules, noting that the judicial process "cannot be held solely to rules". Certainty and predictability also require a "just and wise individual discretion".
[9] Dworkin R "The Model of Rules" (1967) 35 U of Chi LR. 14, 25.
[10] The formulation and impact of principles is considered in detail below at section 2.3.2.
[11] *Supra* n. 9. Dworkin differentiates between principles and rules by noting that although both point to a particular decision about legal obligation in particular circumstances, they differ in the character of direction they give.
[12] Hughes G "Rules, Policy and Decision Making" (1968) 77 Yale LJ 411 at 419. Hughes notes that principles "are vaguer signals which alert us to general considerations that should be kept in mind in deciding disputes under rules."
[13] Per Pound, *supra* n. 8 at 927. See also Davis, *supra* n. 1 at 42 where he suggests that whilst it is possible to provide rules for all circumstances, he accepts that it is neither "practical nor desirable".

One of the primary attractions of a rules-based regime is the certainty and uniformity of application and thus the predictability of a rule-based regulatory approach is arguably its primary advantage. The emphasis placed upon predictability in the creation and enforcement of laws differs amongst jurisdictions with varying weight being accorded to certainty as a required criterion of effective regulation.[14] Davis notes the views of Hayek,[15] who strongly advocates the use of rules and refers to the "fair certainty" they provide for all parties involved.[16] Fairness is a less immediate consequence of predictable, rule-based laws and can be perceived in many ways; Hayek regards certainty as ensuring fairness, with clear rule-based laws providing such predictability.[17] Similarly Schneider advocates the use of rules to regulate behaviour, regarding them as capable of serving the planning function, as best positioned for the like treatment of like cases, and as effective in the organisation of activities and ultimately as operationally efficient. In addition he regards legislative rule makers as better positioned than presiding judiciary to assess what is in the interests of justice, emphasising the importance of the "existence of [the] general authority" to impose rules in order to decide cases.[18]

Equally, it has been suggested that a rule-based legal system contributes to the democratic nature of the decision-making process, allowing for clear communication of the norms which the rules reflect.[19] Regarding the concept of legitimacy, Jowell notes that rules are seen as "a means of both reducing the free exercise of discretion and

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[14] In the context of the regulation of divorce, this thesis, in chapter 4, will assess the impact of certainty arising from the Californian rule-based system of regulation and consider whether certainty is automatically absent from a discretion-based regime such as Ireland. This in turn will uncover how differing approaches to regulation impact upon the individual's choice to negotiate a settlement, draft a pre-nuptial agreement or alternatively allow the courts to resolve the dispute between the parties. See later at chapter 4, especially section 8 thereof.

[15] Hayek F *The Road to Serfdom* (Routledge Press) (1944) 72. In his later work *The Constitutions of Liberty* (1960) Hayek asserts that "The decision must be deductible from the rules of law and from those circumstances to which the law refers and which can be known to the parties concerned."

[16] *Supra* n. 1 at 32. What values are deemed more important than the elimination of arbitrary justice is influenced by a number of matters, and not simply the prevailing cultural and social policy. The motivations and aims of both the legislature and the judiciary, together with the practices and norms of the relevant jurisdiction will influence the approach to such matters.

[17] The view that fairness mandates individualised justice is considered at section 2.1.2 below.

[18] *Supra* n. 6 at 74-75. He notes that the value of rules is to pre-determine the outcome in circumstances where their effect is "to narrow and simplify the issues requiring resolution in subsequent cases."

[19] Per Davis *supra* n. 1 at 68-79.

providing specific standards against which official decisions may be measured".[20] This reflects a more traditional view of law-making with recognition of the distinct separation of powers between the legislature as law-maker and the judiciary as enforcer. This view of a legitimate legal system of regulation demands such delineation in order to ensure a system of democratic and reflective law-making. Pound, in support of this approach, celebrates the role of rules in protecting the system from arbitrary decisions. Any promotion and use of strict rules, in his view, will, "secure us against the well meant ignorance or feebleness of will of the weak judge and ...[is] ...our mainstay against improper motives on the part of those who administer justice."[21] If democratic law-making is the priority he suggests that rule-based governance will be preferred.

If fairness demands that similar cases are treated equally, rules are more likely to ensure such consistency of approach. Such certainty and predictability form the bedrock of a fair and democratic system of regulation. However in family law disputes, fairness is less likely to be guaranteed by the strict application of rules, in light of the nuances and individual peculiarities of such disputes. Rules give effect to standards by providing the precise criteria and conditions where the rule is to be invoked. But in areas of law that react to and regulate human behaviour and create ongoing inter-personal rights and obligations, such as those arising from a marital relationship, the effectiveness of the 'all-or-nothing' nature of rules must be questioned. Given that the strict application of clear rules gives rise to pre-identifiable consequences and outcomes, a rule-based legal system might in the family law context be regarded as an overly exact science in its operation. Where the regulation of human behaviour requires flexibility and evolving laws to reflect social policy, the weaknesses and inflexibility of strict rules are often highlighted and where individual areas of law require individualised consideration, such rules may ultimately be inappropriate and unworkable.

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[20] Jowell J *Law and Bureaucracy* (Dunellen) (New York) (1975) at 12. In this regard the decision-maker, to allow him to almost 'hide behind the rule' and escape accountability, relies upon rules. Jowell notes that such instances correlate with Davis' extravagant version of the rule of law.

[21] Pound R *Jurisprudence* (West Publishing) (Vol 2) (1959) at 383.

2.1.1 Evolution of legal rules

In promoting the adjudication process, Hughes questions the sufficiency of rules, noting that they simply "sketch directive outlines for private and official behaviour but tell us nothing of the vital process by which the rules are used and applied in decision-making."[22] He recognises the limitations of a strictly rule-based system of law, noting that to refuse to depart from existing rules, however created, would prevent law from keeping pace with developing times.[23] Rather, Hughes acknowledges the merits of the adjudication process which operates in the light of rules, thereby giving effect to a system of rules, and ultimately creating an effective system of law.[24] In essence he regards the decision-making process as "the essential link between prescriptive rules and the determination of disputes, between rules on paper and rules in action."[25]

2.1.2 Rules as only one aspect of the regulatory process

Certainly it is arguable that the complexities of life necessitate a myriad of laws with a multitude of configurations, leading to the call for the identification of governing principles and standards, which are less absolute in nature. Thus rather than rely upon "the straitjacket of the rule",[26] and absolute predictability, it has been argued that, "a rule is merely a means of indicating a series of legitimate starting blocks for the adjudicatory performance."[27] Jowell sees a rule as "a general direction, applicable to a number of "like" situations that may arise in the future."[28] The possibility of absolute rules giving rise to 'wrong' results strengthens the argument for a system within which rules play a dominant role, but are not absolute and are ultimately subject to judicial interpretation

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[22] *Supra* n. 12 at 435.
[23] *Ibid* at 412.
[24] *Ibid* at 432.
[25] *Ibid.* See further, Dworkin R "Wasserstrom: The Judicial Decision" 75 Ethics (1964) 47.
[26] Per Pound, *supra* n. 8 at 927. The use of rules causes cases to be fitted into the straitjacket of those rules, which causes a failure for the rule in its application to take account of the circumstances of the facts of the case.
[27] Schauer, although in favour of rules, recognises the limitations of a decision making process based entirely on rules, noting the "inevitable under-and over-inclusiveness" of a rule-based system, the acceptance of which signifies the tolerance of a number of wrong results. Schauer *Playing by the Rules* (Clarendon Law Series Oxford) (1991) at 135.
[28] *Supra* n. 20 at 135. Thus the rule also appends legal consequences to follow on from particular occurrences.

and application.[29] Consequently the overarching need for a fair outcome invariably impinges upon any attempt to secure absolutely predictable laws.

More specifically, Fuller notes the relative incapacity of rule-based adjudication to solve "polycentric" problems,[30] explained by Jowell as "a complex network of relationships with interacting points of influence".[31] The complexities typically arsing in the context of family law disputes can quite rightly be regarded as polycentric in nature with a multi-faceted response often required to address the numerous issues arising. Once the decision to be made strays outside the "yes/no" or the "how much?" variety, the ability of the adjudication process to deal with the issues before it is placed under strain. The resultant need for all parties before the court to modify or even convert their claim to fit within the boundaries of "a claim of right" or "an accusation of fault or guilt" provides an almost artificial formulation of every 'non-standard' case presented and the knock-on obligation on the courts to select a pre-determined 'solution'.[32] Fuller identifies three possible consequences of the use of rule-based adjudicative methods to attempt to resolve polycentric problems. The solution will fail, the judge will ignore judicial properties or instead of accommodating the procedures to suit the problem, the judge might "reformulate the problem" to suit the existing adjudicative structures. However, none of these solutions are acceptable to Fuller, as in his view, they make the adjudicative rule-based process unsuitable for complex and multi-tiered problems.[33] The artificial

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[29] Dworkin, *supra* n. 9 at 18 recognises the limitations of a rule-based system, noting that "the sovereign cannot provide for all contingencies through any scheme of orders, and some of his orders will inevitably be vague or have furry edges." Particularly in the context of regulating social behaviour, Shapiro rejects the approach of treating a rule as an absolute, and regards a rule as properly assessable or workable only when implemented. Consequently the weaknesses of a particular rule and the need to revise its content may only become apparent in the course of the adjudicatory process. Shapiro D L "The Choice of Rulemaking or adjudication in the Development of Administrative Policy" [1965] 78 Harv L. Rev 921 at 924,925.

[30] Fuller L "The Forms and Limits of Adjudication" [1978] 92 Harv. L.Rev. 353 at 371. See ahead at paragraph 4.3.2 for a discussion of the 'polycentric' nature of many family law disputes and the difficulties encountered with the excessively rigid application of the doctrine of precedent.

[31] *Supra* n. 20 at 152. Earlier in his work at 29, Jowell introduces the issue of polycentric problems and notes that "Matters that are suited to compromise, mediation, and accommodation are not best pursued in the structured adversary setting of adjudication."

[32] Fuller L "Collective Bargaining and the Arbitrator" (1963) Wis. L. Rev. 3. See further Fuller, *supra* n. 30 at 368 where he states "The proper province of adjudication is to make an authoritative determination of questions raised by claims of right and accusations of guilt."

[33] *Supra* n. 30 at 403, Fuller is eager to qualify his position and assert that polycentric problems can be solved, but not by individual-issue based legal reasoning, rather by understanding and tackling the issue as a whole.

organisation of cases to fit the overly-rigid rule-based adjudication process and its formal definition and requirement of "rights and wrongs" ultimately serves to highlight the limitations of the process.[34] Fuller outlines the unsuitability of such an approach being adopted in the context of decision-making based on reasoned arguments, although he recognises that certain areas of human activity are fundamentally unsuited to the need to rationalise and provide "an explicit reason for every step taken". Such an approach sacrifices fairness in order to guarantee certainty. In the context of marital breakdown disputes, such a categorised, rule-based approach might prove troublesome, restrictive and ultimately unworkable.

If rules alone are not enough what is the best means of amending their form or manipulating their application? Should the converse approach be adopted and all decisions determined by seeking to achieve a fair result with reference only to the particular facts? Should the end goal in such a process simply be 'justice in the circumstances', or should more definite policy goals be pre-identified to provide the adjudicating body with a distinct objective? Jowell notes that "the process of legalization involves the transformation of broad policies into rules"[35] which suggests that the rule begins and ends with the underlying policy and overall objective(s) that have led to the creation of that rule. Citing Hart and Sacks, he concludes that a rule "is thus a concrete *general direction* in which legal consequences are appended to the happening or non-happening of an event or the occurrence of a situation."[36] As an advocate of the need for both rules and discretion in an effective regulatory process, Hughes notes the limitations of the "modern positivist elucidation of the adjudicatory performance" arising from the failure to sufficiently look beyond this body of rules. He suggests there exists a failure to

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[34] Pound R "The Administration of Justice in the Modern City" (1912-1913) 26 Harv. L. Rev. 302, 315. Pound highlights the detrimental societal and individual consequences of a failure to protect the moral and social life of an individual. Where an efficient and expensive judicial system fails the individual because of the stronger position and powers of the more aggressive opponent, he regards the consequences as "an injury to society at large". He regards the real grievance of the mass of the people to lie not with the rule of substantive law but with the enforcing machinery.

[35] *Supra* n. 20 at 134.

[36] *Ibid* at 135. *(Emphasis added)*

recognise the standards and canons that underlie these rules and which impact upon their interpretation and understanding.[37]

Subjective social standards and attitudes influence the application of rules, and confusion and an absence of predictability can arise where there is a re-interpretation or even non-application of an existing rule. However, Hughes encourages such developments, noting, "it is precisely this social phenomenon of acceptance and application that lifts a system of rules out of the printed page and makes it a system of law".[38] Similarly Schneider highlights the importance of the common law, the discretion exercised by the judiciary and the doctrinal flexibility evident in the legal process. Relying upon Dean Levi, he regards these judicial freedoms as necessary for the progression of laws and for the incorporation of existing social policies.

> "The categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas...even where legislation or a constitution is involved. The words used by the legislature or the constitutional convention must come to have new meanings... In this manner the laws come to express the ideas of the community and even when written in general terms, in statute or constitution, are molded for the specific case."[39]

Attempting to secure the optimum manner in which any judicial discretion in the application of rules should be exercised, is a difficult task.[40] Whilst allowing discretion to be exercised unmonitored and uncontrolled is not advisable, Pound points to the "increasing number of situations where what is to be done or exactly how it is to be done, must be left to the court's individual sense of what is right and just".[41] In such instances, flexibility for judicial interpretation *in the circumstances* may result in a more fair decision and may be defensible where it gives best effect to any underlying social policy

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[37] *Supra* n. 12 at 436.
[38] *Ibid* at 432.
[39] Levi EH *An Introduction to Legal Reasoning* (University of Chicago Press) (1949) at 4, quoted by CE Schneider, *supra* n 6 at 56.
[40] Stewart R "The Reformation of American Administrative Law" (1975) 88 Harv. L. Rev. 1669 at 1701. Stewart regards such a goal as "unrealistic and unwise" which in itself would turn on subjective judgments.
[41] *Supra* n. 8 at 929. Similarly Wilentz *supra* n. 5 at 884, notes "there seems to be no steadfast rule as to what method to apply to a case nor how a case should be decided. It is as complex as life itself."

aims. In this regard, Fuller highlights the importance of identifying the purpose of the rule and he regards this purpose as the underlying reasoning behind any application of that rule. The understanding of the purpose is more likely to result in the 'correct' result ultimately being achieved whilst the poor enunciation of any underlying purpose will make the process less undemocratic and unpredictable in effect. In this regard, all attempts to create and enact laws should seek to diminish the gap, if any, between what the law is and ought to be, and in realising the impossibility of successful attainment through absolute rules, must in turn recognise the role of the judiciary in bridging this gap.

In family law, where fairness is a key policy aim, it is typical for both the legislature and the judiciary to shy away from the development of absolute rules.[42] It is all but impossible to create a fixed rule applicable in every case that would fairly decide the outcome of all or even most family law disputes and thus such an approach is not typically adopted in family law legislation. Rather if a view is adopted that principles of fairness supersede those of democracy and predictability, the legislative approach to regulation will mandate a capacity for judicial discretion to be exercised. Quite clearly in the context of ancillary relief on divorce, the Irish legislature has chosen not to create fixed rules; rather at best it has established basic standards, such as 'proper provision'[43] and 'reasonable maintenance';[44] deciding that the best means of achieving these goals requires the detail of the orders to be left to the courts. The unique facts of each divorce case before the courts and the enormous variability in the circumstances of the parties in every marriage typically though not always, militate against any suggestion that one rule will resolve all cases. The legislative approach to asset distribution, in allocating almost absolute discretion to the judiciary suggests such a prioritisation of the principle of

[42] The jurisdictions considered in the course of this work, primarily, Ireland, California, Scotland and New Zealand illustrate varying approaches to regulation, with only California adopting a rule-based system of asset division.
[43] Section 5 Family Law (Divorce) Act 1996.
[44] Section 21 Matrimonial Causes Act 1973.

fairness in the individual circumstances. The Irish regulatory approach is set out and critically assessed in chapter 3 below.[45]

2.2 Discretion

> "Discretion is an authority conferred by law to act in certain conditions or situations in accordance with an official's or an official agency's own considered judgment and conscience. It is an idea of morals, belonging to the twilight zone between law and morals."[46]

Hughes highlights the importance of discretion-based adjudication in the context of an effective legal system. Whilst he recognises the role of rules and the need to observe their content, he is of the view that "in a functioning legal system all of these activities are carried on with a careful eye to the prospect of adjudication and all are thus influenced and affected by the decision making process."[47] In advocating the use of discretion and the "reasoned adjudicative decision" Jowell recognises the important role of discretion in the context of the application of rules to behaviour in order to avoid the stark application of a rule without explanation.

2.2.1 Effect of discretion-based justice

Pound regards discretion as "the effective individualizing agency in the administration of justice."[48] He is of the view that once there is scope for the exercise of judicial discretion there is a capacity for an individualised approach to each case, causing the particular circumstances of the parties to influence the outcome. Whilst the exercise of discretionary powers allows each case to be determined by reference to its facts and the ubiquitous goal of fairness, in practice the exercise of discretion rarely absolutely individualises the law in its application. More typically, an element of discretion is

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[45] The regime operated under Californian law is the obvious exception to this discretion-based approach to asset distribution, even though there does exist a very limited discretion not to apply the equal division rule and relatively significant judicial freedoms in respect of the capacity and circumstances in which to order the payment of ongoing spousal support; see further chapter 4 below.
[46] Pound R, *supra* n. 8 at 926.
[47] *Supra* n. 12 at 414.
[48] *Supra* n. 8 at 925.

exercisable by the court, with reference to the over-riding rules of governance. Posner considers the role of the adjudicator and the task before him, and concludes that "the highest realistic aspiration of a judge faced with a difficult case is to make a 'reasonable' (practical, sensible) decision, as distinct from a demonstrably correct one."[49] Dworkin notes the increased judicial willingness in more recent times to overrule existing precedents and statutory provisions,[50] the former because of conflicting rules or changing social policies and expectations, the latter more typically through varied interpretations. However he qualifies this acknowledgment with recognition of the limitations on the judicial power to change existing doctrine, and the need to invoke acceptable principles or policies to legitimate any such departure.[51] Davis comments on how discretionary justice is often complicated by pressures, personalities and politics, noting the complexities of the decision-making process, commenting that even the simplest administration of justice "may involve questions of justice, law, facts, policy, politics and ethics".[52] As a result, he believes that the operation of modern government is effectively impossible without discretionary power. However not every commentator favours discretion-based justice. In support of his particular criticisms, Pound quotes from the unreported, but oft-cited judgment of Lord Camden, who spoke damningly of discretion.

> "The Discretion Of A Judge Is The Law Of Tyrants; It Is Always Unknown; It is Different In Different Men; It is Casual And Depends Upon Constitution, Temper, And Passion. In The Best It is Oftentimes Caprice; In The Worst It Is Every Vice, Folly And Passion To Which Human Nature Is Liable.[53]

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[49] Posner R *The Problems of Jurisprudence* (Harvard University Press) (1990) at 456. See also Simon D "A Psychological Model of Judicial Decision Making" (1998) 30 Rutgers L.J. 1.
[50] *Supra* n. 9 at 37.
[51] Without such a requirement, Dworkin, *ibid* at fn. 20 notes, "no rule could be said to be binding".
[52] *Supra* n. 1 at 24. Davis identifies an almost accidental source for the development of discretionary power in the twentieth century, blaming "the zeal of those who a generation or two ago were especially striving to protect against excessive discretionary power. They attempted too much..." He surmises that in attempting to eliminate the possibility of arbitrary decision making powers, the legal system became rigid and inflexible, and ultimately unworkable without discretion.
[53] *Supra* n. 8 at 926.

2.2.2 Source of discretionary powers

> "Discretion is indispensable for individualized justice, for creative justice, for new programs in which no one yet knows how to formulate rules, and for old programs in which some aspect cannot be reduced to rules."[54]

Reliance upon discretion-based regulation can deliberately occur in instances where the legislature has considered an issue and chosen to allocate discretionary power for its resolution. Equally instances arise where a novel question comes before the court, and discretion is by necessity exercised unilaterally by the presiding judge. Dworkin, with reference to positivism notes that "when a case is not covered by a clear rule, a judge must exercise his discretion to decide that case by what amounts to a fresh piece of legislation."[55] In a common law jurisdiction, whilst the power of the judiciary in relation to most issues is statutorily governed, the courts will also be guided by principles of natural and/or constitutional justice and the fundamental requirements of fairness, equity and justice. Pound acknowledges the subjective nature of discretion; the power being exercised in accordance with the official's considered judgment and conscience, and often without reference to, or reliance upon, the conferring authority. He highlights in particular, the role of morals and their consideration in the decision-making process. He suggests that the outcome is in essence, an unknown mix of law and morals, identifiable only through reliance upon the judgment and conscience of the adjudicator.[56]

The exercise of discretion by different adjudicators, even in the same context, will, in the words of Lord Camden, vary depending upon each one's 'constitution, temper and passion' and inconsistency will invariably follow. Davis suggests that the application of different judicial standards is acceptable in American thinking,[57] perhaps because of the desire to avoid the strict application of the fixed rule of law to trivial incidents. Although reliance upon discretionary justice can be defended on the premise that "the prime requirement of justice is not to penalize all violators but...to avoid penalizing the

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[54] *Supra* n. 1 at 216.
[55] *Supra* n. 9 at 31.
[56] *Supra* n. 8 at 926.
[57] *Supra* n. 1 at 168.

innocent", Davis argues that the discretion-based system fails to distinguish between "unevenness from unavoidable imperfections in detection systems and unevenness in conscious choices made by officers who are administering justice."[58] Essentially, he is of the view that the argument for discretion, in whatever form, is weakened by the fact of the individual power on the part of the adjudicator.

> "The discretionary power to be lenient is an impossibility without a concomitant discretionary power not to be lenient, and injustice from the discretionary power not to be lenient is especially frequent..."[59]

Independently both rules and discretion are valuable tools in the decision-making process. Discretion, whilst useful for the consideration of the individual case, and the tool utilised to ensure fairness, cannot stand alone and justice requires a mix with rules, which introduce the benefits of democracy and certainty.[60] When utilised together they can introduce predictability whilst allowing scope for the individual circumstances of a case to be taken into account. To provide for the unexpected case or the peculiar circumstances, most jurisdictions considered in this work insist that discretion plays some part in the asset distribution process on divorce. The choice of regulatory approach will dictate the source of the governing laws and in turn the manner in which family law and policy will develop. Whether any of the four jurisdictions to be considered has achieved an effective balance between rules and discretion will be assessed in the course of this thesis. It will be argued that the relative importance placed upon one or more of the benchmarks of democracy, fairness and predictability will greatly influence the regulatory approach adopted in each jurisdiction.

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[58] *Ibid.*

[59] *Ibid* at 170. Similarly Garrison, *supra* n. 3 at 412 notes that "vague rules increase the likelihood that the characteristics of the judge, the court, or the community may affect the outcome." She further states that as distinct from rules, discretion based standards are not capable of providing as much certainty to litigants who might prefer to settle their case.

[60] *Supra* n. 1 at 232-234. Davis calls for a considerably better brand of discretionary justice for individual parties. He suggests cutting back on unnecessary discretionary power and finding better ways to confine, to structure and to check unnecessary discretionary power.

2.3 Principles, policies and standards

2.3.1 Introduction

It has been suggested that 'goodness' is the ultimate test of the work of a Justice.[61] The use of such a vague and indefinable term to assess the work of the judiciary is indicative of the indistinct science of adjudication. Bell highlights the difficulties in devising rules with adequate precision to fit the multitude of scenarios that might arise, with consequential informal adjustments being repeatedly, yet necessarily, made in their application. Certainly, the problem of over-inclusive rules can cause excessive penalising of conduct, thereby requiring formal or informal relaxation of those rules in order to ensure that justice is achieved.[62] Equally, the drafting of vague rules which deliberately rely upon the discretionary powers of the judiciary can give rise to misinterpretation and inconsistency. One means of guiding the judiciary to achieve the desired outcome in any given case, irrespective of the nature or composition of the law, is an indication of the policy objectives that those laws seek to achieve. Both the rigidity of fixed rules and the absolute freedom of uncontrolled judicial discretion highlight the importance of legal norms which reflect the overriding objectives of the law in a given area and serve to guide the application of that law, whatever its form. Principles, policies and standards, when considered as a collective, can be regarded as less detailed and precise in their impact when compared to rules, thereby retaining an element of flexibility. Such an approach places the emphasis upon the over-riding aims of the laws and may facilitate the 'proper' application of the law, whatever its formation.

Whilst the principle of democracy might demand that rules are created by the legislature, it is less clear where best to place responsibility for the identification of principles and policies. In addition the mere recognition of such principles and polices does not guarantee predictability and certainty in the regulation process. They might however positively impact upon the parties' capacity to negotiate a settlement, should they more

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[61] Skelly Wright J "Professor Bickel, the Scholarly Tradition, and the Supreme Court." (1971) 84 Harv L.Rev. 769, 797.

[62] Bell J "Discretionary Decision-Making: A Jurisprudential View", in Davis (ed) *supra* n. 1 at 90. Earlier in that work Davis discusses such 'informal' practices, which fail to apply the rule as written, referring in detail to the police practice of selective enforcement.

clearly state the aims and intended effects of the law. Certainly Hughes suggests that where "laws are incurably incomplete...we must decide the penumbral cases rationally by reference to social aims."[63] Creating a more predictable regulatory system with identified policy aims might stabilise the negotiation process and allow for bargaining in a less opaque context. In addition fairness might be more easily attained if as a result, it is in the first instance more easily identifiable in the context of over-riding principles and policy aims.

2.3.2 Principles

Pound insists that a principle is not a rule; rather it "is a starting point for reasoning in arriving at a determination, not a fixed prescribing of an exact result."[64] Consequently principles represent the underlying reasons for enacting a statute and for seeking to achieve a certain goal. Where legislatively or judicially pronounced, the rule is the articulation of the aims of those principles. In addition as the law develops the principles remain. Thus Pound suggests that the decision-making process, in relying upon rules where they exist, is ultimately guided in its function by the original underlying principles[65] and notes that the "maturity of the law relies habitually upon principles".[66]

In considering the functional limits of legality, Jowell regards principles as "normative moral standards by which rules can be evaluated" which address "justice and fairness in the judicial situation".[67] In this regard Jowell notes that whilst rules have the capacity to be rigidly and mechanically applied, the application of a standard or principles requires,

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[63] *Supra* n. 12 at 417. At 431, Hughes recognises the complexity of the law, referring to it as "a collection of interwoven prescriptive and purposive statements which we marshall and deploy in the adjudication of disputes and also in the tendering of advice". He notes that where "the meaning of a statute is not plain, or where precedent is not massed, such arguments are more likely to succeed."

[64] *Supra* n. 8 at 925.

[65] *Ibid.* Pound at 927-928 notes that the judge's function is to reach a reasoned decision in light of existing principles. However despite the impact of such guiding principles, Pound concedes at 929 that there are "an increasing number of situations where what is to be done or exactly how it is to be done, must be left to the court's individual sense of what is right and just conscientiously applied."

[66] *Ibid* at 927. Whilst the complexities of life prevent the reduction of all matters to rules, the presence of principles can form the basis of the developing rules and practice.

[67] *Supra* n. 20 at 134. Jowell considers them to arise typically in the form of maxims, which arise mainly in the context of judicial law-making.

in addition to establishing a certain fact, "a qualitative appraisal of the fact, in terms of its probable consequence or moral justification".[68] In family law, principles can often constitute the extent of the guidance offered in legislative enactments, leaving the judiciary to decipher and adjudicate upon the relevant factors in the case before them. It is at this point that the judiciary must rely upon the more general notions of justice, equity and fairness. Ely has considered the best means of identifying such fundamental values and notes the lack of direction available.[69] The consequence of the absence of sufficient guidance is the varying emphases that judges will inevitably place on different values, not just in light of changing social ideas and ideals, but also more subjectively, in light of their own ideas and ideals. The identification of what might constitute fundamental rights and values will depend upon matters such as tradition, reason, public consensus, morals and the law. What is not clear is whose tradition or reason will be the source of those rights and values.[70]

2.3.3 Policies

Legislation can be regarded as a legal instrument to mandate societal and behavioural standards and is broadly defined as the process of making written law.[71] A legislative enactment can, for example, create or confirm legal obligations and/or entitlements, and to this end give effect to over-riding social policies in a given area. Similarly a judicial ruling, with or without related governing legislation, can identify or extend the direction of the relevant underlying social policy. Where clarity exists or develops regarding the policy aims of a given area of regulation, the creation or implementation of laws should be a far simpler process. If social policy is identified and understood, the drafting of legal provisions, or adjudication of disputes should be a far less arduous task. Certainly the enactment of detailed legislation identifying the underlying values and policy objectives will be more easily and effectively applied by a presiding judge. In addition where there remains scope for some judicial development of underlying social policy, in light of the

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[68] *Ibid* at 136, 137.
[69] Ely JH *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press) (1980); see generally chapter 3 "Discovering Fundamental Values" at 43-72.
[70] See later in this chapter at section 4.2 for a consideration of subjective legal reasoning.
[71] *Oxford Dictionary of Law* (Oxford) (5th ed) (2002) at 285.

particular circumstances and evolving social norms, such a policy-driven, dual approach to law-making is more likely to be both evolutionary and effective. Even in an uncertain context, the capacity to refer to political debates as a source of enunciated principles and policies can inform and direct the presiding judge, thereby bringing about a more democratic and predictable outcome.

However such policies are not always evident, Davis has identified three reasons for the frequent lack of policy aims underlying a legislative enactment, reasons which arise in all areas of regulation.[72] He refers to the lack of confidence in the knowledge of the individual legislators as a cause for the overly-vague formulations of objectives, where specific and precise objectives are required. Further, he notes that the development of policy regarding difficult issues is often regarded as most easily done on the basis of considering one concrete problem at a time; generalising in advance is often beyond the capacity of the best of minds. Finally, particularly in respect of issues involving controversial subject matter, he recognises that it can be difficult for the legislature to achieve consensus, typically resulting in a more vague and general statement, if any, of legislative objectives.

2.3.4 Standards

Standards, by definition, suggest a community consensus, whereby the adjudicator invoking the standard to amend or develop the law, can do so legitimately.[73] The identification and assessment of shared community values is a transient matter, historical and traditional principles are invariably interpreted in the light of current social norms and accepted values. Thus although a standard is certainly a legitimate starting point for decision making, its sufficiency has to be questioned.[74] Whilst it is not unreasonable to

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[72] *Supra* n. 1 at 45-46.

[73] *Supra* n. 20 at 138. Jowell notes that standards depend "for their meaningful application upon the existence of a community norm". Criticisms will arise where there is an unexplained expression of a personal preference on the part of a judge. Reliance upon evolving standards is more easily justified where reasoned explanations are forthcoming from the decision-maker.

[74] *Ibid,* earlier at 25-26, Jowell highlights the requirement for a decision to "appeal to some decision-making guide, which ideally is sufficiently specific to qualify as a rule, principle, or standard." However whilst he notes that to decide outside such boundaries is akin to considering the issue in an "intellectual

conclude that rules and standards need to co-exist properly to create an effective system of regulation, Jowell regards standards as "directives more general than rules. Their purpose is to specify policies while retaining the benefit of flexibility".[75]

In essence, standards are the basic levels of justice that must be achieved by the presiding judge in resolving a case. Directions such as "in the interests of justice" and "as the court sees fit" are the typical standards required of the judiciary when making decisions in family law cases. How the courts secure the standards of justice or fairness will typically be determined by the application of the relevant principles and/or rules. Thus standards can be likened to policies – they indicate what should be achieved, with principles being utilised as part of the guidance necessary to secure those goals.

2.3.5 Conclusion

The proper understanding on the part of the law-enforcer of the purpose of the rule is more likely to result in the achievement of the 'correct' result, which might mean, for example, the fairest result in the circumstances. In this regard, the law-makers, in creating the law, must seek to diminish the gap, if any, between what the law is and ought to be, and where this proves difficult to achieve, can in turn recognise the role of the judiciary in bridging this gap. Certainly in the context of asset distribution on marital breakdown, it is often the identification of the aim of the process that can prove the most challenging task for law-makers.[76] Once there exists an agreement as to the aims of a particular regime, it is perhaps less difficult to both create and apply the laws, in order to achieve those end goals. Where the law enforcer understands the aims of the law, applying the law in order to achieve those policy aims is more simple and ultimately successful. Even

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void", it is important to the democratic nature of the decision-making process that one basis of justification does not ignore the importance of others.

[75] *Ibid* at 136.

[76] The absence of policy aims and objectives to underpin and direct the application of the Irish divorce laws has given rise to an unpredictable and inconsistent body of law. This legislative failure has been addressed on an ad hoc basis by the judiciary, resulting in continuing uncertainty for parties to a divorce. It is suggested later in this work at chapter 3, especially at section 6.6, that the Irish law-makers will need to reassess the regulatory process in place with reference to its social and legal policy context.

in a discretion-based system, the pre-identification of the policy aims and goals of laws allows the judiciary to make whatever orders necessary to achieve those policy aims.

Drawing distinctions between principles, policies and standards is neither a simple nor a hugely productive task given that they overlap in both theory and practice. They can individually or collectively, be regarded as tools for the identification and/or expression of the over-riding social policy aims. In this regard principles, policies and standards can be said to represent both the context and the end-goal and are typically supported by legislative provisions and/or judicial pronouncements. In the four jurisdictions considered in this thesis, the policy aims of each regulatory system are considered. It appears that where the law-makers have identified policy aims, principles and/or standards, the application of the legal rules and the exercise of judicial discretion is typically more guided and the process more transparent.[77] It will become apparent that the underlying values and social policy aims of a regulatory process are crucial to its correct interpretation and application.[78] Whilst principles and policies might not equate to absolute rules, it is arguable that they can go far enough as a guiding tool to ensure adequate levels of democracy and predictability are achieved whilst still facilitating a more subjectively based test of fairness, where necessary.

3 Creating the law

The principle of democracy demands a transparent and accountable system of law-making whilst fairness demands a just outcome with like cases being treated alike. Within the legal system, various parties influence the outcome of a case. The law-makers in many jurisdictions are, in fact, typically comprised of both the legislature and the judiciary, and the extent of their respective influence is determined by the nature of the

[77] The legislature in both Scotland and New Zealand has incorporated principles and policies into the governing laws to guide the judiciary as to the intended objectives of the regulatory process. This has proven a useful method for curbing inappropriate use of judicial direction; see further chapters 5 and 6 respectively.

[78] It is argued in the conclusion of this thesis that the fundamental weakness in the asset distribution process on divorce under Irish law is its failure to identify the social policy aims of the Irish divorce laws, causing those laws to operate within a social policy vacuum.

governing law and the scope for its development upon application to the facts. In the process of deciding a given case, laws are either applied as stated, or alternatively evolve, given a novel aspect in the circumstances before the court, or a change in the underlying social policy. This section will consider the role of the legislature as law-maker, responsible for the creation of rules to be applied to all relevant cases and conversely the delegation of law-making powers to the presiding judge who acts as law enforcer by applying a pre-existing rule, or law creator, by deciding the case and thereby creating new law. The approach adopted by each jurisdiction considered in this work and their regard for the principles of certainty, democracy and predictability will be considered individually in the remaining five chapters.

3.1 Creating rules

Legislative rules greatly impact upon the adjudicatory process and can significantly restrict the freedoms and powers of a judge in deciding how to determine a dispute. Whilst rules can operate to restrict the abuse of excessive discretionary power, the legislature will often seek to balance the creation of rules with the exercise of discretion, rather than omit discretion entirely. In so doing, the goal of a just decision being reached might be more easily attained. Of course, the judiciary can also be a source of rules, such rules being created in the delivery of a judgment, which if novel in its reasoning or ruling can become the governing rule in future cases.

The form a rule takes can vary enormously, and it is important that the rule maker considers the most apt form in the particular area of regulation. The nature of the area of the law should influence the composition of the rule, so that the manner in which it is enacted takes account of the various possible issues and circumstances to which the rule might apply. In this regard experience dictates that all good law cannot be derived solely from legislative enactments and for law to be workable it is sometimes necessary for it to evolve from judicial practice and application. Fuller recognises the initiation of adjudication without definite rules by many regulatory agencies in the hope that "as knowledge was gained case by case a body of principle would emerge that would be

understandable by all concerned and would bring their adjudicative decisions within the rule of law."[79] Such an approach places responsibility for rule-making very firmly in the hands of the judiciary or administrator. Whilst such a scheme might not to be regarded as the ideal solution and would certainly be unworkable as the only source of law in a democratic society, when operated in conjunction with broad rules and/or principles, the end result might be closer to the optimum one. Certainly Ely suggests that the "insulation" of judges from the pressures faced by legislators from their constituents frees them to make a more dispassionate judgment in many circumstances.[80]

3.2 Role of the legislature as law-maker

Nonet favourably considers the practice of transforming policies into legislative rules, a practice he refers to as 'legalization' and notes the resulting identification and establishment of clear substantive rights. In this regard, he suggests that policies are the birthplace of legislatively-created laws, such policies identifying legal norms and the fundamental rights of the persons subject to the laws.[81] By incorporating such rights into statutory rules, the legislature not only gives them democratically sound, statutory-based recognition, but also places them in the public arena for consideration and debate.[82] The debate and discussion leading to the legislative enactment can be accessed and relied upon in future applications of the rule, particularly as regards the aims it seeks to achieve. Another advantage of legislatively-enacted rules is the breadth of issues that can be provided for in the legislative process. By way of contrast, Shapiro highlights the unsuitability of adjudicative policymaking:

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[79] *Supra* n. 30 at 374. Fuller notes that whilst in "some instances this hope has been at least partially vindicated; in others it has been almost completely disappointed."

[80] *Supra* n. 69 at 57. Of course the converse argument is also easily made, particularly with reference to the importance of public scrutiny within a system of democratic law-making.

[81] Nonet P *Administrative Justice: Advocacy and Change in a Government Agency* (Russell Sage Foundation) (1969) at 6. See section 2.3 above for a discussion of the role of principles, policies and standards.

[82] *Ibid.* By virtue of the debate surrounding the creation of legislatively-based rights, and the need for reasoned argument as to their viability or otherwise, Jowell suggests that the substance of the rules will themselves by positively affected.

> "If an important or novel question is suggested by an adjudication, especially one not necessary to a decision, an effort to resolve it may end by submerging the actual controversy and delaying its conclusion unduly, while at the same time improperly coloring the larger issue and thwarting fully informed and objective consideration. Indeed, it may be extremely difficult to find a case that adequately presents that larger issue, freed from extraneous complications or possible narrower grounds for decision. This does not necessarily mean that the issue should not be dealt with, but rather that it may be more appropriate for "legislative" than for "judicial" treatment."[83]

Determining responsibility for the reform of law, once the need has been identified, has always been a challenging issue. In the context of Irish divorce law the right to impose a clean break is effectively ignored by the governing legislation and conversely, the courts are given an indefeasible right to make ancillary relief orders at any time on or after divorce. The only attempt to address this issue has been by the judiciary, with distinctly different views being expressed as to the extent of judicial capacity to impose a clean financial break. In identifying a need for capacity to order a clean break in a suitable case, Keane CJ rejected the suggestion that the Irish 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...[on] no view could such an outcome be regarded as desirable and I am satisfied that it is most emphatically not mandated by the legislation under consideration "[84]

However, notwithstanding his desire to 'reinterpret' the existing legislative scope for an infinite right to apply for financial relief, he ultimately conceded the fact and supremacy of the legislative law-making role,

> "It is of course beyond argument that the Irish legislation precludes the courts from giving the same effect as does the English legislation to the "clean break" principle."[85]

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[83] *Supra* n. 29 at 940.
[84] *T v T* [2002] 3 I.R 334 per Keane CJ at 364.
[85] *Ibid* at 363. The approach of the Irish judiciary to existing and under-developed legislative policy is considered at length in chapter 3.

3.3 Role of the judiciary as law-maker

> "Building law through adjudication is a sound and necessary process"[86]

The courts are traditionally regarded as the forum for the application and enforcement of pre-existing rules in a system where such rules are more typically created by the legislature. However in practice it is evident that judges typically play a more pro-active role than that of mere enforcer. Whether arising from the absence of laws or because of the apparent unworkability of an existing law, it is not unusual for judges to embrace their role as law and policy maker. In such a scenario, the significance and importance of a judicial law-making role can be difficult to deny. As a deliberate means of progressing the law however, the merits and viability of judicial law-making must be considered further. Issues of democracy and public scrutiny immediately arise, as do potential difficulties with the imposition of subjective judicial views and values.

Whilst reliance upon judicial discretion might not immediately represent a democratic basis for law-making, if sufficiently guided by statutory guidelines and policy statements, it can more easily be regarded as an acceptable and necessary source of law. In the context of asset distribution on marital breakdown the merits of judicially-developed legal policy are debatable, given the breadth of possible outcomes in any one case and the scope for imposition of moral judgments. The difficulties and uncertainties that this poses for litigants and lawyers alike suggests that absolute judicial freedom to decide cases on broad principles of justice and fairness might not be the most efficient or fair means of developing law and policy in this area. In addition, whilst the particular facts of a case may warrant a judge straying significantly from pre-existing decisions, once the judgment is delivered it exists as a future guide, and depending upon the status of the court in question, may impose a new direction on lower courts. Equally however, an overly restrictive view of the scope for judicial law and policy making might prevent the delivery of a legitimate and perhaps necessary judicial development of law and/or

[86] Hart HLA *The Concept of Law* (Clarendon Press) (1961) at 57.

valuable policy statements.[87] Whilst rules might represent the considered legislative answer for regulating areas of human behaviour, both their relevance and workability come to the fore upon their application to factual situations. The importance of judicial experience and the development of a body of principles in this context have highlighted the valid law-making role of adjudicators in the legal process. In fact, Pound regards these "logical deductions" by the judiciary as a "most important part of our law".[88]

3.4 Who creates the underlying principles and policy aims?

It has already been suggested that the creation of guiding principles and policies would not only eliminate the allocation of "too much freedom" to the courts; it might bring the process closer to achieving satisfactory results.[89] A key issue is the source of the underlying principles and policies and the identification of who is best placed to develop them. Where identified, such aims can simply be stated by the rule-maker at the time of the creation of the rule or can be articulated as governing principles to be utilised as a guide by the law-enforcer. Alternatively the creation of principles can be the responsibility of the law-enforcer, to be developed alongside the application of rules. This might be regarded as the more difficult approach to the creation of principles as they are more likely to be developed on an ad hoc basis as part of the learning curve for the law enforcer. Parkinson notes that the absence of an indication from the legislature as to the outcome that the trial judge should seek to achieve, is evidence of legislative "delegation of responsibility".[90] This suggests that the first responsibility for creating policy rests

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[87] Such policy statements and directions from the Irish judiciary in the context of applications for ancillary relief on divorce are considered in chapter 3, below.

[88] *Supra* n. 34 at 317.

[89] Agell A "Grounds and Procedures Reviewed" chapter 3 of *Economic Consequences of Divorce: The International Perspective* (Clarendon Press) (Oxford) (1992) Weitzman L and Maclean M (ed). At 60/61 Agell notes that all participants in the surveyed group of lawyers agreed on the necessity of legislation on the basic principles for distribution of property. See section 2.3.3 above for a consideration of the importance of identifying underlying policy aims.

[90] Parkinson P "The Yardstick of Equality: Assessing Contributions in Australia and England" [2005] 19 IJLP&F 163 at 166. With reference to Chisholm (1995) Parkinson notes that "[O]ne judge of the Family Court has likened the judge's situation to a bus driver, who is given countless instructions about how to drive the bus, and the authority to do various actions such as turning left or right. There is also the occasional advice or correction offered by three senior drivers. The one piece of information which he or she is not given is where to take the bus. All he or she is told is that the driver is required to drive to a reasonable destination."

with the legislature, and it is only where that responsibility is deliberately or by omission transferred to the judiciary that it is then for the courts to bridge the existing policy gap.

Where the judiciary is tasked with the identification of the principles to guide the application of the law, they become the law-makers. In this regard, they may continue to rely upon available legislative direction or perhaps may themselves identify the over-riding societal and legal needs. Historically judges have not shied away from imposing their social policy views on existing laws, both in their interpretation and application, suggesting once again, that the effect of a rule is only determined by the manner of its application. Hart supports a limited version of this role for the judiciary, refusing to accept the conclusiveness of a rule, noting "there is nothing in the nature of a legal rule inconsistent with *all* questions being open to reconsideration in the light of a social policy".[91]

The lack of conclusive agreement as to the optimum law-maker is illustrated in the analysis of the four jurisdictions considered in this thesis. The Californian legislature has resolved the issue of asset distribution in the abstract and the judiciary are essentially mandated to apply the equal division rule.[92] In Scotland, the legislature has expressly identified the principles governing the distribution of assets on marital breakdown and it is for the courts to make the necessary orders pursuant to the attainment of those legislatively stated principles. Similarly the New Zealand legislature has taken responsibility for stating both the governing rules and principles; whilst relying upon judicial adjudication within relatively strict pre-determined circumstances. Conversely the Irish legislature has failed to identify governing principles and thus the courts have attempted to address this shortfall in the course of determining marital disputes. Davis et al refer favourably to the approach taken by the Scottish Law Commission which engaged in extensive consultation on the issue of re-framing their process for asset distribution. They note that the first task identified for action by the Commission was the need "to address the question of what, in broad terms, the objective of financial provision

[91] Hart HLA "Positivism and the Separation of Law and Morals" 71 Harv. L. Rev. 593 at 615.
[92] The legislative rule of equal division is not absolute in nature; the extent of the judicial discretion exercisable is set out in chapter 4, below.

on divorce ought to be."[93] Notwithstanding the legislative articulation of these principles, it still remains for the judiciary to make the necessary orders to achieve them. Interestingly, however, although Miles recognises the New Zealand approach as premised upon a pro-active legislature that has directed the courts to "resolve cases by reference to more or less closely defined statutory rules and principles", she ultimately concludes that the system is flawed because there are "too many principles".[94] Thus, whilst the judicial obligation to take account of the particular circumstances remains an important aspect of the process, excessive judicial freedom is curbed by the legislatively created duty to adhere to the over-riding principles and policies. Relying upon Clive, Davis et al suggest that without stated policy, there will remain chaos in family law and particularly in respect of ancillary relief orders.[95]

3.5 Principles and policies – dual legislative and judicial roles?

The uncertainty that would attach to absolute judicial freedom to develop legal policy demands that such an approach should be avoided. However in order to preserve the important role of the adjudicator in the decision-making process generally, complementary roles can exist for the legislature and the judiciary in the identification of policy aims. Legislatively-identified state policy can be supported by the development in practice of governing principles, in the course of the adjudication of cases before the courts. With such an approach, the legislature or courts might choose to emphasise certain principles, such as fairness in the guise of compensation, non-discrimination and equal sharing. Ultimately, whatever principles are judicially developed, they can be governed by, and subject to, the established statutory rules and directions, thereby retaining some level of democratic control and ensuring relatively predictable outcomes.

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[93] Davis, Pearce, Bird, Woodward and Wallace "Ancillary Relief Outcomes" [2000] 12 CFLQ 43. This, in due course, was translated into five 'principles' which were then incorporated into Scottish law by section 9 of the Family Law (Scotland) Act 1985.
[94] Miles J "Principle or Pragmatism in Ancillary Relief: The Virtues of Flirting with Academic Theories and other Jurisdictions" 19 [2005] IJLP&F 242 at 251-252.
[95] *Supra* n. 93 at 61.

Whilst Hughes does not accept the notion of dual law-making roles for the legislature and judiciary and regards the primary function of the courts as the administration of justice and not the attainment of policy goals, he recognises the creative role of the judge, given that the "laws are incurably incomplete"[96] and the need to consider contemporary social aims. However, identifying and establishing means to secure policy goals is, in his view, a broader issue for the legislature. He regards the legislature as best placed to create policy and identify principles with the judicial role to create policy only arising in the context of legislative shortcomings or failures. The alternate view is that the judiciary is better placed to dictate and develop policy within the context of adjudicating actual cases. Where such an approach is favoured, Lord Nicholls has emphasised the need for these judicially developed principles to be

> "...identified and spelled out as clearly as possible. This is important, so as to promote consistency in court decisions and in order to assist parties and their advisers and mediators in resolving disputes by agreement as quickly and inexpensively as possible."[97]

3.6 Conclusion

Independently, both rules and discretion are valuable tools in the decision-making process. The creation of an agreed set of principles upon which decisions regarding asset distribution are made would be welcomed by most parties who are affected by divorce proceedings; litigants, lawyers and the courts. Where there exists capacity to refer to stated guiding principles such as compensation, equality or reasonable needs, there should be significantly less scope for the delivery of a wayward judgment. Miles supports this view, noting that the "[A]doption of a clearer set of principles...would provide increased certainty for litigants and a more satisfactory ideological foundation for the

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[96] *Supra* n. 12 at 417.

[97] *White v White* [2000] 2 FLR 981 at 984. Douglas and Perry note the difficulties presented to both the courts and to *inter partes* negotiations by the "lack of any clear objective in the Matrimonial Causes Act 1973 or of any ranking of the factors in section 25(2)". Douglas G and Perry A "Research: How Parents Cope Financially on Separation And Divorce – Implications For the Future Of Ancillary Relief" [2001] CFLQ 67 at 70. Attempts by the Irish judiciary to fill the policy gap currently existing in the divorce laws have been largely unsuccessful, as set out in chapter 3 below.

law."[98] Undoubtedly the development of reliable principles and policy would be likely to create much greater certainty and consistency within the divorce and asset distribution environment, and facilitate the predictable application of the law. In addition, the creation of recognised principles and underlying policies might remove the perceived mystique and inconsistency surrounding the possible outcomes of a judicial hearing and create a greater willingness for a more quickly negotiated settlement of the issues. The potential source of these principles is numerous; legislative, judicial or both, as will be evident in the examination of the regulatory approaches of the four jurisdictions considered in chapters 3 to 6 below.

4 Impact of judicial discretion

4.1 Introduction

> "Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."[99]

Marshall CJ (above) refutes any suggestion that judges themselves make law, declaring that the role of the court is merely to give effect to the will of the legislature.[100] Conversely Jowell rejects the suggestion that the application of rules can always be mechanical, referring to the important role of the decision maker,

> "...because rules are purposive devices (they are techniques to effectuate a broader policy) and thus because language is largely uncertain in its application to situations that cannot be foreseen, the

[98] *Supra* n. 94 at 242.
[99] Marshall CJ *Osborn v. Bank of United States* 22 U.S. 738, 866 (1824).
[100] Somewhat less severely, Wilentz CJ *supra* n. 5 at 865 notes the possibility of regarding rules as a means of limiting the power of the judiciary, suggesting that "all a judge need do is apply predetermined rules to the facts of a case...the outcome when this technique is used is supposedly predictable and stable."

> applier of the rule will frequently have a degree of discretion in interpreting its scope."[101]

Whilst the governing provisions might typically be enacted by the legislature, it is only in their application that their impact is apparent. In this regard the effect of the law depends upon the implementation of its provisions, within a courtroom, or in negotiations in anticipation of a ruling. Thus although a rule might dictate acceptable standards of behaviour and the consequences for breach of such standards, in itself it is ineffectual until enforced. On this basis, Hughes highlights the importance of adjudication in the context of the legal system as a whole, stating,

> "...in a functioning legal system all of these activities are carried on with a careful eye to the prospect of adjudication and all are thus influenced and affected by the decision making process."[102]

Whilst to have effect the rule might require implementation, its very existence can serve to influence the process more generally. In particular rules can provide the backdrop for *inter parte* negotiations, thereby facilitating bargaining based upon the fact and consequences of such rules. The fact of an identifiable rule with associated predictable outcomes, reduces the possibility of a divergent judicial ruling, places limits upon the expectations of divorcing parties, and ultimately encourages resolution through settlement.

4.2 Subjective judicial values

Judges are given the task of interpreting and applying law and are often viewed as the best group of persons to do so.[103] However the allocation of the task to such a select

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[101] *Supra* n. 20 at 135.

[102] *Supra* n. 12 at 414. Should the utopian society be created, where rules were perfectly clear and compliance was perfect, judicial decision-making would no longer be necessary. Until then it is regarded as "a very important feature of the operation of a legal system."

[103] In the context of constitutional law and constitutional justice, Ely *supra* n. 69 at 56 recognises moral philosophy as the basis for such decisions, and equally recognises the basic idea that identifies judges as a group better capable than others at identifying and engaging with it. Whilst he does question the veracity of this assertion, he concedes that within the institutions of government, "...courts are those best equipped to make moral judgments, in particular that they are better suited to the task than legislatures."

group does not guarantee that they will interpret and apply the law consistently.[104] Shapiro notes that in the context of discretionary power, discrepancies become visible in the rulings of different judges. Immediately fears arise as to the impact of subjective judicial values upon the key three identified aspects of an effective regulatory process; democracy, fairness and predictability. Caution must be exercised in respect of the actions of all judges; Fuller expresses a fear of cases where the essence of adjudication lies not in the manner in which the affected parties present the case, but rather simply in the office of the judge.[105] The influence of the mindset and value system of a judge is a widely debated topic, the judges' values arguably representing one of the significant factors in the decision-making process.[106] Hughes discusses the difficulties for the attorney advising his client, and his need to take the personality of the judge into account as a relevant consideration regarding the likely outcome of the case. He refers to the views of the early American extreme realists who considered that "the concept of law has no meaning apart from a prediction of what judges will do."[107] Such an approach regards the individual values of each judge as determinative, as distinct from the legal principles and rules that regulate and determine issues in a rule-based system of law.

Hart queries the objectivity of the values relied upon by a judge when exercising the discretion accorded to him. He refers not to any objective standards used, but to those standards the judge "characteristically uses",[108] suggesting a subjective and individualised judicial approach. Ely is of the view that unavoidably

> "...there will be a systematic bias in judicial choice of fundamental values, unsurprisingly in favor of the values of the upper-middle,

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[104] See the views of Dworkin, *supra* n. 9 at 35. Judges may sometimes agonise over points of law, and two equally trained and educated judges will often disagree. The number and veracity of dissenting judgments on fundamental interpretations of the Constitution are evidence of this very point.
[105] *Supra* n. 30 at 365.
[106] See the views of Simon D, *supra* n. 49. He notes the relationship between judges' personal predispositions and the decisions they make. He regards a judge's general attitudes, values and other socially-determined behavioural traits as a quasi-legal factor, which affects the ultimate decision made in a case. See further G. Schubert *The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices 1946-1963* (Evanston: North Western University Press) (1965)
[107] *Supra* n. 12 at 426. Although a detailed consideration of the realist movement is outside the scope of this work, it is worth noting that political scientists have long suggested that decision-making is significantly influenced by a judge's political ideology and values, reducing the value of legal reasoning and precedent.
[108] *Supra* n. 86 at 144.

> professional class from which most lawyers and judges, and for that matter philosophers are drawn".[109]

In essence what follows is an elevation in importance of the rights regarded as fundamental by this class of persons. Rights including privacy, freedom of expression and education are respected and there can be a failure to recognise the need to fight for the right to housing, food and an adequate standard of living. Such deprivations are unknown to this class of persons.[110] It is this clash of classes, between the judiciary and many litigants, this failure to understand the needs and circumstances of many, which highlights one of the main shortcomings of the typically middle-upper class judiciary. In this regard, Schneider recognises the narrow social spectrum background of most judges, and the consequential influence of their limited life experiences on the adjudicatory processes.[111] In the context of the 'rules versus discretion' debate, excessive judicial discretion permits the reliance by a judge on his own values, which can greatly influence the decision ultimately reached. Ely agrees, noting the futility and unworkability of basing a decision on 'reason' regarding it as an "empty source" or alternatively "so flagrantly elitist and undemocratic that it should be dismissed forthwith",[112] both views reflecting the belief that absolute discretion is fundamentally undemocratic and represents an inappropriate basis for decision making.[113]

Where rules form the basis of the law in a given area, judicial prejudices are more limited in effect. Where the enacted law accords discretion to the judge to decide a case 'as he sees fit' or as 'justice' requires, there is every opportunity for personal prejudices to influence the decision. The manner in which a judge adjudicates a case and the standards upon which he relies will undoubtedly have a bearing on how justice is measured. However despite the concerns that are raised concerning the excessive and undemocratic judicial powers that arise from aligning judicial discretion with the decision-making process, if appropriate checks and balances are in place it is suggested that judicial

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[109] *Supra* n. 69 at 59.
[110] *Ibid.* at 58, 60.
[111] *Supra* n. 6 at 84.
[112] *Supra* n. 69 at 59.
[113] Reason, Ely suggests, lends itself to being filled by the values of the adjudicator in question.

discretion can remain a vital cog in an effective legal process. Thus on the basis that there exists a need for some judicial discretion, the necessary and appropriate controls will now be considered. The importance of transparency and openness within the decision-making process will be identified, as will the best means for formalising these controls. Similarly the tools currently used to limit the excessive use or abuse of judicial discretion will be assessed, with reference to relevant existing laws and practice.

4.3 Structuring and limiting judicial discretion

Whilst discretion is a necessary tool in an effective decision-making process, Davis advocates that it be both confined and structured in order to best eliminate abuse. In confining discretionary power, Davis does not seek to eliminate it; rather he searches for the *optimum* level of discretion. In this regard, he recognises the weaknesses inherent in both excessively broad and excessively narrow discretion, the former resulting in arbitrariness or inequality whilst the latter exposes the parties to an insufficient consideration of individual circumstances. Two methods of confining discretion are suggested; structuring and checking. By structuring discretion its use is clarified, and in turn checking allows for the supervision and review of the exercise of that structured discretion. Interestingly, whilst the blame for the excessive use of discretion often lies with the judiciary who exercise it, perhaps it is primarily for the legislature to take action to limit the discretion available. Thus the essence of structuring is not to eliminate discretion but to introduce openness where it is or can be exercised; Davis regards openness as "the natural enemy of arbitrariness and a natural ally in the fight against injustice."[114] He encourages the use of policy statements and rules in the context of administrative decision-making, regarding them as a means of closing the gap between agency policy, and what an outsider knows. Where determinations are made by the judiciary, in addition to the identified principles, policies and standards statutory guidelines, the common law doctrine of precedent and the delivery of reasoned judgments are all tools capable of limiting excessive judicial freedoms. To this end, the doctrine of precedent, in requiring the judiciary to follow and maintain existing legal

[114] *Supra* n. 1 at 98.

reasoning, serves to restrain the judiciary and protects the fundamental requirement of democratically created laws.

4.3.1 Legislative guidance

Where a legislative rule exists, the manner in which it is enacted may contribute to the judiciary's reluctance or willingness to depart from its directions. One oft-utilised means of limiting judicial discretion, especially in the context of asset distribution on marital breakdown, is the creation of a statutory list of factors to which the court must have regard when reaching its conclusions. Positive criteria for consideration can be included in legislation, thereby requiring certain factors to be considered by the judge. Equally, well-calculated and structured rules can be utilised to eliminate reliance upon inappropriate criteria.[115] Identifying relevant criteria, and demanding an explanation for their application might assist in securing the objective(s) of the legislative enactment.

Whilst all law seeks to manage a particular issue, perhaps the elucidation of objectives might in themselves provide a clearer picture for the judiciary of the legislative aim(s). To ensure fairness and integrity are protected within the adjudication process, the exercise of discretionary power by the decision-maker must operate on the basis of some agreed standards or principles in order to yield consistency in like cases. Whilst without rules a judge can draw inappropriately upon his own views of what constitutes fairness in the circumstances, the inclusion of legislative guidance might create the basis for more equitable and predictable adjudication.[116] The use, to various extents, of statutory guidelines by each of the four jurisdictions considered in this thesis, will demonstrate varying levels of legislative recognition of their perceived merits and the fundamental need for democratically created laws. The particular approach adopted by each jurisdiction and the impact of such measures will be considered in chapters 3-6 below. In addition the sufficiency of such guidelines as a means of limiting judicial discretion

[115] Jowell, *supra* n. 20 at 25, notes that by citing criteria to be considered by the court in the decision making process, the legislature is also, by implication excluding improper criteria.
[116] *Ibid.*

whilst achieving the over-riding regulatory aims will be gauged with reference to judgments delivered to date.

4.3.2 Doctrine of precedent

Another key tool for the monitoring, and where necessary admonishing, of subjective judicial decision-making is the doctrine of precedent, which requires that relevant decisions are followed. Pound emphasises the importance of the existing body of precedent, as a valuable tool to limit the mis-use of discretion. It serves as a supervisory tool and by virtue of the hierarchical courts system, wandering court decisions can be brought into line on appeal. Adherence to precedent secures the fundamental aims of predictability and certainty and more broadly facilitates bargaining in the shadow of those predictable outcomes.[117] Davis advocates the use of and relative adherence to the doctrine of precedent, regarding it as a means of structuring discretion and achieving consistency in the decision-making process.[118] A failure properly to structure discretionary powers, which includes a failure to follow precedent, damages the integrity of the decision-making process:

> "...the resulting case law is often spotty and even self-contradictory, the regulatory law remains uncertain over long periods."[119]

However, whilst the courts are responsible for the development of a body of precedent, judicial adherence to existing decisions will not necessarily guarantee justice. Consequently Davis does not advocate following precedents blindly. Whilst recognising the importance of equality of application, he notes the difficulties arising from undue rigidity and the occasional need for individualised justice. Arguments based on principles

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[117] The impact of predictable laws upon both the court process and attempts to negotiate a private settlement will be evident both in their presence and absence in the forthcoming assessment of the regulatory processes in Ireland, California, Scotland and New Zealand in chapters 3-6 ahead.
[118] *Supra* n. 1 at 98. Later at 202, Davis considers the role of precedents in the administrative law context and regards them as less successful in that context in limiting the exercise of discretion. This is primarily through ignorance, in so far as decisions are not communicated widely. Davis advocates strongly for the development of a number of principles, including a strong, precedent-based prosecution policy. He recognises the value of judicial involvement in the legal process, noting how guidelines are always developing and necessarily yielding to new judicial decisions and new factual studies.
[119] *Ibid* at 99.

of justice and fairness are more likely to succeed in the absence of a clear statute or compulsory adherence to precedent, otherwise "they may have to yield to the plain meaning of a statute or the weight of a venerable precedent".[120] Fuller extends this notion in emphasising the necessity of precedents being liberally interpreted in order to progress the law and to allow complicated or "polycentric problems" to be fairly considered.

> "...it should be noted that the efficiency of adjudication as a whole is strongly affected by the manner in which the doctrine of stare decisis is applied. If judicial precedents are liberally interpreted and are subject to reformulation and clarification as problems not originally foreseen arise, the judicial process as a whole is enabled to absorb these covert polycentric elements. By considering the process of decision as a collaborative one projected through time, an accommodation of legal doctrine to the complex aspects of a problem can be made as these aspects reveal themselves in successive cases. On the other hand, if a strict or "literal" interpretation is made of precedents, the limits of adjudication must perforce be more strictly drawn, for its power of accommodation has been reduced."[121]

In areas of law that give rise to a different set of facts in every case, such as family law, it remains a pre-requisite for the achievement of justice generally, that parties receive like treatment before the courts. Whilst fairness might be perceived as mandating individualised justice; it is equally unfair to treat similar cases differently. Thus failure to follow precedent is only justifiable for an *unlike* case. Judicial discretion introduces the possibility of deviation from pre-existing decisions or laws, and consequently scope for abuse. In the particular and peculiar context of family law, the often-complicated set of facts that come before the court can reasonably be regarded as examples of "polycentric problems".[122] Excessively rigid reliance upon precedent, whilst ensuring predictability and consistency, might cause injustice for the parties before the court. In such instances, the existence of over-riding policy aims can provide a vital point of reference for the presiding judge in determining the fairest outcome in the circumstances.

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[120] Per Hughes, *supra* n. 12 at 431. Hughes at 423 also recognises the manner in which the doctrine of precedent operates to limit the freedoms of the judiciary, noting "precedents are not lightly to be disturbed...[and represent a]...hallowed theme in judicial opinions".
[121] *Supra* n. 30 at 398.
[122] The notion of polycentric problems is introduced earlier in this chapter at para 2.1.2.

4.3.3 Reasoned judgments

The obligation to provide reasons for any decision reached will lessen the judge's likelihood of reaching a decision without reference to rules or legal reasoning and adds legitimacy and transparency to the process generally. Jowell regards the obligation to reason as a means of providing a check against the use of improper or arbitrary criteria. The obligation publicly to reason the basis for a decision also acts as a check against arbitrary decisions, given the associated public accountability and scrutiny. Where a rule is avoided or newly applied, a reasoned decision is a basic and fundamental criterion, both to allow those affected to gain an understanding of that new reasoning and equally to act as a tool to monitor judicial power. Whilst reasoned opinions in themselves are more likely to give rise to even-handed justice, this is even more likely where those reasoned opinions are made available to the public.[123] The publication of the reasoned judgment places it in the public domain and subjects it to criticism, where deserved.[124] Jowell suggests that by having to explain the rationale for the decision reached, the adjudicator might "look at each case anew, and preserve the flexibility that a rule may preclude."[125]

Davis calls for a more regular use of the reasoned judgment, noting that it protects against careless or hasty action, helps to assure that the main facts and ideas have been considered, facilitates supervision of the judicial powers and assists parties to decide whether to appeal the decision.[126] The judicial capacity to deliver a reasoned judgement is perhaps already supported by the existing adversarial nature of the court procedure. The participating parties are afforded the opportunity to present their best case and to propose legal reasoning for a ruling in their favour.[127] In addition Fuller notes that the adversarial process combats the natural human tendency for a swift judgment, whilst affording an

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[123] *Supra* n. 1 at 97, 98. Davis recognises the importance of the delivery of reasoned opinions where discretion is exercised and states that the difference between a system of precedents and a system of *open* precedents is enormous.
[124] *Ibid.*
[125] *Supra* n. 20 at 24.
[126] *Supra* n. 1 at 98.
[127] Jowell *supra* n. 20 at 26. Adjudication involves the litigant in the decision-making process and guarantees the participation of the affected parties. Jowell notes that the participants "are well placed to advance the strongest case for their proposition".

opportunity for all of the "peculiarities and nuances" of the case to be explored.[128] In higher courts, the availability of researchers to aid the adjudicator further ensures that a judge is fully cognisant with the area of law in question, and not limited, for example, to the cases chosen by the participating parties to support their arguments.[129] Reasoned and researched judgments ultimately encourage "judges to contribute to the long-term doctrinal or conceptual development of the law."[130]

Whilst Davis advocates the continuation of the discretionary power to depart from existing precedent and to change the rules (where necessary), he states that "secret law" has no place in any decent system of justice.[131] By requiring the courts to be cognisant of any existing legislatively-based directions, demanding adherence to the doctrine of precedent and accountability in the form of reasoned judgments, the application of rules and the exercise of judicial discretion can become more predictable and public in nature. Accountability, transparency and reasoning can serve to legitimate any doubts that might otherwise surround the exercise of judicial powers. The importance of these qualities for the individual litigant cannot be overestimated, and ultimately give rise to a better understanding of the law.

4.4 Conclusion

Whilst it is well recognised and even constitutionally provided that the legislature shall be the primary law-maker in most jurisdictions, the role of the judiciary in the fine-tuning and interpretation of those laws remains hugely significant. The creation and development of law and policy need not be confined to the legislature, and even in the application of legislatively-created laws, there can exist meaningful and useful scope for the judicial development of law and policy. For example, through judicial interpretation and application, it is certainly possible for vague statutory standards to become

[128] *Supra* n. 30 at 383. Fuller regards the adversarial presentation of a case as the only effective means for combating the natural tendency to judge too soon.
[129] On a more practical level and outside the remit of this work, there continuously exists an issue as to the lack of expertise on the part of the judiciary, and their lack of opportunity to gain expertise on the bench due to rapid rotation.
[130] Idleman S "A Prudential Theory of Judicial Candor" (1995) Tex. L.Rev. 1307 at 1370.
[131] *Supra* n. 1 at 110.

reasonably definite rules. In addition, as the experience and understanding of the particular rule and its application develops, its content and purpose will become more apparent to all relevant parties.[132] Arguably attaching legislatively-created guidelines to a statutory enactment in order to aid and direct its application serves to limit the abuse of discretion, whilst allowing sufficient scope for the law to be applied in light of the particular facts. This dual approach affords both the legislature and judiciary the opportunity to contribute in a significant, yet appropriate way to the progression of law and policy. Where some element of discretion is accorded to the judiciary, such discretion is to be welcomed and is often very necessary. Equally however, it is important that the use and exercise of that discretion does not go unchecked and the means of legitimately yet effectively limiting excessive judicial discretion have been noted. The requirement of reasoned judgments can limit the scope of discretionary power, with the obligation to account reducing the arbitrary exercise of power and ultimately contributing to a more democratic and predictable process of adjudication.[133]

5 Judicial discretion – a controllable necessity?

Hughes promotes the legal system that incorporates as "a central role", the participation of a judge to decide a dispute between opposing parties.[134] The traditional division of roles between the legislature and the judiciary typically sees the legislature concerned with law and policy creation, with the judiciary responsible for the application of those provisions, with an overall collective aim of securing justice in each case. In theory this could represent a sensible division of tasks and create manageable undertakings for both, in circumstances where the laws created are sufficiently detailed and precise. Certainly it describes a structure whereby law-makers are democratically elected and the politically appointed judiciary are the mechanics of enforcement. However, in practice, where the

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[132] *Ibid* at 219. Davis makes a similar point in the context of the role of agencies in the application of legislative enactments. Further he encourages the development of a quasi rule-making role for agencies, where they would develop guidelines and administrative rules regarding the interpretation of the legislative rules and any use of discretion by the agency.

[133] *Supra* n. 20, Jowell recognises the practical limitations on the exercise of discretion, including availability of resources, time, professional norms and political pressures.

[134] *Supra* n. 12 at 416. However his argument is premised upon a fundamentally rule-governed society, with such rules being applied by the judiciary to resolve disputes.

facts of a case fall outside the rules which purport to govern an issue, the judge may have no choice but to draw on less certain notions of public policy, morality and justice.[135] In the context of family law cases, the application of the rules might expressly require the courts to rely upon such subjective issues in order to achieve a fair outcome.

The enactment of rule-based legislation, which encompasses judicial discretion in the application of those rules, can as a result of the freedoms accorded to the judiciary, potentially negate the effect of that rule. Stewart suggests as a response to this problem, that discretion "be exercised in accordance with consistently applied general rules." He is of the view that substituting:

> "...general rules for ad hoc decision...tends to ensure that officials will act on the basis of societal considerations embodied in those rules rather than on their own preferences or prejudices, and increases the likelihood that the contents of the policies applied will be consistent with the preferences of a greater number of citizens."[136]

Conversely any shift towards individualised justice avoids the rigid application of law and sanctions to particular circumstances and permits a more tailored approach by the adjudicator. It can introduce a more individualised form of regulation by moving from a simple legal pronouncement to a recognition of the diverse influences and factors in any one case. However it is apparent that such individualised justice must be exercised with direction and within the confines of identified governing principles and policy aims.

Ultimately Pound cites the need for rules, principles and standards, as well as individual discretion, "in the pursuit of certainty and predictability".[137] Whether courts or rules

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[135] *Ibid* at 429. Whilst some scholars might suggest that the mechanical approach of rules makes the legal process quite simple, the more realistic view recognises the lack of simplicity in the structure of legal reasoning. Hughes refers to the process of judicial decision making as "more typically a rummaging through layers of material in which prescription and policy are more or less express and more or less vague."

[136] *Supra* n. 40 at 1698. Stewart is of the view that such an approach would promote a general sense of individual and social security. He suggests that to the extent that uncontrolled discretion is exercised, there exists an absence of formal justice.

[137] *Supra* n. 8 at 926. Pound is of the view that "...it has become generally well perceived that the judicial process cannot be held solely to rules. But experience has shown also that application of principles and standards cannot be molded to the fashion of rules. A just and wise individual discretion in the choice of

should come first in the law-making process is debatable, Fuller admits to seeing both sides of that argument, recognising the role of an "agency capable of determining the rights of parties", whilst highlighting that "you cannot be fair in a moral and legal vacuum".[138] Certainly it appears from the discussion in this chapter that the success or otherwise of various approaches to legal regulation can be gauged with reference to the goals of democracy, predictability and fairness. Following a consideration of both the historical and current regulatory approaches to marital breakdown law in Ireland, this thesis will consider the approaches of the law-makers of California, Scotland and New Zealand as evidence of alternative approaches to the creation of effective processes and policies and in so doing will attempt further to progress the identification of the optimum process for the regulation of asset distribution on marital breakdown. These four jurisdictions will be critically considered with reference to these three key yardsticks with a view to measuring the effectiveness of the distinctive approaches adopted.

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remedies, in the application of remedies, in dispensation from rules prescribing details of duty and obligation, or in mitigation of penalties cannot be wholly eliminated in the pursuit of certainty and predictability."

[138] *Supra* n. 30 at 372-375.

Chapter 2 - A Historical Overview of the Regulation of Marital Breakdown in Ireland

1 Introduction

In order to understand and evaluate the position of Irish divorce law at the discretion end of the rules/discretion continuum, it is necessary first to consider the historical influence of the Constitutional ban on divorce, and how this came to be lifted. This chapter therefore provides a historical overview of family regulation under Irish law, whilst chapter 3 considers in depth, the ancillary relief provisions which now accompany the grant of a divorce.

The divorce regime in Ireland is grounded primarily upon an amended constitutional provision and more comprehensively by the provisions of the Family Law (Divorce) Act 1996. The effect of the amended Article 41.3.2 of Bunreacht na hEireann (the Irish Constitution) is to introduce the remedy of divorce to Irish family law and outline the basic criteria to be fulfilled prior to the granting of a decree of divorce. This is in turn supported by the lengthy and broadly drafted provisions of the Divorce Act which statutorily empower the court to order a decree of divorce and in so doing afford the judiciary very extensive freedoms in determining what financial ancillary relief orders, if any, to make. It appears that the reasoning that underpinned such extensive discretionary powers was grounded in a legislative desire to protect and guarantee as much as possible, the rights of dependent spouses and children. Such guarantees were required at the time of canvassing for the proposed amendment to the Constitution, in an attempt to convince the conservative voters of Ireland that it would be impossible for the needs of dependent spouses to be ignored or avoided by absconding spouses, seeking to avoid their responsibilities.[1] By according such extensive discretion to the judiciary the needs of all parties, whatever their circumstances, would be provided for and could not be evaded. By

[1] The infamous campaign statement of Alice Glenn opposing the introduction of divorce to Ireland in 1986 was that "A women voting for divorce is like a turkey voting for Christmas". In support of their views, the anti-amendment campaigners emphasised the damage that divorce would do to the financial status of women and children.

rejecting the imposition of strict guidelines, it was believed that unfettered judicial discretion would facilitate the varying circumstances that would invariably arise;

> "...every individual is different, every marriage is different and, to the extent that it is possible to do so, the legislature must allow the courts to recognise that...The legislation must allow the courts latitude to deal with the infinity of different circumstances which will be brought before them."[2]

The aim of this chapter is to present a historical overview of the special position of the marital family in Irish law and society and the impact of this status on the manner in which the divorce laws have been drafted and enforced. The historical approach to the issue of marital breakdown in Irish law will be considered, encompassing the influence of Catholicism, the protection and perpetuation of the traditional role of the homemaker as well as previous attempts to introduce family law remedies, including divorce. The nature and effect of the pro-change campaign adopted by the government prior to the 1995 amendment to the Constitution will be considered, incorporating an overview of the particular social and cultural issues which contributed to the adoption of a discretion-based regime, lacking in articulated policy objectives.

2 Elevated status of the family under Irish Constitutional law

The Irish Constitution, as enacted in 1937, emphasised the immensely important function of the family and in particular the marital family in Irish society. Article 41 declares the family to be "the natural primary and fundamental unit group of Society....a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law." Consequently the State guarantees in Article 41.2 to "protect the Family in its Constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State." This special and very elevated status deliberately accorded to the family by the drafters, and the positioning of the family effectively above the remit of lawmakers, reflects the view of the family as the most important Irish social construct. Whilst the Constitution does not expressly define

[2] Dail Debates Second Stage Vol. 467 27/6/1996 at 1953-1954 per Alan Dukes T.D.

the family, Article 41.3 outlines the State's pledge "to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack." By virtue of the inclusion of the Article 41.3 pledge in respect of the marital family, the Irish courts have confined the concept of the family and the consequential constitutional rights and protections, to the family based on marriage.

This distinctive constitutional recognition and protection of the marital family, compounded by various judicial pronouncements, has influenced greatly state policy as regards maintaining and supporting the marital union and for many years acted as an almost insurmountable obstacle in debates concerning the remedy of divorce. The case law surrounding the impact of Article 41 has centred on two primary issues – constitutionally founded personal rights particular to the marital family, and the obligations of the State towards that family unit. In *Murphy v The Attorney General*[3] the court declared aspects of the Income Tax Act 1967 to represent an unconstitutional attack on the married family in circumstances where the earnings of a married couple were more heavily taxed than an equivalent unmarried couple.[4] One of the most significant cases to single out the marital family as one that attracts constitutional protection is *McGee v Ireland*[5] which concerned the importation of contraceptives by the applicant, a married woman with four children, such act constituting a criminal offence under Irish law. The Supreme Court held that there existed an unenumerated constitutional right to marital privacy and that inter-spousal family planning decisions were not an appropriate matter to attract state intervention and regulation. However, such a right to privacy was to be strictly limited to persons who were party to a marriage. Similarly, in delivering the judgment of the Supreme Court, Walsh J in *State (Nichalou) v An Bord Uchtála and the A.G.*[6] confirmed that the rights and duties of the family did not extend to the non-marital family:

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[3] [1982] IR 241.
[4] In confirming the decision of the High Court, Hamilton J stated that "...in the opinion of the Court [the relevant sections are in] breach of the pledge by the State...to guard with special care the institution of marriage and to protect it from attack."
[5] [1974] IR 284.
[6] [1996] IR 567.

> "While it is quite true that un-married persons co-habiting together and the children of their union may often be referred to as a family and have many, if not all, of the outward appearances of a family, and may indeed for the purposes of a particular law be regarded as such, nevertheless so far as Article 41 is concerned the guarantees therein contained are confined to families based on marriage."[7]

The Constitutional preferential treatment of the marital family is twinned with a patriarchal view of the domestic role of the mother within that family unit, with express constitutional recognition in Article 41.2.1 "that by her life within the home, woman gives to the State a support without which the common good could not be achieved." Thus a very particular and protective view of the marital family with designated gender-specific roles was expressly identified by the 1937 Constitution and has formed the basis for the State's approach to the regulation and almost resolute defence of the marital family since then.

Interestingly, despite this quite deliberate Constitutional preference for the marital family, the extent to which Article 41 places positive obligations on the state to identify rights or entitlements for the family is open to question. The nature, scope and extent of the State's constitutional obligations to the family are a matter that has been left to the courts to determine.[8] It has been stated that Article 41 does not in itself afford many rights to spouses and children.[9] Equally in protecting the family as a collective unit the individual members of the family are not especially protected. In particular, the vulnerable position of the child within the family unit has given rise to a debate on the need for independent constitutional recognition of the rights of the child. In the recent

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[7] *Ibid* at 643-644. This narrow interpretation of "the family" continues, the court in *WO'R v EH and An Bord Uchtála [1996] 2 IR 248* confirmed that the de facto family, in this case unmarried parents of a child, is not recognised as deserving of protection under the constitution. Very recently in the context of the guardianship claims of the applicant sperm donor, the Supreme Court in *McD (J) v. L(P) and M(B)* [2009] IESC 81 confirmed that the concept of a *de facto* family does not exist under Irish law and rejected the ruling by the High Court judge that the lesbian couple with custody of the child could be regarded as a family unit capable of asserting rights under the Constitution.

[8] Hogan and Whyte are of the view that the judges, in attempting to interpret the intentions of the drafters of the Constitution have had to "rely largely on their instinct." See generally Hogan G and Whyte G *JM Kelly The Irish Constitution* (Butterworths) (4th ed) (2003).

[9] Alan Dukes, the then Minister for Justice, interview in The Sunday Press 25/5/1986, as cited by Kennedy F. *Family, Economy and Government in Ireland* ESRI General Research Series Paper no 143 January 1989 (ESRI) at 74.

case of *N v Health Service Executive and An Bord Uchtála*,[10] the rights of the child were presumed, by virtue of the elevated position of the marital family under Irish law, to be best served within that family unit and could not be assessed independently of the family unit. Similarly it is only by virtue of statutory enactments that spouses can rely upon state measures to claim spousal maintenance, succession rights, or equitable interests in the family home and other properties, and those statutory provisions[11] merely give rise to an inter-spousal obligation. Certainly the Constitutional preference for a woman to work in the home for the benefit of her family and society generally, is not supported by any associated direct financial support. In the course of the parliamentary debates surrounding the drafting and enactment of the Judicial Separation and Family Law Reform Act 1989, Deputy Barnes asserted that the Constitution fails to protect women who work in the home and adopt the role of the homemaker wife in the preferred traditional Irish family composition.

> "The Constitution, with its high sounding words with regard to the value of woman's work in the home and the value of the family unit to society, in legal terms offered nothing."[12]

Notwithstanding the reluctance on the part of both the executive and the legislature to positively support the rights of the members of the marital family, historically their support of the marital family as a unit in Irish society has been emphatic.

3 Historical influence of the Catholic Church on social and legal policy

The traditional notion of social and family life in Ireland was historically premised upon strict Catholic teaching, reflecting the views and lifestyle choices of most Irish citizens in 1937[13] and in particular the identity for Ireland and its citizens favoured by Eamon de Valera, founder of Fianna Fail and responsible almost entirely for the drafting of the

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[10] [2006] 4 IR 374.
[11] Family Law (Maintenance of Spouses and Children) Act 1976; Succession Act 1965; Family Home Protection Act 1976.
[12] Dáil Debates Vol 377 3 Feb 1988 – Second Stages (Resumed) of the Judicial Separation and Family Law Reform Bill 1987 at 1143 per Deputy Barnes TD.
[13] James C P "Céad Míle Fáilte? Ireland Welcomes Divorce: The 1995 Irish Divorce Referendum and the Family (Divorce) Act of 1996" 8 Duke J. Comp. & Int'l L. 175 at 222.

1937 Constitution. For many years Catholic Church involvement in the State's approach to the legal regulation of personal choice was not only prevalent, but expected by the people and lawmakers of Ireland. Burley and Regan refer to the manner in which the new Constitution "gave a special place to the moral leadership of the Catholic Church in the Irish state".[14] They regard the influence of Catholicism as being particularly reflected in Article 41's limitation of the Constitutional family to one based on marriage, and the identification of the woman's role within the family as one preferably confined to the domestic duties of a mother and a wife.[15] In 1950/51 the collapse of the proposed Mother and Child scheme, intended to provide financial and medical support for mothers and children irrespective of the marital or personal circumstances of the mother, directly resulted from strenuous objections by the Bishops of Ireland, and served as a reminder of the extent of the Church's influence on state policy. This influence was difficult to defeat given the almost absolute affiliation to Catholicism amongst Irish citizens, and perhaps even more importantly, the manner and extent to which the Articles of the Irish Constitution are premised upon the ultimate authority of the Holy Trinity.[16] Such deference to the Catholic Church influenced in particular the State's capacity to regulate the family, which was regarded as autonomous and, as mentioned above, "superior to all positive law". Consequently "the prohibition of divorce was a logical consequence of upholding the vision of Ireland as a Catholic state and the State was unwilling to recognise or regulate the contentious issue of dissolution of marriage."[17]

In more recent years the influence of the Catholic Church has waned and Catholic teachings in respect of the family and personal autonomy are far less relevant to individual and state decisions regarding the regulation of the family and in particular to the development of legal remedies for marital breakdown. Kennedy in her Economic Social Research Institute (ESRI) research paper, published prior to the introduction of the legislative remedies of judicial separation and divorce, noted the undeniable changes in

[14] Burley J and Regan F "Divorce in Ireland: the Fear the Floodgates and the Reality" [2002] 16 IJLP&F 202.
[15] *Ibid.* They note that it was not until the enactment of legislation from the late 1950's onwards that spousal rights to property, succession and guardianship of children were recognised.
[16] The Preamble to the Constitution commences as follows:- "In the Name of the Most Holy Trinity, from whom all authority and to Whom, as our final end, all actions both of men and States must be referred..."
[17] James CP *supra* n. 13 at 223.

"social and economic conditions, and [how the]... accompanying changes in values and policies have raised fundamental questions about the nature, role and limits of the family."[18] This shift in societal deference towards the marital family and the growth in the development of alternate family formations,[19] has caused the state to provide practical support and remedies for those affected by marital breakdown and has focussed recognition upon the very real need for legal capacity to dissolve the union in appropriate circumstances. Kennedy has noted the significant developments with regard to the family in Irish society in the (then) 50 years since the publication of the Irish Constitution and the manner in which the changing family has contributed to "great change in Irish society and the Irish economy".[20] Quite sensibly, she recognised that the family does not exist in a vacuum but rather in interaction with *inter alia*, "economic, political and religious institutions". The cultural, societal and moral norms that existed in 1937 and thus framed and affected the interpretation of the Constitution had undoubtedly shifted by 1989 when the State first enacted a remedy for marital breakdown.[21] Such changes were necessitated by changing societal circumstances in which marital breakdown was more openly admitted and socially acceptable.

Notwithstanding these religious and social developments, and the introduction of the remedies of judicial separation and eventually divorce, the significance of the marital family in Irish society remains. The 1998 *Report of the Commission on the Family* recognised the role of the marital family in Irish society and the importance of continuity and stability in family relationships.

> "...marriage as a visible public institution, underpinned by contractual obligations, presents clear advantages from a public

[18] *Supra* n. 9 at 9. Kennedy cites Goode's observations regarding the impact of the expansion of an economic system through industrialisation and the consequential change to family patterns.
[19] Legal protection and recognition of the rights of co-habitees and legal facilitation and regulation of the registration of civil partnership is now propose under the terms of the Civil Partnership Bill 2009, published 26 June 2009.
[20] *Supra* n. 9 at 8.
[21] Beale in 1986 noted, with reference to individuals' histories and cited examples, "...the social and economic changes of recent years, during which significant changes in the status of women have taken place." Beale J *Women in Ireland; Voices of Change* (Gill and Macmillan) (1986) at 6.

policy perspective, in promoting security and stability in family life and in providing a continuity in society."[22]

4 History of reform and remedies in the context of marital breakdown

4.1 1967 Informal Oireachtas Committee on the Constitution

The express prohibition on the enactment of laws permitting the dissolution of a marriage[23]and the influence of Catholic Church teachings on both the citizens and the lawmakers of Ireland, established almost insurmountable obstacles to the reform of this area of law. This prohibitive article was examined by the 1967 Informal Oireachtas Committee on the Constitution[24] which noted the State's failure to take account of the wishes of the minority of the population, who were prevented by the religious beliefs of the majority, from securing a divorce. The according of absolute partiality towards the religious preferences of the majority led the Committee to propose the rewording of the Article 41.3.2 prohibition, which, whilst maintaining the ban on laws permitting divorce, would only do so in respect of those who wished to be so restricted:

> "In the case of a person who was married in accordance with rites of a religion, no law shall be enacted providing for the grant of dissolution of that marriage on grounds other than those acceptable to that religion."[25]

Although no action followed this recommendation, the matter received renewed attention from the Law Reform Commission in 1983 and subsequently from the Oireachtas in 1985.

4.2 Law Reform Commission Report 1983

The primary task for the Law Reform Commission in 1983 was to examine the existing laws relating to divorce a mensa et thoro in light of the Constitutional protection of the

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[22] *Strengthening Families for Life* (1998) Final Report of the Commission on the Family to the Minister for Social, Community and Family Affairs at 183.
[23] Article 41.3.2 as originally drafted in 1937 provided that "...no law shall be enacted providing for the grant of a dissolution of marriage."
[24] *Report of the Informal Committee on the Constitution*, December 1967. Pr. 9817.
[25] *Ibid* at para 124.

marital family and to consider possible reforms of those laws, without the necessity of a Constitutional referendum. The existing remedy of divorce a mensa et thoro[26] did not dissolve the marital union nor entitle either party to remarry; rather it simply relieved the petitioner of his obligation to cohabit with the respondent. The 1983 report was very much reform focussed and considered in detail the best way forward for this remedy, which it regarded as more appropriately titled 'legal separation'. The two main concerns of the report issued by the Law Reform Commission related to the grounds for securing relief and the ancillary financial orders that might attach to a decree.[27]

At that time and in light of co-existing statutory provisions that empowered the courts to make orders providing for inter-spousal financial provision and relief from domestic violence, it was noted that the remedy of divorce a mensa et thoro was infrequently sought.[28] Notwithstanding this, the importance of retaining a remedy which relieved parties of the duty to cohabit was emphasised by the Commission.[29] Central to the suggestions for reform was the identified need for the reform of the existing laws relating to alimony[30] and the introduction of legislation "to permit the Court to make orders for the payment of a lump sum and for the transfer of property...and for related matters".[31] The immensely significant impact such powers would have on family property law in Ireland was expressly recognised by the Commission, cautioning that "this new jurisdiction should not be treated in isolation, without reference to more general policy questions regarding family property law."[32] Ultimately the reform of the existing remedy

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[26] The remedy of divorce a mensa et thoro was carried over from the Ecclesiastical courts and was available on limited grounds; adultery, cruelty and unnatural practices. The jurisdiction for this remedy, originating in the Matrimonial Causes (Ireland) Act 1879 passed to the High Court of Ireland by virtue of section 17 of the Courts of Justice Act 1924.

[27] *Report on Divorce a Mensa et Thoro and Related Matters* (LRC 8 – 1983).

[28] *Ibid*; in Appendix 2 the report details the statistics relating to proceedings for divorce a mensa et thoro. The last five years of the statistics included in the appendix illustrate the infrequent rate of application and very limited success of such applications. During the period 1978-1982, 146 applications were made and only 13 decrees were granted.

[29] *Ibid* at 32.

[30] *Ibid* at 54.

[31] *Ibid* at 57. Interestingly the recommendation of the majority of the Commission was that such property transfer orders should only be made with the consent of the parties. This aspect of the proposal has never formed part of the governing law for separation or divorce under Irish law.

[32] *Ibid.* The Commission also discussed at length the various possible approaches to the issue of succession rights and the impact upon the statutory spousal legal right share, in the event of a legal separation of the parties.

of divorce a mensa et thoro and its reinvention as legal separation with associated judicial powers to make necessary inter-spousal orders for financial relief, was strongly recommended by the majority of the Commission. In making these recommendations, the Commission expressly limited itself to reform within the confines of the existing Constitutional position regarding the prohibition on divorce; thus the Commission regarded as outside its function, the making or considering of related questions of fundamental social policy.[33] Any more significant or fundamental issues were regarded as a matter for the legislature to resolve, rather than a law reform agency. Thus the reforms proposed were not regarded as radical in nature, and did not represent a particularly drastic shift in family regulation and policy.

4.3 The 1985 Report of the Joint Oireachtas Committee on Marital Breakdown and the 1986 referendum on divorce

The 1983 Law Reform Commission Report was closely followed by the publication of the *Report of the Joint Oireachtas Committee on Marital Breakdown.*[34] Whilst the primary function of the State to protect marriage as an institution was recognised by the Committee, its main focus was the issue of marital breakdown and the associated problems. Chapter 7, entitled *The Legal Remedies,* presented a detailed, 58 page account of the existing legal remedies available to spouses; namely, nullity, separation agreements, judicial separation (divorce a mensa et thoro), maintenance, guardianship and custody, matrimonial property and barring orders, together with a critical consideration of the reform possibilities in respect of each of these remedies. In this context, the existing weak legal position of the homemaker was highlighted. In particular, the Committee noted that the governing laws did not permit the homemaker contributions to form the basis of a legal claim in respect of the family home.[35] This vulnerable legal position was certainly at odds with the Constitution's apparent value and support for the woman who provided such a domestic role. What is equally apparent from the body of the report is the very real fact of marital breakdown in Ireland at that

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[33] *Ibid*; introduction at 1.
[34] The Committee was established in July 1983 "to consider the protection of marriage and of family life, and to examine the problems which follow the breakdown of marriage, and to report to the House of the Oireachtas thereon." The Report of the Committee was published on 27th March 1985.
[35] *Ibid* at paras 7.6.6 - 7.6.8 at 62.

time and the co-existing lack of any meaningful legal remedies to permit parties to move on from the failed marriage and perhaps more importantly in the long-term, to enter into subsequent familial arrangements that could be afforded legal recognition and protection. Citing the submission of the Church of Ireland, the report highlighted the undesirable consequences of such a lack of legal measures:

> "The existing machinery suffers from the defect that it deals only with matters which, important, and even vital though they may be, are only ancillary to the root problem, that of status. Persons whose marriages have broken down and who have struggled through the complex legal machinery find themselves substantially poorer but without the one remedy which they really want, namely the freedom to marry."[36]

Ultimately the Committee supported the 1983 proposals of the Law Reform Commission and opined that the introduction of a statutory remedy of judicial separation with judicial powers to make any necessary ancillary financial relief orders was essential. It was suggested that such a remedy should be granted by the courts where there is evidence that a marriage has irretrievably broken down.[37] In addition the Committee supported the holding of a Constitutional referendum regarding the removal of the prohibitive Article 41.3.2. In defence of its position, advocating that the more controversial matter of divorce be put to the people in a referendum, the Committee was of the view that such a move would still permit the protection and safeguarding of the institution of marriage,

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[36] *Ibid* at para 7.8.11 at 79, 80. Similarly, in the course of the debates surrounding the eventual introduction of the Judicial Separation and Family Law Reform Act 1989, Deputy Shatter emphasised the ad hoc and piecemeal approach adopted by the legislature in the 1970s and early 1980s, referring to it as "a fire brigade legislative response" to particular problems that had been highlighted by pressure groups and the media.

[37] *Ibid* at para 7.3.8 at 49. In considering the scope of 'irretrievable breakdown' the Committee suggested at para 7.3.8.2 that a court should be satisfied that such a breakdown has occurred if the applicant shows evidence of one of the following:-

"(a) That his or her spouse has behaved in such a way that the Applicant cannot reasonably be expected to co-habit with that other spouse.

(b) That his or her spouse has been guilty of adultery.

(c) That his or her spouse is in desertion or in constructive desertion of the Applicant.

(d) That the Applicant has been living separate and apart from the other spouse for a continuous period of not less than one year and the other spouse consents to the making of the decree.

(e) That the Applicant has been living separate and apart from the other spouse for a continuous period of three years.

(f) That such other facts and/or reasons exist or existed which in all circumstances made it reasonable for the Applicant to live separate from, and not co-habit with, the other spouse."

albeit in a number of distinct and interlinked forms. It was concluded that whatever form the proposed amendment would take, Article 41 could "continue to place a duty on the State to protect the family and the institution of marriage and to recognise the family as the natural primary and fundamental unit group of society".[38]

The referendum to delete the Constitutional prohibition on divorce was held on 26 June 1986[39] and was quite strongly defeated by 63% to 37%. It has been suggested that the lack of consideration and clarification of the economic consequences of divorce and the consequential uncertainty served to fortify the cautious conservative views of Irish citizens and ultimately dissuaded voters on the basis that such a change was fraught with danger, particularly for the economically vulnerable spouse.[40] Kennedy suggests that the uncertainty regarding the viability of a claim by a dependent spouse for a share in the family home as compensation for her contribution to their joint wealth or for loss suffered from foregoing her career needed further consideration, the lack of which had led to confusion in the run-up to the 1986 referendum.[41] The existence of such significant, yet unanswered policy questions in respect of divorce and its financial consequences merely served to bolster the position of the anti-amendment lobby, and ultimately contribute to the defeat of the referendum.

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[38] *Ibid* at para 7.8.22 at 86.

[39] The Tenth Amendment of the Constitution Bill 1986 proposed that the prohibition on divorce be deleted from the Constitution and be replaced by the following wording in Article 41.3.2:
"Where, and only where, such court established under this Constitution as may be prescribed by law is satisfied that:

i a marriage has failed,
ii the failure has continued for a period of, or periods amounting to, at least five years,
iii that there is no reasonable possibility of reconciliation between the parties to the marriage, and
iv any other condition prescribed by law has been complied with,

the court may in accordance with law grant a dissolution of the marriage provided that the court is satisfied that adequate and proper provision having regard to the circumstances will be made for any dependent spouse and for any child who is dependent on either spouse."

[40] See further James C P *supra* n. 13; Binchy W *Is Divorce the Answer? An Examination of No-Fault Divorce Against the Background of the Irish Debate* Irish Academic Press(1984); and Ward P *Divorce in Ireland: who should bear the cost?* Cork University Press (1993). James notes at 195, 196 that many of the essential financial issues, including pension and succession rights were "not worked out until the very eve of the Referendum".

[41] *Supra* n. 9 at 86.

5 Judicial Separation and Family Law Reform Act 1989

5.1 Absence of comprehensive statistics on marital breakdown

The lack of any available legal remedy for marital breakdown before 1989 can certainly not be regarded as evidence of a lack of marital breakdown at that time. Regrettably, comprehensive statistics regarding the prevalence of marital breakdown were unavailable for many years. At the time of the publication of the 1985 *Report of the Joint Oireachtas Committee on Marital Breakdown*, it was noted that statistics in this area could only be garnered in respect of those who had had recourse to the courts or those relying upon state financial welfare support.[42] The 2001 ESRI research document by Fahey and Russell again noted the lack of comprehensive statistics on marriage *breakdown* in Ireland; rather the available statistics reflects the marital *status* of the people of Ireland. Given the lack of available legal remedies to effectively alter the status of married persons, the figures reported in the census are unlikely to have properly reflected the realities of marital breakdown in Ireland in the late 1970s/early 1980s.

Whereas the 1979 census recorded 8,000 separated/divorced people living in Ireland,[43] the 2006 census has recently recorded 166,797 separated/divorced people.[44] Although the 1979 figures might appear relatively low, social, religious and financial circumstances at that time discouraged strenuously the abandonment of a marital commitment and many spouses remained in effectively dead or abusive relationships. In addition the financial circumstances of most women in the 1970-80's saw them relying entirely upon their breadwinner husbands for financial assistance, thereby making it impossible financially for women to leave the home and the marriage, in particular where there were dependent children of the union. Beale has noted that in the early 1970's "...only one in fifteen married women worked outside the home and women's traditional roles as family-based wives and mothers were more firmly established."[45] In addition it was socially unacceptable to be a party to a broken marriage, with parties ostracised by their families because of the disgrace attaching to such status within the community. Undoubtedly,

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[42] *Supra* n. 34 at 31.
[43] Central Statistics Office *Census of the Population of Ireland 1979* Dublin Stationery Office, 1980.
[44] Central Statistics Office *Census of the Population of Ireland 2006* Dublin Stationery Office, 2007.
[45] *Supra* n. 21 at 5.

Catholicism and Irishness were "intertwined as synonymous and gave the Irish people an inflated sense of social value grounded in a collective, rigorously Catholic identity."[46] In addition, the lack of state response for many years to the fact of broken marriages only served to compound these difficulties, failing to give any status or recognition to the second families that developed subsequently.

5.2 Lack of available remedies

As a remedy for marital breakdown, divorce was considered at length by the Joint Oireachtas Committee on Marriage Breakdown in 1985, and the advantages of introducing divorce were well articulated in their report. In addition to the absence of a right to have a marriage dissolved, the absence of divorce also prevented the courts from providing for the financial and related needs for parties upon the breakdown of a marriage. The consequences of the lack of available remedies on personal autonomy, the rights of the minority and freedom of choice generally were considered but it became apparent that the lack of divorce and subsequent right to remarry was regarded as impacting most significantly upon those in unrecognised and unregulated second relationships. Such lack of state regulation and support affected all parties to the second relationship, children at that time were regarded as "illegitimate", no legal status or protections attached to the new adult relationship in areas including maintenance, succession rights and domestic violence.[47] Ultimately it was noted, albeit in the context of physically abused spouses, that to deny the right to remarry "has no social advantage to the State and is in fact detrimental to society in general and lacking in compassion."[48]

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[46] Dillon M *Debating Divorce: Moral Conflict in Ireland* (University Press of Kentucky) (1993) at 40.
[47] *Supra* n. 34 at 83-85. The illegitimate status previously accorded to children born outside wedlock was eliminated by the enactment of the Status of Children Act 1987. Whilst the position of co-habitees is largely unregulated under Irish law, co-habitees were afforded protections by the Domestic Violence Act 1996, subject to certain limiting conditions and pre-requisites. More recently the Government has published the Civil Partnership Bill 2009 which introduces the right for a couple to register as a civil partnership and also proposes statutory rights and remedies for cohabiting couples.
[48] *Ibid* at 79.

Kennedy, in regarding the right to remarry as "the essence of divorce",[49] emphasised the reality of marital breakdown in Ireland at that time, referring to Kearney's assertion that we,

> "...have been preaching one set of laws for the nation – as witnessed in our legislation on divorce and contraception for example – but practising quite another set of laws as individuals."[50]

5.3 Enactment of the Judicial Separation and Family Law Reform Act 1989

Although not as far-reaching as the remedy of divorce, the enactment of the Judicial Separation and Family Law Reform Act 1989 (1989 Act) gave rise to the introduction of the more accessible remedy of judicial separation[51] and was regarded as a "watershed in Irish family law".[52] Perhaps most significantly the courts were now empowered to make orders for ancillary relief in respect of assets held legally or equitably by either spouse and the decision to make such orders was at the discretion of the presiding judge whose primary task was to make whatever orders were necessary in the interests of justice. In introducing and explaining the provisions of the proposed Bill, Deputy Shatter summarised the potential impact of the legislation.

> "It confers new comprehensive powers on the court to make financial lump sum and property orders to provide additional protection, in particular for dependent wives and children, by enabling the courts to give to them a far greater degree of security than they can obtain at present."[53]

However as a remedy for marital breakdown, judicial separation was regarded by the Irish Labour Party as "the second best solution", being enacted when "what the situation

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[49] *Supra* n. 9 at 81.
[50] *Ibid* at 137, citing Kearney R "Creatively Rethinking the Breakup of the Nation State" The Irish Times 28 December 1987.
[51] Judicial Separation replaced the more complicated procedure attaching to an application for a decree of divorce a mensa et thoro.
[52] Shatter A *Shatter's Family Law* (Butterworths) (4th ed) (1997) at 383.
[53] Dail Debates Vol 377 2 Feb 1988 – Second Stage (Resumed) of the Judicial Separation and Family Law Reform Bill 1987 per Deputy Shatter at 891. The parliamentary debate surrounding the breadth of powers allocated to the judiciary is discussed in detail in chapter 3 below, especially in sections 1 and 2.

really requires is divorce legislation".[54] Similarly Deputy McCartan, in the course of the Dáil debates, regarded the introduction of the remedy of judicial separation as "a compromise", in circumstances where the members of his political party[55] "would prefer to be talking about divorce legislation". Conversely in defence of his legislative proposal, Deputy Shatter, outlined its far-reaching benefits.

> "This Bill will provide a modern, humane framework of legislation. It recognises the role that wives play in the home and provides for the obtaining of a separation decree without exacerbating animosity between the spouses. It provides additional protection for the welfare of children, for a modernised and simplified court structure and the establishment of a circuit family court. We have taken a great step forward in the area of social legislation."[56]

It is immediately apparent in reviewing the social and political debates surrounding the proposed legislation that the discussion of both the remedy of judicial separation and the extent of the available ancillary relief orders was embedded in the over-riding emphasis on the vulnerable position of the homemaker. The "numerous [and] innovative"[57] provisions of the Bill were regarded generally as a

> "...very valuable addition to the corpus of the legal criteria which are to be applied in the divide-up of property between a husband and wife in a separation...and looks after a basic instinct of the partners of marriage to seek appreciation and recognition for the toil in the home – and outside it – in relation to the ordinary day-to-day looking after the family".[58]

For example, section 13 of the Bill,[59] which set out the over-riding statutory requirement that justice be achieved, and more specifically, the statutory factors to which the court

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[54] Dail Debates Vol 387 23 Feb 1989 - Report and Final Stages of the Judicial Separation and Family Law Reform Bill 1987 at 1385 per Mervyn Taylor TD. Despite the shortcomings of the remedied proposed, Deputy Taylor did recognise at 1455 that nonetheless "it marks a great improvement in family law and will be a valuable addition to the remedies for families whose marriages have broken down."

[55] The Workers Party – members of the opposition at the time of the enactment of the Judicial Separation legislation, *ibid* at 1396.

[56] *Ibid* per Deputy Shatter at 1453 -1454.

[57] *Supra* n. 12 at 1125, per Deputy Abbott.

[58] *Ibid.*

[59] Section 13 of the Bill, as amended, was enacted as section 16 of the 1989 Act.

was to have regard when making orders for ancillary relief, was welcomed as "one of the first great steps we have taken towards ensuring an acknowledgement of the partnership of marriage and the value of the work done in the home."[60] More generally the enactment of legislation enabling the courts to provide for the dependent spouse and to make the necessary orders in respect of the family home was applauded as finally empowering the judiciary to deal effectively with family law cases. The breadth of these judicial powers and the "extra flexibility that is given to the courts" was welcomed by Deputy Colley noting that prior to this enactment parties were required to initiate many separate proceedings to deal with each aspect of the marriage breakdown.[61] Thus it was noted by Deputy Cowen during those Dail debates that the "Bill in principle has universal approval".[62]

Undoubtedly however, the introduction of the remedy of judicial separation with its significant associated available ancillary relief was very much a consolation prize for those who had supported the unsuccessful divorce referendum in 1986. In this regard it was acknowledged by Deputy Taylor in the course of the 1987 parliamentary debates, that whilst "[W]hat is required is divorce...the proposal before us is not that far removed from it."[63] However given that the remedy did not incorporate a right to remarry, it did not conflict with the Constitutional protection of marriage, and therefore was able to move more benignly through the parliamentary process, without any great controversy arising as to the powers it created. Further, it was certainly more palatable to enact wide judicial powers in respect of spousal obligations where spouses retained their marital status. The right to return to court for further relief anytime after the granting of the separation decree is certainly evidence of a cautious legislative approach. What was not envisaged nor discussed at that time was the impact such powers might have in the context of divorce.[64] Finally, the unprecedented cross-party support for this Private

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[60] *Supra* n 12 at 1148 per Deputy Barnes.
[61] Dail Debates Vol 377 10 Feb 1988 – Second Stage (Resumed) of the Judicial Separation and Family Law Reform Bill 1987 at 1874 per Deputy Colley.
[62] *Ibid* at 1150.
[63] *Supra* n. 12 at 1135-1136.
[64] Section 6.2 ahead sets out details of the relevant parliamentary debates surrounding the proposed amendment to the Constitution necessary to introduce the remedy of divorce, which again lacked any significant consideration of the financial implications likely to arise.

Member's Bill,[65] which unusually, was not in principle challenged by the Government, contributed to the absence of significant debate surrounding the ancillary relief powers created for the courts and the over-riding judicial discretion permitted to achieve reasonable outcomes.[66] This cross-party consensus arguably deprived the electorate of a robust debate concerning the implications of its provisions and the associated social policy issues.

The subsequent 1992 Government White Paper, discussed below, regarded the provisions of the 1989 Act as "comprehensive" and tellingly, many of its provisions, as amended by the Family Law Act 1995, most especially in relation to ancillary relief, were mirrored in the provisions of the Family Law (Divorce) Act 1996 when eventually enacted. Interestingly Shatter has since observed that the 1989 Act

> "...put in place most of the ancillary relief orders envisaged by the government as forming part and parcel of the divorce legislation that it had promised to enact if a majority had voted for constitutional change in the 1986 referendum".[67]

6 Introduction of the remedy of divorce

6.1 1992 Government White Paper for change

The enactment of the 1989 Act was quite swiftly followed by the publication in 1992 of a Government White Paper entitled *Marital Breakdown: A Review and Proposed*

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[65] Although the Bill, in its own right, did have cross-party support, it was emphasised by Deputy McCartan, amongst others, that such support "must not take away from the demand and need for the Government, and all parties in the House, to look at the prohibition on divorce as contained in our Constitution with a view to doing something positive about it. Divorce is a civil right and it must be introduced into our corpus of law one way or another without much delay". Dail Debates Vol 377 9 Feb 1988 – Second Stage (Resumed) of the Judicial Separation and Family Law Reform Bill 1987 at 1630. Similarly, Deputy Harney had at an earlier second stage debate, *supra* n. 53 at 910, commented upon the value of such cross-party support, lamenting its absence in 1986, causing in her view, the unfortunate loss of the referendum which deprived "those unfortunate people who are the victims of marital breakdown a second chance".

[66] In the course of the second stage of the passing of the Bill, Deputy Shatter noted that it was his first experience since being elected to the Dáil in 1981 "in which all of the parties here, of different ideologies, backgrounds and political beliefs, have come together in a non-party political way to confront a major social issue and to deal with legislation in a constructive way"; *supra* n. 60 at 1887.

[67] *Supra* n. 52 at 384.

Changes.[68] The then Minister for Justice, Deputy Flynn, stated that the White Paper was undertaken at the direction of the Government in the context of the "unfortunate reality that a minority of those who marry have their hopes and expectations of a permanent union dashed through the breakdown of their marriages".[69] He declared that whilst the Government position must be to preserve marriage and to take measures to avoid marriage breakdown, it must "also endeavour to ensure that there is in our law and social policies a proper response where marriages break down."[70] The Paper was both retrospectively reflective as well as reform focussed in content and ultimately declared the Government's intention to hold another referendum on the possible introduction of divorce. Such a referendum was only to occur "after a full debate on the complex issues involved".[71] In hindsight it is questionable whether this full debate ever occurred.

6.2 1995 referendum on divorce

Given the failings of the 1986 referendum, a more pro-active governmental approach that sought to inform the electorate and eliminate scare tactics was adopted in the lead-up to the 1995 referendum on divorce. In addition, the unprecedented cross-party support for change in this area strengthened the position of all pro-divorce campaigners. Certainly, the more prepared and considered approach of the Government to this socially contentious, if not divisive issue, resulted in many of the previously utilised fear tactics being dissipated through the dissemination of information to the public.[72] In this regard, the Government, as part of its pro-change campaign, commissioned a study of divorce which resulted in the publication and distribution of an outline of the procedures attaching to the proposed Irish remedy of divorce and included the proposed draft Divorce Bill.[73] The study, entitled *The Right to Remarry: A Government Information*

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[68] *Marital Breakdown: A Review and Proposed Changes* Government Publications 1992 (Pl. 9104).
[69] *Ibid* at para 1.1 at 9.
[70] *Ibid* at para 1.2.
[71] *Ibid* at para 1.6 at 9.
[72] *Supra* n. 14; Burley and Regan note that "[H]ighly organised and effective fear campaigns were again mounted by anti-divorce campaign groups in the lead-up to the 1995 referendum. The concerns relating to the consequences of divorce including money, children, property and inheritance and the Irish way of life were again a feature."
[73] It had previously been suggested in the course of the debates surrounding the enactment of the 1989 Act that its speedy passage through the Oireachtas and general cross-party support was greatly aided by the detailed nature of the draft legislation. Deputy McCartan, *supra* n. 65 at 1632 suggested that the 1986

Paper on the Divorce Referendum, was published two months before the referendum and did not attempt to disguise the Government's very pro-change stance. In its introduction, the Paper was declared to be "a guide to members of the public who wished to inform themselves about the legislative and other provisions which would apply if divorce was introduced".[74] This contrasts sharply with the information vacuum within which the 1986 referendum took place.[75] Whilst again the paper emphasised the Government's strong commitment to protecting the family and the institution of marriage, it pointed to the "comprehensive" initiatives already in place to deal with marital breakdown under Irish family law. The main focus of the information paper and perhaps consequently the debate generally, was threefold; whether fault should be a pre-requisite for the granting of a decree of divorce, the importance of the right to remarry and, whether in supporting the divorce referendum the Irish people were effectively rejecting the ethos and teachings of the Catholic Church. As the divorce debate transpired, it became apparent that the economic issues attaching to a decree of divorce were quite a secondary issue for the electorate. It is further evident from the information paper and contemporary commentary, that the emphasis was quite easily placed on the impact of divorce on the institution of marriage and Irish society generally, the implication being that to focus the debate on the financial consequences was to belittle marriage and the marital union, and was thus inappropriate, if not offensive in the eyes of Irish society. Similarly with reference to the 1986 referendum, Dillon notes that economic issues never formed a central part of the Irish divorce debate, as to do so "would have been perceived as trivialising marriage".[76] She is of the view that for the Government to have "initiated arguments for divorce grounded in the context of its practical and economic consequences would have been to exacerbate the radical nature of their proposals and to

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defeated referendum may well have succeeded if the Government at that time had published "simple legislation similar to [the 1987 Bill]...which would have helped people to find an answer to...questions." Deputy McCartan was critical of the Government's failure in 1986 to "have the political courage...to see the matter through and to couple it with effective legislation."

[74] *The Right to Remarry: A Government Information Paper on the Divorce Referendum* (1995) Pl 1932; introduction at 5.

[75] Ward, in advance of the 1995 referendum, noted that the Minster was taking the steps necessary "to avoid the absence of a comprehensive legislative framework for the introduction of divorce which was so apparent during the debate in 1986." Ward P "The Path to Divorce" (1994) 12 ILT 29 at 29.

[76] *Supra* n. 46 at 46.

de legitimate further their agenda."[77] Such an analysis, if credible, suggests an extreme naivety on the part of the Irish electorate and a general failure to recognise the significant impact of divorce on the asset ownership and financial earnings of both spouses. Instead in the context of the published Divorce Bill, the proposed extensive and discretionary based judicial powers to make infinite orders for financial relief between spouses who were no longer legally married merited vociferous public debate.[78]

The limited focus of the electorate was further facilitated by the Government's repeated reference to the existing legal remedies available, which it suggested were "equivalent to divorce in every respect except one – the right to remarry".[79] The Government relied in particular on the extensive and recently enhanced ancillary relief provisions attaching to the remedy of judicial separation, thereby suggesting that the proposed amendment to the Constitutional ban on divorce would be very minor in effect.[80] These existing statutory provisions governing ancillary relief orders, which included the right to make pension adjustment orders with an infinite right to apply, were simply mirrored in the provisions of the Divorce Bill, contained in Appendix 2 of the Information paper.[81] Consequently the implication was that the proposed change to the Irish legal system was minimal, introducing only the right to re-marry and that to challenge the proposals for ancillary relief orders was effectively too little too late and thus futile. Ironically, it appears that the legislatively created right to judicial separation merited far more consideration that it was accorded during its time as a Bill in the late 1980s, given that it was the birthplace for the current Irish regulatory approach to asset division on marital breakdown,

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[77] *Ibid.*

[78] The draft Divorce Bill outlined the proposed process regarding decrees of divorce and ancillary financial relief. Such orders were to be determined on the basis of unfettered judicial discretion and applications for financial relief could be made on the granting of the decree or at any time thereafter.

[79] *Supra* n. 74 at 7.

[80] In the section of the information paper outlining the procedures to govern an application for a divorce, it was noted that in "separation proceedings the court already has extensive powers, which have been in place since the passage of legislation in 1989, regarding maintenance and property of spouses." In addition, it was noted that on an application for a decree of divorce, "[A]s in the case of judicial separation, the court, before making any of the financial or property adjustment orders referred to, is required to take all the circumstances of the parties into account as well as a range of specified matters." James, *supra* n. 13 at 212, notes that having learned from the mistakes made in the 1986 campaign, the Government used the publication of the information paper to remind voters of related provisions already in force, in the context of marital breakdown.

[81] Ward regarded the 1989 Act governing judicial separation as "the blueprint for an Irish divorce law." Ward P "Second Time Around – The 1995 Divorce Referendum" (1995) 13 ILT 274 at 275.

including divorce.[82] The far-reaching discretion-based judicial powers to divide assets of one or both of the parties, on divorce or anytime thereafter, in effect remained almost immune from public debate and policy discussions, given that the vehicle for change i.e. the remedy of judicial separation, had not required public sanction by way of referendum. By the time the 1995 divorce referendum was being considered, the most radical of its elements, apart from the right to re-marry, were already part of Irish law. Interestingly thus, the analysis of the proposed divorce process was mostly limited to the grounds for divorce and in particular the relevance, or not, of spousal fault.

Unfortunately, the deeper and more crucial issue of state policy in facilitating and regulating the dissolution of marriage was also lost in the pre-referendum debate. It is still uncertain what the state seeks to achieve in permitting parties to sever the marital union, outside the need for second relationships and families to be accorded some form of legal status. Equally, why inter-spousal financial ties and dependencies should be maintained, notwithstanding the possibility of the formation of new unions and the birth of children in such second relationships was never considered, beyond the dampening of fears carried over from earlier debates that the State should ensure that the (presumed) wayward father could not renege on his responsibilities to his first family.[83] Why the proposed Irish divorce laws ensured that these responsibilities should survive every marriage dissolution is unclear, as is the infinite right of a spouse to make claims for ancillary relief orders in respect of earnings and assets of the former spouse, acquired well after the marriage ends. The lack of a statutory right to apply for a clean break or any judicial right to impose a clean break reflects a conservative approach on the part of the drafters, who sought to ensure that financial ties would remain enforceable wherever necessary. It appears that in recognising the need to properly inform the public the government was forced to take a premature stance on the process to be enacted, arguably giving rise to a conservative statutory approach in order to avoid the alienation of undecided voters or those who might disapprove of a limited approach to the availability

[82] See section 5 above which sets out the context and debate surrounding the enactment of the Judicial Separation and Family Law Reform Act 1989.
[83] The draft Divorce Bill outlined an infinite and indefeasible spousal right to make applications for ancillary relief. This infinite right to apply and the lack of availability of a clean financial break are considered in detail in the next chapter.

of financial relief. It is also suggested that the approach adopted was more readily acceptable to opposition parties, thereby facilitating the all-important cross-party support for change.[84]

The referendum was held on 24 November 1995 and was carried by a mere 9,114 votes, 50.28% of the people voting supported the proposed amendment and 49.72% of those voting opposed it. Thus although the pro-amendment groups were successful in their campaigns, it was immediately apparent that this was not an overly popular mandate, especially as only two-thirds of the people had voted, meaning only one-third of the Irish electorate had voted in favour of the introduction of divorce.

6.3 Family Law (Divorce) Act 1996

The introduction of a divorce regime premised upon broad discretionary judicial powers to make financial orders in respect of any and all of the assets of either of the parties, with no possibility of a clean financial break, irrespective of the circumstances of the parties, certainly merits very real political and social debate. Unfortunately the attentions of neither the government nor the electorate in the run-up to the 1995 referendum and the enactment of facilitating legislation were focussed in a meaningful way upon the consequences of retaining lifelong financial ties between parties who are no longer regarded as spouses by law. The government's desire not to be defeated on the same issue twice in 10 years was perhaps the driving motivation for the creation of a system which pleased the majority, but especially the fearful, whilst ensuring that irrespective of the circumstances of a given case, the courts would retain power to make any and every order deemed necessary on every occasion. In the pre-referendum debates, the government emphasised the need for societal acceptance of the fact of marital breakdown, the importance of regulating and protecting the needs of the second family and the significance of creating a remedy that was capable of protecting dependent parties, typically wives. What was never queried was why the emphasis was placed entirely upon the need to accord unfettered powers to the judiciary to order asset division

[84] Burley and Regan *supra* n. 14 at 207. Similarly, Ward refers to the legislative preparation for the referendum as "painstaking, wide-ranging and cautious"; *supra* n. 40 at 3.

and in so doing the power to maintain financial dependencies, thereby preventing parties from moving on in any meaningful way from a broken marriage.

The value of judicial-led family law policy has equally never been measured, yet the broad and unlimited manner in which the Divorce Act has been drafted appears to have deliberately left to the judiciary the determination of the manner in which such laws and protections should operate in practice. Whilst choosing to create regulatory structures which rely primarily upon the exercise of judicial discretion is not an unworkable approach, its success requires critical consideration of the underlying state policy in such a socially relevant area of law. The Divorce Act places the burden for decision and policy-making firmly on the shoulders of the Irish judiciary who are expected to decide how best to divide the property of the spouses. The Irish legislature made no attempt to identify the policy aims of the new legislation other than to highlight the ongoing vulnerable position of the homemaker spouse and any children of the union. Neither, perhaps more significantly, did the Irish legislature attempt to identify the principles and purposes of the legislation which might ultimately have acted as useful guidance for the judiciary. Given the more lengthy experiences of many other jurisdictions with the remedy of divorce, some of whom have developed principles and policies to direct the application of their statutory provisions, it might have been prudent for Ireland to have considered alternatives to its regulatory approach. It seems somewhat short-sighted to have failed even to consider the merits of such a policy-driven approach given the important social consequences arising from the introduction of the remedy of divorce.

7 Conclusion

The elevated status accorded to the marital family by the Irish Constitution and subsequent judicial interpretations prevented the lawful dissolution of the marital relationship for many years. Consequently the remedy of divorce has only recently been introduced to the Irish statute books, and when enacted, the legislation failed to either guide the courts or place parameters on the extent of judicial powers. The short-term gain of convincing the Irish electorate to accept the necessary amendment to the Constitution may be over-shadowed by the difficulties arising from the regulatory approach adopted.

In critiquing the current regime, it might be more appropriate to point to the unresolved issue of the underlying policies of the Act, such lack of policy direction and state objectives simply highlighting the procedural inadequacies and fundamental flaws of the remedy as enacted. In order to consider these key issues surrounding the weaknesses of the current Irish regulatory approach, the next chapter will outline the relevant provisions of the Divorce Act and will illustrate the manner in which they have been interpreted and applied by the judiciary. The clear preference for decisions made on the basis of judicial discretion rather than strict legislative rule will be considered in the context of the decided case law to date. Given the lack of policy discussion or direction offered by the legislative or political debate generally, any policy directions evident from relevant judgments will be critically considered. Later chapters will examine alternative approaches to the regulation of divorce and will seek to provide options for the reform, where necessary, of the current Irish regulatory system.

Chapter 3 - Asset Division as Regulated by the Family Law (Divorce) Act 1996

1 Introduction

The aim of this chapter is to present a critical overview of the mechanics of the Irish regulatory system on divorce, specifically as it relates to asset division and distribution. Given that Irish divorce law lies very much at the discretion end of the rules/discretion continuum, this chapter provides a description and analysis of the laws adopted and in so doing assesses which, if any, of the over-riding goals of democracy, fairness and predictability are achieved under such a system of regulation.

The manner in which the Irish law-makers, both legislative and judicial, have chosen to regulate this contentious area of personal and marital property will be assessed with an emphasis on the impact of the far-reaching discretionary judicial powers and the lack of supporting policy direction for their application. In particular the broad non-committal phraseology adopted by the legislature in creating these judicial powers and the identification of the vague goals of justice and fairness will serve to highlight a regime hugely reliant upon the subjective adjudications of the individual judge. The effectiveness of statutory attempts to guide the judiciary in the form of the over-riding 'proper provision' requirement and the enunciation of statutory factors will be considered. In addition the significance of the co-existing remedy of judicial separation with almost identical ancillary relief provisions will be acknowledged, taking account of its repercussions for social and judicial perceptions of divorce, as part of the peculiarities of the Irish family law framework. Ultimately, policy objectives, if any, which have been expressly or implicitly developed by the legislature and/or courts will be identified and assessed. This chapter will seek to gauge the impact of this discretionary approach to securing justice where such notions of justice have not been pre-determined.

1.1 Divorce v separation – approach to regulation

As is evident from the preceding chapter, the Irish divorce law regime has evolved from a historical reluctance to recognise and regulate marital breakdown and more recently it has followed on from the introduction of the remedy of judicial separation. Although enacting legislation to permit divorce might rightly be recognised as a defining moment in Irish family law, in truth, notwithstanding the constitutionally mandated referendum, the only adjustment made to the regulation of the marital family on breakdown was the right to remarry. By contrast with the decree of divorce, the effect of a decree of judicial separation is merely to relieve the parties of their legal obligation to cohabit.[1] However notwithstanding this important distinction between the two remedies, the Irish legislature has chosen to arm the judiciary with the same ancillary relief powers in both instances. Thus the assets to which the orders can attach, the nature of the orders that can be made, and the factors to which the court must have regard, are effectively identical on the granting of both judicial separation and divorce.

1.2 Dearth of family law research and policy discussions

Despite the undoubted priority accorded to the family by the Irish Constitution, judicial pronouncements and legislative enactments, there exists a distinct lack of collected data on the family in Irish society and a dearth of research or consideration of what policy aims Irish family law seeks to achieve. Kennedy suggests that this lack of any significant quantity of studies concerning the family might:

> "...reflect a fairly widespread failure to grasp the major implications for the family itself and the wider society which now arise as a result of changes in the pattern of family life, in the social and economic

[1] Section 8(1) 1989 Act; as confirmed by the Supreme Court in *TF v Ireland* [1995] 1 IR 321 "The effect of a decree of judicial separation is that it is no longer obligatory for the spouses who were parties to such proceedings to cohabit", per Hamilton CJ at 375. Given that the obligation to co-habit is now effectively unenforceable, it is reasonable to surmise that judicial separation proceedings are typically commenced in order to activate the ancillary relief machinery of the court.

> environment where families exist, and in values and attitudes which impinge on the family."[2]

As outlined in the previous chapter, the family has been accorded an elevated position in Irish law and society, the Constitution regarding it as "the natural primary and fundamental unit group of Society"[3] representing "the necessary basis of social order and as indispensible to the welfare of the Nation and the State".[4] However one of the main criticisms of the approach of repeated Irish governments, as identified by the Commission on the Family, is that "family policy has never been co-ordinated or separately identified in any way".[5] Their 1998 report identifies the very great need for state objectives relating to the family to be clarified, suggesting that:

> "...this lack of coherence and clarity of objectives in relation to family policy should be rectified so that the valid role of the State in supporting the family life and in promoting family well-being can be more effective."[6]

Similarly in the debates surrounding the Family Law (Divorce) Bill 1995, the lack of research on marital breakdown in Ireland was highlighted. Deputy Keogh referred to the need for information on

> "...the extent to which maintenance orders are being complied with and how effective are existing enforcement measures....In the absence of research we are reduced to making policy and allocating resources in a vacuum. A notable feature of the divorce debate was that...there was a dearth of reliable information about what was happening [in Ireland]."[7]

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[2] Kennedy F *Family, Economy and Government in Ireland* ESRI General Research Series Paper no 143 January 1989 at 7. Similarly in their 2001 research paper for the ESRI, Fahey and Russell recognise that it is "in the context of the under-developed state of family research in Ireland that the present study was initiated." Fahey T and Russell H *Family Formation in Ireland Trends, Data Needs and Implications* (2001) Report to the Family Affairs Unit of the Department of Social, Community and Family Affairs. Policy Research Series 43.

[3] Article 41.1.1.

[4] Article 41.1.2.

[5] *Strengthening Families for Life* (1998) Final Report of the Commission on the Family to the Minister for Social, Community and Family Affairs at 6.

[6] *Ibid* at 7.

[7] Dail Eireann debates Vol 467 27 June 1996 Second Stage at 1794-1795. In addition the lack of "empirical studies, interdisciplinary work and research focussing on the social dimension of legislation" has not been

What needs to be made explicit is what the State is trying to achieve both for and with families: the strategic dimension of family policy urgently requires consideration and clarification. Nowhere is this more necessary than in the creation of laws to regulate all aspects of the dissolution of a marital union. The absence of identified state policy, both in respect of the family and marital breakdown is magnified by the lack of definitive legislative direction and the limited access to judicial decision-making in this area. Buckley has highlighted this "dearth of information"[8] which "makes it difficult to comment authoritatively on the family property provisions", obstructing the aims of predictability and certainty.[9]

1.3 Rules v discretion

It is evident from the preceding chapter that Ireland's turbulent history regarding attempts to introduce the remedy of divorce caused the government to create a divorce regime premised upon broad judicial powers and freedoms.[10] The extensive discretionary powers delegated to the judiciary by the legislature were considered in the Dáil and Seanad debates during the passage of the Divorce Bill. As a starting point for the creation of a divorce regime, the legislature appears to have taken the broadest and most discretion-based route available. The legislative choice to create a divorce regime with an infinite right to apply for a vast array of orders in respect of any assets held by one or both of the parties allows the judiciary to deal with whatever circumstances may arise. Given the historical fears surrounding the impact of marital breakdown on the vulnerable spouse, it is arguable that the promise of an open-ended power to make whatever orders are required by justice, ultimately convinced the electorate to accept the constitutional amendment.

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undertaken in respect of Irish law. Archbold C and Shannon G "Thinking Globally and Locally – Developing a Research Culture in Irish Family Law" [2002] 5(2) IJFL Editorial.

[8] Buckley LA "Irish Matrimonial Property Division in Practice: A Case Study" (2007) 21 IJLPF 48 at 49.

[9] *Ibid.* Buckley interviewed 44 family law practitioners in Ireland with a view to analysing patterns of property division following marital breakdown under Irish separation and divorce laws. Her study analyses 89 divorce, separation and judicial separation cases, primarily focussing upon the types of orders/agreements made, and the reasons, if any, given for the orders/agreements made.

[10] See generally section 6 of the preceding chapter for an overview of the introduction of divorce in Ireland.

In the course of the Dáil debates Deputy Taylor recognised the need for such extensive judicial powers, acknowledging that:

> "...even in an Act one cannot set out the detailed provisions of the huge multiplicity of cases that will arise. Every case is different and it is hard to find two cases where the assets, income, prospects, ages, length of marriage, needs etc. will be the same. Of necessity, whether we like it or not, we have to leave the discretion on those provisions to the decision of the court, having heard the circumstances of each family."[11]

The judicial view of these powers has supported this approach, with the Supreme Court emphasising that "the very broad discretion conferred on a judge hearing a case of this nature will still remain to be exercised having regard to the circumstances of any particular case."[12] This view was expressly relied upon in a later High Court hearing, where O'Higgins J recognised the "...widely different circumstances from one case to another [which] make it desirable that there be considerable discretion vested in the court of trial."[13] As a policy choice, he recognised the intention of the legislature in adopting this approach, relying on the words of Fennelly J.:

> "The Oireachtas, in choosing the approach...made a considered decision to confer upon the court a duty of a particularly broad discretionary character..."[14]

The apparent benefits have been repeatedly identified as permitting the judiciary to adapt the application of the laws depending upon changing social perceptions of fairness and

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[11] Seanad Eireann debates Vol 144 18 October 1995 at 1655.
[12] *T v T* [2002] 3 I.R 334 per Murray J at 401-402.
[13] *C v C* [2005] IEHC 276. O'Higgins J further quoted directly from the judgment of Keane C.J in *T v T*; "It is obvious that the circumstances of individual cases will vary so widely that, ultimately, where the parties are unable to agree, the trial judge must be regarded as having a relatively broad discretion in reaching what he or she considers a just resolution in all the circumstances."
[14] *T v T supra* n. 12 at 414 with reference to the 12 statutory factors to which the court must have regard, discussed below at section 5.

justice as well as allowing the resolution of the issues to be individualised to suit the circumstances of the case before the court.[15]

The issue of legal rules versus discretionary powers also arose previously in the context of the introduction of judicial separation. In particular there was much debate surrounding the attempts by the then Minster for Justice, Deputy Owen, to restrict the discretionary scope of judicial powers in respect of spousal succession rights. Following the introduction of the Judicial Separation and Family Law Reform Bill by Deputy Shatter, Deputy Owen proposed an amendment to its provisions to provide for the automatic extinguishing of spousal successions rights of separated parties. This move was strongly challenged in parliamentary debates, and was essentially regarded as an inappropriate, absolutist approach and ultimately including scope for the exercise of judicial discretion was deemed a fairer approach.

Thus interestingly, where the government attempted in one area to impose a strict policy-based rule regarding spousal rights on death, it was strongly contested in both houses of the Oireachtas. Deputy Taylor emphasised that the "range of possible cases that can arise in this regard is so various and vast that it is extremely difficult to encompass all the different possibilities that could arise."[16] Consequently he rejected as inappropriate a legislative policy stance on succession rights to be imposed in every separation case and emphasised the importance of the court retaining "ultimate discretion in each case".[17] Given the "various and complex" circumstances that might arise, he stated that "it must surely be safer to leave the issue within the powers of the court and not to over tie the hands of the court."[18] Notwithstanding his criticism of strict rules which in his view

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[15] For example, see the views of O'Neill J in *MK v JK* [2003] 1 IR 326, noting that the list of statutory factors to which the court must have regard under section 20(2)(a)-(l) is not exhaustive and does not confine the discretion of the court. Similarly Coveney identifies the lack of specific direction provided by section 20, "the Oireachtas deliberately avoided listing prescriptive guidelines for the application of the section 20 criteria." Coveney H "Proper Provision in Matrimonial Breakdown: The Debate Continues in the Aftermath of *T v T*" [2003] 6(1) IJFL 3.

[16] Dail Eireann debates Vol 384 23 November 1988 at 1611.

[17] *Ibid* at 1612.

18 *Ibid* at 1613. Given the complexities that can arise, he stated that it is essential that the court retains these powers. Regarding the conflicting aims of certainty and fairness, Deputy McCartan, *ibid* at 1624, highlighted the cost of prioritising certainty, "...in the cause of certainty

would no longer "serve the cause of justice",[19] by contrast, Deputy McCartan later queried the "ambiguity and wideness" of the broad-based guidance offered by (the then) section 18 statutory factors which he concluded was "undesirable for all the reasons that have been advanced ... [given the importance of the principles of] certainty, clarity and letting people know exactly where they stand."[20]

Unsurprisingly very differing views were evident in the Houses regarding the nature and extent of the discretion-based judicial powers in the proposed Divorce Bill. Ultimately however those judicial powers were enacted as proposed. The suggested automatic extinguishing of spousal succession rights was abandoned, the issue being accepted by the Oireachtas as one to be subjectively determined in each case.

2 Ancillary relief orders under the Family Law (Divorce) Act 1996

Part III of the Divorce Act is entitled *Preliminary and Ancillary Orders in or after proceedings for divorce* and is comprised of sections 11 – 30. In essence this Part grants wide-ranging powers to the court to make one or more of an extensive array of orders to provide for the financial needs of the applicant, respondent and any dependent members of the family. Immediately the breadth of the powers of the judiciary in divorce proceedings is apparent. It is open to either spouse to apply for any or every form of ancillary relief provided for by the Divorce Act[21] at the time of making the initial divorce application to the court,[22] or at any time into the future save where the proposed applicant has re-married.[23] Once any such application is before the court, the judiciary is entitled to make whatever order it considers appropriate, once it is satisfied that "...it would be in

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so much has to be sacrificed....[conversely] fairness, equity and protection of the vulnerable spouse in matrimonial law in Ireland is what should guide us in this legislation and to hell with certainty."

[19] *Ibid* at 1625.

[20] *Ibid* at 1687. The draft section 18 was enacted as section 20 of the Divorce Act.

[21] Section 13 – periodical payments and lump sum orders; section 14 – property adjustment orders; section 15 – miscellaneous ancillary orders; Section 16 – financial compensation orders; Section 17 – pension adjustment orders; section 18 – provision from estate of deceased spouse; section 19 – orders for the sale of property.

[22] Or if the respondent, upon the filing of the defence and counterclaim.

[23] The provisions governing each form of ancillary relief exclude a former spouse who has re-married from the category of persons who can apply for such relief.

the interest of justice to do so."[24] It is for the court to decide if this is the case and any directions in the Divorce Act simply act as guidelines for the judiciary.

As will become evident in this chapter, the provisions of the Divorce Act are deliberately replete with terminology that is designed to maximise the breadth of discretion available to the judiciary in providing for the parties to an application for divorce. In addition despite the over-riding obligation on the court to ensure that proper provision is made for the parties and any dependent children, there is a distinct lack of instruction as to the best means to determine this. Under Part III, the judiciary can make an order in respect of any assets held legally or equitably by the parties, jointly, individually or otherwise. The court is the ultimate and only adjudicator as to whether the asset is to be divided and can determine the nature and scope of any order made. However notwithstanding these broad powers to make whatever orders are necessary, there is no requirement that ancillary relief orders be made in every case.[25] The guidelines that might assist the court to reach its decision on ancillary relief orders are couched in broad terms in section 20, criteria which can be followed where the court deems them to be relevant, but again there does not appear to be any compulsion for any or all of the criteria to be considered. By incorporating a provision such as section 20, the legislature has effectively empowered the court to make whatever order(s) it sees fit and in turn enables the court to justify such orders on the basis of one or more elements of the widely-drafted section 20. For the most part the Irish judiciary have welcomed this delegation of power, which in failing to create strict principles and policies has encouraged the judiciary to decide each case on its own merits. This has led to a suggestion from the Supreme Court that judges should equally avoid the creation of judicially developed principles and guidelines, preferring that the courts retain their freedom to decide each case in its own right:

[24] Section 20(5).

[25] O'Higgins J emphasised in *MP v AP* Unreported High Court 02/03/2005 that the law "does not mandate any particular ancillary relief form of order in divorce cases."

> "It is only with the greatest care, therefore, that one should formulate any general propositions. The judge must always and in every case have regard to the particular circumstances of the case."[26]

3 Over-riding pre-requisite of proper provision

3.1 Overview of 'proper provision' requirement

The Irish government succeeded in convincing the electorate to accept the deletion of the Constitutional ban on divorce by promising a divorce regime which would protect the vulnerable spouse. By enacting legislation that requires a four-year period of separation prior to divorce, that prevents a clean financial break between the parties upon divorce and that empowers the judiciary to make whatever financial orders are necessary, such a spouse could not be left destitute as a result of the dissolution of the union. Further, the government inserted in both the proposed amendment to the Constitution and the draft Divorce Bill the requirement that prior to the granting of a decree of divorce the court must be satisfied that:

> "...such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent members of the family".[27]

At the second stage of the passage of the Bill through the Dáil, Minister Taylor for the government explained this double-statement, outlining the government's determination "to protect and support the institution of marriage and the family in so far as is possible",[28] thereby eliminating scope or capacity for a divorce to be too easily obtained.

The inclusion of the proper provision requirement, without an explanation or definition of the required standard, caused much concern in the course of the legislative process. The decision not to define proper provision and to leave it to the presiding judge to determine

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[26] *T v T supra* n. 12 per Fennelly J at 418. Similarly Murray J in the same case emphasised at 409 that "...Each case will necessarily depend on its own particular circumstances."

[27] This quote represents part of the wording of the proposed amendment to the Constitution, now contained in Article 41.3.2 of the Constitution, also included in section 5(1) of the Family Law (Divorce) Act 1996.

[28] Dáil Eireann debates Vol 456 27 September 1995 at 18.

was regarded as an abdication of responsibility by the legislature. Deputy Harney, then a member of the Opposition, expressed grave concerns about the importance of the proposed proper provision test, given, that it is such a "vague concept". For this reason she was additionally uneasy with its inclusion in the Constitution.[29] She regarded the proposed approach as "writing vague, ambiguous and uncertain words in the Constitution" and thereby "storing up enormous difficulties for the victims of marital breakdown." In her view this represented an abdication of legislative responsibilities and the "passing [of] the buck to the Judiciary".[30] In response to these concerns, Minister Taylor emphasised the importance of judicial discretion in family law, given the myriad circumstances that might arise. In defence of the government's approach, he also referred to the "terms and details" set out in the statutory factors listed to guide the courts in the decision-making process. Rather than attempt to define proper provision, the legislature chose to set out an exhaustive list of criteria, which if applied by the courts, should secure proper provision in each set of circumstances.[31] In *BD v JD*, McKechnie J recently stated that his obligation was to

> "...apply the individual factors therein listed to the particular circumstances of this case, so that by way of doing justice between the parties I should ensure that "proper" provision is made for each of them. Moreover, when looking at these individual matters one must consider the facts pertinent to each such matter and must ascribe to them the appropriate weight in accordance with the evidence as tendered. Furthermore I must ensure that neither spouse is discriminated against and that whatever provision is made,

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[29] Dáil Eireann debates Vol 456 3 October 1995 at 818-819.

[30] *Ibid.* Noting at 821 the "doubt and debate about the meaning of the various words", she proposed that a different course be taken by the legislature. "The proferring of a formula involving that level of uncertainty represents a grave failure of leadership". This position was supported by Senator Cassidy, *supra* n. 14 at 1653-1654. He was of the view that democracy demands the legislature decide and define such issues. Conversely Finlay Geoghegan J in *RG v CG* [2005] 2 IR 418 has highlighted in the context of a judicial separation case, what might be regarded as the nonsense of attempting to predict what might constitute proper provision at the time of a future divorce, which in her view can only ever be regarded as some "future unknown date".

[31] Section 20 is the vehicle for such direction. Section 20(2) provides that in determining what orders are required to achieve the proper provision standard demanded by both sections 5 and 20(1) of the Divorce Act, the court shall, in particular, have regard to the 12 factors contained therein. In addition, the court is also required by section 20(3) to "have regard to the terms of any separation agreement entered into by the spouses and is still in force." The peculiarities and judicial interpretations of the detailed provisions of section 20 are considered in section 5 below.

is so made in the context of judicial separation proceedings and with the court's inability to achieve asset finality between the parties in mind."[32]

3.2 Reasonable provision v proper provision

As a regulatory standard of provision to be achieved on marital breakdown, the concept of 'proper provision' when introduced in 1996, was a novel benchmark under Irish matrimonial law. The 1995 Act, when first enacted, included in section 16 a reference to the making of "adequate" and "reasonable" provision for the spouses and dependent members of the family on separation. When defending the 'proper provision' requirement on divorce, Minster Taylor argued that it "is similar to the situation that pertains at present with regard to separation applications", noting that this requirement "would be the position on divorce as it is now on separation". Of course, this is not strictly correct, given that the statutory requirement on separation up to the enactment of the Divorce Act was the making of adequate and reasonable provision.[33] However subsequent to the passing of the referendum and the enactment of the Divorce Act, proper provision was substituted as the new test for judicial separation by section 52(h).[34] Thus whatever distinctions between the remedies of judicial separation and divorce that might be identified by the courts, the statutory approach has deliberately avoided such distinctions and has ensured almost identical governing statutory regimes.

3.3 Judicial interpretation of proper provision

It is arguable that the only identifiable policy objective upon the passing of the 1995 referendum was to secure proper provision for the parties and dependent children. This pre-requisite has since been regarded as the central focus of the remedy, such provision being determined with reference to other aspects of the Divorce Act:

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[32] Unreported High Court 5 December 2003.
[33] As per section 16 of the Family Law Act 1995, as originally enacted.
[34] In *AK v JK* [2008] IEHC 341, in the context of an application to vary existing ancillary relief orders made on granting a decree of judicial separation, Abbott J noted that the test of proper provision for separating parties "is to be informed by the test of justice."

> "The scheme established under the Act of 1996 is not a division of property. The scheme established under the Act of 1996 provides for proper provision, not division. It is not a question of dividing the assets at the trial on a percentage or equal basis. However, all circumstances of the family, including the particular factors referred to in s. 20(2) of the Act of 1996, are relevant in assessing the matter of provision from the assets."[35]

Pursuant to its constitutional and legislative obligations, the court must be so satisfied and the parties cannot contract out of this *inter partes* obligation.[36]

Despite varying judicial statements on the matter, it appears that the time for assessing whether proper provision has been made for the parties, is at the date of the divorce hearing.[37] More typically perhaps, proper provision is often secured over an extended period of time, thereby allowing a decree to be granted in limited resources cases. Although the parties may not be able to afford to finalise matters immediately, the decree is not necessarily denied by the courts. To meet the pre-condition of proper provision, such circumstances often require the ordering of ongoing maintenance and other arrangements to allow the goal to be achieved in the long-term, as necessary. In *JC v MC*,[38] Abbott J considered the proper provision requirement in light of the economic realties of the family circumstances and emphasised that the making of proper provision at the time of the decree or into the future is a "condition precedent" to the granting of a divorce, creating a situation

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[35] *T v T supra* n 12 per Denham J at 383. Buckley has suggested, with reference to this Supreme Court judgment that "the emphasis of the Supreme Court on "proper provision" rather than the "division" of assets was designed to rule out any strict rules or principles on division, and to ensure that the prescribed statutory factors were fully considered in each case". Buckley LA ""Proper Provision" and "Property Division": Partnership in Irish Matrimonial Property Law in the Wake of T v T" [2004] 7(3) IJFL 8.

[36] See below at section 5.4 which considers the relevance of pre-existing separation agreements.

[37] See the views of the Supreme Court in *T v T* and those of Finlay Geoghegan J in *RG v CG supra* n. 30, as set out in section 5.4 below, in the context of a pre-existing separation agreement or court order. In *B v B* (Unreported High Court 8/12/2005) O'Higgins J re-affirmed the obligation on the court in the context of divorce proceedings to "be satisfied at the time of this hearing proper provision exists or will be made for the spouses and children." Conversely, and somewhat controversially, Hardiman J appears to suggest in *A v A* [2004] 1 IR 1 that a 13-year old settlement satisfied the proper provision test on an application for divorce, given that it was deemed sufficient by the parties when executed, as discussed at section 5.5 below.

[38] Unreported High Court 22 Jan 2007 per Abbott J.

> "...where a court is obliged as a preliminary to a divorce to assess the capacity in the future for provision but leaving the actual delivery of such provision to the future as in the case of maintenance or other executory possibilities including the frequently-occurring pension provisions the effects of which may only "kick in" in certain cases well into the future."[39]

3.4 How to calculate 'proper provision'

The term 'proper provision' has not been defined in any part of the Divorce Act and thus must be determined judicially in the circumstances of each case. In the course of the passage of the Divorce Bill, Deputy Gallagher recognised this constitutional pre-requisite as "a general statement which is open to wide interpretation."[40] Consequently he welcomed the inclusion of statutory factors to which the court is obliged to have regard, and emphasised the importance of the "specific criteria that must be taken into account by the court" as set out by the legislature.[41]

As a starting point it has been emphasised by the courts that proper provision does not mean that the dependent spouse should receive financial support to provide merely for her basic needs. It has been clearly stated that any surplus wealth remaining after the needs of both parties are satisfied, should be available for distribution, and not retained by the earning spouse:

> "But the Oireachtas did not limit the 'proper provision' for a spouse solely to his or her financial needs and responsibilities...Proper provision should seek to reflect the equal partnership of the spouses. Proper provision for a spouse who falls into the category of a financially dependent spouse...should seek, so far as the circumstances of the case permit, to ensure that the spouse is not only in a position to meet her financial liabilities and obligations and continue with a standard of living commensurate with her standard of living during marriage but to enjoy what may reasonably be regarded as the fruits of the marriage so that she can live an independent life and

[39] *Ibid* at 22. Notwithstanding the doubts expressed by some members of the court in the earlier case of *T v T*, Abbott J at 23 referred to the yardstick of equal contributions and one-third/two-third division of assets between the breadwinner and homemaker as having "the authority of the Supreme Court".
[40] *Supra* n. 7 at 1802.
[41] *Ibid.*

> have security in the control of her own affairs, with a personal dignity that such autonomy confers, without necessarily being dependent on receiving periodic payments for the rest of her life from her former husband."[42]

This Supreme Court explanation of the concept of proper provision represents a helpful judicial statement of the over-riding aims of the pre-condition, and allows it to be aligned with the 'marriage as partnership' approach which is evident in other jurisdictions.[43] In *T v T* the five Supreme Court judges made effective use of this ample resources case to expound upon the parameters and impact of proper provision. Keane CJ preferred a formulaic approach, suggesting a starting point of one third of the assets for the dependent spouse, and he received some support for this view from Denham J.[44] However a more typical view is that proper provision is more rightly a matter that should be determined with reference to the individual circumstances of each case, in the context of recognised legal principles:

> "Each case must be decided on its own circumstances. However, there are relevant fundamental legal principles – such as to recognition of spouses' work in the home – as to spouses' rights under the Succession Act – as to the place of the family in our society."[45]

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[42] *T v T supra* n. 12 per Murray J at 408. Similarly in the more recent Supreme Court appeal hearing in *MF v EF* [2005] IESC 45, McGuinness J affirmed as "entirely correct" the view of the lower court regarding the extent of the applicant's entitlements. "I approach the issue of asset share on the basis that the court should provide not only for the needs of the applicant (where there is provision to do so) but also should assess a fair lump sum to reflect her interest in the family assets (not necessarily 50%) even if this is greater than her specific needs..." per O'Sullivan J (Unreported High Court May 2002), although on the facts, O'Sullivan J was deemed to have erred in including 22 adjoining acres within the definition of the family home.

[43] Buckley, *supra* n. 35 at 8 regards sharing principles and partnership as being of "fundamental concern to the issue of marriage and our resulting attitude to property regulation." She regards marriage as "more than simply a legal bond between individuals...hence it is appropriate to think of needs and objectives, including financial needs, in joint rather than individualistic terms." The notion of marriage as a partnership and its impact upon regulatory approaches is considered later in the concluding chapter of this thesis.

[44] Denham J, *supra* n. 12 at 384 acknowledged that a figure of one-third of the assets may be a useful benchmark to fairness against which could be aligned, "both positively and negatively, the specific circumstances of a case, and in particular the factors set out in s.20(2)(a)-(l) of the Act of 1996.". However she later noted that such a formulaic approach "may have no application in many cases", in particular it would be an unsuitable benchmark for a family with inadequate assets or one of adequate means, where such a sum could only be achieved by a sale of assets which might ultimately destroy a previously viable business.

[45] *Ibid.* Unfortunately Denham J offers no further clarification on these "recognised legal principles." It was later suggested by O'Neill J in *MK v JK supra* n 15 at 349-350, quoting from the judgment of Keane CJ in *T v T* at 367-369, that the one-third starting point, although far from appropriate in every case, has evolved

Irrespective of the varying views of the five presiding judges in *T v T*,[46] regarding the judicial creation of yardsticks or formulaic approaches general agreement was evident amongst them as to the fact of the trial judge's over-riding broad discretion in determining what constitutes proper provision in the circumstances of a particular case. Even Keane CJ, who favoured a formula-based division of assets where the wealth of the parties so permitted, recognised that notwithstanding the section 20(2) factors:

> "...the circumstances of individual cases will vary so widely that ultimately, where the parties are unable to agree, the trial judge must be regarded as having a relatively broad discretion in reaching what he or she considers a just resolution in all the circumstances."[47]

Thus whilst the efforts of the legislature to guide the decision-making process were acknowledged, ultimately it was declared that the "discretion given by the legislature to the trial judge under this scheme is ample."[48]

More recently in *C v C*[49] O'Higgins J rejected the suitability of relying upon percentages as a means of adjudicating upon the merits of an application for ancillary relief:

> "In the present case the property assets of the parties were inherited and brought to the marriage by the Applicant. The concept of one-third as a check on fairness is not in my view useful in the present case."

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from the historical approach of the Irish courts to spousal entitlement on death, which has traditionally influenced applications for spousal maintenance. "The Irish courts...dating from times when family law cases were far less frequent and complex, traditionally approached the assessment of maintenance on the basis that, all things being equal, the amount of maintenance should be one third of the disposable income of the earning partner, then almost invariably the husband."

[46] The judicial views of yardsticks or formulaic approaches to asset distribution, as evidenced in the judgments delivered in *T v T* are discussed in section 4.2 below.

[47] *Supra* n. 12 at 365. It was emphasised subsequently by O'Higgins J in *CD v PD* [2006] IEHC 100 that where there is significant wealth, this must be taken into account in determining what constitutes proper provision. Citing Thorpe LJ in *Parlour v Parlour* [2004] EWCA Civ 872, O'Higgins J stated that "it is of course correct that the proper provision must be assessed on the basis of the assets and that the concept of proper provision cannot be assessed without taking into account the assets."

[48] *T v T supra* n. 12 per Denham J at 388.

[49] *Supra* n. 13.

By way of contrast he regarded "the purchase of a suitable home and a suitable and proper level of maintenance" as his priority and quite simply the clearest means of ensuring that proper provision would be achieved. Equally in *MS v PS*[50] Sheehan J made no reference to percentage-based spousal entitlements, rather, having considered the section 20 statutory factors with reference to the circumstances of the case, he made six orders for financial and property relief, the combination of which he deemed necessary to make "proper provision for the applicant and the children of the marriage".[51] Interestingly O'Neill J identified a role for the parties in the calculation of what might constitute proper provision in the circumstances - he commended "the approach adopted by the parties in setting out at the start of the trial what they considered to be a proper provision" and regarded their views as being "of great assistance to the court".[52] In her recent analysis of the decision-making trends as they relate to ancillary relief orders, Buckley has attempted to gauge the manner in which the proper provision requirement is being secured by way of order/settlement.[53] She identifies periodic payments and property transfers as by "far the most common outcomes" of consensual cases, noting that the majority of property transfers relate to the family home. In non-consensual cases, again Buckley notes that periodic payments were the most common orders made, and where made, were always in favour of the wife. Certainly, both in respect of the nature of the orders made, as well as property ownership during and after marriage, Buckley's data uncovers evidence that marital relationships in Ireland remain predominantly in the traditional format, with dependent homemaker wife and breadwinner husband. Consequently the securing of proper provision necessitates utilisation of the armoury of judicial powers, with arrangement typically consisting of a combination of a periodic payments order, a property transfer order and/or lump sum order and where available, a pension adjustment order. Confirming the trends identified by the orders made, Buckley notes that "periodic payments were invariably paid to the wife"[54] and though not

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[50] Unreported High Court 21/11/2008.
[51] *Ibid* at 10. McKechnie J in *BD v JD supra* n. 32, in deciding what constituted proper provision for the parties in the circumstances, had recognised his obligation to "be guided by section 16" and his duty to "utilise the facts of this case within the provisions of that section so that the resulting orders are fair, just and equitable."
[52] *MK v JK, supra* n. 15 at 344. This view was echoed by O'Higgins J in *CD v PD, supra* n. 47 above.
[53] *Supra* n. 8.
[54] *Ibid* at 63, 64.

particularly common, "wives were almost the exclusive beneficiaries of pension adjustment orders".[55]

3.5 Impact of proper provision requirement

On divorce, failure to secure the standard of proper provision for the parties, howsoever determined, ought to prevent the ordering of the decree sought. In the course of the Seanad debates prior to the divorce referendum, the capacity of most individuals to make proper provision for a spouse and children was queried, with reference to the "limited capacity, even for professional or business people" to locate the necessary resources.[56] The general unsuitability of the proper provision requirement to the financial capacities of Irish families was raised, as was what was regarded as the unavoidable "diminishing [of] the rights of the wife and children" of the first marriage because of the limited funds available.[57] It was regarded as a suitable test only in cases where one or both spouses has significant financial resources, but being of "little or no relevance for the majority of divorce cases" that would arise.[58] Deputy Wallace noted that "the sad reality is that relatively few divorce applicants provide adequate material support for their former families to allow them to maintain or enhance their previous standard of living."[59] In truth, financial limitations often require the court to maintain financial ties for many years after the decree is granted, in order to ensure that proper provision is made for the parties into the future.

In her recent analysis of the decision-making trends as they relate to ancillary relief orders, Buckley has attempted to gauge the manner in which the proper provision requirement is being secured by way of both court orders and negotiated settlements. Interestingly she has identified very distinct approaches to the need to maintain financial

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[55] *Ibid* at 64.
[56] *Supra* n. 11 at 1675 per Professor Lee.
[57] *Ibid* at 1679 per Senator O'Kennedy.
[58] *Supra* n. 7 at 1820 per Deputy Wallace. Ultimately Deputy Wallace suggested that the economic realities of post-divorce life were likely to cause many spouses to be reliant upon the State for financial support.
[59] *Ibid* at 1821-1822.

ties depending upon whether the dissolution is resolved by way of *inter partes* settlement or non-consensual court adjudication. She has noted, that

> "...maintenance orders were much less frequent in consent divorces than in non-consensual ones, while property adjustment orders and pension adjustment orders were much more common in consent divorces."[60]

It appears that where given the opportunity to agree post-divorce financial arrangements, avoiding ongoing ties was preferred by spouses. Conversely where the matter was left for the courts to determine, post-divorce payments were typically retained. Although these ongoing payments may have been necessary to fulfil the proper provision requirements, given that periodic payments were made in 53% of consent divorces but in 85% of non-consensual cases,[61] this judicial reluctance to break the marital ties seems to reflect a particularly conservative approach to post-divorce independence. It is certainly arguable that in the course of negotiations, spouses may be more willing to forego the extent of their 'proper provision' rights simply for conciliatory purposes. Buckley surmises that the courts "may be less focussed on establishing a clean break between the parties as this is not legislatively mandated and therefore may be less resistant to ongoing obligation."[62] In consent cases, she suggests that the data collected may indicate that parties may "prefer a clean break property division to ongoing obligations such as maintenance".[63]

4 Statutory sources of judicial guidance

4.1 Introduction

Despite the breadth of judicial powers under the Divorce Act, the governing provisions are remarkably bereft of statutory guidance or direction. The Irish legislative framework includes neither the statutory rules of Californian divorce laws nor the principles and

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[60] *Supra* n. 8 at 66.
[61] *Ibid* at 80, fn 53.
[62] *Ibid* at 66.
[63] *Ibid.*

policies pronounced in the New Zealand legislation.[64] Rather, the Irish Divorce Act is distinctly silent on the over-riding aims of the legislation, preferring to identify basic pre-requisites, financial and otherwise, for the granting of the decree, and to set out a series of issues and factors which may particularly, but not exhaustively, influence the deliberations of the presiding judge. The terms of section 20(1) of the Divorce Act require the court, when making virtually any order for ancillary relief,[65] and in determining the provisions of any such orders, to ensure that proper provision is made for the spouses and any dependent member of the family. Notwithstanding the generality of that section, section 20(2) requires in particular, that the court have particular regard to the matters set out in section (20)(2)(a) – (l):

(a) the income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future;

(b) the financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future (whether in the case of the remarriage of the spouse or otherwise);

(c) the standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses commenced to live apart from one another, as the case may be;

(d) the age of each of the spouses, the duration of their marriage and the length of time during which the spouses lived with one another;

(e) any physical or mental disability of either of the spouses;

(f) the contributions which each of the spouse has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family;

(g) the effect on the earning capacity on each of the spouses of the marital responsibilities assumed by each during the period when they lived with one

[64] The regulatory approaches of these two jurisdictions will be considered later in chapters 4 and 6 respectively.

[65] The provisions of section 20(1) relate to orders made by the courts under sections 12, 13, 14, 15(1)(a), 16, 17, 18 and 22 of the Divorce Act.

another and, in particular, the degree to which the future earning capacity of a spouse is impaired by reason of that spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family;

(h) any income or benefits to which either of the spouses is entitled by or under statute;

(i) the conduct of each of the spouses, if that conduct is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it;

(j) the accommodation needs of either of the spouses;

(k) the value to each of the spouses of any benefit (for example, a benefit under a pension scheme) which by reason of the decree of divorce concerned, that spouse will forfeit the opportunity or possibility of acquiring;

(l) the rights of any person other than the spouses but including a person to whom either spouse is remarried.

The detailed contents, in particular of section 20(2)(a)-(l),[66] setting out the factors to which the courts must have regard merely confirm the power, if not duty, of the court to decide each case with primary and almost absolute reference to the individual circumstances before the court. In addition, section 20(3) of the Divorce Act requires the court in deciding whether to make an order for ancillary relief, to have regard to the terms of any separation agreement, which has been entered into by the spouses and is still in force. Section 20(4) is similar to section 20(2) in that it sets out specific criteria to be considered by the court,[67] except that these additional seven criteria are to be taken into account only when considering whether to make any orders in favour of a dependent member of the family. Finally, section 20(5) is perhaps the most vague element of section 20 in that it stipulates that the court "shall not make an order under a provision referred to in subsection (1) unless it would be in the interest of justice to do so."

[66] As the content and impact of each aspect of section 20 is considered in the course of this section, it has been cited in full.

[67] These factors are to be considered by the court without prejudice to the generality of section 20(1) and the extensive factors to be considered by the court as outlined in section 20(2)(a)-(l).

4.2 Absence of legislative principles and yardsticks

Power has commented upon the absence of a rationale underlying the statutory powers to make property and maintenance awards. He notes the lack of a statutorily-stated aim which, if articulated, would give court orders "a legitimacy and transparency that may make for better compliance and enforcement...a welcome and necessary objective."[68] The judiciary has also recognised the lack of statutorily-stated principles of division and in particular the absence of rules or preference for equal division. In *T v T*, Fennelly J was not in favour of embracing any of the suggested yardsticks, stating that the Irish regulatory approach:

> "...does not erect any automatic or mechanical rule of equality. Nor does it institute any notion of family resources or property to be subjected to division. Several considerations militate against the adoption of such rules of thumb."[69]

In particular he cautioned against any such rule or yardstick of equality being implied from the requirement under section 20(2)(f) that the court have regard to both monetary and non-monetary spousal contributions. This view was supported by Murray J who rejected the view that "in making financial provision for spouses that their assets should be divided between them. Neither the Constitution nor the Act of 1996, requires that, expressly or implicitly."[70] Thus, as has been outlined above, in rejecting a principle of equal division, the Supreme Court has refused to regard the Divorce Act as mandating an approach which might focus judicial attention upon a *division* of the assets of the spouses.[71]

With reference to the constitutional and statutory pre-requisite of proper provision, Keane CJ has recognised the distinction between the Irish and English/Welsh jurisdictions, noting that under Irish divorce law, "...the appropriate criterion is the making of proper

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[68] Power C "Maintenance: No Clean Break with the Past" (1998) 1(1) IJFL 15 at 19.
[69] *Supra* n. 12 at 417.
[70] *Ibid* at 407.
[71] In attempting to define the impact and role of the proper provision requirement, the courts have emphasised that the focus of the Irish regulatory system must be provision and not division. See section 3.3. above.

provision for the parties concerned" as distinct from the English/Welsh approach which seeks to divide the assets fairly.[72] Thus whilst proper provision can not be achieved without some division of the available assets, the latter is simply the means to achieve the former and once proper provision is secured it appears that the courts may not be willing to act beyond this.[73] The extent of the available assets will ultimately determine the nature and scope of the asset distribution; cases of limited resources may well see an equal division of the assets whereas in the ample resources case of *T v T* the Chief Justice noted that:

> "...in cases such as the present where there are substantial assets which have admittedly been brought into being in circumstances where it would be unjust not to effect some form of division between the parties, the court will inevitably find itself having to determine, where the parties are unable to agree, how the assets should be divided between them..."[74]

However the apparent distinction drawn by Keane CJ between the approaches of Ireland and England/Wales is not entirely clear. Although he has suggested that the England/Wales determination is premised upon what is regarded as fair, this basis undoubtedly informs the Irish proper provision calculations. In *CD v PD*, O'Higgins J explained that "the court should strive not for equality but for fairness" and similarly in *AK v JK*[75] Abbott J, in refusing to vary the orders made at the time of the granting of the decree of judicial separation, stated that the court determines the division of the assets "on the basis of the question of fairness and justice".

The numerous factors contained in section 20, seek to provide guidance to the courts in making an adjudication regarding the nature and amount of ancillary relief orders. Broadly, section 20 identifies general statutory aims of justice and fairness but does not seek to define them nor identify how they might best be achieved. The individual factors

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[72] *Supra* n. 12 at 368.
[73] It is worth noting, however the comments of O'Higgins CJ in *CD v PD*, *supra* n. 47 regarding the relevance of significant available wealth and its necessary impact on the awards made, and the large award made in favour of the homemaker wife in *T v T*.
[74] *Supra* n. 12 at 365.
[75] *Supra* n. 34.

to which the court must have regard are numerous, perhaps to the point that every aspect of the union is potentially relevant to the decision-making process. The impact of such a broad-brush approach to statutory guidance, the duplication of 'relevant' statutory factors on separation and divorce[76] and the judicial interpretation and application of those factors will be considered in section 5 below which will focus exclusively upon the statutory factors and assess their impact and effectiveness on the asset distribution process.

4.3 Concept of marital property

The related issue of the legislature's decision not to define marital property represents further evidence of the broad delegation of power to the judiciary and the decision to avoid the abstract imposition of a definitive view. The only attempt to identify what might be available for distribution is found in the Rules of the Court and relates to the content of the mandatory affidavit of means which must be signed and sworn by both parties to the proceedings. The affidavit of means must accompany the family law civil bill when filed with the court to commence proceedings, or equally the defence and counterclaim where the proceedings are being defended. The Rules of the Circuit Court[77] require the deponent of the affidavit to declare all the assets to which he or she is "legally or beneficially entitled".[78] Thus the issue of what constitutes the property available for consideration and/or division is a further matter to be determined by the courts in light of the individual circumstances arising. In *T v T* Fennelly J, confirmed the absence from the Divorce Act of "any notion of family resources or property to be subject to division."[79] He further noted the potentially significant impact of such a non-committal approach to statute drafting giving rise to the reality:

> "...that any property, whenever acquired, of either spouse and whenever and no matter how acquired, is, in principle, available for

[76] Whilst on an application for a decree of divorce the court may well be influenced by issues such as the fact or potential of a second family and perhaps a consequently greater need for a clean break between the parties, it appears that the duplication in legislative approach reflects a policy decision not to distinguish between the remedies.
[77] Order 70A as enacted by the Rules of the Superior Courts (No.3) 1997 S.I. No 343/1997.
[78] As per form no. 2; schedule to Order 70A.
[79] *Supra* 12 at 417.

> the purposes of the provision. Thus, property acquired by inheritance, by chance, or the exclusive labours of one spouse does not necessarily escape the net."[80]

Once again the undecided issue has been regarded as determinable only in the particular circumstances of each case.[81]

5 Statutory factors

5.1 Section 20 factors

Section 20 is entitled *Provisions relating to certain orders under sections 12 to 18 and 22*, and sets out the statutory factors to which the court must have regard when determining the merits of an application for ancillary relief orders. It consists of five subsections which in turn contain guidance and direction for the courts. Section 20(1) sets out the over-riding obligation of the court when making virtually any order for ancillary relief,[82] and in determining the nature of any such orders, to ensure that proper provision is made for the spouses and any dependent member of the family. In the context of judicial separation proceedings, ancillary relief is governed by the statutory factors set out in section 16(1)-(5) of the Family Law Act 1995 which effectively mirror the factors set out in section 20(1)-(5) of the Divorce Act.

The precise status of these statutory factors is unclear. They certainly represent a substantial part of the legislative guidance offered by the Divorce Act and exist in lieu of

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[80] *Ibid* at 416.

[81] *Ibid*, See further the views of Murray J at 409; "That is not to say that the resources of one spouse which could be said to have been acquired completely independently of the marriage should be excluded from consideration by the court. Each spouse has a continuing obligation to make proper provision for the other and the resources which are available to each of them may be taken into account, so far as is necessary, to achieve that objective. Each case will necessarily depend upon its own particular circumstances. Where there are quite limited resources available it may only be possible to provide for the basic needs of each spouse. On the other hand, different considerations would also arise where one spouse was independently wealthy before the marriage and the marriage was of a very short duration."

[82] The provisions of section 20(1) relate to orders made by the courts under sections 12, 13, 14, 15(1)(a), 16, 17, 18 and 22 of the Divorce Act.

stated objectives.[83] Whilst section 20(2) requires the court to "in particular have regard" to these criteria, suggesting that the twelve factors are one possible source of influence for the decision(s) of the courts, there is no express mandatory obligation to apply each factor to the circumstances of a case before the courts. This is evident from the reported judgments which illustrate varying levels of judicial references to aspects of section 20(2) (a)-(l). Thus the impact of these twelve statutory factors differs depending not only on the facts of the case, but also on the attitude and approach of the presiding judge. Furthermore, the absence of a statutory obligation on the courts to declare the basis upon which ancillary relief orders are made weakens the capacity to assess the impact of this statutory approach to guiding the judicial adjudication process. In *MP v AP*[84] O'Higgins J noted the extent of the list of factors and the reality of their variable influence in every case and suggested that in drafting section 20 in such a broad manner, the Oireachtas had "studiously avoided giving any prescriptive guidelines", leaving instead a broad discretion for the court. The "ambiguity and wideness" of the statutory factors listed can not be reconciled with the principles of "certainty, clarity and letting people know where they stand".[85] In this context, Power has lamented the legislature's failure to identify or explain the goals which the application of the section 20 factors seeks to achieve:

> "What is missing is the bigger picture. What outcome are the criteria designed to achieve between the couple? To ask this is to speculate on the aim that underlies the making of orders and there is little legislative guidance on this, except that, it must be proper in the circumstances."[86]

The lack of contextual debate and subsequent failure to identify the purpose of these criteria causes them to exist in a policy vacuum and invariably makes their correct application by the judiciary a speculative task.

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[83] *Report of the Study Group on Pre-Nuptial Agreements* presented to the Tánaiste and Minster for Justice Equality and Law Reform in April 2007; at 73.
[84] *Supra* n. 25.
[85] *Supra* n. 17 at 1687, discussed in section 1.3 above. In relation to predicting the future income and financial needs of a spouse, Deputy McCartan queried whether the courts would require the employment of a soothsayer to provide the necessary foresight.
[86] *Supra* n. 68 at 16.

5.2 Judicial interpretations of section 20(2) factors

Most fundamentally it appears that the purpose of the 12 factors enunciated in section 20(2) is to highlight for the court those factors which, where relevant, must be taken into account, in order to fulfil the obligation to make proper provision for the parties. This is not a matter of interpretation; rather the wording of section 20(2) expressly relates its 12 factors to the attainment of the over-riding obligation, as repeated in section 20(1). The workability of this approach to statutory guidance is best assessed with reference to the pronouncements of the courts. Just as the legislature regarded it as unnecessary to incorporate novel statutory guidelines on divorce, the courts have mostly applied the factors in a similar fashion in the context of both separation and divorce. For the most part the legislature regards the factors to be applicable equally on separation and divorce, mirroring the general similarity of treatment of these two remedies. In practice however, the courts have on occasion referred to the fact of the right to remarry on divorce and have considered the weight to be attached to this distinguishing factor.

The decision-making powers of the judiciary and the impact of the provisions of section 20 were considered by McGuinness J in the Irish Supreme Court in the original appeal from the judgment of Lavan J in *MK v JK*.[87] In the body of her judgment, although McGuinness J acknowledged that the provisions of the Divorce Act "leave a considerable area of discretion to the Court in making financial provision for spouses in divorce cases", she emphasised that this discretion is "not to be exercised at large".[88] Against this background, she proceeded to set out almost the entire provisions of section 20, and referred to these statutory factors as "mandatory guidelines".[89] This reflects her earlier interpretation of section 16(2) in relation to judicial separation; in *JD v DD*[90] she noted that when calculating the appropriate lump sum and/or periodic payment orders to be made, "...full regard, of course, must be paid to the guidelines set out in s.16 of the Act of 1995".[91] However in so stating, it was noted that even given these guidelines, the court still had "a wide area of discretion particularly in cases where there are considerable

[87] [2001] 3 IR 371.
[88] *Ibid.*
[89] *Ibid* at 384.
[90] [1997] 3 IR 64.
[91] *Ibid* at 94.

financial assets".[92] Budd J subsequently regarded this interpretation of section 16 as "a helpful review of the law and the relevant provisions governing the situation".[93] He considered at length the factors set out in section 16(2), the relevant facts of the case before him and how they would ultimately influence his decisions regarding the ancillary orders to be made by the court. In a similar approach to that adopted by McGuinness J, he thought it appropriate to cite in full the terms of section 16(2). In so doing he noted the compulsory obligation on the court to pay "full regard" to these guidelines in making the "necessary calculations".[94]

A question which repeatedly arises, and is not assisted by the provisions of the Divorce Act, is the weight and/or prioritisation, if any, to be accorded to the 12 statutory factors. Keane CJ in *T v T*, in acknowledging the detail of section 20(2), recognised the broad discretion that they necessarily afford the judiciary and accepted that such breadth of discretion will unavoidably give rise to elements of inconsistency.

> "...it is obvious that the circumstances of individual cases will vary so widely that ultimately, where the parties are unable to agree, the trial judge must be regarded as having a relatively broad discretion in reaching what he or she considers a just resolution in the circumstances. While an appellate court will inevitably endeavour, so far as it can, to ensure consistency in the approach of trial judges, it is also bound to give reasonable latitude to the trial judge in the exercise of that discretion.[95]

To this end, referring to the judgment of Lord Hoffmann in *Piglowski v Piglowski*[96] Keane CJ confirmed that there is no hierarchy of factors under Irish divorce law. Notwithstanding this however, he did accept that in a more typical, limited resources case, the first task of the court must almost certainly be to consider the financial needs of the spouses and dependent children. This stance was accepted by his co-presiding colleague Denham J, who, whilst considering the provisions of section 20(2) (a)-(l) to be

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[92] *Ibid* at 91.
[93] *PO'D v JO'D* [2000] IEHC 173.
[94] These views of McGuinness J were again approved by O'Sullivan J in *CF v CF* [2002] IEHC 64.
[95] *Supra* n. 12 at 365.
[96] [1999] 1 WLR 1360.

mandatory when determining what constitutes proper provision, equally confirmed that the relevance and weight of the individual factors would depend upon the circumstances of each case.[97] Fennelly J agreed, declaring that it "is for the High Court judge to decide on the weight to be accorded to each of the statutory matters."[98]

It appears from these cases that the Irish judiciary is slow to embrace any responsibility for the development of guiding principles, given the repeatedly-stated need for an underlying safety-net of judicial discretion. The transparency of the process appears to fall at this final obstacle. This weakness is equally identified by Buckley; she comments on the difficulties encountered when trying to identify precise "trends or principles in asset division, given the dearth of reported cases in this area."[99] Even where written judgments are delivered, she regards them as evidence of the highly inconsistent judicial views on the matter.[100]

5.3 Judicial obligation to account for orders made

Whilst the statutory factors require the presiding judge to consider the relevance of 12 separate aspects of the familial arrangements, the exact impact of these factors is rarely explained. Greater transparency might be achieved by an express judicial acknowledgment of the relevance and impact of particular factors as to do so might directly or indirectly allow for the identification of the over-riding judicial policy aims. Such an approach was advanced by McGuinness J in *MK v JK*[101] where she stated that:

> "The court must have regard to all the factors set out in s. 20, measuring their relevance and weight according to the facts of the original case. In giving the decision of the court, a judge should give reasons for the way in which his or her discretion has been exercised in the light of the

[97] *Supra* n. 12 at 379.
[98] *Ibid* at 419.
[99] Buckley LA "Matrimonial Property and Irish Law: A Case for Community?" [2002] 53(1) NILQ 39 at 64.
[100] *Ibid.*
[101] *Supra* n. 87 at 384.

> statutory guidelines. In his judgment in the instant case the trial judge has notably failed to do this."[102]

It appears that in delivering this judgment, McGuinness J has attempted to establish greater judicial accountability, in that not only must decisions be made in light of the requirements of section 20, such decisions must also be reasoned and elucidated in light of those provisions. She suggested that the decision of the trial judge in relation to the relevance and weight of each of the statutory factors should be judged "according to the facts of the original case".[103] Her judgment is certainly evidence of an appeal for greater judicial policy-making and seeks to extend the existing statutory obligations of the court. In particular, McGuinness J has highlighted the legislature's failure to demand the explanation of the impact of the section 20 factors upon each judicial determination. However despite her best efforts, there remains a general reluctance on the part of the judiciary to embrace the role of policy-maker with reference to the impact of the statutory factors.[104]

For example, in *T v T*, despite the concerns expressed by various members of the court, and the statement of Denham J. that "...[B]etter practice would be to consider all the circumstances and each particular factor *ad seriatim* and give reasons for their relative weight in this case...", the consideration of the factors contained in section 20(2) was mostly general and non-specific in nature and it is difficult to conclude that the court did in fact consider all twelve factors. Whilst obviously if a factor is not deemed relevant there is little point in discussing it further, where the judicial determination as to the relevance is not openly made, the logic or policy-based adjudication remains unexplained. Rather it appears that in *T v T*, despite the concerns expressed, the judiciary took a collective view of the parties' circumstances and the judgments delivered failed to provide any factor-based explanation for the decision reached. Whilst an overview of the

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[102] *Ibid.*
[103] *Ibid.*
[104] Notwithstanding the general reluctance to explain judgments with reference to the section 20 factors, a minority of judges have developed a practice of accountability by expressly identifying he factors that they have had regard to in the circumstances. In *MR v PR* [2006] 1 ILRM 513, Quirke J expressly identified sections 20(2)(a), (b), (c), (d), (f) and (l) as relevant in the circumstances, concluding that the applicant was thus entitled to the ancillary relief sought. Ultimately he was of the view that he was alleviating the unbalanced financial circumstances of the parties "in a just and equitable fashion".

circumstances might deem the significant assets to have been fairly divided, providing the homemaker with a substantial share of the breadwinner's assets, as a precedent it is difficult to apply to future cases. The failure to require the courts to account for the decisions reached merely contributes to an already unclear and unpredictable regime that is likely to confuse and frustrate the parties to the proceedings.

Buckley has attempted to analyse the level of juridical reference to the statutory criteria in her examination of the ancillary relief orders made in 89 divorce, separation and judicial separation cases.[105] She qualifies her findings by noting the absence of written judgments in the majority of cases and her research is thus reliant upon either the order made or upon a solicitor's contemporaneous note of the judgment delivered.[106] She notes that the general perception of family law practitioners is that judges do not commonly refer to the statutory criteria, although "many felt that judges did have certain factors in mind in reaching their decisions".[107] Thus notwithstanding the Supreme Court decision in *K v K*, her research demonstrates a lack of reliance upon, or at least reference to the section 20 factors. In the 48 divorce and judicial separation consensual cases, only one judicial separation case contained any reference to the statutory factors.[108] However in the context of non-consensual cases, the judgments delivered only referred the statutory criteria in 46% of cases. Thus in the slim majority of objectively determined cases, the presiding judge chose not to articulate with reference to the established statutory criteria, the reasons for the orders made. Where the influential factors were identified, emphasis was generally placed upon financial and economic factors and less so on past and future contributions or the duration of the marriage. Interestingly, little mention was made of spousal roles and responsibilities in the course of the marriage.[109]

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[105] *Supra* n. 8.
[106] *Ibid.* Buckley, at 72, concedes that references to statutory criteria may have been made orally but not recorded.
[107] *Ibid.*
[108] *Ibid* at 73. Given the typical format of such an agreement, it is arguable that the reasoning for the agreed terms is not normally regarded as necessary for restatement within the agreement.
[109] The lack of consistent reliance upon the identified section 20 factors suggests a preference for judicial discretion exercised based on a general overview of the circumstances of the marriage rather than the identification of particular aspects of the union. Buckley presents a statement and analysis of her findings, *ibid* at 72-76, helpfully including tables (consensual and non-consensual cases), setting out the extent and detail of the judicial reference to the statutory criteria.

Thus most fundamentally the weaknesses in the Irish divorce process appear to evolve from the lack of underlying legislative policy together with a dearth of any consistent judicially-developed policy, as distinct from the existence of any inherent weaknesses in the process itself. Perhaps a mandatory obligation to explain the impact of the section 20(2) factors might contribute to a more considered approach to their relevance, thereby encouraging the judiciary to more actively identify and cultivate policy in this context.[110] The current regulatory approach, given the lack of legislative direction and general reluctance to develop policy aims gives rise to an undemocratic and unpredictable system of regulation. This is enhanced by the failure to disseminate the details of rulings made, which are typically not available for consideration and analysis. Whilst the individualised approach to the determination of disputes may allow for a 'fair' as opposed to 'correct' outcome to be achieved, such fairness is difficult to gauge in light of the dearth of enunciated judicial reasoning.

5.4 Relevance of pre-existing separation agreement or court ruling

Section 20(3) of the Divorce Act requires the court in deciding whether to make an order for ancillary relief, to have regard to the terms of any separation agreement which has been entered into by the spouses and is still in force.[111] On the basis of a literal

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[110] See section 6.2 below for a consideration of the judicially-developed policy that can be identified to date.

[111] Despite the obligations under section 20(3) arising in the context of an existing separation agreement, the judiciary have repeatedly referred to its obligation under section 20(3) equally where on divorce there pre-exists a decree of judicial separation. In *MP v AP*, *supra* n. 25, O'Higgins J in the context of an existing decree of judicial separation cited section 20(3) and noted the variable weight that can attach to an existing settlement, depending on many factors including the length of time since it was reached, the financial background against which such settlement was reached, when compared with the present circumstances, and the reasonable expectations of the parties at the time of the settlement. In the circumstances he regarded the terms of the separation order to be of very great importance and he did not make any distinction between the settlement by way of judicial order and an *inter-partes* settlement, as expressly referred to in section 20(3). However more recently the issue has been complicated by the suggestion that an existing separation *order* should not be treated in the same manner as a separation *agreement*. In *MB v VB* (Unreported High Court 19/10/2007), Birmingham J highlighted the very differing circumstances that might exist in securing these alternate forms of judicial settlement; "It seems to me that there is a significant difference between a court order, even a court order that was not appealed by either side as is the case here, and a separation agreement. In the case of a court order either or both parties may regard the order as entirely inappropriate and may have been dissuaded from appealing only by the costs that they

interpretation, section 20(3) is the only element of section 20 to place a mandatory obligation on the courts. However, the extent of the impact of this statutory obligation is also uncertain. Section 20(3) does not require the court to enforce the terms of the agreement, rather it simply requires it to "have regard" to its contents. Couching the court's obligations in this manner empowers the court to decide without any further guidance, the extent of the regard to be had for the agreement. Arguably the court could "have regard" to its terms and in so doing, decide to ignore it entirely or equally could strictly enforce it. This uncertainty of interpretation is evident from the quite varying approaches adopted by members of the Irish judiciary when assessing applications for divorce where the parties have previously separated either by agreement or court order. Depending upon the circumstances of the case and the views of the presiding judge, the courts have both enforced absolutely the terms of an existing separation agreement, and equally have reviewed entirely the ownership of all available assets on divorce.[112] This approach evidently prioritises fairness over predictability and even freedom of contract.[113] More fundamentally it is also necessitated by the constitutional pre-requisite of proper provision. However, such judicial discretion might be more evenly exercised if the legislature, in drafting the Act, had adopted a more definite position on the significance of a pre-existing inter-spousal contract and indicated the relative value, even in broad terms, to be attached to such a significant agreement. Even a policy discussion as to the importance of encouraging *inter-partes* settlement by agreement as against the need for capacity to review, might prove helpful to a court wrestling with these conflicting aims. The lack of clearer legislative guidance impacts particularly in the Irish context, where there has traditionally been significant reliance upon separation

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would have been likely to incur." As distinct from this, Birmingham J noted that a separation agreement reflects a "shared understanding" between the parties, and he suggests that it should be given significance and weight accordingly.

[112] There have been six reported judgments of the High Court and Supreme Court where a divorce application has been made in the context of a pre-existing separation agreement or judicial separation order, and these have illustrated very differing approaches to the relative weight to be given to the prior agreement/order: *MK v JK* supra n. 13; *A v A supra* n. 35; *RG v CG supra* n. 28; *MP v AP supra* n. 23; *B v B supra* n. 35 and *NF v EF* (Unreported High Court 4/7/2007).

[113] Monaghan notes the broad powers created by the Divorce Act which permit the court to override "fundamental principles of contract law". Monaghan L "The Slicing of the Marital Cake – The relevance of separation agreements to the making of property adjustment orders" [1999] 2(2) IJFL 8.

agreements and private ordering to regulate matters by private contract, given the historical lack of statutory remedy for separation and/or divorce.

For example, in *MK v JK*[114] at first instance, notwithstanding the execution of a separation agreement by the parties in 1982 which purported to finalise matters between the parties, Lavan J ordered that the respondent pay an additional lump sum of IR£1.5 million to the applicant on divorce. This order was appealed to the Supreme Court on the basis of his failure to have any due or sufficient regard for the agreement as mandated by section 20(3). Without conducting a substantive hearing of the issues, McGuinness J recognised the shortcomings of the approach of the trial judge and ordered that the matter be returned to the High Court "so that the question of proper provision for the parties to the divorce may be considered in the light of the mandatory provisions of the statute".[115] At the eventual rehearing of the application for ancillary relief, O'Neill J ordered a significant reduction of the IR£1.5 million award.[116] He regarded it as still necessary to vary the terms of the original *inter-partes* settlement in circumstances where the applicant had not been adequately catered for by the terms of the agreement.[117] Thus, notwithstanding the existence of a written, negotiated agreement, the court was willing to vary what was previously regarded as a binding full and final settlement.

> "Section 20(3) of the Act of 1996 places upon the court an obligation to have regard to the terms of any separation agreement which is still in force. Section 20 (1) places upon the court an obligation to [make proper provision for the parties]...Thus, the court has two unavoidable mandatory obligations."[118]

In discussing how these mandatory obligations should be fulfilled, O'Neill J regarded the order in which they should be applied as best left to the discretion of the courts in each case but placed emphasis on the "length of disconnection" between the parties, i.e. the extent of the lapse of time between the execution of the agreement and the application for

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[114] *Supra* n. 15.
[115] *Supra* n. 87 at 384.
[116] *Supra* n. 15 at 361. O'Neill J reduced the award to the value of €511,000, comprising a lump sum order of €450,000 and the transfer of half the value of the family home to the applicant, valued at €61,000.
[117] Coulter "Ruling shows how costly divorce can be" Irish Times 27 January 2003.
[118] *Supra* n. 15 at 344-345 per O'Neill J.

further relief. He suggested that the greater the "antiquity of the agreement", the more likely the court will be required to intervene to guarantee that proper provision exists on divorce. In *RG v CG*[119] the court considered the weight to be attached to the pre-existing judicial separation consent order secured by the parties, such order including a declaration that its terms constituted a full and final settlement of all matters arising at that time *and* in the event of proceedings being issued under the Divorce Act. In concluding her judgment, Finlay Geoghegan J stated that the content of section 20 and all the circumstances of the family in question were each to be regarded as "influencing factors" in determining the issue of ancillary relief. Given the court's obligations under both Article 41.3.2 of the Constitution and section 5(1) of the Divorce Act, Finlay Geoghegan J rejected the suggestion that parties could effectively enter into an agreement to relieve the court of its future obligation to be satisfied that proper provision is made between the parties upon the granting of a divorce:

> "These provisions require the Court to exercise its judgment as to what constitutes proper provision. The obligation on the Court to make such determination cannot be removed either by an acknowledgement or agreement such as that contained in...the Consent between the parties herein."[120]

Finlay Geoghegan J was particularly influenced by the argument that at the time of the drafting of the agreement, even if it could be said that divorce proceedings were contemplated, they could not be regarded as imminent and thus she refused to gauge the ordering of proper provision with reference to that agreement. Rather she stated that the test for proper provision had to be assessed at the date of the divorce hearing. Adopting this position in respect of the relevance of the agreement, it was unavoidable that the court would prove itself receptive to the wife's application for further financial relief.[121]

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[119] *Supra* n. 30.
[120] *Ibid* at 424.
[121] The case concerned an application for divorce by the husband who sought to enforce the terms of an existing judicial separation settlement, thereby preventing any application for periodic maintenance. The respondent successfully challenged the sufficiency of the financial arrangements in place, claiming that they failed to make proper provision for her and the children of the marriage.

Interestingly, and an illustration of the extent of judicial discretion exercisable under the Act, a contrasting view was taken by Hardiman J in *A v A*,[122] where he showed a willingness to distinguish the decision of O'Neill J and ultimately refused to alter or add to the terms of the separation agreement, executed by the parties in 1993. He did so primarily on the basis of the seventeen-year disconnection between the parties and the availability of the remedy of judicial separation at the time of the execution of the agreement. However Hardiman J appears to have placed the emphasis on the validity and effect of the agreement rather than the position of the parties at the date of the divorce hearing, refusing to order additional ancillary relief on the basis that the agreement represented proper provision for the parties at the time of its execution and it would be unfair and unjust to unilaterally alter the agreement. This judgment certainly represents a departure from the pre-existing case law and arguably from the mandatory obligations of the court regarding proper provision at the time of divorce but was defended on the basis of the court's over-riding obligation under section 20(5) not to make any order that would not be in the interests of justice.

In considering the above judgments of both Hardiman and Finlay Geoghegan JJ, O'Higgins J in *MP v AP*[123] considered the impact of section 20(3) on his deliberations where the parties had previously secured a decree of judicial separation with ancillary relief orders, as distinct from executing a separation agreement. It appears that O'Higgins J, in complying with his perceived obligations under section 20(3), did not differentiate between the two methods of regulating the separation, Whilst he noted that the weight to be attached to a prior settlement between the parties would vary from case to case, depending on many factors, he specifically highlighted the importance of the length of time since the matters had previously been compromised, the financial background when compared with current financial circumstances, and the reasonable expectations of the parties at the time of separation. In the circumstances, given that the intention was that the judicial separation order would be "long term and lasting", that the bulk of the family assets were transferred to the applicant and that the circumstances had not changed from

[122] *Supra* n. 37.
[123] *Supra* n. 25.

those anticipated at the time of the separation settlement, O'Higgins J ultimately determined that the terms of the prior separation order were of "very great importance", and that it was not necessary to make any further property orders, notwithstanding a significant economic disparity between the parties. He did, however, vary maintenance upwards in favour of the applicant. The sufficiency of the separation order and the thirteen-year period before divorce proceedings were issued undoubtedly limited greatly the success of the applicant-wife who was regarded as having been effectively provided for by the terms of the original settlement. The distinction between this and the earlier ruling of Hardiman J is the willingness of O'Higgins J to consider and evaluate the sufficiency of the existing agreement prior to rejecting the application for property orders. Finally in this context, although the court in *MB v VB* regarded it as appropriate to give "very considerable weight" to the pre-existing settlement between the parties and assessed the agreement as having made proper provision for the parties, Birmingham J ordered the payment of a further lump sum to the applicant, given the significant increase in the value of the family home in the interim period.

Thus whilst it remains impossible to predict the outcome of a divorce application where a separation agreement or order exists, the Irish courts have shown a general unwillingness to bind the parties to their agreed terms. Equally however, whilst there remains both scope and willingness to supplement the agreement made, the courts do not appear willing to allow one party unilaterally to repudiate it entirely. Although fairness is preferred at the cost of certainty and predictability, it appears that where an existing agreement has already provided generously for the applicant, fairness equally demands that a spouse not mis-use the right to return to the courts where she has already been provided for.

5.5 Over-riding obligation to ensure that justice is done

Section 20(5) is perhaps the most vague aspect of section 20 in that it provides that:

> "The court shall not make an order under a provision referred to in subsection (1) unless it would be in the interest of justice to do so."

This subsection unquestionably adds further to the discretion of the judicial decision-making powers. Whilst the express inclusion of twelve criteria in section 20(2) is an attempt to ensure that the court considers such pre-identified factors, the decision to include such a vague over-riding requirement could in theory permit the court to circumvent the provisions of section 20(2) and simply order whatever justice requires. So long as 'fairness' and 'justice' remain the ultimate statutory goals it is hard to be overly critical of such an outcome. Unquestionably any order made in family law proceedings should meet the interests of justice test and the making of orders that are unjust is never advocated. However by including such a clause, the legislature might simply, albeit unintentionally, encourage the courts to ignore the criteria set out in section 20(2) and fashion a solution to a case that is based upon no other legislative guideline than that contained in section 20(5). For example, in the judicial separation case of *AK v PK*[124] Murphy J. made a number of orders, including a periodical payments order, a property adjustment order, a right of residence order and a preservation of pensions entitlement order without any reference to section 16 or the factors that he deemed relevant. Thus although it may be appropriate to presume that Murphy J made these orders because he believed it to be "in the interests of justice to do so" he failed expressly to identify the specific basis for his decision. This judgment supports the suggestion above, that the "catch-all" clause of section 20(5) might lead to and even permit the making of any order on the obvious basis of "necessity of justice" However the net effect of permitting such leeway is that it might serve to over-extend the discretion exercisable by the judiciary and ultimately permit the trial judge, effectively to ignore the detailed provisions of the remainder of section 20.

In setting out 12 individual factors, the legislature has created an expectation that the judiciary will rely upon this list and utilise it as a base reference point when explaining the orders to be made by the court. However in practice, it appears that apart from section 20(3), all other parts of section 20 can be viewed as merely containing a choice of factors

[124] [2000] IEHC 24.

to be considered by the court, at its absolute discretion. In *CF v CF*,[125] in the context of an application for a decree of judicial separation, O'Sullivan J noted that he was guided primarily by the requirements of the statute and thus in his judgment he cited in full, the lengthy provisions of sections 16(1) and 16(2) in the 1995 Act. However having quoted them, he did not consider them any further in his judgment nor did he expressly apply them to the facts before him. As a result it is not possible to establish whether O'Sullivan J considered each factor and decided whether it is was in itself influential to the outcome of the case or whether he was selective in applying certain factors. However he did recognise the more general requirement of section 16(5) when noting that he was under an obligation to ensure that:

> "...the court shall not make any order under a provision referred to in subsection (1) unless it would be in the interest of justice to do so."

In citing and relying upon the broad and discretion-based section 16(5), O'Sullivan J clouded the basis for his decision and made it difficult to identify the reasoning upon which the orders were made. Similarly in *N v N*[126] Abbott J indicated that in accordance with section 16(5) he considered his orders to be commensurate with the interests of justice. Principles of justice demanded recognition of the respondent's position "as the holder of the family inheritance" and to allow him to "pursue as best he can...his calling as a cattle dealer".[127]

Finally in *A v A*[128] in the context of an application for a divorce decree with ancillary relief orders where there was a pre-existing separation agreement, Hardiman J recognised the need to factor into his determinations, the "twelve matters set out" in section 20(2) but concluded that he was statutorily prevented from making further ancillary relief orders by virtue of section 20(5) as to do so would be contrary to justice. His decision not to vary the financial arrangements between the parties, as settled in the separation

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[125] *Supra* n. 94.
[126] Unreported High Court 18/12/2003 per Abbott J.
[127] *Ibid* at 12.
[128] *Supra* n. 37

agreement between the parties in 1993 was ultimately premised on his view that justice in all its interpretations demanded such an outcome:

> "In all the circumstances, I do not consider it proper, that is, "fit, apt or suitable", much less "correct or in conformity with rule", to make any ancillary relief order against the husband in the circumstances of this case. Still more fundamentally, I do not consider it just to do so and therefore I am precluded from doing so by the terms of s.20 (5)."[129]

Thus the judiciary have indicated a general willingness to utilise the generalities of section 20(5) to import judicial freedoms to make any order that is required. Although the specific criteria set out in section 20(2) might be considered capable of placing limits on the scope of judicial discretion, section 20(5) serves potentially to negate any such limits.

5.6 Impact of statutory guidance on ancillary relief adjudication process

The Irish judiciary has demonstrated a distinct lack of willingness to develop policy objectives in the context of resolving marital disputes. Evidence and case law to date suggest an over-reliance on individualised decision-making and an apparently deliberate avoidance of pre-existing court rulings.[130] It is not surprising that McGuinness J in *K v K* identified the need for judicial elucidation and explanation of decisions reached, to allow for a body of consistent judicial precedents to develop.

The decision of Hardiman J in *A v A* is interesting, in that Hardiman J identifies the role of the section 20(2) factors as merely part of the process of achieving the overall aim of proper provision. Thus he states that the task of the courts is to secure proper provision for all the parties, and into this exercise "must be factored firstly the twelve matters set out ... [in section 20(2) (a)-(l)] as well as all other matters which the Court considers relevant and the terms of the Separation Agreement". It appears that he relegates slightly

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[129] *Ibid* at 20.

[130] Coveney, *supra* n. 15 at 10, laments these judicial freedoms, noting that "Whilst the increasing jurisprudence from the courts is of undoubted assistance to practitioners, the *sine qua non* is that each case will turn on its own particular facts. It therefore, remains difficult to predict an outcome at the outset of a case as many financial aspects often come to light only after exhaustive discovery and raising of queries."

the significance of the section 20(2) factors and appears very willing to add to the proper provision calculations, any other factor or issue which the court deems relevant. A similar approach was adopted by Birmingham J in *MB v VB*[131] where, apart from considering the factors contained in section 20(2), he identified two further considerations which might influence the nature of the orders to be made, namely the claim by the applicant that she was entitled to a lifestyle equivalent to that of the respondent, and the effect of the existing judicial separation order. These developments are not typical but they represent the first suggestions of judicial policy preferences and a desire to move away from the parameters identified by the legislature.

Whilst section 20 seeks to guide the judiciary in reaching their decisions regarding applications for ancillary relief, only a limited amount of consistency is evident from the reported judgments in the area. Certainly there exists a lack of transparency as to the fact and extent of the influence of individual factors. The lack of judicial obligation to explain the decisions reached and the extent of the influence of the guidelines in section 20 further hampers the development of a consistent and transparent application of these provisions. The apparent failure of McGuinness J's attempt to require the courts to explain their decisions by reference to the statutory criteria illustrates the difficulties faced in seeking to impose expectations of judicial accountability as well as the development of policy in this area, judicially-led or otherwise. Ultimately the application of the section 20 factors with reference only to the need to do justice provides significant legitimate scope for varied judicial approaches. Clearer legislative policy regarding the significance and reasoning for maintaining/severing financial ties, the value and importance of spousal self-sufficiency at some point in the future and the over-riding policy aims of the marriage dissolution process would add predictability and legitimacy to the decision-making process, without necessarily restricting the exercise of discretionary judicial capacity to achieve a fair outcome.

[131] *Supra* n. 111.

6 Underlying policy goals

6.1 Legislatively stated policy

In the course of the debates surrounding the enactment of the judicial separation legislation there was a particular emphasis placed on the capacity of the proposed regime to provide for the dependent homemaker spouse and to recognise her contributions to the family assets. With reference to the section 13 statutory factors to be included in the Judicial Separation and Family Law Reform Bill 1988, later to be enacted as section 20(2) of the 1989 Act and replaced by section 16(2) of the 1995 Act,[132] Deputy Shatter, who was responsible for the introduction of the Judicial Separation Bill, stated that it requires the court

> "...specifically to take into account the manner in which family property was acquired and the relevant contributions of both spouses during the course of the marriage. It also incorporates the view expressed by the committee that a dependent spouse should not be prejudiced in the ownership of family property by the fact that he or she gave up employment in the course of the marriage to attend to family duties in the home."[133]

He further reflected that the enactment of a separation regime which required the court to give recognition to such non-financial contributions would

> "...for the first time in our law, afford a substantive recognition of the work done by the wife in the home and for the first time in legislation give statutory expression to the constitutional duty imposed on the State to recognise the worth of the work done by a wife in the home."[134]

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[132] Repeated verbatim in section 20(2) of the Divorce Act.

[133] Dáil Eireann debates Vol 377 2 Feb 1988 at 885.

[134] *Ibid.* This position was later supported by Deputy Barnes who applauded the relevant provisions of section 16 which "for the very first time in the experience of women in this State acknowledged full and broadly their contribution, the sacrifices they had made, the cutbacks on their financial independence for the good of others, particularly their husbands and children who are the basic unit of a healthy society, and was accepted by women in the home." Dáil Eireann debates, *supra* n. 16 at 1692.

Although Deputy Shatter concluded his introduction of the Judicial Separation Bill by presenting an overview of the aim and scope of the legislation he did not demonstrably identify the policy aims that might be achieved by the application of the Act.

> "The Bill is designed effectively to take Irish family law out of the 19th century and into the 21st century. It seeks to minimise the hardship and distress that can occur when marriages break down and attempts to ameliorate rather than exacerbate marital conduct."[135]

Later in the course of the debates surrounding the 1988 Bill, the proposed amendment that separated parties should automatically lose their spousal succession rights of inheritance was regarded critically as "using the big stick on the women of Ireland", given that "Society has ordained that the married woman is more often than not the dependant". Once again, in challenging the proposed amendment, which was ultimately defeated, it was argued that Ireland as a society "must protect the dependent spouse".[136]

The over-riding aims and obligation to guarantee that both justice and proper provision are achieved were identified as pre-requisites in the development and enactment of both marital remedies. Proper provision as a legislative requirement has been considered in detail above, as have the uncertainties and scope for the varied interpretations that surround it. Similarly the vague concept of 'justice' and the subjective nature of any such adjudication have been examined above. Both over-riding statutory aims ultimately serve to illustrate the breadth of judicial powers as their impact as over-arching goals can only be assessed upon a consideration of their interpretation by the courts. Consequently given their ambiguity in the legislation, they cannot rightly be regarded as legislative goals; they more rightly form the starting point of the judge-led policy that might govern the Irish divorce process.

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[135] *Supra* n. 133 at 890.

[136] *Supra* n. 17 at 1635-1636 per Deputy Flanagan; see earlier at section 1.3 where the debates surrounding this proposal are considered in the context of the rules versus discretion debate.

6.2 Judicially developed policy

The case law following the enactment of the Divorce Act has highlighted the vague and discretion-based approach to this remedy with little statutory direction being offered other than that each case is to be dealt with fairly. O'Neill J has referred to the Divorce Act and particularly the co-existence of the section 20(2) factors and the section 20(5) requirement of justice as a "complex statutory scheme" which necessitates the judicial discerning of "clear overriding principles" in an attempt to give it practical application.[137] However the weaknesses of excessive reliance upon judicial policy-making have also become apparent; the views adopted by the courts to date have primarily highlighted the continuing lack of clarity surrounding the Irish divorce regime.[138] Fennelly J has stated that the need for any distribution of assets to be fair and just is "a clearly stated objective",[139] similarly McCracken J has declared the test as "not equality but fairness".[140] However as an apparent objective of the process, it is far from clear what this means and how it can be achieved. It has been suggested that the best method of securing a fair and just outcome "requires the court to weigh in the balance the infinite variety and complexity of the elements of human affairs and relationship and to arrive at a just result."[141] In addition, the importance of flexibility, given the ever-evolving standards of fairness, has been emphasised. It has been suggested that the discretionary powers accorded to the judiciary in family law arise from the capacity for "accepted standards of fairness in a field such as this [to] change and develop, sometimes quite radically, over comparatively short periods of time."[142] It has been noted in the opening chapter on rules versus discretion, that principles must be regarded as a starting point for

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[137] *MK v JK supra* n. 15 at 346.

[138] Buckley, *supra* n. 99 at 64 is critical of judicial attempts to identify policy; "...it is difficult to establish precise tends or principles in asset division...a brief analysis of some of the leading cases clearly demonstrates that judicial views of "proper" provision, in terms of both maintenance and equitable redistribution of capital assets, are highly inconsistent." More recently Buckley, *supra* n 35 at 10 has again criticised the inconsistency displayed by the Irish judiciary noting that "Judicial applications of the current marital breakdown provisions have also not been noted for consistency, or the regular application of partnership principles, or an emphasis on factors such as sharing moral support and contributions to home life".

[139] *T v T supra* n. 12 at 413.

[140] *MK v JK* (No. 3) [2006] 1 IR 283 at 292.

[141] *Ibid.*

[142] *Supra* n. 15 at 347, per O'Neill J quoting favourably from the judgment of Lord Nicholls in *White v White* [2001] 1 AC 596.

reasoning[143] and standards represent a transient community consensus which can legitimately be amended by the adjudicator invoking the law.[144] With reference to the yardstick of equality and its application (or not) by the court, according discretionary judicial powers has "enabled the courts to recognise and respond to developments of this sort".[145] The difficulty however is that such an approach can give rise to an infinite number of outcomes. The extent of the discretion, which although in place to protect vulnerable parties, is being exercised and applied without any significant identifiable or articulated policy objectives and ultimately gives rise to uncertainty in the application of the law. Only in very recent cases has there been any meaningful evidence of judicial attempts to develop governing principles and precedents to direct the future application and interpretation of the law. This is evident in respect of the right to vary or make new orders where a pre-existing divorce decree or settlement exists. In *JC v MC (preliminary issue)*[146] Abbott J created a distinction between what he referred to as a post-divorce application for "strategic relief" as distinct from an application for the "fine-tuning" of existing orders. In assessing the suitability of an application for variation he demonstrated a judicial willingness to place parameters on the statutory right to vary; enunciating the following test;

> "...the test as to whether a change, or changes, in circumstances ought to ground a strategic application going outside the limited circumstances envisaged by s.18 should be that...if they were of such a fundamental nature that it would be unfair and unjust to ignore such change or changes....with the final overriding test of fairness and justice...."[147]

Similarly, in *F v F*,[148] in a case where the ongoing economic recession prevented the execution of the orders made, Abbott J directed that a variation of the existing orders, previously regarded as necessary to make proper provision for the parties, would not jeopardise the validity of the original decree of divorce. To this end he identified three

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[143] See section 2.3.2 of chapter 1 above.
[144] See section 2.3.4 of chapter 1 above.
[145] *Ibid.*
[146] Unreported High Court 31/10/2008.
[147] *Ibid* at para 14.
[148] Unreported High Court 19/12/2008.

governing principles which should apply in such circumstances; the court does have jurisdiction to vary the terms of the orders where the circumstances have fundamentally changed, but such variation must strike a "balance and symmetry" with the original order; the court must consider alternatives so as to ensure proper provision under the Divorce Act; and the court will only exercise this discretion provided that the alternative provision is in accordance with the Constitution and the Divorce Act.[149]

Prior to these recent developments, the attention of the courts, in attempting to develop judicial policy, had focussed upon its scope to impose a clean financial break upon the parties; the protection of the homemaker and the importance of securing a home for the dependent spouse; and to a lesser extent, the conduct of the parties.

6.3 Clean break

The divergent judicial views on many of the provisions of the Divorce Act present clear evidence of the excessively broad manner in which it was drafted and the extent of the discretion available to the presiding judges. Nowhere has this been more evident than in the debate surrounding the right of the court to impose a clean financial break. The conflicting decisions and interpretations delivered on this issue serve to substantiate the view that the provisions of the Divorce Act provide excessive scope for interpretation, resulting in the development of an inconsistent and unpredictable body of law. The lack of legislative clarity on this key issue has permitted scope for very conflicting judicial pronouncements, as evidenced below.

The notion of a clean break refers to the possibility that spouses may at the time of the decree of divorce being granted, or at some time in the short-term future, be in a position whereby their financial ties are permanently severed. In such a situation, the prospect of re-opening in the future any or all of the financial issues between them would not be permissible. Post-divorce, the current Irish legislative position makes it possible for one

[149] *Ibid* at para 8. For further commentary see Aylward R, "Dissolved Marriages and the Recession: The Variation of Orders for Ancillary Relief" [2009] 12(1) IJFL 9.

or both of the parties to return to court to alter the existing arrangements in two ways; firstly by seeking an order at any time after the decree of divorce has been made[150] or secondly by seeking the variation of an existing order.[151] The right to apply to the court after the granting of the original decree is very clear and almost indefeasible, unless the applicant remarries. This infinite right to apply for ancillary financial relief exists in relation to almost all the orders that can be made by the court under the Divorce Act and can only be restricted in very limited circumstances.[152] As set out in chapter 2, anti-amendment arguments surrounding the introduction of divorce relied heavily upon the vulnerable position of the homemaker spouse and the fear that divorce would excuse the husband from his spousal financial obligations.[153] As a result a very cautious approach was taken by the legislature when drafting the provisions of the Divorce Act, which duly sanctioned the right to return to court at any time after the granting of a divorce. By awarding a spouse the right to return for further ancillary relief where necessary, irrespective of the length of time that had passed since the granting of the decree, it was reasoned that any negative impact of the introduction of the remedy of divorce and the breadwinner's consequent right to re-marry would be sufficiently eliminated.

In addition to the right to apply to the court at the time of the granting of the decree of divorce or at any time thereafter, the alternative means of returning to court is to do so by

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[150] Applications can be made at the time of the granting of the decree of divorce or at any time thereafter in relation to periodical payments and lump sum orders under section 13, property adjustment orders under section 14, miscellaneous ancillary orders under section 15, financial compensation orders under section 16 and pension adjustment orders under section 17. This right to apply at any time after the granting of the decree does not extend to applications for preliminary relief under sections 11 and 12 of the Divorce Act.

[151] Section 22 permits the court at any time after the granting of the decree of divorce, to vary the following orders: a maintenance pending suit order, a periodical payments order, a secured periodical payments order, a lump sum order if and in so far as it provides for the payment of the lump sum concerned by instalments or requires the payment of any such installments to be secured, a property adjustment order under paragraph (b), (c) or (d) of section 14 (1) in so far as such application is not restricted or excluded pursuant to section 14 (2), an order in respect of the family home under section 15, a financial compensation order, a pension adjustment order under section 17 (2) insofar as such application is not restricted or excluded pursuant to section 17 (26) and a variation order under this section 22.

[152] Limitations can be placed upon the right to make or vary an order at any time after the decree of divorce, e.g. in relation to the family home, section 14(7) states that a property adjustment order cannot be made in relation to a family home if, following the grant of a decree of divorce, either of the spouses concerned, having remarried ordinarily resides there. In relation to pension adjustment orders, section 17(26) provides that an order made under that section could restrict to a specified extent or exclude entirely the right to make an application to vary under section 22 in relation to the order made by the court. Finally, where a lump sum is ordered to be paid in instalments that order cannot subsequently be varied by the courts.

[153] See in particular section 4 of the preceding chapter.

way of application to vary. The right to vary an existing order is clearly stated in section 22 of the Divorce Act and empowers the court on application by either of spouses to vary or discharge an existing order, if it considers it proper to do so having regard to any change in the circumstances of the case and to any new evidence.[154] The orders to which the section can apply are clearly stated in section 22(1) but the basis of the decision to vary any existing order(s) again relies ultimately upon the exercise of judicial discretion.[155] In the course of his judgment in *T v T* Murray J (dissenting), again confirmed the traditional view that the marital family holds an elevated place in Irish society, rejecting any suggestion that a decree of divorce should remove the spousal obligations arising from the original union.

> "The moment a woman and man marry their bond acquires legal status. The relationship once formed, the law steps in and holds the parties to certain obligations and liabilities. Even where a marriage is dissolved by judicial decree the laws of many if not most states require that the divorced spouses continue to respect and fulfil certain obligation deriving from their dissolved marriage for their mutual protection and welfare, usually in a financial nature. This reflects the fact that marriage is in principle intended to be a lifetime commitment and that each spouse has fashioned his or her life on that premise. If the law permitted a spouse to cut himself or herself adrift of a marriage on divorce without any continuing obligation to the former spouse it would undermine the very nature of the marriage contract itself and fail to protect the value to which society has placed on it as an institution."[156]

The absence of a judicial power to achieve a clean break on both separation and divorce was, until recently, accepted by the courts. Admittedly, depending upon the extent of the parties' assets, the court might be in a position to make sufficient financial orders effectively to defeat any post-divorce applications for further orders. However the Divorce Act does not directly or indirectly suggest that the courts should seek to secure a clean financial break between the parties. Thus even in circumstances where both parties

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[154] Section 22(2). Such an application can be made by either of the spouses, or in the case of the death of either of the spouses, a person with a sufficient interest, or in the case of the re-marriage of either of the spouses, by his or her spouse.

[155] See section 5.5 above for a discussion of the limits of the statutory right to vary, and the courts assertion of its own inherent jurisdiction to vary where justice so demands. See further Aylward R, *supra* n. 149 for an illustration of the workings and limitations of section 22 of the Divorce Act.

[156] *Supra* n. 12 per Murray J at 405.

might express a preference for a clean financial break, the existing legislative structure does not permit the court to block absolutely the right of the spouses to return to the court at some time in the future.

In *JD v DD*[157] McGuinness J left little room for doubt on the matter and provided a succinct analysis of the intention of the legislature in this context in enacting both the 1995 and the Divorce Acts. In this case, the respondent had considerable means and sought orders that would introduce an element of finality to the union, thereby preventing the applicant from returning to court for further relief at any time in the future. In delivering the judgment of the High Court, and indicating that a clean financial break was an impossibility on separation, McGuinness J noted that in enacting both Acts, the Oireachtas had intentionally legislated to permit repeated ancillary relief applications so that finality could never be achieved. Thus this seminal case produced a definitive statement regarding the limits placed on the power of the court and the lack of judicial discretion in this regard

> "...the Oireachtas has made it clear that a "clean break" situation is not to be sought and that, if anything, financial finality is virtually to be prevented. Under both the Act of 1995 and the Act of 1996, as pointed out earlier in this judgment, there appears to be no limit on the number of occasions on which a property adjustment order may be sought and granted. The court, in making virtually any order in regard to finance and property on the breakdown of a marriage, is faced with the situation where finality is not and never can be achieved...The statutory policy is, therefore, totally opposed to the concept of the "clean break"."[158]

Interestingly, although determining an application for judicial separation, McGuinness J deemed it within her remit to comment definitively on the impossibility of a clean break both on separation and divorce. Following this judgment, it was widely accepted that a clean break did not constitute an available option and a party to a decree of divorce or indeed separation, could not prevent the other party from making future applications to the court. It is certainly arguable given that on separation the parties do not lose their

[157] *Supra* n. 90.
[158] *Ibid* at 89.

status as spouses and that McGuinness J was justified in seeking to maintain inter-spousal financial ties. However the extension of this policy to those securing a divorce might properly be regarded in the context of *JD v DD* as obiter. Spouses who divorce are no longer legally married, however the Divorce Act does permit ongoing applications, thereby preventing equally, the severing of financial ties.

The viewpoint of McGuinness J was reiterated by Budd J in *PO'D v JO'D*,[159] again in a hearing arising from judicial separation proceedings. Budd J stated that finality is not and never can be achieved, and recognised that:

> "...no agreement on property between the parties can ever be completely final since such finality would be contrary to the policy and provisions of the legislation."[160]

In adhering very closely to the judgment of McGuinness J, he noted her views that this policy

> "...is not only clear on the face of the statutes but was most widely discussed, referred to and advocated in the considerable debate that surrounded the enactment of the divorce legislation."[161]

However the decision of the Supreme Court in *T v T* is evidence of a new willingness on the part of Ireland's highest court to break the ties of financial obligation between the parties to a dissolved marriage. This novel interpretation of the Divorce Act by the Supreme Court, which is difficult to reconcile with the governing statutory provisions, has arguably been facilitated by the broad language and phraseology adopted by the legislature. Alternatively it simply reflects a judicial decision to create and direct policy in an area that has been left unrestricted by the legislature.[162]

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[159] *Supra* n. 93.
[160] *Ibid* at 87.
[161] *Ibid*, quoting from McGuinness J in *JD v DD supra* n. 90 at 89.
[162] For further analysis of the five judgments delivered by the Supreme Court, see further Crowley L "Divorce Law in Ireland – facilitating or frustrating the resolution process?" [2004] 16(1) CFLQ 49.

In *T v T* at first instance, Lavan J considered and ultimately reinforced the views of McGuinness J in relation to the impossibility of a clean break on divorce. He rejected counsel's argument that Irish courts should follow the lead of the English/Welsh cases and consider the implementation of a clean break in big money cases. He confirmed that there was no clean break under Irish divorce law, with the Divorce Act specifically providing for capacity to review several areas of ancillary relief, including maintenance and lump sum awards. Although in the circumstances the applicant was ordered to make a lump sum payment of IR£5 million to the respondent, Lavan J stated that he did "not see the making of a lump sum payment as introducing the 'clean break' concept into Irish law."[163]

Notwithstanding that Lavan J stated that he was making a lump sum order "...without the payment of continuing Maintenance..."[164] and although he failed to make any reference to the respondent's right to re-apply into the future, this right remained and it was open to the respondent to seek a variation of the terms of the lump sum order[165] or to seek further orders, including property adjustment orders[166] or periodic payments orders[167] into the future. The only prohibitions on such subsequent proceedings are where the applicant has re-married or where the respondent spouse was deceased.[168] The fact that the respondent had provided for the applicant on divorce would only constitute one of the criteria to be considered by the court and would not prevent the application being made. This judicial stance confirmed the capacity for future reviews in the event that they were necessary because of inadequate or dishonest disclosures by the respondent,[169] or because of a future

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[163] *Supra* n. 12 at 347.
[164] *Ibid.*
[165] Section 22 permits the variation of, inter alia, lump sum orders made at the time of the decree of divorce.
[166] Section 14 permits the making of an application for a property adjustment order at any time after the granting of a decree of divorce.
[167] Section 13 permits the making of a periodical payments order not only at the time of granting a decree of divorce (as was not ordered in this case), but also at any time thereafter.
[168] The right to apply for a periodical payments order, a financial compensation order, or an order for a payment from a contingency or death-in-service benefit cease upon the death of either spouse or upon the re-marriage of the applicant spouse. However the right to apply for a lump sum order under section 13(c) of the Divorce Act survives the re-marriage of the spouse seeking the order. There is no question of any rights of the applicant spouse ceasing upon the re-marriage of the respondent spouse, however the fact of the re-marriage must be taken into account by the court under section 20(2)(l).
[169] As occurred in *PO'D v JO'D supra* n. 93.

change in the circumstances of the parties.[170] However when the five judgments of the Supreme Court were delivered in *T v T*,[171] it was evident, apart from the dissenting judgment of Murphy J, that the previously indisputable stance regarding the impossibility of a clean break was no longer the absolute view of the Irish judiciary.

Somewhat ironically, given the eventual outcome of the Supreme Court appeal, counsel for both parties presented their arguments premised on the belief that a clean break was not permitted under Irish law. Counsel on behalf of the applicant argued that in ordering the lump sum payment of IR£5 million, Lavan J had failed to take into account the right of the respondent to seek further financial relief, post-divorce. As the right to return to court remained an option for the respondent, such a significant financial order was excessive. Whilst counsel for the respondent equally accepted that the clean break doctrine did not apply in Ireland, he stated that where the resources were sufficiently ample and a relatively large financial order could be made, there was no reason to anticipate future applications by the respondent and the IR£5 million financial payment order should stand.

In his judgment, Keane CJ recognised the distinctions between the divorce regime in Ireland and in England/Wales, but noted that whilst section 20(2)(a)-(i) of the Divorce Act was modelled on the English/Welsh equivalent, it did not include the 1984 statutory amendment which now permits and encourages the court to impose a clean break.[172] In considering this distinction, he noted that in the English/Welsh jurisdiction, a clean break was first judicially imposed in the case of *Minton v Minton*[173] where Lord Scarman expressed the following views in relation to the adoption and application of such a principle:

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[170] As was suggested in *JD v DD supra* n. 90.

[171] The judgments were delivered by a five-judge Supreme Court, thus adding to the weight of the judgments and to their worth as judicial precedents.

[172] Section 25A of the Matrimonial Causes Act 1973, as inserted by section 3 of the Matrimonial and Family Proceedings Act 1984. Section 25(2) of the Matrimonial Causes Act 1973 requires the court to take into account the eight different factors set out in that subsection. Douglas notes that these factors are not ranked in order of priority. She regards them as perhaps the 'obvious' factors that the parties themselves would consider relevant to reaching a decision as to how the financial and property consequences of the divorce should be dealt with. Douglas G *An Introduction to Family Law* (Clarendon) (2nd ed) (2001) at 196.

[173] [1979] AC 593.

> "The law now encourages spouses to avoid bitterness after family breakdown and to settle their money and property problems. An object of the modern law is to encourage the parties to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down. It would be inconsistent with this principle if the court could not make, as between the spouses, a genuinely final order..."[174]

Keane CJ declared his decision, in favour of a clean break, to be based upon the right of the courts under section 22 to vary orders made previously in divorce proceedings. He concentrated upon the wording of section 22, which, although allowing for the variation of lump sum orders, is only exercisable where the original order is to be paid by instalments. Similarly he regarded the right to apply for the *variation* of a pre-existing maintenance order as an unavailable future option for the respondent, as a periodic payments order was not being made at the time of granting the decree. In such circumstances he deemed it appropriate to confirm the payment of a lump sum of IR£5 million to the respondent, a payment he regarded as effectively operating to prevent any future applications.

The contention made by Keane CJ that a clean break is permissible in appropriate cases is defended in the first instance, by the need for certainty and finality in litigation, and by way of support relies upon the judgment of Denham J in *F v F.*[175] Whilst he accepted that there are undoubtedly cases where finality is not possible and as a result the Divorce Act provides scope for the future variation of many orders, he rejected the notion that the intention of the Irish legislature was:

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[174] *Ibid* at 608. This case was heard in October and November 1978, seven years after the applicant had obtained a decree nisi of divorce. Since obtaining that order the parties had resolved matters by way of an agreement, which had been made an order of the court. However notwithstanding the respondent's compliance with the requirements of said orders, the applicant sought further financial relief by way of variation of the earlier orders. Ultimately the House of Lords rejected her petition as the court had approved the earlier financial provision for the applicant. Thus it was found that the lower court had been correct in deciding that the court lacked jurisdiction to vary the consent order, executed by the parties and made an order of the court.

[175] [1995] 2 IR 354. The case was decided in the context of the 1989 Act whereby a property adjustment order could only be made on one occasion only, under section 15 of the 1989 Act.

> "...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".[176]

Keane CJ challenged the previously undisputed views of McGuinness J regarding the imposition of a clean break and specifically disagreed with her observation that financial finality is to be prevented in Irish family law. Whilst recognising that the Irish divorce regime does not go as far as the English/Welsh system in relation to the power to order a clean break, Keane CJ did not accept that the Irish system entirely prevents financial finality. He stated that:

> "On no view could such an outcome be regarded as desirable and I am satisfied that it is most emphatically not mandated by the legislation under consideration."[177]

It appears thus, that the then Chief Justice was motivated by a desire to introduce finality in appropriate cases and regarded this as a suitable exercise of his judicial powers. Given that the pre-enactment debates in favour of not permitting a clean break focussed on the over-riding need to protect the vulnerable spouse, certainly it could be argued that a wife who is in a position to receive a payment of millions of euro can not be regarded as part of that 'vulnerable' category.

Similarly Denham J noted that whilst a clean break divorce "...is not part of the Irish Constitution or legislation", its absence does not exclude the making of a lump sum order. Whilst she agreed with Keane CJ by declaring that the principles of certainty and consistency must apply to family law, she noted that such concepts are subject to the requirement of fairness. The prior ordering of a lump sum payment becomes one of the circumstances to be taken into account on a future application, and in this way may ultimately greatly limit or even exclude any further orders being made by the court.[178] Thus, despite differing approaches, the over-all aims of the presiding judges appear to be

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[176] *T v T supra* n. 12 at 364.
[177] *Ibid* at 365.
[178] *Ibid.* Fennelly J also approved the ordering of a lump sum to bring about financial finality, as it was possible in the particular circumstances. However Murphy J followed the earlier decisions by refusing to accept that the Irish legislature had included or intended to include scope for a clean financial break.

similar. However, as distinct from the quite definite position adopted by Keane CJ, Denham and Fennelly JJ appear more willing to concede the capacity for repeated applications, although noting that such relief would be near impossible to secure.

Notwithstanding the reality that there may be cases where relief will be justifiably sought and granted many years after the granting of the decree of divorce, there is certainly scope for the argument that the absence of even the possibility of applying a clean break solution in certain cases is both unjust and inequitable. It would undoubtedly be foolish to suggest that a clean break resolution would be unsatisfactory in every instance. In a case where the parties have assets sufficient to permit the making of adequate orders necessary to provide for the dependent spouse and/or children into the future, a facility should perhaps exist within the terms of the Divorce Act to allow the courts to have the authority to make such final orders, thereby giving rise to the breaking of the ties of further financial responsibility. Such a possibility would facilitate and encourage the parties to move away from what evidently is an unsuccessful marriage. Where there are sufficient funds, it is hard to see the negatives in the development of such a policy.

Certainly the introduction of a clean break option might improve the predictability of the Irish divorce regime, but it is crucial that it is introduced honestly and deliberately, in an appropriate and democratic manner. Keane CJ does not appear to be aware of the weaknesses that exist in his own reasoning. Ultimately he is of the view that in light of the failure by the legislature to expressly exclude the right to apply a clean break, it must remain permissible:

> "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...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."[179]

[179] *Ibid* at 364.

His assertion that a clean break can be imposed on the basis of the non-inclusion of lump sum orders payable by instalments in section 22, appears to ignore the statutory entitlement of every party to a decree of divorce, to return to court for further relief at any time after the granting of the decree.[180] The fact that it is incumbent upon the respondent to overcome the evidentiary burden regarding a sufficient change in the circumstances, cannot in itself deny the applicant of his/her statutory right to make that application.

Keane CJ defends his insistence that a clean break can be permitted in certain cases, on the basis that despite the constitutional requirements for proper provision and the various statutory provisions permitting applications at the time of the divorce or at any time thereafter, the legislature chose not to expressly exclude the possibility of a clean break. To base the reasoning for the introduction of a right to impose a clean break in divorce proceedings upon a section that has not been included in the terms of the Divorce Act and to create a right to impose a clean break simply because it has not been expressly excluded by the legislature is difficult to defend. If the logic proffered by Keane CJ is to be followed, the failure on the part of the legislature expressly to exclude the power to vary lump sum orders paid by instalments, could equally permit the omission to be ignored, ultimately allowing the orders to be varied.

Notwithstanding the position adopted by Keane CJ in the course of his judgment, he claims to recognise the limitations of judicial-led policy and in particular judicial law-making, in light of Article 15.2.1 of the Irish Constitution which limits to the Oireachtas, the power to make law.[181] When considering this, he acknowledges that;

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[180] Whilst the returning applicant may be prevented from varying a lump sum order payable by instalments, she remains capable of applying for other orders, including property adjustment orders, at any time after the decree of divorce is granted and is not prevented from so applying even in circumstances where the court has already made one or more property adjustment orders on divorce.

[181] Article 15.2.1 of the Irish Constitution declares that the "sole and exclusive power of making laws for the State is hereby vested in the Oireachtas..." The Oireachtas comprises the two houses of the legislature; the Dail and the Seanad and the President of Ireland.

> "It is of course beyond argument that the Irish legislation precludes the courts from giving the same effect as does the English legislation to the "clean break" principle."[182]

Keane CJ seems determined to introduce the policy of the possibility of a clean break into Irish divorce law and whatever the shortcomings of his arguments, perhaps he should be applauded, given the legislature's avoidance of any such predictability or finality in its regulatory framework.

6.4 Protection of the homemaker

It has already been established that the protection of the homemaker has been one of the unwavering focuses of the Irish regulatory process on divorce. Notwithstanding the creation of powerful judicial armoury to protect the vulnerable homemaker, the interpretation and application of the relevant provisions have proven unclear. Thus from a protective starting position, it has been left to the judiciary to determine the effect of the provisions and more particularly to resolve the conflicting arguments regarding the impact of the legislative approach.

In the aforementioned judicial separation case of *JD v DD* McGuinness J was required to determine what might constitute suitable financial provision for a wife where her husband had amassed relatively substantial wealth. It is immediately apparent from her judgment that McGuinness J regarded the 12 statutory factors included in section 16(2) as failing to deal comprehensively with the issue of spousal support. Despite the combination of the statutory guidelines and the over-riding judicial discretion, McGuinness J was required to raise the following questions:

(i) In these cases should the court seek simply to provide for actual day-to-day needs of the dependent spouse or should it endeavour to divide the family assets in a more equal way by the operation of a lump sum and/or property adjustment order?

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[182] *Supra* n. 12 at 363.

(ii) In such a division of the family assets should the "stay at home" wife be treated differently from the wife who works outside the home?

McGuinness J lamented the absence of decided case law on these issues since the enactment of the 1989 Act, noting that even where written judgments were delivered, each case had been dealt with on its own facts. The approach of the legislature left these key issues unanswered and placed responsibility for the development of policy squarely at the feet of the Irish judiciary.

O'Donovan J in *CO'R v MO'R*[183] considered the criteria to be applied by the court when deciding the appropriate orders to be made in respect of a dependent spouse on an application for judicial separation. In making orders for ancillary relief, and in particular when considering the orders to be made in relation to the family home, he noted that the duty on the court was to have regard to the welfare of the children and to the relative circumstances of the spouses, such that the ancillary relief would enable them to follow an appropriate lifestyle having regard to their means and prospects, and their lifestyle while living together, and having regard to their ages and the length of the marriage.[184] In the circumstances, he stopped short of transferring ownership of the home to the custodial mother:

> "...given that the marriage of the husband and wife only lasted the three and a half years, that in my view, both of them contributed to its breakdown, that, while, undoubtedly, Mrs. O'R made a major contribution to the marriage, while it subsisted, there does not appear to have been any financial input on her part and that both parties are relatively young, I think that it would be a grave injustice to transfer the family home to Mrs. O'R."

In *PO'D v JO'D* Budd J, in ordering the equal division of the available assets between the breadwinner spouse and the applicant homemaker wife, concluded that,

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[183] [2000] IEHC 66.

[184] In light of the circumstances before the court, O'Donovan J ordered that the applicant should have a right of exclusive residence in the family home until such time as the children completed their full-time education.

> "...the parties both contributed to a partnership with regard to the building up of the property portfolio and the justice of the situation requires that a half a share of the properties known at present should be transferred into the Applicant's name."[185]

Echoing this approach, Dunne J in *PB v PF*[186] ordered the 60/40 division in favour of the wife, of the proceeds of the sale of the marital property notwithstanding the greater financial contributions of the respondent to the acquisition of the property, noting that "The parties embarked on a marriage together and not a property transaction."[187]

In the financially significant case of *T v T* Keane CJ recognised that where one spouse is working and the other spouse has taken on the role of homemaker, section 20(2)(f),[188] which relates to contributions in the home environment, must be regarded as a particularly relevant factor. In this regard Denham J in the same case was of the view that there exists a requirement on the court to take into account the home-based contributions, such recognition being in line with the acknowledgment in the Irish Constitution of the work done by women in the home:

> "In this case the learned trial judge assessed correctly the family role of the respondent and gave a significant weighting for her time spent in the home. A long lasting marriage, especially in the primary childbearing and rearing years of a woman's life, carries significant weight, especially if the woman has been the major home and family carer."[189]

In all five judgments in *T v T*, section 20(2)(g),[190] which deals with the impact of spousal sacrifices on career opportunities, was emphasised in light of the sacrifices made by the

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[185] *Supra* n. 93 at 91.
[186] Unreported High Court 4/12/2008.
[187] *Ibid* at 13.
[188] Section 20(2)(f) requires the court to have regard to the contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family.
[189] *Supra* n. 12 at 382.
[190] Section 20(2)(g) requires the court to have regard to the effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each during the period when they lived with one another and, in particular, the degree to which the future earning capacity of a spouse is impaired by reason of that spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family.

applicant in respect of her own medical career. Keane CJ supported the position adopted by Lord Nicholls in *White v White*[191] that the entitlements of a homemaker could not be confined to her future reasonable requirements simply because of the non-financial nature of her marital contributions.[192] Alternatively Murray J grounded his support for the non-discriminatory treatment of differing spousal contributions in Article 41.2.1 of the Constitution and the evident state support for the role of the homemaker and its importance to the common good. However as is evident from the final orders made in *T v T* and the discussion above at section 3.4 regarding the use of formulae to calculate proper provision, the Supreme Court ultimately ordered (approximately) a 65:35 split of the assets in favour of the breadwinner spouse. Later in *K v K*, O'Neill J, commenting on this approach, and notwithstanding the extent of the homemaker sacrifices and contributions, supported the view of Keane CJ that the Divorce Act does not mandate an equal division of assets in an "ample resources" case.[193] However he regarded it as clear from the judgments of Keane CJ, Denham, Fennelly and Murray JJ "...that the role of the dependent homemaker and child carer, usually the wife is not to be disadvantaged in the distribution of assets by reason of having a non-economic role."[194]

O'Neill J presented an interesting analysis of his perception of the yardstick of equality in the English courts, regarding it:

> "...not as a starting point or as the presumptive basis for the distribution of assets but as a device to guard against a historical bias, favouring the breadwinner as distinct from the home maker in the distribution of assets, in essence a mental exercise or discipline to be observed to ensure that the value of the role of homemaker and child carer, particularly in a long marriage, is given equal weight to that of the role of the breadwinner."[195]

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[191] *Supra* n. 142.
[192] Notwithstanding the willingness of Keane CJ to quote favourably from *White v White*, it was more generally accepted that the Irish regulatory approach differs from the English/Welsh approach. Despite calling for the recognition of differing but equal spousal contributions, Fennelly J did not regard this as introducing or requiring a yardstick of equality of division.
[193] *Supra* n. 15 at 349-350.
[194] *Ibid.*
[195] *Ibid* at 349.

In practical terms, O'Neill J suggested that the use of a yardstick only becomes relevant after the court has considered the entirety of the section 20(2) factors and reached a tentative conclusion, which "would then be measured against the yardstick in question, to ensure that no bias or invidious discrimination has crept in because the wife has adopted the traditional role of homemaker".[196]

Conversely in *N v N*[197] following a lengthy marriage as homemaker with two children, the applicant sought a 50% share of the family farm, which had been inherited by the respondent. Abbott J found in her favour, stating that in complying with his obligation to ensure that proper provision is made for the parties prior to granting the decree of divorce, the court should

> "...in principle, attribute the same value to the contribution of a spouse who works primarily in the home as it does to that of a spouse who works primarily outside the home as the principal earner."[198]

Consequently he was of the view that

> "...by reason of the duration of her marriage and the length of time which she lived with the Respondent the Applicant is entitled to be treated on the basis of a full partnership with the Respondent in relation to the income earning capacity of the family."[199]

He regarded the applicant's continuous work in the farm and in the home as an equal contribution on her part meaning it would be unjust to deal with her on any basis other than equality, notwithstanding that the farm had been inherited and thus entirely provided by the respondent.

More recently, in an appeal concerning costs and the implications of currency fluctuations, the Supreme Court emphasised the importance of the dependent wife being

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[196] *Ibid.*
[197] *Supra* n. 126.
[198] *Ibid* at 12.
[199] *Ibid.*

provided for to the extent of allowing her to secure a home.[200] McCracken J supported the view of the trial judge that "providing for the purchase of a house was a proper provision to be made for the wife".[201] Consequently the husband did not succeed in his application to reduce the amount of the lump sum order, given the decline in the value of the dollar and the added cost this required him to bear. This fundamental requirement of securing a property for the dependent wife was reiterated by Sheehan J in *MF v AF*:[202]

> "Taking all the circumstances of this case into account the interests of justice require at the very least that the wife be enabled to purchase a property...Accordingly, the net proceeds of the sale of the land should be divided in such a way that the wife's share of these proceeds exceeds that of her husband's share by €115,000."[203]

Moore has very briefly considered the valuation of homemaker contributions in divorce proceedings, concluding that such contributions are devalued by the courts.[204] Her empirical research is based on twelve High Court rulings, by definition involving a couple or at least individuals of high net worth and thus is of limited scope and value.[205] However notwithstanding the limitations of the research it is interesting to note Moore's observations that "equality ideals have resulted in judicial pronouncements advocating equality of treatment of the partners upon marriage breakdown".[206] Similarly, Buckley has observed that although the individual spousal arrangements and activities in the course of the marriage are not highlighted by the courts in determining the orders to be made, the majority of the financial relief orders are made in favour of the wife.[207] Thus whatever the view of the nature and merit of the inter marriage contributions, the willingness to identify an end goal of equality must be applauded as at least evidence of policy-driven outcomes. In the context of a relative dearth of judicially-developed policy,

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[200] *MK v JK*, supra n. 140.
[201] *Ibid.*
[202] Unreported High Court 23/5/2008.
[203] *Ibid* at 5,6.
[204] Moore E "The significance of "home-maker" contributions upon divorce" [2007] 10(1) IJFL 15.
[205] In addition, given the distinctions identified elsewhere by Buckley between outcomes in consensual versus contested cases, the lack of a consideration of settled outcomes further weakens the probative value of the work.
[206] *Ibid.*
[207] *Supra* n. 8 at 63-66.

the importance of protecting the homemaker can be identified as one of the few areas of policy statement and development embraced by the Irish judiciary to date.

6.5 Conduct

When calculating proper provision in the circumstances, the court is required to have regard to the conduct of each of the spouses, "if that conduct is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it".[208] The legislature does not provide any further explanation or examples of what might constitute such conduct. Dissatisfaction with the legislative delegation of responsibility in respect of this "fundamental term" was evident in the course of the parliamentary debates.[209] The issue was addressed in *T v T* and the Supreme Court ultimately determined that conduct should only influence the court's determination of asset division where such conduct can be regarded as "obvious and gross". The marriage in question was described in evidence as turbulent, and the applicant admitted to a number of extra-marital affairs over a period of time. In addition, at the time of the hearing, the applicant's new partner of two years had recently give birth to their child. Quoting from the judgment of Lord Denning MR in *Wachtel v Watchtel*,[210] Keane CJ agreed that the court should not vary its orders simply because of guilt or the apportionment of blame. Such a punitive approach would be inappropriate as it would in effect cause the imposition of a fine for supposed misbehaviour in the course of an unhappy life. Thus, on the facts, Keane CJ was not willing to regard the adulterous behaviour of Mr T as "gross and obvious".[211] Similarly the court in *C v C*[212] refused to classify the adulterous conduct of the applicant husband as "gross and obvious" notwithstanding the apparent "huge upset" caused to the respondent and children of the marriage. With reference to the dicta of Keane CJ, O'Higgins J concluded that "the actions of the husband at the time of his infidelity do not

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[208] Section 20(2)(i).
[209] See section 1.3 above.
[210], [1973] Fam. 72 at 90.
[211] *Supra* n. 12 at 370. In *T v T*, the wife's share of the pension was increased by 5% to 56% as recompense for the adulterous misconduct of the husband, but this was reversed by the Supreme Court, regarding such conduct as not so "gross and obvious" as to influence the ancillary relief orders to be made.
[212] *Supra* n. 13.

come within the type of conduct – "obvious and gross" which would justify the implication of section 20(2)(i)."

Conversely in *R v R*,[213] in the context of judicial separation proceedings, McMahon J, relying upon the ratio in *T v T* concerning conduct, did consider the nature and extent of the respondent's behaviour in the course of the marriage sufficiently bad to justify influencing the orders to be made. Despite doubts concerning certain elements of the evidence proffered by the applicant, he was satisfied that:

> "...there was sustained verbal abuse of a sexualised nature addressed to the applicant over the years in the presence of the children which was meant to, and did, seriously demean her. There was also some physical violence over the years."[214]

Consequently McMahon J regarded the respondent's conduct as "obvious and gross" and thus declared that it would be unjust to disregard it when contemplating his obligations under section 16 of the 1995 Act. He did clarify that such a finding in respect of the conduct of one of the parties "does not mean that a person against whom such a finding is made has no rights, or that he or she is to be punished in some analogous fashion as a criminal is treated in our criminal justice system."[215] Rather, he emphasised that once the relevance of the conduct is established, it is then another factor that the court is required to have regard to in determining the issue of adequate and reasonable provision.[216]

6.6 Consequences of current approach to policy aims

The weaknesses in the current Irish divorce regime appear to derive from the creation of a statutory regime which has failed to identify over-riding policy aims and has accorded

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[213] [2006] 2 ILRM 467.
[214] *Ibid* at 475.
[215] *Ibid.*
[216] *Ibid.* In the course of his judgment, McMahon J stated that the financial relief orders made in favour of the applicant wife, including a 60% share in the proceeds of sale of the family home and an ongoing maintenance order of €150 per week reflected his attitude towards the conduct of the respondent.

excessive and effectively unfettered powers to the presiding judiciary.[217] Thus notwithstanding the objective merits of judicial discretion in this context, under Irish law, such powers are currently exercised within a policy vacuum. The capacity, and perhaps need, for individuals to be lawfully empowered to avoid this regulatory system has recently received significant attention in Ireland in the context of the validity and enforceability of pre-nuptial agreements. In December 2006 the then Minister for Justice Equality and Law Reform established the Study Group on Pre-Nuptial Agreements which was tasked with the function of reporting on the law governing such agreements and to propose any necessary reforms. Given the state's obligation to protect the family and to ensure that proper provision is secured on divorce, the Group recommended that whilst they could not be automatically binding, a degree of recognition should be afforded to such agreements, to be considered in light of other relevant factors in divorce and ancillary relief proceedings.[218] Thus the Group was of the view that the common good would be best served if the validity and effect of a pre-nuptial agreement could be determined by the courts in each individual case.[219] The potential benefits of supporting this means of private ordering of financial affairs were recognised, including the likely increased predictability and reduced costs of the process.[220]

Ultimately the Study Group made a series of recommendations to the Minster as to how the proposed role for pre-nuptial agreements might best be regulated under Irish law and

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[217] The weaknesses of this regulatory approach are further compounded by the dearth of reported judgments in this area. Ward has recognised this limitation, noting in 2006 that "In the near 9 years since the availability of divorce, little instructive case-law has been handed down", Ward P "Ancillary Reliefs on Divorce: The Emerging Jurisprudence from the Superior Courts" *The International Survey of Family Law* (2006 edition) ed Bainham A at 245. Similarly, Flockton in outlining the aim and scope of her family law reporting project, concluded that given the workings of the *in camera* rule and the failure on the part of the judiciary to properly explain case outcomes, she concludes that "family law is shrouded in secrecy". Flockton S "The Family Law Reporting Project" [2003] 6(1) IJFL 17 at 17.

[218] The *Report of the Study Group on Pre-Nuptial Agreements* was published in April 2007; *supra* n. 83. The Report considered the following issues; constitutional considerations; current legal status of pre-nuptial agreements in Ireland, the legal Status of pre-nuptial agreements in other jurisdictions; public policy considerations; the common good; private ordering of financial affairs; and arguments against pre-nuptial agreements. The recommendations of the Group are set out in chapters 9-12 of the Report.

[219] Ibid at chapter 6.

[220] However it was also recognised that invariably couples may embark on litigation on the preliminary issue of contesting the enforceability of a pre-nuptial agreement in advance of seeking ancillary relief orders and thus in certain instances might cause an increase in costs overall.

made recommendations for legislative reform.[221] The Study Group recommended that express statutory provision be made for pre-nuptial agreements allowing them to be scrutinised by the court in separation and divorce proceedings in much the same way as separation agreements are currently dealt with. However given the Group's view that pre-nuptial agreements are subject to different considerations when compared to separation agreements, it was suggested that a discrete provision be enacted to require a court to have regard to these agreements.[222] Although the safeguards mandated by Irish divorce laws operate to prevent parties from definitively determining the financial terms of their divorce, the proposed legislative reforms relating to the recognition of pre-nuptial agreements would give validity and some weight to private negotiations and positively recognise the benefits of private autonomy in marital disputes. Whilst the government's motives for raising this issue in December 2006 may have been mixed, the fact that the legal status of such agreements was debated and reviewed hints at a growing awareness of the goals of predictability and fairness; goals that might be perceived as currently absent from the system of regulating divorce and ancillary relief under Irish law.

7 Conclusion

The Irish legislature has deliberately eschewed a prescriptive regulatory model in favour of an entirely discretion-based regime. Equally the Irish judiciary has declined to interpret the provisions of the Divorce Act in a policy-based manner. Rather, for the most part they have elected to employ the various factors so that each case is given individualised treatment before the courts. It is evident from the judgments considered, particularly those delivered in *T v T*, that there is no hierarchy of factors and the factors that will influence the court's determination of what constitutes proper provision in the circumstances of any case will depend upon the facts of that case. Thus whilst the

[221] It now appears likely that these recommendations will be included in a draft Family Law Bill, due to be published in mid-2010.

[222] In addition, the Group recommended that procedural safeguards be imposed as a matter of law and thus any governing legislation should include a definition of a pre-nuptial agreement such that an enforceable agreement must be; in writing, signed and witnessed; made after each party has received separate legal advice; made with disclosure of financial information; and made not less than 28 days before the intended marriage.

legislature has accorded substantial discretion to the judiciary in relation to the determination of what constitutes proper provision, rather than attempting to structure such powers, the judiciary have embraced this discretion-based divorce regime. Although Denham J has in two different cases espoused the importance of certainty and finality in family law, she and her colleagues prefer to ignore the need for certainty as regards predicting the outcome of a case, and have elected to decide each case individually, without any great reliance upon existing legislative guidelines or judicial precedents.

Most recently, Abbott J in *JC v MC*[223] considered what he regards as the "Keane C.J and McGuinness J. dichotomy that falls to be considered in the clean break debate."[224] Equally he recognised the:

> "...spectrum of authority between the Hardiman J. decision in *WA v., MA* and Finlay Geoghegan J. in *G v. G* and the *K. v K.* [2003] 1 I.R. 3 decision where these cases defined the spectrum going from black to white, and the choices in between depending on the circumstances...".

Whilst he recognised that considerations of fairness and justice might be best suited to allow each case to be determined on its facts, he ultimately regards such an approach as "a far from satisfactory view from the public policy perspective."[225] Thus he concluded that whilst the Divorce Act and the Constitutional provisions neither admit nor require the courts to provide a clean break solution, he suggests that they may in certain cases seek to do so. He reaches this conclusion with reference to what he regards as the "broad scheme" of the governing provisions and the lack of any legislative demand or expectation of transparency or judicial accountability. As a result the developing jurisprudence in Irish divorce law is neither coherent nor predictable. Irrespective of the type of cases that come before the courts in the future, it is unfortunately apparent that it has become acceptable for the provisions of the Divorce Act to be applied in an ad hoc,

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[223] *Supra* n. 38.
[224] *Ibid* at 20.
[225] *Ibid.*

inconsistent manner with little attempt being made to establish a coherent body of case law.

Where strict legislatively imposed rules are avoided in favour of judicial discretion, that discretion must be directed if it is to form the basis of a workable and effective system, as discussed and outlined in chapter one. The vast distinctions uncovered by Buckley in her empirical research, between the terms of negotiated settlements and what the Irish judiciary perceive to be the best approach to asset division, suggests that what is judicially regarded as required under the governing provisions may differ significantly from what is workable within Irish society and in light of the circumstances of divorcing spouses.[226] Buckley queries whether it is simply a case of "incorrect guesswork" on the part of practitioners advising on divorce settlements or whether the "financial packages" negotiated by the parties better reflect what the parties actually need or would prefer by way of over-all system.[227] Unfortunately the Irish judiciary, much like the Irish legislature has largely eschewed any responsibility for policy-making and instead, has utilised discretion generously in individual cases. Thus although the issues of the homemaker, clean break and conduct have received some judicial attention, it is difficult to identify any significant and consistent policy direction to date.

The three benchmarks identified in the opening chapter as an effective test for ascertaining the success of individual approaches to regulation are worth considering in light of the approach of the Irish law-makers to date. Certainly the entire spectrum of democratic approaches has been utilised, with absolute democratic principles underpinning the referendum of the people that sanctioned the introduction of divorce, whilst the laws that give effect to this change depend greatly upon subjective judicial determinations. As regards the ideal of a predictable regime, the existing regulatory structure is not structured to encourage certainty, neither in its enactment nor its practice. The combination of the extensive breadth of judicial powers to make whatever orders are deemed necessary, coupled with the legislative decision neither to define nor limit the

[226] *Supra* n. 8 at 77.
[227] *Ibid.*

concept of marital property has resulted in an absence of parameters and thus predictability in the system. Further, it has become evident that the judiciary have not bridged this gap through effective law or policy directions. Finally as regards fairness, whilst the Irish legislature might argue that the avoidance of strict rules facilitates the delivery of individualised justice and thus ultimately promises a greater likelihood of a fair outcome for the parties involved, equally it might be argued that such an open-ended system of regulation, lacking in principle and purpose might be excessively unbounded and simply operate to facilitate unfairness.

Evidently, a discretion-based process is not the overriding difficulty; a rule based system is simply more likely to be based upon pre-considered motives, such an approach forces the legislature to identify in advance, the outcome of an application of those rules. A discretion-based system has the potential to be entirely effective and perhaps more equitable, once operated within defined parameters. What these parameters should be and who should be responsible for their creation and interpretation is the more difficult question, one that might be assisted by reference to contrasting approaches of other jurisdictions. The next three chapters will outline and critically assess alternative approaches as adopted by the jurisdictions of California, Scotland and New Zealand.

Chapter 4 - Equal Division of Community Property under Californian Divorce Law

1 Introduction

The manner in which the Californian legislature has approached the issue of asset distribution upon divorce is distinctively different from both Ireland and the other jurisdictions studied in the course of this work. First, the Californian legislature has adopted and created a system that is almost entirely dependent upon rule-based governance. This removes the capacity for subjective judicial adjudication and evaluation of the rights of the parties in the individual circumstances. Secondly the application of the rule-based approach requires an equal division of the marital property. In essence the Californian regime vests its law-making powers in the legislature, and for the most part the judiciary has the more rudimentary task of simply applying the governing rules. Thus very definite positions have been taken on the best approach to governance and the form such governance should take. In the context of this thesis, the regulatory approach adopted by Californian law-makers will be assessed with reference to the identified benchmarks of democracy, fairness and predictability. On the face of it, it is arguable that California's system is democratic, in that it is based on legislatively drafted rules; is predictable insofar as property division is concerned and is fair in that all cases are treated equally and all marital property is divided equally. However this chapter will ultimately demonstrate that notwithstanding the apparent merits of the system in place, the lack of clearly articulated policy goals causes the Californian model to fall short of achieving the identified benchmarks. In addition, in analysing this rule of equal division and its impact in practice, this chapter will provide an illustration of the regulation of divorce from the rule-based end of the regulatory continuum and will serve as a very worthwhile comparator in later attempts to critique and reform the discretion-based Irish divorce law regime.

2 History of Californian asset distribution laws

The division of property under Californian divorce law, judicially or by agreement, is governed by the provisions of the Family Law Act 1970 which was re-codified as the California Family Code, effective from 1 Jan 1994.[1] The statutory regime contains important reforms from the pre-1970 position, including a requirement that property earned or gained in the course of the marriage is regarded as community property and that such community property is divided equally without regard to the circumstances of the marriage or the reasons for its dissolution.[2]

California's current community property system has historical roots. Its 1849 Constitution affirmed its continuation of Spanish-Mexican community property principles.[3] However under the pre-1970 position, the Californian courts were entitled to avoid the equal division of the matrimonial property where the divorce decree was granted on grounds of extreme cruelty, adultery or incurable insanity.[4] As almost all divorces were granted under one of these three grounds, most cases resulted in an unequal division of the matrimonial property. It was confirmed in *Tipton v Tipton*[5] that the Californian courts had discretion to assign more than one-half of the community property to an innocent spouse, if the other spouse was found guilty of adultery or cruelty. The decision of the court regarding the unequal division was influenced by the statutory obligation to divide the property in such a manner "as the Court, from all the

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[1] The statutory references in this work are cited from the California Family Code.
[2] Since the enactment of the Family Law Act 1970, there has been little reform of the substantive provisions, with the rule of equal division remaining the bedrock of the Californian regulatory approach. It will be evident from this research that the case law since 1970 equally has not generated any particularly radical policy developments. Thus the materials relied upon in the course of this analysis include both current caselaw and commentary and judicial pronouncements and academic analysis from the period immediately after the enactment of the 1970s reforms, with many such longstanding decisions remaining valid today. Equally, whilst the research considering the economic effect of the equal division rule commences with the seminal work of Lenore Weitzman, published in 1985, more recent empirical research has also been identified, which reflects the shift in spousal roles from the more traditional breadwinner/homemaker, gender-based division of responsibilities to contemporary norms where often both spouses work outside the home, typically generating an independent income for each spouse.
[3] See further McMurray OK "The Beginnings of the Community Property System in California and the Adoption of the Common Law" (1914-1915) 3 Cal. L. Rev. 359.
[4] California Code Sec 138.
[5] (1930) 209 Cal. 443 p.65

facts of the case and the condition of the parties, may deem just."[6] Thus there existed a financial incentive to identify and allocate blame for the marriage break-up.

The division of matrimonial assets upon divorce was one of four issues referred to the California Governor's Commission on the Family, established in 1966 as part of substantial reform efforts at that time.[7] The Commission recognised that proof of spousal fault on divorce acted as a powerful determinant of the division of community property and called for the close ties to be eliminated.[8] In essence the Commission sought to "establish procedures for the handling of marital breakdown which [will] permit the Family Court to make a full and proper inquiry into the real problems of the family", as distinct from merely focussing on the allocation of blame.[9] Whilst in the body of its report the Commission regarded an equal division of the community assets to be "desirable", it equally recognised that "an absolutely equal division is impracticable, if not impossible, in many cases".[10] The Report cited examples of such circumstances, including where there is only one principal asset, the division of which would most likely eliminate the whole, where the assets are miniscule, and finally where equal division would fail sufficiently to provide for the wife and children. Given the distinct possibility of such circumstances arising, the Commission recommended a regulatory approach premised upon a general presumption of equal division with a co-existing, wide scope for the exercise of judicial discretion.[11]

> "We believe that as it examines the total picture of the family before it, the Family Court must be able to take account of these and similar contingencies. We therefore recommend that the law provide for division of the community and quasi-community property equally between the parties where possible, except that if the Court should

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[6] *Ibid.*
[7] *Report of the Governor's Commission on the Family (California)* (1966) submitted to Edmund Brown, Governor of California on 15 December 1966.
[8] *Ibid* at 1-2.
[9] *Ibid* at 2. The Commission sought to "minimize the swords-point hostility of the parties rather than exacerbate it [and thereby] eliminate the element of fault as a controlling factor in the division of marital property, alimony and child support."
[10] *Ibid* at 45.
[11] *Ibid* at 5-16.

find that the economic circumstances of the parties require it, an unequal division may be ordered."[12]

It was suggested that the Commission's proposal would operate on the basis of a judicial consideration of the economic circumstances of the individual parties in each case.[13] Ultimately however, this proposal was not adopted by the Californian legislature. Rather the suggested presumption of equal division was enacted as a rule, with much less scope for individualised discretion-based justice. It has been suggested that in establishing a rule-based system of equal division of community property, the new regime sought to "reduce the acrimony and bitterness surrounding divorce proceedings"[14] with reformers hoping "to create conditions for more rational, equitable, and uniform settlements."[15]

3 California Family Code – current regulatory framework

3.1 Introduction

Contrary to the more liberal proposals of the Governor's Commission, the Californian legislature ultimately adopted a rule-based equal division regime with very limited scope for avoidance of that rule. The California Family Code deals primarily with two fundamental issues, the definition and categorisation of the property at issue and the manner in which that property is to be divided. The statutory rules mandating equal division of community property work in tandem with complementary legislative presumptions as to both the status of property and the intentions of the parties as regards that status. When the equal division rule was enacted in 1970, it related to "the community estate of the parties", as defined below in section 3.2. Thus the court is expected to divide equally, property earned or gained during the course of the marriage, such claim arising from the fact of the marriage, as distinct from a test of legal title or direct monetary contributions.

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[12] *Ibid* at 46.
[13] *Ibid* at 45-46.
[14] Dixon R and Weitzman L "Evaluating the Impact of No-Fault Divorce in California" (1980) 29 Family Relations 3 297 at 297-298.
[15] *Ibid* at 302.

3.2 Status of contested property

The governing provisions regarding classification of property, seek to provide definitive answers to the property status and distribution issues that arise on the dissolution of a marital union. In the event of a dispute, the Californian community property regime relies upon a judicial capacity to delineate the property of the parties into separate and community property in order for its divisibility to be determined. However there are ongoing criticisms of the effects of the definition as stated, for example Parkman has suggested that the lack of a clear understanding of property has given rise to much confusion as to the status of earning capacity and professional goodwill.[16]

Section 760 of the California Family Code defines community property as;

> "Except as otherwise provided by statute, all property, real or personal wherever situated, acquired by a person during the marriage while domiciled in this state is community property".[17]

The community estate is typically comprised assets and liabilities, thus requiring the court to distribute equally the net community assets of the union, i.e. after the deduction of community liabilities.[18] Attempts privately to agree the status of property outside the rules of the statutory provisions are permitted by legislation, but the comprehensive approach of the Californian legislature includes the incorporation of statutory

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[16] Parkman A "Bringing Consistency to the Financial Arrangements on Divorce" (1998/1999) 87 Ky LJ 51 at 64.

[17] In addition section 2581 provides that all property held in joint names is presumed to be community property, absent a written agreement to the contrary. Further improvements and expansions of the concept of community property, typically benefitting the homemaker spouse, were judicially-driven and over time gave rise to the inclusion of pensions, military payments post-retirement and severance/retirement payments.

[18] *In re Marriage of Harrington* (App. 2 Dist. 1992) 8 Cal. Rptr. 2d 631, 6 Cal. App. 4th 1847. In the earlier decision of *In re Marriage of Barnert* (1978) 149 Cal. Rptr. 616, 85 Cal. App. 3d 413, the court had suggested a similar formula to comply with the statutory requirement of equal division; that the trial court is required to add all community property assets, deduct all community obligations and divide residual assets equally.

requirements as to the form such an agreement must take. The strong presumption in favour of community ownership of property acquired during the marriage prevents reliance upon an oral statement.[19]

Section 770(a) defines separate property as follows;

> "Separate property of a married person includes all of the following:
> (1) All property owned by the person before the marriage.
> (2) All property acquired by the person after marriage, by gift, bequest, devise or descent
> (3) The rents, issues and profits of the property described in this section."

Given the separate status of such property, section 770(b) confirms the right of a married person to convey such property without the consent of his/her spouse.

In the light of the almost indisputable equal division mandated by the governing legislation, the central issue in a divorce application typically relates to the status of the available property, the 'owner' invariably seeking to categorise it as separate property in order to avoid the imposition of the equal division rule.[20] Whilst Krauskopf recognises the unavoidable fact of frequent disputes as to what constitutes community property, she still advocates the benefits of automatic spousal entitlements in respect of community property, regarding such a system as less contentious in practice.[21] In addition she promotes the capacity of such a system to ensure a fair division of marital assets, premised upon the equalising of spousal contributions to the marriage, whatever their form.[22]

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[19] See further section 8 below, for a consideration of the role of private agreements within the Californian divorce regime.
[20] The very significant impact of the choice of approach to defining the scope of the property available for distribution will be considered in the conclusion of this work, as a key, often underestimated influence on the outcome of a regulatory process.
[21] Krauskopf JM "Theories of Property Division/Spousal support: Searching for Solutions to the Mystery", Family Law Quarterly Vol XXIII No 2 Summer 1989 253, 259.
[22] *Ibid.*

Kornhauser suggests that the adoption of community property based divorce laws by some US states, including California, reflects an articulation of the partnership model, which is reliant on the notion of the community of marriage.[23] The statutory definition of community property which presumes a joint and equal ownership of gains from spousal endeavours reflects the view of marriage as a partnership "to which each spouse makes different but equally valuable contributions".[24] Krauskopf regards this approach as reflecting the reformers' desire to authorise a right to property on a basis other than title.[25] She notes that whilst

> "...much litigation has questioned what benefits should be included as property, few debated the right to share in whatever gains the courts finally classed as property. The legislation clearly recognizes a right or entitlement to share in property because of contributions to the marriage."[26]

Californian divorce laws rely upon this presumption of equal contribution as the basis for the equal division of marital property.[27]

Ultimately Kahn-Freud has identified the importance of the marital community property system, suggesting that a system not relying upon the rule or even a presumption of community property is unimaginable:

> "Since in our societies, marriage is the basis for the normal family, it follows that marriage must have a profound effect on the property of

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[23] Kornhauser ME "Theory versus reality: The Partnership Model of Marriage in Family and Income Tax Law" 69 Temp. L. Rev. 1413. For a contrasting view, see Dagan H and Heller M "The Liberal Commons" 110 Yale L.J. 549 (2001) at 586-87.

[24] Smith J "Why the Community Property System fails Divorced Women and Children" 7 (1998) Tex Journal of Women and the Law 135 at 135,136.

[25] *Supra* n. 21.

[26] *Ibid.*

[27] A related issue is the mutual rights of spouses to control, manage and dispose of community property, particularly prior to the granting of the divorce. Legislative amendment in 1975 provided for the mutual right of *both* spouses to manage community property during the course of the marriage. [Act of Oct 1 1973, ch. 987, 1973 – codified at California Family Code 751] The decision to extend the rights of both spouses to use and manage the community property in the course of the marriage further confirms the view of marriage as a partnership. It seems only logical that the rights of a spouse arising from his/her status as a spouse should equally exist in the course of the marriage and not require the breakdown of that marriage for those rights to become actionable.

> the spouses...It is difficult to imagine any system of law which, in its regulation of the impact of marriage on property, could completely ignore these elementary social facts, *i.e.* confine itself to a strict rule of "separation of property" in the sense that marriage has no effect on the property of the spouses at all."[28]

4 Equal division

4.1 Introduction

The reform of Californian divorce law, culminating in the enactment of the Family Law Act 1970, was focussed primarily upon two central issues. The first major achievement of the reforms was the elimination of fault as a necessary proof, in turn eliminating much of the acrimony and hostility attached to many divorce applications. The second reform related to the economic consequences of a divorce order, with the court now mandated to order an equal division of the parties' community property.[29] Kay suggests that those pushing the reform of the Californian process at that time did not originally include the achievement of equality amongst its stated goals.[30] Rather she suggests the main focus of the reform lobbyists, particularly the feminist movement, was to secure no-fault divorce.[31] In California, in the late 1960's, the historic reliance upon fault as a basis for determining the division of matrimonial property settlements was increasingly criticised and was regarded as "outmoded and irrelevant, often producing cruel and unworkable results".[32] In order to reduce the time and expense being spent on proving the wrongdoings of the other party, by the elimination of the relevance of spousal fault and the creation of the rule of equal division, "reformers hoped to create conditions of more

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[28] Kahn-Freud O *Matrimonial Property Law* (Stevens & Sons London) (Friedman M ed) (1955) at 267 at 268.

[29] Developments – The Law of Marriage and Family" 2002-2003 116 Harv. L. Rev. 1996 at 2092, with reference to the reforms of the late 1960's, the Harvard Law Review editorial comment notes that "the same reform movement that led to the elimination of fault-based divorce also began a trend away from alimony and toward property division."

[30] Kay HH "An Appraisal of California's No – Fault Divorce Law" (1987) 75 Calif. L. Rev. 291 at 300. Interestingly, despite its less than primary status for the lobbyists for change, California's lead was followed by many, with equal division being adopted as a priority by states seeking reform, post-1970.

[31] On the back of its support and drive for an equal rights amendment to the Constitution, the women's movement was largely focussed on three issues; the equal rights amendment; abortion rights and no-fault divorce reform.

[32] Krom HA "California's Divorce Law Reform: An historical analysis" (1970) Pacific Law Journal 156 at 181.

rational, equitable, and uniform settlements".[33] In line with this, it is interesting to note that the two key recommendations of the Governor's Commission related to the introduction of a no-fault divorce regime and the establishment of an independent Family Court.[34] In the general context of strengthening the position and protection of the woman in the home, the proponents for change recognised, albeit belatedly, the importance of equal division of community property on divorce as a key aspect of the equal rights amendment movement.[35] So it appears that the momentum gathered by those pushing for reform in the context of equal rights ultimately embraced the notion of equal economic treatment on divorce as part of their ideology of equality.

The elimination of judicial discretion and the legislative shift to equal division of community property was ultimately regarded by some as being more significant than the elimination of fault-based divorce.[36] Equality of division was introduced to the Californian legislative framework at a time when gender equality had recently been achieved in most aspects of civil rights. The manner in which the provisions were drafted reflected a new absolutist approach to equality, insofar as women could now secure 50% of their husband's earnings and gains in the course of the marriage, men could similarly secure 50% of their wives' marital assets and wealth. The imposition of gender-neutral equal-division rules further eliminated any possibility of a compensation-based model

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[33] *Supra* n. 14 at 302.

[34] The Governor's Commission was charged with considering four issues central to what he referred to as the existing inadequate social and legal procedures for dealing with divorce;

1. revision of the substantive laws of California relating to the family
2. to determine the feasibility of developing significant and meaningful courses in family life education
3. to consider the possibility and desirability of developing uniform nationwide standards of marriage and divorce jurisdiction
4. to examine into the establishment of Family Courts on a state-wide basis and to recommend the procedures whereby they may function most effectively.

Due to time constraints the Commission chose to focus its attention on two of those issues; the revision of the substantive law and the operation of the Family Court. In reviewing the law governing divorce, the Commission focussed on the elimination of fault as the basis for granting a decree of divorce. One consequence of so doing was the removal of fault as a determinant in the division of community property.

[35] For an explanation of the historical background see generally Kay HH "From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century" (2000) **88** Calif. L. Rev. 2017 at 2054-2066, citing the works of Ginsburg (1979), Brown (1971) and Mansbridge (1986).

[36] Freeman M, Hogoboom W, MacFadden W and Olson L *Attorney's Guide to Family Law Act Practice* 156 (1970), cited by Kay HH *supra* n. 30 at 301.

which might favour the financial contributions or achievements of the breadwinner or alternatively the career sacrifices and non-financial contributions of the homemaker.

4.2 Rule of equal division

Section 2550 of the California Family Code provides for the manner of division of the community estate as follows:

> "Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, or as otherwise provided in this division, in a proceeding for dissolution of marriage or for legal separation of the parties, the court shall, either in its judgment of dissolution of the marriage, in its judgment of legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community estate of the parties equally."

Thus, the statutory obligation to divide the community assets of the parties equally is essentially mandatory, subject to these permitted exceptions.[37] Waggoner regards the fact of this right to negotiate a settlement outside the terms of the legislative rules as effectively demoting the statutory rules to the position of "default rules", which "must yield to a contrary intention".[38] However given that the rule of equal division is so unambiguously stated in legislation, it is arguable that once the dependent spouse is properly advised, the wealthier spouse is unlikely successfully to negotiate a significantly better arrangement in the course of the marriage. A wealthy spouse seeking to protect his/her assets is more likely to succeed by executing a pre-nuptial agreement to govern the terms of the marital breakdown. Where a pre-nuptial agreement is not executed, the favourable default position available to the applicant spouse is 50% of the community property of the spouses.[39]

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[37] For further discussion of the permitted exceptions to equal division see below at section 4.4.
[38] Waggoner L "Tribute to William F. Frathcer: Marital Property Rights in Transition" (1994) 59 Mo. L. Rev. 21 at 27.
[39] See section 8 below which considers the role of pre-nuptial agreements in a jurisdiction where the outcome of the governing regime is almost never influenced by the exercise of judicial discretion.

4.3 Why choose equal division?

Frantz and Dagan refer to the concept of equal division on divorce, which underlies the Californian system, as "the cornerstone of the contemporary law of marital property".[40] McRae regards the Californian Family Code and its reliance upon the rule of equal division as a reflection of the legislature's commitment to the equitable treatment of spouses during marriage, which extends to the State's goal of equal distribution upon the termination of the marital economic community.[41] In adopting this system of equal division, the Californian legislature has eschewed the judicially-determined equitable basis for dividing the marital assets of the parties, as adopted by a significant number of other US states.[42] Undoubtedly the Californian approach exemplifies democratic law-making whereby the threat of the imposition of subjective judicial views is avoided and instead the governing provisions represent considered governance by those elected to state legislature for this purpose. In support of the approach of the Californian legislature, Gardner rejects the subjective accounting-based approach to marriage and subsequent asset division, preferring to advocate communality, which he regards as "incontestably the right approach".[43] The equal division rule eliminates the notion of dividing assets to meet individual needs and instead reflects an implementation of the partnership theory of equality. As an equal investor in the investment partnership model of marriage promoted by Singer, on divorce each spouse is entitled to "an equal share in the fruits of the marriage."[44]

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[40] Frantz CJ and Dagan H "Properties of Marriage" 104 Colum. L. Rev. 75 at 100. Whilst they recognise the relatively recent arrival of the notion of equal division, equally they acknowledge its widespread application. "Equal division is a relative newcomer to marital property law, but by now we can hardly think of the law without it."

[41] McRae MC "Contribution or Transmutation? The Conflicting Provision of Sections 852 and 2640 of the California Family Code" 49 UCLA L. Rev. 1187, 1188.

[42] Given that the equal division rule is premised upon the notion of marriage as partnership, it is typically associated with the concept of community property, discussed at section 3.2 above. Only nine US states rely upon a community property system of classification and division upon divorce: Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington and Wisconsin.

[43] Gardner S "Rethinking Family Property" (1993) 109 L.Q. Rev. 263, 291. He regards as an obvious connotation of marriage, the commitment to organise the parties' whole lives according to the values of trust and collaboration, echoing the views of Kahn-Freud O, cited above at section 3.2.

[44] Singer JB "Divorce Reform and Gender Justice" 67 N.C.L. Rev 1103 at 1114.

By way of contrast with the Irish discretion-based system which places a heavy emphasis on the spousal contributions and circumstances in the course of the marriage,[45] the Californian legislature has rejected the practice of the subjective calculation and rewarding of spousal contributions. The automatic equalisation of contributions and in turn spousal property rights, attempts to equalise the position of the two spouses at the time of the divorce, irrespective of the form or extent of those contributions. Glendon supports this approach and regards it as likely "that the average couple would choose a simple equal division of what they had acquired through their respective efforts during the marriage over the discretion system with its uncertainty and its controversy-provoking guidelines".[46] Blumberg notes the considerable symbolic force of the 'equal rights in marital property' approach, noting that it "clearly announces that spouses are understood to contribute equally to the family without regard to the actual division for labor".[47] In practice, the Californian courts have repeatedly relied upon simple mathematical equality in guiding the manner in which assets should be divided. In *re Tammen*,[48] the appeal court emphasised the need for "mathematically equal division" when complying with the equal division requirement.[49]

The legislative approach adopted by the Californian law-makers has in effect been endorsed by the American Law Institute (ALI).[50] In encouraging reform of the approaches of states across America, the ALI demonstrated support for both the legislative rule of equal division and the specific classification rules regarding the status of separate and marital properties.[51] Quite simply the ALI argues that once there is

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[45] Section 20 Family Law (Divorce) Act 1996, as considered in detail in section 5 of chapter 3, above.
[46] Glendon MA. "Family Law Reform in the 1980's", 44 La. L. Rev. 1553 at 1562.
[47] Blumberg GG *Community Property in California* (Aspen) (3rd ed) (1999) at 7.
[48] (App. 1 Dist. 1976) 134 Cal. Rptr. 161, 63 Cal. App. 3d 927.
[49] However as noted below at section 4.4 in the context of the residual judicial discretion exercisable under the Californian regime, section 2601 permits the court to offset one asset against another, where this will give rise to a substantially equal division of the community property.
[50] The ALI was founded in Washington DC in 1923 and according to its Certificate of Incorporation the ALI seeks to "promote the clarification and simplification of the law and its better adaptation to social needs."
[51] Although the remit of the ALI is wide, it has given significant attention to the regulation of families with the publication of the ALI Principles of the Law of Family Dissolution: Analysis and Recommendations (2002). This was the Institute's first comprehensive work in the area of family law. The project comprises six principal parts: Child Custody; Child Support; Division of Property at Dissolution; Spousal Compensatory Payments; Domestic Partners; and Agreements. Chapter 4 of the Principles addresses the issue of asset division on divorce. Dallon notes that this chapter "thoroughly discussed property division

acceptance of the principle that both spouses have a claim on some or all of the marital assets of the parties, an equal division of the relevant assets is "the allocation that least requires justification".[52] On the basis that it is difficult to offer a convincing rationale for any other formula for division, the ALI advocates the 50:50 rule. The ALI prefers not to take an absolute stance on the 'rules versus discretion' debate, stating that whilst "no formulation can eliminate all need for judicial discretion" it regards the rule of equal division as "the inevitable choice".[53] Such an approach operates on the basis of the partnership theory *simpliciter* and avoids any attempt to value financial and/or non financial contributions, preferring to assume that they are equal.

The ALI regards the Californian regulatory approach as contributing significantly to the attainment of fairness and consistency. Dallon commends the ALI for supporting the principle of the equal division of marital property, regarding this approach as promoting "reliable and simplified property division rules" which should ultimately cause "the cost and complexity of divorce litigation ... [to be]...reduced and settlements [to be] encouraged".[54] Thus the rule of equal division does bring certainty not only to the court process, but also to inter-spousal negotiations. The presence of a rule which creates a very definite indication of the outcome should the parties proceed to trial, more easily facilitates and encourages a settlement between the parties. In this regard Dixon and Weitzman look favourably on the greater possibilities offered by the requirement of equal division, noting that it should "allow divorcing couples and their attorneys to predict the types of settlement they can expect in court...Consequently we expect more couples to agree on the division of property out of court".[55] Similarly Glendon has referred to the "old principle of the Spanish community of gains" as

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law and proposes a careful framework of rules with illustrations and comments to guide property division". Dallon CW "The Likely Impact of the ALI Principles of the Law of Family Dissolution on Property Division" (2001) BYUL Rev. 891 at 892.

[52] *Ibid* 4.09 cmt. B at 734.

[53] *Ibid.*

[54] *Ibid* at 896.

[55] *Supra* n. 14.

> "...serving as a framework for private ordering of the financial aspects of divorce by enabling the spouses to know what the likely result will be if their affairs are settled by a judge".[56]

On the face of it, a strict legislative rule of equal division ensures a democratic and predictable approach to regulation. However empirical research relating to the divorce process in practice does not support the prediction that a system of fixed rules lends itself to an uncomplicated divorce resolution process. The research conducted by Dixon and Weitzman, considered below in section 5, suggests that the aims of predictability and certainty of outcome are not necessarily evident in the course of settlement negotiations.[57] Weitzman has previously outlined the many shortfalls and inherent weaknesses of private settlements.[58] The shortfalls of the negotiation process impact both generally and in a gender specific manner, referred to by Weitzman as the "sex-role socialization" that gives rise to differing perspectives on the process and outcomes of negotiated settlements.[59] Weitzman emphasises the differing tolerance for conflict between men and women and suggests that women are more likely to shy away from negotiation and conflict. The main impact of this is a frequency of inadequate settlements for women. She rejects any suggestion that women fail themselves in simply accepting inadequate support awards, pointing to the social context and structures of the negotiation process. Weitzman concludes that women, who are more risk-averse than men, may regard the cost of bargaining to be greater than the pay-off to be expected. In addition she cites the lack of available information as serving to further prevent women from negotiating and securing a fair and adequate settlement on divorce.[60] Thus whilst reliance upon fixed rules is likely to enhance the predictability of the eventual outcome of the application of those rules, a rule-based system does not necessarily discourage those desirous of a court hearing from proceeding to trial. Equally given the myriad of factors

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[56] *Supra* n. 46 at 1562.
[57] *Supra* n. 14 at 306. The research, although largely positive did note that the "liberalized provisions of the new law" did not seem to encourage parties to divorce more quickly, and although the level of litigation had lessened, the percentage of parties requiring their issues to be resolved by way of trial had not diminished.
[58] Weitzman LJ *The Divorce Revolution The Unexpected Social and Economic Consequences for Women ad Children in America (*Free Press) *(*1985) at 315-318.
[59] *Ibid* at 316.
[60] *Ibid* at 316-318. Ultimately Weitzman suggests that even though the terms of a settlement may be inadequate, "it may well be a "rational" decision for her to "agree" to what he offers."

that can influence the negotiation process, the fact of a rule-based regime does not of itself eliminate the complications arising nor guarantee predictable negotiation outcomes.

4.4 Residual judicial discretion – limited by rules

Notwithstanding the equal division rule, there still exists scope for the unequal distribution of assets, with the California Family Code expressly setting out such circumstances.[61] Whilst these exceptions represent a move away from the primary rule of equal division,[62] such deviations, although often necessitating an element of judicial discretion, exist within the confines of the governing legislation.[63] Thus, unusually, they rely minimally upon judicial discretion and instead seem to be a further extension of that rule-based system, both in their creation and application. Arguably, these exceptions indicate that the Californian legislature accepts that an absolute equal division rule is not always appropriate but in so recognising has maintained regulatory control for the identification of the scope of such exceptions. Rather than enacting statutory provisions which leave the identification of 'extraordinary circumstances' to the judiciary, the legislature has identified and drafted the detail of each permitted exception. Such instances of unequal division include the court's power to defer the sale of the family home even where it is the only community asset, the right to assign community debts as it deems 'just and equitable' where such debts exceed the value of the community assets, and the power to award a community property asset to one spouse and thus effect a

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[61] S 2601 – Awarding community property asset to one party
S 2602 – Unequal division where there is evidence of deliberate misappropriation of community property
S 2622 - Community debts valued in excess of community liabilities
S 2623(a) – Family expenses incurred post separation
S 3801 – Deferred sale of the family home
S 2604 – Community estate valued at less than $5,000
S 2603 – Personal injury awards assigned to injured spouse

[62] The equal division rule is referred to at times in this work as the 'primary rule' given it is the central rule governing the division of the assets of the parties.

[63] *In re Marriage of Brown* (1976) 126 Cal. Rptr. 633, 15 Cal. 3d 838, 544 P.2d 561 which confirmed that the trial court retains discretion to divide community assets in any fashion which complies with statutory provisions. This rule-based approach to the limiting of judicial discretion exists in only two other states, Louisiana and New Mexico, with the other six community property states preferring to rely upon the exercise of more open-ended judicial discretion to equitably divide the community property of the parties.

"substantially" equal division of the community estate.[64] Although these exceptions are specific and limited by legislation, their existence represents a concession to the significance of individual claims and circumstances.

Ultimately it appears that in California the tasks of law and policy-making remain firmly within the remit of the legislature. Given this rigid rule-based approach, the only alternative means of resolution appears to be through private ordering which is permitted and regulated by the Californian legislature. In the light of the absence of scope for individualised justice in the particular circumstances, parties who wish to avoid the equal division of community property will be required to do so by way of pre- or post-nuptial settlement. Unfortunately as is recognised by many commentators, it is difficult to establish the extent to which parties are choosing to execute such agreements, in order to self-determine the outcome of any future divorce.

> "Little useful data has been gathered regarding how many couples sign premarital agreements or the economic situation of the people who enter such agreements."[65]

5 The equal division rule and the homemaker spouse

The partnership theory of marriage requires the court to have equal regard to the contributions of the homemaker and those of the breadwinner. Fineman has noted that the

> "...partnership model is urged because of its symbolic significance in reflecting the preferred or correct vision of women, and also, secondarily, because it addresses need. Through ideological fiat, the

[64] For the most part, the statutory exceptions to equal division comprise those exceptions previously identified in the report of the Governor's Commission on the Family as necessary to avoid injustice in certain circumstances.

[65] Bix B "Premarital Agreements in the ALI Principles of Family Dissolution" (2001) 8 Duke Journal of Gender, Law and Policy 231 at 232. Similarly Glass has noted that there exists "little demographic information on people who enter into prenuptial agreements". Glass R "Trading Up: Postnuptial Agreements, Fairness, and a Principled New Suitor for California" 92 (2004) Cal. L. Rev. 214 at 218. The role of pre-nuptial agreements in the context of the rigid, rule-based Californian regime will be considered at section 8 below.

> dependent woman is considered to be benefitted in being "brought up" to partnership status and made an "equal"."[66]

The Californian system effectively equalises the non-financial contributions of the homemaker with those market-based contributions of the spouse working outside the home. Thus the right of the non-earning spouse to an equal share of the community property of the marriage arises from the fact of the marriage, as distinct from the circumstances of the union. As mentioned above, Glendon has acknowledged the capacity for a community property based approach to reflect the concepts of partnership and equality.[67] By statutorily categorising all property and income earned or secured in the course of the marriage as community property, Californian law-makers have simply, but definitively determined that the marital union is a partnership of equals and that all gains arising from the union are equally owned by the spouses. This rights-based model was preferred by the Californian legislature to a system of asset division premised either upon an examination of the individual spousal contributions or equally upon the identified future needs of the previously dependent spouse.

Although the laudable aim of equal division may be the equalisation of spousal contributions, it often fails to put the parties on an equal footing after the divorce. In identifying the "rule equality approach" as inappropriate, Fineman identifies three relevant, related factors:

> "...women's unequal social and economic position in society, the ways in which marriage and family decisions are affected by these and other economic and social circumstances, and the impact of divorce on women with dependent children."[68]

Singer observes that in most marriages priority is given to one career, typically the husband's, and the wife is more likely to either forego her career to care for their

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[66] Fineman MA *The Illusion of Equality The Rhetoric and Reality of Divorce Reform* University of Chicago Press (1991) at 45. Later, at 174, she notes critically that "The newly-fashioned gender-neutral law creates an appearance of equality, but the consequences of divorce are far from equally borne."
[67] *Supra* n. 46 at 1557.
[68] *Supra* n. 66 at 36.

children, restrict her working hours or forego opportunity for advancement.[69] Whilst the earning spouse can simply continue in the workplace in his established position, the homemaker has not had the opportunity, supported by a spouse, to establish and/or improve herself within the workplace. Thus a regulatory system premised upon the partnership model may equalise asset ownership on divorce but is likely to fail to address the post-divorce earnings and opportunity inequalities. Fineman criticises the partnership concept of sharing responsibility and contribution and views it as "typically translated into assuming equal economic responsibility after divorce, a result that is unrealistic, even cruel, given the material situation of many women."[70] In support of this weakness, Kornhauser regards the partnership model of marriage where it mandates an equal division of assets upon divorce, as having "precipitated a slide into poverty for many divorcing women and their children".[71]

> "The partnership model of marriage and the consequent changes in domestic law have proved to be disastrous for women and children, thrusting many into poverty when the marriage ends".[72]

The seminal work of Lenore Weitzman[73] is regarded by many as "by far the most influential evidence" of the divergence in the standards of living of mothers and fathers post-divorce.[74] The work which is based upon a ten-year empirical research study, charts the economic consequences of divorce for women and children in America. In particular Weitzman assesses the real impact of the rule of equal division on the parties post divorce and identifies the system's failure to take account of the economic inequalities arising from the marriage and the individual spousal roles. The strength of the work lies in the depth of the research carried out, with both parties to divorce proceedings interviewed at the time of the divorce and in the years after the financial arrangements have been

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[69] *Supra* n. 44 at 1115, citing Goldfarb *Marital Partnership and the Case for Permanent Alimony* (1988) and Berk S *The Gender Factory* (1985).
[70] *Supra* n. 66 at 176.
[71] *Supra* n. 23. Similarly, Fineman, *supra* n. 66 at 36 notes that "Economic inequalities persist in our society in spite of decades of attempted reforms."
[72] *Supra* n. 44 at 1418.
[73] *Supra* n. 58.
[74] For example, see the views of Braver S; "The Gender Gap in Standard of Living After Divorce: Vanishingly Small?" (1999) 33 FLQ 111 at 113. Braver traces the significant impact of Weitzman's research noting it to be amongst the "most cited demographic statistics of the 1980's".

executed. The comprehensive nature of the work is reflected in the breadth of the categories of parties interviewed, with Weitzman producing an analysis of financial implications of divorce from the perspective of all relevant stakeholders in the process. Ultimately she regards men as "rewarded" by divorce whereas women are "impoverished" or at the very least suffer a significant diminution in their standard of living. In addition, she notes the almost unavoidable, related impact upon the children of the marriage.

Singer recognises the work as the "starting point for virtually all of the current research on the economic consequences of no-fault divorce."[75] One of Weitzman's central theories is that the elimination of fault-based divorce and the mandatory equal division rule led to the further impoverishment of women and in fact "worsened women's condition, improved men's condition, and widened the income gap between the sexes".[76] Notwithstanding Singer's recognition of the impact of Weitzman's work, she does question the research and the conclusions reached, noting Weitzman's failure to provide any comparative research premised upon the pre-existing, fault-based divorce system in California.[77] Certainly it is difficult to identify the shift from fault-based to no-fault-based divorce as the solitary cause of spousal impoverishment. Rather it is perhaps more reasonable to surmise that both fault- and no-fault-based systems have the potential to impoverish one or both spouses; it is the fact of divorce, not the fact of the fault, that impoverishes the wife in Weitzman's research, or even both spouses in some instances.

Despite the doubts cast over the precision of Weitzman's statistics by Peterson,[78] even the revised and less dramatic figures still indicate a 27% decline in the standard of living for mothers and a 10% increase in the standard of living for fathers.[79] Thus notwithstanding

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[75] *Supra* n. 44 at 1104.
[76] *Supra* n. 58 at 378. Weitzman originally claimed that following a decree of divorce women and children suffered on average a 73% drop in standard of living whereas the average divorced man's standard of living increased by 42%.
[77] *Supra* n. 44 at 1105. Singer states that the conclusions reached by Weitzman are "both flawed and potentially dangerous".
[78] Peterson RR "A Re-Evaluation of the Economic Consequences of Divorce" (1996) 61 Am. Soc. Rev. 528
[79] Further research carried out by Mauldin subsequent to Weitzman and Peterson, noted that 89% of the 356 women interviewed by Mauldin experienced a decrease in their economic well-being. Mauldin T "Women

the proven inaccuracies of the statistics originally produced by Weitzman, it appears well-established that the economic consequences of divorce are significantly worse for long-term homemakers and their children than they are for the breadwinner spouse.[80] Further research has indicated that the factors which are most likely to reduce the financial wellbeing of mothers post-divorce are: the presence of children under the age of 6, race, geographical location and the type of marital disruption.[81] Although accepting the original statistical error,[82] Weitzman has defended the essence of her work and argued that it had "a real impact on public policy and resulted in the passage of 14 new laws in California".[83] She cites the example of the judicial power to defer the sale of the family home as the first legislative amendment enacted as a direct consequence of her research. As her work focussed on the experiences of participants in the legal process, Weitzman was able to produce evidence of the "direct link between *specific* features of the law and the economic hardships experienced by women and children after divorce".[84] One example of such hardship was the negative consequences arising from the sale of the family home which was often necessitated by the strict operation of the equal division rule. Weitzman, in noting the significant hardship that such a sale placed on children at a very vulnerable time in their lives, recognised the continuity and stability that the legislative amendment could bring.[85]

More recently conducted research has focussed on the impact of marriage and motherhood on the earning capacity of women, presenting further evidence of the sustained cost of family circumstances for women. The disproportionate costs borne by

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Who Remain Above the Poverty Level in Divorce: Implications for Family Policy" (1990) 39 Family Relations No 2 141 at 142.

[80] McLindon JB "Separate but Equal: The Economic Disaster of Divorce for Women and Children" (1987) 21 Fam. LQ 351; Peters HE "Marriage and Divorce" Informational Constraints and Private Contracting" (1986) 76 Am. Econ. Rev. 437

[81] *Ibid.*

[82] Weitzman LJ "The Economic Consequences of Divorce are still unequal: Comment on Peterson" (1996) 61 American Sociological Review 537-538 noting at 537 that her work "did not receive scholarly awards or attention because of the magnitude of that single statistic".

[83] *Ibid* at 538.

[84] *Ibid.*

[85] *Ibid*; Weitzman claims credit for other legislative amendments, including; provisions for alimony, child support enforcement, regulation of attorney's fees and judicial education in California.

women were illustrated by the research of Budig and England;[86] later analysed by Oldham in the context of US divorce laws.[87] One of the intriguing findings from their research was that on average, young American women suffer a 7% wage penalty per child.[88] Whilst in many instances of marriage, such losses and any residual needs arsing can be supplemented by the other spouse, upon divorce, the economic implications of this wage penalty become especially relevant.

The primary purpose of the work of Weitzman was to attempt to determine the impact of a divorce regime which relies upon a rule-based system of equal division. What the work ultimately achieved was to provide a stark illustration of what has been labelled the "feminization of poverty",[89] thereby strengthening the arguments against reliance upon absolute equal division as an effective tool to equalise the positions of the spouses. Whether 25 years on from Weitzman's findings such statistics remain relevant is of course a matter for serious consideration. Certainly Oldham has cited the results of a more recent study, which presents evidence that the economic costs suffered by the homemaker spouse are in decline. With reference to the work of Johnson[90] and his analysis of the employment patterns of first-time mothers, based upon US Census Bureau data, it was noted that more women are working during most of their pregnancy and returning to work more quickly.[91] However, it has also been observed that as "family income increases, mothers with children younger than 18 are less likely than other mothers to work full time".[92] Where such a marital unit breaks down, the dependent spouse's vulnerability to post-divorce poverty undoubtedly arises, unless the asset and wealth distribution system can provide adequately for her. Finally, one other recent body

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[86] Budig MJ and England P "The Wage Penalty for Motherhood" (2001) 66 Am. Soc. Rev. 204.
[87] Oldham JT "Changes in Economic Consequences of Divorces, 1958-2008" 42 Fam. L.Q. 419 at 426.
[88] *Supra* n. 86, where, by way of introduction, it was noted that "Motherhood is associated with lower hourly pay ... [and]...the costs of child rearing are borne disproportionately by mothers."
[89] The "feminization of poverty" refers to the concentration of poverty amongst women, particularly amongst female-headed households. The term originates in the work of Diana Pearce; Pearce D "The Feminization of Poverty: Women, Work and Welfare" (1978) 11 Urban and Social Change Review 28.
[90] Johnson TD *Maternity Leave and Employment Patterns of First-time mothers: 1961-2003* (Washington DC: Bureau of the Census) (2008)
[91] Johnson notes, *ibid* at 12, that "women in the most recent first-birth cohort of 2000-2002 worked longer into their pregnancy and started work after childbirth sooner than their counterparts in the early 1960s....most of the increases in the percentage of women working later into their pregnancy and working after their first birth came about in the early 1980's."
[92] *Ibid.*

of research has suggested that marital disruption has a modest economic impact on many women, given the significant changes in contemporary labour force participation by women. McKeever and Wolfinger have concluded that women are less dependent upon the income of their former spouses as they are now more likely to be independently engaged in the workforce.[93] Their analysis suggests that "women's postdivorce incomes are primarily attributable to their labor force participation and secondarily attributable to income transfers from their former husbands."[94] Thus they conclude that "changes in women's labor force participation in recent years have begun to positively affect how they fare after marital disruption."[95] The previously vulnerable homemaker spouse with little potential for well-paid employment is gradually being replaced by a woman who either works outside the home in the course of the marriage or is in a position to assert her position in the workplace upon divorce. Undoubtedly where a previously financially dependent spouse is in a position to become financially self-sufficient post divorce, the equal division of the property at the time of the divorce become less unequal in its effect.

Notwithstanding changing social and work-place norms, the lack of flexibility and consequently individualised fairness is a key consequence of a strict rule-based regime. Internationally, and particularly within the two jurisdictions considered in the next two chapters of this thesis, namely Scotland and New Zealand; the need for some element of flexibility, depending upon the circumstances of the parties, and in particular the financially vulnerable spouse, has been recognised.[96] In those two jurisdictions, despite a willing reliance upon a presumption of equal division, this presumption is not automatically applied and co-exists with judicial powers to order unequal division in order to secure equality of result in individual circumstances. The divergent approaches to asset division, all initiated with a view to protecting the financially vulnerable spouse, demonstrate very different means of attempting to secure this outcome. However the fact of residual discretion, even within the Californian regime, arguably confirms that the

[93] McKeever M and Wolfinger NH "Re-examining the Economic Costs of Marital Disruption for Women" 82 (2001) Social Science Quarterly 202.
[94] *Ibid* at 215.
[95] *Ibid.*
[96] See further, chapters 5 and 6 respectively.

predictability associated with a rule-based system of governance cannot achieve a fair outcome without scope for some level of individualised justice.

6 Equal Division – fair or unfair?

Although the application of a rule of equal division promises fairness and predictability, the impact of such a strict universal rule upon very varying circumstances can ultimately give rise to unfair outcomes. In questioning the fairness of a rule of equal division, Stark highlights the importance of property being divided "fairly", and the unavoidable relevance of need as a determining factor in the asset division process.[97] She notes that except for California and Arizona, which operate equal division regimes, all other states divide property according to equitable principles by which property is divided "fairly," with reference to various statutory factors.[98] Although traditionally separate property states have approached division of the relevant assets on an equitable basis, there is evidence of a growing reliance upon a presumption of equal division as a starting point. This shift in approach has "made separate property states' treatment of property on divorce virtually identical to that of community property states".[99] Dallon notes that "many equitable division states already impose a presumption of equal division"[100] and slightly less definitively, it has also been suggested in respect of those states that provide statutorily for equitable division of property upon divorce, "approximately half of these states start with a presumption of *equal* division."[101] Thus whilst an absolute rule of equal division irrespective of the circumstances, has the potential to result in unfair outcomes in some instances, the merits of applying a norm of equal division, subject to variation where equity so demands, have been identified by many. Whilst in practice the ordering of equal division is in fact often the fairest outcome, a rule of equal division is perhaps a step too far.

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[97] Stark B "Marriage Proposals: From-One-Size-Fits-All to Postmodern Marriage Law" (2001) 89 Calif. L. Rev. 1479, 1482 at fn. 8.
[98] *Ibid.*
[99] *Supra* n. 29 at 2092.
[100] *Supra* n. 51 at 905. Dallon refers at footnote 76 to the statutory position adopted in Arkansas, Florida, Idaho, Indiana and New Hampshire as evidence of a starting point of equal division in states which mandate equitable divisions.
[101] *Supra* n. 29 at 2092.

Internationally, attempts have been made to define both the concept and scope of fairness in the marriage and divorce context. Scottish matrimonial laws rely upon a rebuttable presumption that fairness can best be secured through equal division[102] whereas the New Zealand legislature permits the presiding judge to adjudicate what orders are necessitated by fairness, with reference to guiding factors and governing principles.[103] Whilst fairness in the circumstances might be more readily achievable in a system of equitable division, such success remains dependent upon a sufficiently detailed and considered regulatory system. A rule-based system of equal division, at the very least ensures equality of treatment, predictability and consistency. Which approach is preferable ultimately depends upon the policy priorities of the law-makers in question.[104]

7 Spousal support

7.1 Introduction

Despite the apparent position of Californian divorce law on the rules end of the rules/discretion continuum, the issue of spousal support receives particular treatment in contrast with the automatic equal rights share of community property. By permitting the courts to exercise discretion when considering the issue of spousal support, the Californian regime moves away from a strict rule-based approach to regulating divorce and in so doing California law-makers lose the certainty and predictability associated with the equal division rule. The co-existing distinct legislative approaches to property division and alimony certainly suggest that a strict rule-based approach does not necessarily operate successfully in every instance and lends weight to the suggestion that an element of discretion is always necessary for justice to be achieved, a theory to be considered further in the conclusion of this work. Certainly this approach contrasts

[102] See further, chapter 5 below.
[103] See further, chapter 6 below.
[104] See chapter 1 above at sections 2.1 and 2.2 for a discussion of the relative merits of rule and discretion-based governance.

significantly with the Irish system which looks at spousal support and property division as part of one collective package.[105]

Carbone recognises the distinctive structural approaches to property and alimony, classifying property division as a final decree and spousal support as modifiable.[106] Yet despite the clear distinction drawn between the two forms of support, she regards law-makers as not at all clear as to what purpose the distinction should serve. Parkman has suggested that "while the basic ideas behind a property settlement are to return the parties' separate property and to divide the property acquired during the marriage, alimony is meant to serve other purposes such as providing for the basic financial needs of a spouse."[107] To this end the Californian legislature has expressly enunciated the factors to be considered by the court in respect of an application for post-divorce spousal support in order to identify the particular spousal needs and ultimately to calculate accordingly, the payments, if any, to be made.[108] In reaching a decision to award alimony, the court is obliged to take an overview of the financial position of the parties, together with a consideration of the parties' circumstances and contributions during the course of the marriage. In deciding to award spousal support, the importance of the generalised overview has been highlighted,

> "...the court should consider the needs of the parties and their abilities to meet such needs, the earning capacity and actual earnings and property owned and obligations to be met by each".[109]

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[105] The four jurisdictions considered in this work demonstrate differing approaches to the inter-play between property orders and ongoing spousal support. The regulatory approaches and the impact of their distinctive elements will be considered in the conclusion of this work with a view to identifying the potential for the reform of this aspect of the Irish divorce law process.

[106] Carbone J "The Futility of Coherence: The ALI's *Principles of the Law of Family Dissolution*, Compensatory Spousal Payments" (2002) 4 J L & Fam Stud 43.

[107] *Supra* n. 16 at 63. In light of the absence of articulated distinctions as to the purpose of property and alimony orders, Carbone, *ibid* at 54, suggests that the difference seems to arise from practice more than from principle.

[108] The list of 14 factors that currently exist in the Californian Family Code represent an expansion of the original two factors enunciated in the 1969 statute, and the eight factors included in the 1987 version of the Californian Family Code. See section 7.2 below for the exhaustive list of factors.

[109] *Todd v. Todd* (1969) 78 Cal. Rptr. 131, 272 Cal. App. 2d 786.

Whist it might be argued that the very detailed legislative provisions represent an attempt by the legislature to retain control over the structure and exercise of the judicial power to award spousal support, such legislative parameters are undoubtedly weakened by the residual judicial obligation to rely upon any factor where it is deemed just and equitable to do so. Thus despite a more focussed and detailed consideration of the circumstances particular to the ordering of spousal support, this section illustrates the weaknesses inherent in the Californian approach to spousal support and ultimately identifies similarities with the open-ended approach adopted by Irish law-makers in this context.

7.2 Legislative provisions governing spousal support

The court's power to award spousal support is influenced by both statutory factors and the underlying discretion of the court to "achieve a just and reasonable result under the facts and circumstances of the case".[110] Section 4300 sets out the apparently compulsory nature of the inter-spousal duty to provide financial support, subject to the relevant statutory provisions.

> "Subject to this division, a person shall support the person's spouse". [111]

Evidently, section 4300 is limited to a one-sentence mutual inter-spousal statutory obligation and thus relies upon the succeeding sections of the Family Code to place limits on that duty. Section 4330(a) addresses the power of the court to award orders of spousal support on the dissolution of the marriage, noting that it may order the payment of "an amount, for a period of time, that the court considers is just and reasonable, based on the standard of living established during the marriage". The circumstances of the parties, the duration of the marriage and the future possibility of self-sufficiency are some of the factors that can influence the decision to award spousal support, as well as the amount and nature of any such order.[112] Such determinations of justice and reason must be

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[110] *In re the Marriage of Cheriton* (App. 6 Dist. 2001) 111 Cal. Rptr. 2d 755, 92 Cal. App. 4th 269.
[111] The inclusion of "when in need", with reference to the claimant spouse, in the former Civil Code section 242 was omitted in section 4300, being regarded as surplus and unnecessary.
[112] By way of contrast an equal share in the community property is ordered as a right.

calculated with reference to the 14 statutory factors,[113] all of which must be considered by the court in deciding whether to grant the order sought.

Section 4320 requires the court to consider the following fourteen factors where relevant to the circumstances of the parties:

> "(a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following:
> (1) The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment.
> (2) The extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.
> (b) The extent to which the supported party contributed to the attainment of an education, training a career position, or a license by the supporting party.
> (c) The ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living.
> (d) The needs of each party based on the standard of living established during the marriage.
> (e) The obligations and assets, including the separate property, of each party.
> (f) The duration of the marriage.
> (g) The ability of the supporting party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.
> (h) The age and health of the parties.
> (i) Documented history of any history of domestic violence, as defined in section 6211, between the parties, including, but not limited to, consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party.
> (j) The immediate and specific tax consequences to each party.
> (k) The balance of the hardships to each party.
> (l) The goal that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of long duration, as described in section 4336, a "reasonable period of time" for purposes of this section generally shall be one-half length of the marriage. However, nothing in this section is intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section, section 4336, and the circumstances of the parties.

[113] Sections 4320-4323, as discussed below.

(m) The criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of a spousal support award in accordance with section 4325.
(n) Any other factors the court determines are just and equitable."

In practice the court has regarded the term "circumstances" as including any aspect of the parties' circumstances that might have a legitimate bearing upon the present and prospective lives of both parties.[114] The statutory obligation on the courts to consider the facts in determining a just outcome in each case stands in marked contrast with the stark application of the equal division rule to the statutorily defined concept of community property, irrespective of the circumstances of the parties.[115]

Citing the views of Hawkins, Krauskopf accepts the validity of the argument that a legislative list of factors, in the absence of a stated purpose or underlying theory, can ultimately please both sides in divorce proceedings.[116] Hawkins states that a laundry list of factors without weighting allows a judge to emphasise whichever factor appeals to him or her.[117] Such a list of potentially relevant factors is a much-utilised tool by domestic legislatures, perhaps as it avoids the need for a definite position to be asserted in respect of what can prove to be controversial matters. Certainly the extensive list of factors in section 20 of the Irish Divorce Act has failed to encourage the Irish judiciary to develop any hierarchy of factors or aims in dividing assets upon divorce. In addition the legislature has relied upon the creation of this list as sufficient guidance for the

[114] The word "circumstances" within section 4320 includes "practically everything" which has a legitimate bearing upon the present and prospective matters relating to the lives of both parties; *Vogel v Vogel* (1960) 6 Cal Rptr. 402, 182 Cl. App. 2d 628, and is based on facts and circumstances existing at the time the order for divorce is made; *In re Marriage of Tydlaska* (App. 4 Dist. 2003) 7 Cal. Rptr. 3d 594, 114 Cal. App. 4th 572. The court *In re Marriage of Morrison* (1978) 143 Cal. Rptr. 139, 20 Cal. 3d 437, 573 P. 2d 41, in defining the concept of circumstances, repeated the views of the court in *Vogel v Vogel*, adding that such circumstances also referred to the needs of parties and their ability to meet such needs. In measuring such circumstances it was mentioned that consideration should be given to property owned and obligations to be met as well as ability to earn, as well as actual earnings.
[115] The appeal court In *re Marriage of Baker* (App. 1 Dist. 1992) 4 Cal. Rptr. 2d 553, 3 Cal. App. 4th 491 presented a summary of the factors to be considered by a trial court in determining the amount and duration of spousal support; the earning capacity of each spouse, the spouses' respective needs, the obligations and assets of each spouse, the duration of the marriage, the time required by the supported spouse to acquire appropriate education and employment, the ability of the supported spouse to engage in gainful employment, the age and health of the parties, the spouses' standard of living, and any other factors deemed just and equitable.
[116] *Supra* n. 21 at 256.
[117] Hawkins K "Discretion in Making Legal Decisions" (1986) 43 Wash. & Lee L. Rev. 1161 at 1186.

extensively empowered judiciary.[118] Undoubtedly, such an approach does not lend itself to achieving the goal of predictability. Similarly, Krauskopf regards this lack of precise legislative direction as contributing to existing difficulties and inconsistencies.[119]

Carbone has commended the ALI's statement of principles noting that such a considered approach has the capacity to "bring a measure of coherence to an area of law lacking consistent justification for almost as long as the law has been willing to recognize divorce itself."[120] When comparing the divergent statutory approaches to the calculation of asset division versus ongoing maintenance obligations, it appears that an equal share in the community assets of the parties exists as a right by virtue of the fact of the marriage whereas the right to post-divorce spousal support requires a more individualised subjective determination of the circumstances of the parties, the nature of their marital roles and standards and ultimately the merits of the application in question in light of an array of potentially relevant factors. Thus in the context of spousal support, the applicant is required to prove a meritorious case before a court can make an order granting relief. The justification for such contrasting approaches to these distinct judicial powers is unclear.[121] Certainly Krauskopf has written at length on the "property/support mystery",[122] querying the different purposes of these distinct means of dividing assets and wealth. Ultimately rather than solving the 'mystery', she suggests its resolution through purpose-driven regulation, and to that end to allow the use of a "whole range of orders, including equitable orders, to best achieve the economic settlement."[123]

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[118] For a detailed consideration of the impact, and ultimately the weaknesses of the statutory list of factors contained in the Irish Divorce Act; see earlier, chapter 3 at section 5.
[119] *Ibid.*
[120] *Supra* n. 106 at 43.
[121] The fact that the *Report of the Governor's Commission on the Family, supra* n. 7, favoured a regulatory system incorporating discretionary-based property division and spousal support powers, resulted in a report which detailed the reasons for such a preference, at the cost of any published substantive debate on the merits of a rule-based equal division regime. Consequently, if any such debates occurred the final report did not include them and thus research in this area is deprived of the Commission's views, if any, regarding the merits and potential impact of a rule-based approach to the issue of asset division.
[122] *Supra* n. 21 at 266.
[123] *Ibid* at 278.

7.3 Judicial approach to spousal support

In making any order for spousal support, judicial discretion must be exercised in light of the aforementioned statutory factors, with the ultimate goal being to accomplish "substantial justice for the parties" before the court.[124] In particular, cases involving long-term marriages and/or homemaker spouses have been identified as typically cases justifying spousal support beyond the dissolution of the marriage.[125] Where it is shown that a trial court has adjudicated on the issue of spousal support without regard to the relevant statutory factors, the decision is reviewable. In *Fransen v Fransen*,[126] the trial judge was deemed to have erred where he failed to have regard to the parties' respective earning capacities, their station in life, the wife's educational and work-skill background and the duration of the marriage. Similarly, in criticising the inadequate spousal support order of the trial judge in a case involving a seventeen-year marriage where the wife had not worked outside the family home, the appeal court in *Re Marriage of Rosan*[127] rejected the notion that the statutory provisions indicated

> "...any legislative intent that a wife of a marriage of longstanding whose attentions had been devoted during the marriage to wifely and parental duties and whose earning capacity has therefore not been developed should be, at a time when the husband is reaching his peak of earning capacity, relegated to a standard of living substantially below that enjoyed by the parties during the marriage or to subsistence from public welfare."[128]

It is also necessary for the court to present adequate reasons for the decision made regarding the provision or termination of spousal support. The trial court in *Re Marriage of Bower*[129] was regarded by the appellate court as having provided adequate reasons for its decision to reduce and ultimately terminate the former wife's spousal support after a

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[124] *In re Marriage of Kerr* (App. 4 Dist. 1999) 91 Cal. Rptr. 2d 374, 77 Cal. App. 4th 87.
[125] See further Kay HH, *supra* n. 30 at 294.
[126] (App. 2 Dist. 1983) 190 Cal. Rptr. 885, 142 Cal. App. 3d 419.
[127] 24 Cal. App. 3d 885, 101 Cal. Rptr. 295 (1972).
[128] *Ibid.*
[129] App. 2 Dist. 2002 117 Cal. Rptr. 2d 520, 96 Cal. App. 4th 893.

year, whereas it was decided on appeal in *Re Marriage of Cheriton*[130] that the trial court had failed to sufficiently provide reasons for denying spousal support to the former wife.

7.4 Limitations for childless couples

Section 4322 as an unusual legislative provision, seeks to exclude a certain category of potential applicants for spousal support. It provides that where a childless party has or acquires a separate estate sufficient for self-support, the court is prevented from making an order or continuing an order for spousal support. What in effect this section does, is to create a legislative bias towards the need to compensate the spouse with children, who is *presumed* to have made various sacrifices in the course of the marriage and provided homemaker contributions at some level. Once again a legislative presumption serves to dictate the nature of the entitlements of the parties to a divorce, and eliminate any exercise of judicial discretion. However notwithstanding this legislative presumption, section 4322 does require the childless spouse to have a sufficient separate estate to ensure self-support, thereby in fact allowing such a spouse to claim spousal support where inability to self-support is proven, perhaps negating the purpose of the section in the first instance.[131] The courts have considered the distinction between the childless and non-childless applicant noting that the prohibition is mandatory if the sufficiency threshold is met, irrespective of co-existing circumstances that might otherwise influence the court.[132] The policy aim of the legislature in targeting the childless spouse as undeserving of spousal support is difficult to identify, although it appears to be premised on a presumption of greater self sufficiency or capacity for self sufficiency. Glendon supports this approach in principle, stating that "childless and child-rearing marriages involve different social, political and moral issues and should therefore be analyzed separately".[133] However, notwithstanding this 'capacity to self-support' provision, the attempt by the legislature to impose an exclusionary rule in particular circumstances

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[130] *Supra* n. 110.
[131] The sufficiency of income requirement makes the section unwarranted and excessive, as any spouse with or without children would find it difficult successfully to seek spousal support (as distinct from child support) if he/she is sufficiently financially independent.
[132] *In re Marriage of Terry* (App. 1 Dist. 2000) 95 Cal. Rptr. 2d 760, 80 Cal. App. 4th 921.
[133] *Supra* n. 46 at 1560.

seems arbitrary and unwarranted, particularly given the otherwise broad discretionary approach of the legislature to the issue of spousal support generally.

7.5 Identifying underlying policy

In placing an emphasis on subjective factors such as the standard of living of the parties, the needs of the dependent spouse and the future earnings of one or both of the spouses, the court has relatively wide powers to order spousal support. The broad underlying requirement is that a just and reasonable result be reached. The decision of the trial court will be reversed where there has been an abuse of judicial discretion, which will only be established in circumstances where the court has exceeded "the bounds of reason" or where it is accepted that no judge would reasonably make the same order under the same circumstances.[134] The legislature chose to draft wide and numerous factors to permit the court to explain an award of spousal support whatever the circumstances. However it did so whilst failing to identify the overall objective for the presiding judge. Safeguards such as requiring the court to base any orders made on the facts and circumstances existing at the time of the order,[135] the promotion of self-support and an underlying goal of termination of spousal support where possible,[136] have been developed by the courts in an attempt to streamline and regularise the decision-making process. The section 4330(b) reference to a claimant's duty to make reasonable efforts to become financially self-supporting where appropriate was confirmed as state policy in *In re Marriage of Brantner*.[137] In that instance, the court stated that an order for spousal support should be for a ten-year period, reversing the less generous two-year period of payment, to be followed by reduced payment for a further two years, as ordered by the trial court. The Superior Court regarded the orders of the lower court "that provided for the "automatic

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[134] *Ibid.*
[135] *In re Marriage of Tydlaska supra* n. 114.
[136] In *Pekar v Pekar* (App. 2 Dist. 1985) 218 Cal. Rptr. 823, 173 Cal App. 3d 367, the appeal court confirmed the decision of the trial court to terminate spousal maintenance after five years despite a 24-year marriage and the wife's return to further education.
[137] (App. 4 Dist. 1977) 136 Cal. Rptr. 635, 67 Cal. App. 3d 416.

reduction and eventual termination" of the appellant's spousal support as "an abuse of discretion".[138] It was noted by the court that whilst

> "...the legislative policy is that wherever possible orders for spousal support be for a time certain and terminate at the end of the [period specified...nevertheless... [A]fter a lengthy marriage retention of jurisdiction to modify spousal support should be the norm and the burden of proof of justification for terminating the order should be on the party seeking termination".[139]

Similarly in *In re Marriage of Heistermann*[140] whilst the court confirmed the power of the lower court to set a termination date based on existing evidence of likely capacity to become self-supporting, it insisted that the court retain jurisdiction to allow for the possibility of continuing support.

Arguably the evolution of no-fault divorce brings with it an implied recognition of the entitlement of each spouse eventually to exit the marriage and all associated financial responsibilities. Consequently the notion of "rehabilitative alimony" has grown in popularity, whereby a court might require the breadwinner spouse sufficiently to provide for the dependent spouse, but only to the extent necessary to allow her to avail of the necessary education or job training to result ultimately in self-sufficiency. In rejecting long-term alimony as too high a price to exit a marriage, Frantz and Dagan regard rehabilitative alimony as "a reasonable compromise" as it is aimed towards self-sufficiency.[141] In noting the specific goal of self-sufficiency, they regard rehabilitative alimony as neither compensation nor contribution based, and with very few exceptions, they suggest that the courts do not consider a spouse's pre-divorce standards of living or even spousal contributions to the other's earning potential. Although this suggests that the basis for calculation is solely the financial cost of rehabilitation, it is difficult to

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[138] *Ibid* at 423.
[139] *Ibid* at 421.
[140] (App. 4 Dist. 1991) 286 Cal. Rptr. 127, 234 Cal. App. 3d 1195. In *Marriage of Stallworth* App. 1 Dist. 1987, 237 Cal. Rptr. 829, 192 Cal. App. 3d 742, on appeal, the right of the trial court to exercise discretion not to fix the duration of spousal support was acceptable, although it would have been preferable to do so.
[141] *Supra* n. 40 at 122-123. Frantz and Dagan are of the view that rehabilitative alimony is based on the importance of giving women the tools to overcome their market disadvantages, and the measure of rehabilitative alimony should be calculated with that specific goal in mind.

accept entirely that the current and future level of income of the earning spouse will not have some impact on the calculations of the presiding judge.[142] Conversely Krauskopf notes that the courts in their judgments appear to have denounced the notion that support is limited to a period of rehabilitation and have favoured more significant support awards.[143] The courts have viewed such awards as a means fairly to share personal losses and gains caused by the marriage, the most common loss being the decreased earning capacity of the dependent spouse. Thus, in justifying a spousal support order in excess of rehabilitative alimony, Krauskopf regards it as fair for the other spouse to share that loss of earning capacity, at least to the extent that he has benefited from the arrangement that caused the loss, typically by means of an increased earning power on his part.

More generally, Kachroo is heavily critical of the ambiguous role of alimony in the divorce process and the "inchoate or tenuous position occupied by spousal support in a culture steeped in equality and self sufficiency rhetoric" suggesting that it gives rise to "inconsistencies in post-divorce spousal economics".[144] Similarly Parkman has stated that the "logic and purpose of alimony has been unclear for a long time."[145] He notes that as a direct consequence, the current structures for decisions in respect of spousal applications for alimony "lack a consistent framework resulting in injustice and inefficiency."[146]

Given the existence and strict imposition of rules relating to the classification of property and the equal division of what is regarded as community property, it is not surprising that the Californian courts are reluctant to maintain the marital ties by ordering the payment of ongoing spousal maintenance. Although it is difficult to determine the extent to which

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[142] *Ibid.* Frantz and Dagan suggest that the courts would be well advised to calculate the amount and duration of the alimony on the basis of the balance between the need to facilitate a wife's new beginning and the need to minimise the burden on a husband. They are of the view that such a basis for calculation would cause the courts to exercise their judicial discretion more effectively.

[143] *Supra* n. 21 at 263.

[144] Kachroo G "Mapping Alimony: From Status to Contract and Beyond" (2006-2007) 5 Pierce L. Rev. 164 at 169. By way of illustration Kachroo refers to the confusing statement of the presiding judge in a New Jersey Court in *Turner v Turner* 385 A.2d 1280 at 1282: "The law should provide both parties with the opportunity to make a new life on this earth. Neither should be shackled by the unnecessary burdens of an unhappy marriage. This is not to suggest that women of no skills, or those who suffer a debilitating infirmity, or who are of advanced age should be denied alimony for as long as needed. But such is the exception not the rule."

[145] *Supra* n. 16 at 71.

[146] *Ibid* at 93.

orders for spousal support are being made,[147] the editorial of the Harvard Law Review has identified as a consequence of the 1960s Californian reforms, a trend away from alimony and toward property division. They note that alimony increasingly became "temporary and rehabilitative...was forward-looking and focussed on need".[148] Ellman suggests that the introduction of no-fault divorce at this time altered significantly the basis for alimony given that the new blameless process normatively grants divorce to either party and eliminates this bargaining leverage from the spouse who is no longer regarded as the innocent victim in need of recompense.[149] Consequently he is of the view that since the reformulation of the divorce regime in California, the payment of alimony lacks foundation in law. Notwithstanding the expression of varying academic views on the function and aim of spousal support, the failure on the part of the legislature to identify their motivations for spousal support results unavoidably in a failure sufficiently to restrain and/or direct the powers of the judiciary. In a similar manner to the competing academic views on this issue, a presiding judge can declare and rely upon his subjective perceptions of spousal support and determine his calculations accordingly. Given the delegation of responsibility for this aspect of financial relief to the discretionary powers of the judiciary, until the aim of spousal support is legislatively agreed and enunciated, there remains scope for such judicial liberties.

8 Private settlements: role of marital agreements within a rule-based regime

8.1 Introduction

An obvious consequence of a system premised upon rigid rules is the development of means to avoid the imposition of those rules. Except for the very limited stated exceptions, the Californian courts are only permitted to avoid the strict statutory rule-based system of equal division of community property where a valid written agreement to

[147] Schneider laments the lack of empirical research on the extent to which spousal alimony orders are being made, implying that an excessive reliance upon this judicial power might represent evidence of abuse of that judicial discretion. Schneider C "Rethinking Alimony: Marital Decisions and Moral Discourse" (1991) BYULR 197 at 253.
[148] *Supra* n. 29 at 2092.
[149] Ellman IM "The Theory of Alimony" (1989) 77 Cal L Rev 1 at 7.

the contrary has been executed by the parties, or following an oral stipulation of the parties in open court.[150] One form such an agreement can take is a pre-nuptial agreement between the parties, drafted and executed prior to the marital ceremony. A pre-nuptial agreement can regulate the manner in which property is classified as well as the manner in which it is to be divided.[151] Weitzman has advocated the value of such "intimate contracts",[152] recognising the capacity of an agreement to conform to contemporary social reality and afford freedom and privacy to the couple as to the order of their personal relationship.[153]

It has been recognised earlier in this work that by adopting a rule-based system of equal division there often exists little financial incentive or other compulsion for the less wealthy spouse to execute a post-nuptial settlement.[154] Conversely the parties can elect prior to the marriage, by way of agreement, to avoid the 50:50 default position mandated by law. Whatever the circumstances or motivation, pre-nuptial agreements as a means of avoiding the statutory marital regime have grown in favour under Californian law and are now regarded as a legitimate means of private arrangement between spouses.[155]

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[150] S 2250 California Family Code.

[151] Whilst section 2550 permits the parties to avoid the equal division of community property by agreement, section 2581 permits parties to define and categorise property owned other than as defined under the Californian Code. Following the decision *In re Marriage of Lucas* 27 Cal. 3d 808, 614 P2.d 285, 166 Cal. Rptr. 853 (1980), the right to provide evidence of an oral agreement as to status of the property was eliminated and parties must now complete in writing an agreement confirming their intentions in respect of what would otherwise be regarded as community property. It was determined that to permit oral statements to rebut the presumption of community property would frustrate the strong public policy that favours community ownership of property acquired in the course of the marriage.

[152] Weitzman L *The Marriage Contract* (Free Press) (1981) at 226.

[153] *Ibid* at 227-228. Weitzman also recognises the social and psychological benefits of the contractual model, regarding it as facilitating open and honest communication and assisting in the clarification of individual expectations.

[154] See section 4.4 above concerning the impact of a rigid equal division rule on the capacity to negotiate a settlement.

[155] Marston AA "Planning for Love: The Politics of Pre-Nuptial Agreements" (1997) 49 Stan. L. Rev. 887, 891.

8.2 Pre-nuptial agreements – law and practice in California

Historically a pre-nuptial agreement that contemplated divorce was regarded in California and all other US states as contrary to public policy and thus unenforceable.[156] California was one of the first states to embrace the growing importance of contractual freedom, even in the family context. Thus the Californian Supreme Court in *In re Marriage of Dawley*[157] elected to uphold the terms of a pre-nuptial agreement, asserting that neither:

> "...the reordering of property rights to fit the needs and desires of the couple, nor realistic planning that takes account of the possibility of dissolution, offends the public policy favoring and protecting marriage....[Rather] It is only when the terms of an agreement go further – when they promote and encourage dissolution, and thereby threaten to induce the destruction of a marriage that might otherwise endure – that such terms offend public policy."[158]

Glass regards this judicial shift in attitude, evident also in Florida[159] as being driven by "recognition of women's de jure equality, the increasing number of women in the workplace, and the expanding emphasis on contractual freedom."[160] These judicial developments were subsequently supported by legislative shifts in favour of the autonomous decision-making powers of parties who intended to marry. The legislative lead was taken by the Uniform Premarital Agreement Act (UPAA) in 1983 which in essence regarded the pre-nuptial contract as a standard contract which should be subjected to the norms and rules of contract law, subject to some restrictions relating to specific policy concerns.[161] Unsurprisingly, California's willingness to support private ordering saw it adopting in 1985, the facilitative provisions of the UPAA, and was the first state to do so.[162]

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[156] *Supra* n. 65, per Glass at 221.
[157] 551 P.2d 323 (Cal. 1976)
[158] *Ibid* at 333, quoted by Harvard Law Review Editorial *supra* n. 29 at 2078.
[159] The first US court to recognise the validity of a pre-nuptial agreement was the Florida Supreme Court in *Posner v Posner* 233 So. 2d 381 (Fla. 1970).
[160] *Supra* n. 65 at 221.
[161] For example, section 3 prohibits parties from contracting on a matter that would be regarded as being in violation of public policy and in particular prevents pre-marital agreements from adversely affecting the right to child support.
[162] Uniform Premarital Agreement Act 9C U.L.A. 35 (2001) as amended.

Whilst California supported the emphasis on contractual autonomy and otherwise gave effect to the terms of the UPAA, it did draw the line at the parties' capacity to waive, absolutely, future claims to spousal support. This singling out of spousal support for separate treatment from all other aspects of property and wealth division mirrors the separate treatment given to spousal support within the Californian Family Code. In the context of pre-nuptial agreements under Californian law, it remains outside the absolute remit of parties, who otherwise appear relatively free to self-determine the division of wealth and assets on divorce.

In implementing the Californian version of the UPAA, the Californian Supreme Court took an even more permissive view of pre-nuptial agreements, giving effect to them in the controversial cases of *In re Marriage of Bonds*[163] where the wife had signed the agreement without legal representation, and in *In re Marriage of Pendleton*[164] where the pre-nuptial agreement provided *inter alia* for the mutual waiving of rights to spousal support. This increasingly liberal view of pre-nuptial agreements by the Californian courts, whilst applauded by some,[165] was quickly dampened by the state legislature, with the passing of a Bill to amend California's version of the UPAA in relation to spousal support.[166] The amended section 1612 provides that spousal support waivers will be automatically unenforceable where the challenging party was not represented by independent counsel at the time of execution and/or where such a waiver is deemed unconscionable at the time of enforcement.[167] In addition the amended provisions clarified the concept of 'voluntary' by setting out what would be regarded as an

[163] 83 Cal. Rptr. 2d 783 (Cal. Ct. App. 1999).
[164] 5 P. 3d 839 (Cal. 2000).
[165] *Supra* n. 65 per Glass at 230, 231, citing Wasser D "Prenuptial Disagreements" L.A. Law Dec 2000 26, notes the comments of the attorney acting for the husband in *Pendleton* that the California Supreme Court had now "strongly indicated that a more favorable judicial climate lies ahead regarding the allowable scope of pre-nuptial agreements as well as the factual circumstances under which they will be enforced." Similarly, citing Blumberg P, "Supreme Court Rules in Favor of Barry Bonds" L.S. Daily J Aug 22 2000 at 1, Glass at 231, refers to the views of the attorney for the husband in *Bonds* that "the Supreme Court is trying to make it easier for people to enter into prenuptial agreements as consenting adults."
[166] S.B. 78, 2001, Leg., Reg. Sess. (Cal. 2001).
[167] Cal. Fam. Code s 1612(c)-(e).

involuntary execution.[168] Whilst there has been much criticism of these legislative restrictions on the freedom of parties to contract as they wish, these criticisms have mostly come from practitioners who regard these developments as unnecessary and paternalistic in nature.[169]

8.3 Unequal bargaining powers

Relative to other US states,[170] California, notwithstanding the 2001 legislative restrictions, operates quite a permissive approach to pre-nuptial agreements. In essence, the Californian approach regards pre-nuptial agreements as deserving of the same treatment as other (non-marital) *inter-partes* contracts. Such an approach, embraced for the most part by both the legislature and judiciary in California, suggests a belief in the willingness and capacity of parties to self-determine their arrangements on divorce. In addition, it emphasises the need to respect the choices of independent adults and to resist the temptation to dictate the nature and extent of their responsibilities to each other. Given the private and intimate relationship between married parties, it has been suggested

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[168] Cal. Fam. Code s 1615(c) provides that a pre-marital agreement will be regarded as not executed voluntarily unless the court finds in writing or on the record all of the following:

(1) The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement, or after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel.
(2) The party against whom enforcement is sought had not less than seven calendar days between the time that party was first presented with the agreement and advised to seek independent legal counsel and the time the agreement was signed.
(3) The party against whom enforcement is sought, if unrepresented by legal counsel, was fully informed of the terms and basic effect of the agreement as well as the rights and obligations he or she was giving up by signing the agreement, and was proficient in the language in which the explanation of the party's rights was conducted and in which the agreement was written. The explanation of the rights and obligations relinquished shall be memorialized in writing and delivered to the party prior to signing the agreement. The unrepresented party shall, on or before the signing if the premarital agreement, execute a document declaring that he or she received the information required by this paragraph and indicating who provided that information.
(4) The agreement and the writings executed pursuant to paragraphs (1) and (3) were not executed under duress, fraud or undue influence, and the parties did not lack capacity to enter into the agreement.
(5) Any other factors the court deems relevant.

[169] Seastrom PG and Seastrom BG "Drafting and Litigating Premarital Agreements" Orange County Law, July 2003 44 and Sanders J "Law Aims to End Bonds-Like Prenups" Sacramento Bee Oct 28 2001 at A3, both cited by Glass, *supra* n. 65 at 232.

[170] For example, the state of Wisconsin will not enforce what it regards as an "inequitable" agreement; see *Button v Button* 388 N.W. 2d 546 (Wis. 1986) which applied a fairness test, with reference to both the time of the execution of the agreement and the time of the divorce.

by Bix that states must be "more receptive to the parties' private ordering of the terms of their marriage".[171] The counter-argument naturally relates to the vulnerable spouse who has historically been viewed as requiring the support of the state to identify and enforce (typically) her rights against her resisting husband.

Brod has criticised excessive private autonomy in marital affairs, arguing that current permissive legislative and judicial approaches over-emphasise the need for freedom of contract and personal autonomy whilst ignoring the importance of the "attainment of economic justice for the economically vulnerable spouse at the end of marriage".[172] Equally the argument that marital agreements should be treated like any commercial contract has been strongly criticised by Glass, who highlights the oft-unavoidable cognitive limitations arising in the marital context.[173] Even though the private and consensual exercise of autonomous powers by consenting adults might be the policy basis for facilitating pre-nuptial agreements in law, such an argument pre-supposes the informed and full consent of both parties. Whilst such consent may in some instances be both informed and forthcoming, agreements can equally be entered into as a means of avoiding a less desirable situation. For the wealthy spouse, the choice is an easy one, as the effect of the pre-nuptial agreement is most likely to reduce the entitlements of the dependent spouse upon divorce. Conversely for the dependent or less wealthy spouse, the choice can be the execution of the agreement or the forfeiture of the marriage. Whilst the issue of choice and the study of human behaviour on marriage may be outside the remit of this work, the suggestion that both parties are *choosing* to enter into the pre-nuptial agreement is questionable. Bix suggests that a vulnerable spouse might "in a sense "prefer" marriage with an agreement to no marriage at all" and that ultimately the "moral significance of the choice depends on the alternatives available".[174] Further, in relation to the position of the less-wealthy spouse, who typically limits or waives her statutory rights on divorce, it has been observed that "to the extent that this acquiescence is a reflection

[171] *Supra* n. 65 at 231.
[172] Brod G "Premarital Agreements and Gender Justice" (1994) 6 Yale J. L. & Feminism 229 at 295.
[173] *Supra* n. 65 at 241. Glass notes that in "addition to increasing the risk of unconscionable agreements, the relative lack of knowledge and resources of many parties to marital agreements may also increase cognitive errors".
[174] *Supra* n. 65 at 241 citing Nussbaum M.C *Sex and Social Justice* (2000) Oxford University Press, USA.

of unequal bargaining positions at the time of execution, the agreements themselves will likely magnify these disparities."[175]

A regime which provides for an equal division outcome in every instance of divorce enhances the impetus for the wealthy spouse to execute a pre-nuptial agreement in order to prevent the potential loss of half of his future fortune. Arguably, rather than protecting the position of the vulnerable spouse, a rigid rule-based system might only serve to encourage the avoidance of the supervisory role of the courts, effectively forcing the wealthy spouse to circumvent its provisions and demand the execution of a pre-nuptial agreement.

9 Conclusion

When the procedure for asset distribution on divorce was enacted by the Californian legislature, it might have been perceived as a deliberate attempt to compel the court to resolve all financial issues between the parties at the time of dissolution and thereby eliminate post-dissolution claims. However to counter any such interpretation, the California Family Code deliberately accords the court the discretionary power to order spousal support in light of the circumstances of the parties. Frantz and Dagan are critical of these mixed messages from the legislature, noting that spousal support which seeks to compensate a dependent spouse "contradicts the principle of free exit reflected by no-fault divorce".[176] By contrast, it could be argued that the discretionary powers are crucial given that the partnership model upon which both the underlying community property and equal division rules are premised ignores the individual and particular circumstances of each marital relationship. In this regard, Frantz and Dagan recognise the merits of the co-existing alimony scheme insofar as "it is tailored to address the problem societal gender discrimination poses for marriage."[177] The tension that exists between the finality and certainty of the equal division rule and the scope for individualised justice in the guise of alimony orders gives rise to an intriguing contradiction in regulatory approaches,

[175] *Supra* n. 29 at 2096.
[176] *Supra* n. 40 at 120.
[177] *Ibid* at 121.

which primarily serves to acknowledge the inadequacies of a system based entirely upon rules.

Certainly this combined approach of the Californian law-makers confirms the conclusions reached in chapter 1 of this work that ultimately a mix of rules and discretion is required, a system premised entirely upon rules will invariably yield to some element of discretionary justice. In this regard, exceptions to the rule may develop, such as the discretionary-based power to order spousal support as evidenced in California, or equally there may develop a growing reliance upon means of avoiding the strict application of pre-determined rules, as evidenced by the growing use and regulation of pre-nuptial agreements. Whilst it is difficult to pronounce definitively whether these exceptions and avoidance mechanisms are reactions to the rules themselves or whether the impact of the equal division rule has necessitated alternative means of securing a fair outcome, ultimately the absolute application of a universal rule in itself, has proven to be an insufficient means of regulating asset division on divorce. Further, whilst the manner in which Californian divorce laws are structured might suggest that all three benchmarks of democracy, predictability and fairness can be achieved, these successes are not so evident when the effect of the rule-based approach is assessed. The more traditional view that equal division of assets on divorce gives rise to equality of outcome has long been queried, particularly given the very different starting points for the breadwinner and the homemaker spouse upon divorce. The economic disparity between the parties is not addressed by the award of an equal share in the assets and represents an inherent weakness in the arguments presented in favour of the introduction of the equal division rule in the late 1960s. Further, the empirical evidence gathered to examine the impact of the equal division rule suggests that its effect is in fact to impoverish women to some extent, and not to equalise the historical gender divide in the home. Until the Californian law-makers consider the merits of their current approach and clarify the aims of the regime, its laws are likely to continue to fall short of securing the three benchmarks

identified above.[178] Thus it is perhaps only in the articulation of the policy goals of its regime that Californian law-makers can assess the merits and effect the workability of its current regulatory approach. Fineman has advocated the benefits of result-oriented law-making, calling upon "policy- and lawmakers to inquire into and specifically define what factors should be considered fundamental in making allocation decisions during divorce".[179] Specifically in the context of ongoing spousal alimony obligations, Ellman has identified an absence of justification for such orders.[180] He is critical of the lack of express policy goals in this context, and has called for "more attention... [to be paid]...to the policy choices implicit in guideline writing" given that spousal support orders have "long been a matter of trial judge discretion".[181]

The imposition of equal division as a rule in every instance has the capacity to give rise to injustice, and in such instances residual scope for a more equitable division is useful, as enacted in Ireland, and included as a statutory option in Scotland and New Zealand. By way of contrast to the significant reliance placed on rules by the Californian regime, this thesis will, in the following two chapters explain and critically assess the more dual-based approaches of law-makers in Scotland and New Zealand which identify law and policy-making roles for both the legislature and the judiciary, arguably providing a more balanced and individualised approach to governance. Whilst their respective regulatory systems remain premised upon statutory rules and guidelines, ultimately it is for the judiciary in these two jurisdictions to make the final determinations regarding asset distribution, with reference to the statutorily-stated principles and purposes. What will follow is a critical analysis of the regulatory approaches of Scotland and New Zealand in order to evaluate alternative regimes, located somewhere in the middle of the regulatory

[178] Fineman, *supra* n. 66 at 179, has suggested that in ardently striving for equality, the Californian law reforms have impeded the development of legal doctrine that might more effectively represent the views and needs of financially vulnerable spouses.
[179] *Ibid.* In considering the need for reform of existing laws, Fineman at 22 identifies that a "contemporary perception of a need for "protective" or result-oriented legislation has been at the base of many recent battles in the public arena." Here and again later at 179, Fineman is critical of the "equality rhetoric" for its failure to address the circumstances of many women.
[180] Ellman IM "The Maturing Law of Divorce Finances: Toward Rules and Guidelines" 33 Fam. L.Q. 801.
[181] *Ibid* at 808, 809.

continuum, with the discretionary-based Irish system at one end and the contrasting Californian rule-based approach at the other.

Chapter 5 – Scotland's Approach to the Regulation of Asset Distribution on Divorce

1 Introduction

In critically outlining the regulation of asset distribution on divorce in Scotland, this chapter will illustrate the manner in which Scottish laws have been deliberately modelled to provide overarching guidance in respect of the implementation of its provisions. This guidance articulated as a set of expressly formulated principles, sets out the policy goals of the regulatory system and operates to both limit and structure the co-existing judicial discretion. Whilst the fact of such discretion distances Scotland from the essentially rule-based system operated in California; on the rules/discretion continuum, it will be shown that Scotland is best placed at a midway point between the regimes of California and Ireland. This jurisdiction provides a clear illustration of the beneficial impact of principles in both driving and guiding the implementation of the law, and highlights their value as quasi-rules within a regulatory framework. Ultimately it will be demonstrated that in elucidating the underlying policy goals of its regulatory provisions, the Scottish law-makers have moved closely towards a system capable of securing the three benchmarks of democracy, predictability and fairness.

The approach of Scottish law-makers to the governance of asset distribution on marital breakdown has benefitted greatly from the lessons of its past and its willingness to embrace considered reform.[1] Historically there existed little by way of identifiable objectives in the drafting or implementation of the law in this area, which depended upon judicial powers of adjudication reliant almost entirely upon notions of fairness and

[1] Scotland has been regarded as "leading the way in the reform of divorce matters", with its more recent reforms including the reduction in time periods for the demonstration of separation and the waiting time for uncontested divorces; Booth P "Newsline – Picking faults in Divorce Law" [2004] Fam Law 556. Similarly Lord Hope has noted that it is best "to go north for modern family law", acknowledging both the Scottish Executive and Law Commission for its "careful and imaginative" work. Lord Hope of Craighead "Do We Still Need a Scottish Law Commission" [2006] Edin LR 10 at 25. However Lord Hope has equally been critical of certain aspects of these reforms, most notably in *Miller v Miller and McFarlane v McFarlane* [2006] 3 All ER 1 where he highlighted the harsh impact on the previously dependent spouse, of the Scottish aim to secure a clean financial break as quickly as possible, considered in more detail in sections 4.7 and 4.8 below.

justice. As the legislative approach developed and shifted, so too did the nature and extent of the judicial powers exercisable. Thus whilst the legislature has enhanced the capacity of the courts to make orders in respect of a growing category of assets, these powers are contemporaneously limited by the identification and imposition of over-riding policy objectives and measured legislative guidelines. In adopting this approach Scottish law-makers were heavily reliant upon the views and studies of the Scottish Law Commission and have attempted to strike a balance between relatively strict legislative principles and the necessary levels of co-existing residual judicial discretion. In so doing, the use of quasi-rules in the form of legislative presumptions, supported by governing principles and statutory factors has allowed the legislature to retain primary control over the manner in which the issue of asset distribution on divorce is governed in Scotland. Thus as an exercise of comparative study, the careful approach of the Scottish laws to the need for and creation of democratic statutory controls of this nature will serve as an interesting and perhaps informative lesson for the potential reform of the existing Irish regulation of divorce. This analysis of the approach adopted by Scottish law-makers lends itself to a significant reliance upon the primary legal materials both currently and historically governing divorce in Scotland. In particular the manner in which reforms have been considered, most particularly by the Scottish Law Commission, demonstrates the value of detailed, informed consultation whereby existing weaknesses can be identified and utilised to structure effective reforms. Whilst the main texts relied upon in the course of this study are those from Clive and to a lesser extent Dick, contemporary commentary where available is also used to inform and where appropriate, support the analysis presented. It is suggested that the analysis to follow might demonstrate a future approach that could be adopted by the Irish legislature and in turn the Irish judiciary.

2 Historical approach to asset distribution

Beyond avoiding outcomes whereby the dependent spouse became a charge on the community, Scottish matrimonial laws historically lacked any definite strategy regarding the purpose of ancillary financial relief.[2] Traditionally Scottish family law and policy-

[2] Until 1964 marital breakdown was legislatively governed by a number of enactments, originally by the Act of 1573 which was updated by the Married Woman's Property (Scotland) Act 1881 and the Divorce

makers dictated that financial relief upon divorce was only payable to the spouse who was the 'victim' of the misconduct of the other spouse. In divorce actions commenced prior to September 1964 the guilty spouse was prevented from securing financial provision of any kind.[3] The effect of the law was to regard the guilty spouse as having died at the date of the decree of divorce, allowing the innocent spouse to receive what she would otherwise be legally entitled to on his death. However despite the entitlement to apply for financial relief being premised upon the guilt or innocence of the other spouse, the underlying aim was not the provision of compensation to the 'victim' but rather to avoid his/her destitution and dependence upon the state for support.[4]

The Morton Commission[5] which issued its report in 1956 endorsed long-standing calls, including those from the earlier Mackintosh Committee[6] for the enhancement of the powers of the judiciary. The existing statutorily-based judicial powers were confined solely to the making of a financial lump sum order. The Morton Committee called for a judicial power to order not only the payment of a lump sum to a wronged spouse but also, where appropriate, a periodical payments order to ensure that even in the absence of any available fixed assets, the court was still sufficiently empowered to provide for a dependent party.[7] However the right to seek such financial relief was to remain the exclusive right of the innocent spouse. In addition to this the Morton Commission recommended the cessation of spousal entitlement to claim financial relief upon the claimant's remarriage, judicial capacity to vary the provisions of a marriage settlement,

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(Scotland) Act 1938. For a brief outline of the history of Scottish laws see further *Report on Aliment and Financial Provision* (Scot. Law Com. No 67) (1981) at para 3.4.

[3] One exception to this quite-draconian rule was where the marriage breakdown occurred as a result of the incurable insanity of one spouse, such circumstances permitting the court to order the payment of a lump sum or periodical payments for the benefit of the insane spouse and any children of the marriage, section 2(2) Divorce (Scotland) Act 1938.

[4] In taking this view, the Morton Commission recommended that on the death of the paying spouse, the surviving spouse should have a power to apply for a share in the deceased's estate, not only to allow the courts to counteract avoidance transactions but also to prevent him or her from having to rely upon the community for support. See further *Report on Aliment and Financial Provision* (1981) *supra* n. 2 at paras 3.4 -3.8.

[5] *The Royal Commission on Marriage and Divorce* (Cmd. 9678 (1956)), so called after its Chairman, Lord Morton of Henryton, a Lord of Appeal in Ordinary. The report concerned the regulation of marriage and marital breakdown in England, Wales and Scotland.

[6] *Report of the Departmental Committee on the Law of Succession in Scotland* (1950).

[7] *Supra* n. 5 at para 553-559.

and the capacity for a surviving spouse previously in receipt of spousal maintenance to apply for provision from the deceased's estate.[8]

Some of the proposed changes were incorporated in the Succession (Scotland) Act 1964 in the context of the reform of spousal succession rights. Notwithstanding the succession law context, Part V, entitled *Financial Provision on Divorce*[9] dealt with a wide range of financial relief issues arising on divorce. The right to claim an automatic legal share on divorce was abolished and in place the 1964 Act established a discretionary judicial power to award a lump sum or periodical payments order to the applicant spouse.[10] This judicial discretion extended to a subsequent right on the part of *either* spouse to apply for the order to be varied on a proven change of circumstances.[11] In creating discretionary powers for the presiding judge, it was suggested by the Scottish Law Commission that the effect of the 1964 Act was to improve upon the pre-existing rule-based system of financial relief, thereby broadening the scope of the judiciary.[12] Unfortunately these significant changes to the process of statutory regulation were not supported by any identifiable contemporaneously-developed policy direction. On reflection the Law Commission concluded that the 1964 Act had failed to establish the purpose of allowing or requiring financial provision on divorce.[13]

Interestingly one key aspect not addressed or affected by the 1964 Act was the restriction of the right to apply for financial relief to the 'innocent' spouse. The lack of debate on this central issue at the time is surprising. The 1981 report notes that the "Mackintosh Committee assumed, without debating the matter, that only the innocent spouse should have a claim."[14] The Morton Committee appears to have taken the implicit view that the innocent spouse was entitled to the ongoing support of which she would otherwise be in

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[8] *Ibid.*
[9] Sections 25-27, later repealed by the Divorce (Scotland) Act 1976.
[10] Section 5 Divorce (Scotland) Act 1976 permits the court at its own discretion to order either spouse to pay the other a capital sum or periodical payment or both.
[11] Section 26(4).
[12] *Supra* n. 2 at paras 3.9-3.10.
[13] *Ibid*, considered in detail at section 3 below.
[14] *Ibid* at para 3.8.

receipt, but for the enforced divorce application, arising from the 'wrongful' actions of the respondent spouse.

The Divorce (Scotland) Act 1976 was the last significant enactment prior to the publication of the Law Commission reports on *Aliment and Financial Provision* and *Matrimonial Property*. Essentially the impact of this Act was twofold; divorce could now only be secured on the basis that the marriage had irretrievably broken down and the right to seek financial relief was now available to both parties. Irretrievable breakdown could be proven in one or more ways, including proof of fixed periods of separation. Where proven, this amendment allowed a divorce to be granted without the need to prove spousal fault. One of the major consequences of this statutory change was to allow a 'guilty' spouse to act as the applicant in divorce proceedings as they could now rely upon grounds other than misconduct to seek the decree of divorce. Thus section 5 of the 1976 Act permitted the court to make a periodical payments or lump sum order in favour of both the applicant and/or respondent spouse. In its review of this Act, the 1981 report[15] noted that this change was necessitated given that an innocent spouse could now be divorced against his or her will, making it necessary to allow either spouse to apply for relief from the court.

3 1981 Report of the Law Commission

3.1 Introduction

Notwithstanding the changes brought about by the 1976 Act,[16] as part of its programme on family law reform[17] the Scottish Law Commission in its 1981 *Report on Aliment and Financial Provision*, considered at length the existing law governing financial provision and readjustment on divorce and nullity, and in particular the obligation of financial support amongst family members. In tracing the development of the governing laws, and in considering the need for reform, the Law Commission restricted its focus to inter-

[15] *Ibid* at para 3.11.
[16] The Law Commission in its introduction to the 1981 report regarded the changes brought about by the 1976 Act as "the minimum necessary to take account of the changes then made in the grounds for divorce".
[17] *Second Programme of Law Reform* (Scot. Law Com. No. 8, 1968) Item 14.

spousal obligations,[18] with its central focus being on the redistribution of spousal property on divorce.[19] The Commission further limited the scope of this report by admitting to being concerned only "with the powers of the courts on divorce and with the principles on which those powers should be exercised".[20] One of the primary aims of the statutory reforms proposed in the 1981 report was to "modernise, simplify and improve" the law relating to aliment in Scotland.[21] Ultimately the Commission observed that

> "...the disadvantages of the current system are such that an attempt must be made to provide some more specific guidance to the courts, the legal profession and the public on the purpose or purposes of financial provisions on divorce, and on the principles to be applied and the factors to be taken into consideration in connection therewith".[22]

3.2 Proposals for reform

Part III of the 1981 report contained substantive recommendations for reform. In essence it sought to resolve what were regarded as the "two major defects" of the existing law; that the law lacked any ascertainable objectives and that it gave the courts an inadequate range of powers. To this end, the Commission identified Part III of the report as being

> "...designed to put forward for consideration by Parliament a system of financial provision on divorce which is firmly based on fair and clearly stated principles but which leaves adequate scope for the exercise of judicial discretion to cater for the different circumstances of different cases".[23]

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[18] This is justified by the Commission at para 3.1 of the 1981 Report given the separate regulation of parent/child obligations by the law of aliment. In addition it is noted that the ordering of a divorce does not impact upon the fact of a child's right to be maintained by his or her parents.

[19] This, as distinct from upon death, or during the subsistence of the marriage.

[20] *Supra* n. 2 at para 3.2.

[21] The pre-existing multiple obligations of support were to be reduced to create a "restricted list of alimentary relationships and one set of rules for all actions of aliment", *ibid* at para 1.4.

[22] *Ibid* at para 3.39.

[23] *Ibid* at para 1.5. The Commission reviewed but chose not to recount the approaches of many jurisdictions, identifying general trends in recent foreign legislative enactments, ultimately pinpointing three main aspects of current international trends:

- The sharing of matrimonial property (howsoever defined)
- Restrictions to ongoing maintenance
- The diminishing of the role of conduct in the assessment process

It was envisaged that such reforms would incorporate enhanced judicial powers with sufficient scope to make the most appropriate orders for financial and ancillary relief on divorce. As a means of articulating aims of a regulatory system, principles have been identified earlier in chapter 1 as an effective tool to guide the decision-making process.[24]

3.3 Judicial discretion v legislative rules

When considering the crucial issue of the objective of financial provision on divorce, the Report highlighted the lack of legislative guidance offered by the 1976 Act. Part III of the Report considered the existing scope of the discretionary judicial powers regarding the redistribution of property on divorce and the basis upon which decisions were being made. The power of the court to make "with respect to the application, such order, as it thinks fit",[25] highlighted the existing absolute discretion of the court.[26] Furthermore the lack of a judicial policy direction was apparent in the judgment of the Second Division of the Court of Session in *McRae v McRae*[27] where it was stressed that the financial amount, if any, to be awarded was "essentially a matter for the discretion of the Court which grants the decree of divorce".[28]

In weighing up the impact of the existing discretion-based approach, the benefits and shortfalls of this longstanding 'objective-free' approach were considered. In short, the Commission regarded flexibility as the sole identifiable gain. Whilst the Report recognised the advantages that can flow from such flexibility, the "serious disadvantages" arising from the lack of stated objectives were unashamedly denounced as "an abdication of responsibility by Parliament in favour of the judiciary...[and] also an abdication of all collective responsibility in favour of the conscience of the single judge".[29] The Commission noted the unavoidable subjective adjudications that would be imposed by

[24] See earlier in chapter 1, at section 2.2.2.
[25] Section 5(2) Divorce (Scotland) Act 1976.
[26] *Supra* n. 2 at para 3.35.
[27] 1979 SLT 45.
[28] *Supra* n. 2 at para 3.35.
[29] *Ibid* at para 3.37, quoting from the judgment in *McKay v McKay* 1978 SLT 36.

different presiding judges and rejected the repeated suggestion by counsel in reported judgments that there existed at that time, "rules of thumb" that were followed by most Outer Court judges.[30] Such an approach was deemed unacceptable by the Commission, regarding as unsatisfactory, an approach that permits "questions of social policy, which have very important financial consequences for individuals" to be determined based on "informal understandings and somewhat arbitrary rules of thumb based on no ascertainable principle and known only to a small circle of court practitioners".[31] This undemocratic approach to the development and dissemination of legal principles was denounced by the Commission. The consequential unavoidable lack of certainty and predictability was highlighted, particularly as it affected parties to a divorce hearing. Finally, given these uncertainties the scope for fear and bullying tactics to be incorporated into the negotiation process was recognised. Thus not only were the three benchmarks of democracy, predictability and fairness being defeated by the mechanics of the existing regime, the Commission concluded that the established system served only to increase bitterness and acrimony and did little to facilitate amicable or mature resolution of issues.

In considering the possibilities for reform the Commission undertook an examination of the governing provisions in force in many other jurisdictions, including more recent statutory developments in Canada and New Zealand. Recognising that guidance was required by the courts, the legal profession and the public on the purpose of financial provision on divorce, the Commission confirmed the very great need for the enunciation of stated objectives and specific guidelines to ensure certainty and fairness and to curb the excessive freedoms of the judiciary. However the Commission also accepted a co-existing need for the retention of some element of judicial discretion, in light of the excessive rigidity of a rule-based regime.[32]

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[30] The 1981 Report, *supra* n. 2 made reference in para 3.37 to the representations made by counsel in both *McRae v McRae* and *Lambert v Lambert* 1980 SLT 77 as to the customary use by the courts of capital awards ranging from one third to one half and periodical allowance awards of a quarter to one third of joint gross incomes.

[31] *Ibid* at para 3.37.

[32] *Ibid* generally at paras 3.35 to 3.40.

3.4 Developing underlying principles and objectives

In light of this policy vacuum within which the courts were regarded as operating, the need for the development of underlying principles and objectives more closely to steer the process of asset distribution formed the central reform proposal of the 1981 report.[33] The Commission's proposals, which identified the principles to govern the asset distribution process followed on from the detailed examination of all possibilities.[34] Under various guises, including objectives, models and aims, a total of sixteen possible objectives were considered in the body of the Report.[35] The merits of each objective were considered, with the Commission ultimately concluding that no single objective, with or without a list of factors would be sufficient to serve as the sole objective when awarding financial provision on divorce. Basing a system of financial provision upon a combination of principles was regarded as being more readily workable. Further, it was the view of the Commission that given the inevitable variation in circumstances that would arise, the recognition of more than one governing principle would more typically correspond to reality and give rise to clarity in the law generally.[36] This realisation led to the conclusion that several of the considered objectives could "usefully feature in a scheme based on a combination of principles or objectives."[37]

3.5 Unworkable models for reform

Following lengthy deliberation the Commission rejected numerous policy bases for asset division including: the preservation of the pre-divorce economic positions of both parties,

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[33] *Ibid.*
[34] *Ibid* at para 3.63. The Commission recognised that in order to reform the laws in an effective and workable way, it was imperative that such reforms be developed in a manner that would be justifiable to reasonable husbands and reasonable wives, i.e. not be discriminatory between men and women, would be capable of application to many different types of marriage and would be capable of application to cases where the marriage ended as a result of the fault of the applicant or respondent party, or the fault of both or the fault of neither.
[35] *Ibid* at paras 3.41-3.57.
[36] *Ibid* at paras 3.59-3.60.
[37] *Ibid* at para 3.59.

the securing of justice as determined by the presiding judge, the relief of need, individual rehabilitation and reward for spousal contributions.[38]

Firstly, the reinstating of the spouses to their financial position had they remained married, previously enshrined as an objective in section 25 of the Matrimonial Causes Act 1973 in England/Wales but deleted in 1984, was rejected by the Scottish Law Commission as inappropriate, regarded as typically giving rise to a continuing obligation of inter-spousal support.[39] Similarly, a system which would rely upon the delegation of responsibility to the courts to determine the best orders in the circumstances was quickly rejected as perpetuating the weaknesses of the existing system. It was recognised that to centre the regulation of the division of marital assets solely upon needs would be to place a mandatory support obligation on the wealthier spouse, which would only be defeated when the dependent spouse could no longer prove financial need. Such a policy approach would have the potential to place the wealthier spouse at the eternal mercy of the dependent spouse and would serve to make the financial ties between the parties almost indefeasible.[40] The Commission expressly recognised the "life-long obligation of support"[41] that this might give rise to, and considered that as a stand-alone model for division, this proposed basis for ancillary relief orders was not justifiable. Further, dividing marital assets on the basis of needs alone would not permit the court to make property adjustment orders to achieve an over-all equitable distribution of the wealth of the parties and the marriage.[42] Similarly rejected as possible underlying policy aims or objectives of any reformed process of division were both the rehabilitation model and reliance upon a formulaic method for the division of assets. Whilst a rehabilitation-based model was regarded as not capable of operating as a stand-alone objective of asset distribution, the Commission did recognise its overlap with the transitional periodical payments structure that was ultimately proposed.[43] As regards the adoption of a formula-

[38] *Ibid* at paras 3.41-3.57.
[39] *Ibid* at para 3.47.
[40] *Ibid* at para 3.49.
[41] *Ibid.*
[42] The issue of need and its use as the basis for both justifying and calculating ongoing inter-spousal payments was discussed again by the Commission specifically in the context of ongoing spousal support obligations, considered at section 3.7 below.
[43] *Supra* n. 2 at para 3.50.

based approach, although the Commission noted the value of the predictability and consistency likely to arise, it was rejected as an unsuitable objective in itself.

> "Predictability of results ceases to be a virtue if the results are predictably unsatisfactory and unjustifiable."[44]

However the Commission was willing to recognise that given the "obvious attractions in such an approach", it should be used to "some extent in relation to the division of property on divorce".[45]

Although the Commission recognised that a share in the matrimonial property of the parties was the typical means of rewarding spousal contributions,[46] the view of the Commission was that it was more suited "as an ingredient" in a system of financial provision on divorce with justice for the parties demanding that the law provide the machinery for "the due recognition of contributions". The Commission acknowledged that the desirability of taking spousal contributions into account was evident in the laws governing financial provision on divorce in several jurisdictions, citing in particular England/Wales and Australia. Ultimately however, the Commission concluded by indicating a preference for "the idea of equal sharing" rather than simply calculating and rewarding past contributions. To choose the latter approach would be overly "retrospective" and "narrow" in approach.[47]

Thus many of the models and potential policy objectives, whilst discounted as the sole basis upon which to develop the new system, were recognised as relevant and necessary in the development of any new approach.

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[44] *Ibid* at para 3.52.
[45] *Ibid.*
[46] For further discussion of the relevance and impact of spousal contributions, see paras 3.91-3.99 of the 1981 Report.
[47] *Supra* n. 2 at para 3.56. In this context the Commission considered the various forms that such spousal contributions could take, noting the various levels of direct and indirect contributions that might be measured Interestingly, and somewhat controversially, the Commission regarded contributions which do not result in an improvement of the other spouse's economic position as not a suitable premise upon which to base a claim for financial relief on divorce.

3.6 Over-riding preference for equality of division

In advocating the strengths of a presumptive starting point of equal division, the Law Commission relied upon significant public support.[48] The 1981 Report details the extent of support received, collated through surveys and questionnaires together with suggestions and comments submitted. The Law Commission emphasised the underlying concept of marriage as a partnership, with fairness demanding a norm of equal division.[49] In light of this, the Commission regarded any fixed proportioning of assets other than one based on equal sharing as being difficult to justify. Requiring the courts to award a fair share to each spouse was deemed to be "too vague" and would have simply represented a perpetuation of the existing discretion-based system,[50] whereas equally, the Commission regarded a "fixed rule of apportionment for all cases" as too rigid an approach.[51] In this context the Commission stated that irrespective of how a couple might hold title to a property, this should not be regarded as a reflection of how they regard the property.[52] However given the peculiarities of any given case, the need for a capacity to vary from the starting point of equal division was noted and it was suggested that the scheme proposed should include the power of the court to adjust where necessary, the position of the parties following the equal division, allowing the court to award a capital lump sum or property transfer order as necessary. To strengthen the inclusion of this discretionary capacity to order unequal division, the Commission referred to the additional child care costs that might arise as an example of where such a power might prove valuable.

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[48] *Ibid* at para 3.67. The Commission referred to submissions and comments received directly together with the 1979 survey of family property in Scotland conducted by Manners and Rauta on behalf of the Commission, which indicated that over 90% of informants believed that property acquired jointly during the marriage should be divided equally and 65% considered that property obtained by one spouse in the course of the marriage should be divided equally; Manners AJ and Rauta I *Family Property in Scotland* HMSO (London) (1981).

[49] In commenting on this norm of equal division, Dick highlights the view of the 1981 report that "any departure from the principle of equal sharing of matrimonial property should be kept to the minimum..." Dick A "Using the 1985 s.9 principles in negotiation and their implications for negotiations involving cohabitants" 2007 25 SLT 186 at 187.

[50] *Supra* n. 2 at para 3.66.

[51] *Ibid.*

[52] *Ibid* at para 3.67, with reference to para 3.27 which outlined data gathered to illustrate the various ways in which the family home was held by married people.

In determining the principles that might best govern an award of financial provision on divorce, the Law Commission set out what it perceived as the fundamental components of an effective approach to regulation. It emphasised the need for non-discriminatory, reasonable laws that could readily be applied to all types of marriages, irrespective of the circumstances of the parties or the cause of the breakdown. More specifically the Commission recommended that any financial order should be justifiable on one or more of the following principles; the fair sharing of matrimonial property, the fair recognition of contributions or disadvantage, the fair sharing of economic burden of child care, the fair provision for adjustment to independence and the relief of grave financial hardship

These principles were regarded as reflecting the underlying idea of marriage as a partnership with "the only fair solution" demanding a norm of equal division of the assets.[53] The Law Commission's proposals ultimately formed the foundations of section 9 of the 1985 Act, which identifies the five governing principles of asset distribution and is regarded as "the heart of the financial provision in divorce" under Scottish law.[54]

3.7 Spousal Support

The issue of post-divorce spousal maintenance and the continuation of support notwithstanding the termination of the marriage also received much consideration prior to the enactment of the 1985 Act. In particular the Law Commission recognised that, typically the ordering of continuing inter-spousal support was inconsistent with the concepts of divorce and the termination of marriage. Thus as a starting point the Commission identified many instances where an obligation continuously to maintain would be unjustifiable, including a short childless marriage or an application made 20 years after the divorce is ordered. The Commission was strongly of the view that a maximum time-line should be placed on the duration of the obligation to support, in order to prevent transitional financial assistance from evolving into "permanent life-long

[53] *Supra* n 49; Dick summarises the starting point as "equal sharing based on...views of fairness as regards recognition of both material and non material contributions."
[54] Dick A *Family Law (Scotland) Act 1985* Greens Annotated Acts (Sweet & Maxwell) (2000) at 18.

support".[55] From the submissions and correspondence received in preparing its report the Commission noted the multiple criticisms of the existing system which had permitted the ordering of life-long periodical allowances notwithstanding the dissolution of a marriage.[56] Such an ongoing payment obligation was regarded as an "unjustifiable burden" particularly in circumstances where the recipient was not incapacitated or where there were no minor children of the union.[57] Ultimately the Commission regarded the existing regime as "an unsatisfactory one for both parties" and preferred the ordering of a capital lump sum or a transfer of property order "whenever this would be sufficient and appropriate". Interestingly what might be regarded as sufficient or appropriate was not commented upon and was regarded as more correctly "left to the discretion of the court in each case".[58] It was conceded by the Commission however that the scope for the ordering of periodical payments would have to be retained and should exist alongside the right to order a lump sum or property order to fulfil the identified underlying principles of fair sharing of the burden of child care and the relief of grave hardship.

The Commission acknowledged the importance of the retention by the courts of a capacity to make such a transitional inter-spousal order upon divorce. This eventually manifested as the Commission's proposal for inter-spousal maintenance orders for a maximum time period of three years post divorce. In the body of its Report, the Commission recognised the relevance of the individual circumstances of the parties before the court:

> "....cash awards based on the principle of fair sharing of the value of matrimonial property, or on the principle of fair recognition of contributions and disadvantages, should be in the form of a capital sum, (payable by instalments if necessary) rather than in the form of a long-term periodical allowance. Cash awards based on the principle of easing the adjustment to independence are based partly on past dependency and partly on future needs and may

[55] *Supra* n. 2 at para 3.107.
[56] *Ibid* at para 3.38. Those consulted by the Commission on this issue unanimously rejected long-term spousal support as an objective of financial provision on divorce but did call for the retention of a flexibility to allow for such support in appropriate cases.
[57] *Ibid* at para 3.121 which highlighted the fact of "avoidable human suffering" arising from the existing law, given the continued financial dependence implicit in the post-1976 system.
[58] *Ibid* at para 3.122.

> appropriately take the form of either a capital sum or a periodical allowance".[59]

It was envisaged that by permitting the court to relieve the financial needs of the previously-dependent spouse by way of inter-spousal periodic payments order, the possibility of the dependent spouse otherwise becoming a charge on the public purse would be significantly lessened.[60]

The Commission's proposal of a payment period of three years, which it regarded as "an adequate maximum period" was included as a key aspect of the legislative reform provisions adopted by the legislature. However it is not an absolute rule, as section 9(1)(e) permits a party who is likely to suffer serious financial hardship to be awarded reasonable financial provisions for a reasonable period.[61] The three year limit expressed in section 9(1)(d) of the 1985 Act is a commendable legislative inclusion, signalling quite clearly that whilst post-dissolution spousal support can be necessary where a previously-dependent party needs to adjust to their post-divorce financial circumstances, such support is not permanent and the claimant is expected to adjust their earning/financial capacity within a stated time period. Wilson has referred to this approach as representing "a much fiercer propulsion towards the clean break" than is evident in neighbouring England/Wales and thus providing certainty and predictability within a democratic framework.[62] The three year presumption reflects a legislative policy to provide financial support to avoid immediate injustice, but is ultimately predicated upon a severing of financial ties into the future. However the inclusion of the aforementioned section 9(1)(e) power to order spousal support to avoid serious hardship[63] seems to ensure the satisfaction of the final benchmark of fairness, where fairness in the circumstances demands ongoing financial support.

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[59] *Ibid* at para 3.123.
[60] Such an instance would more likely arise where 50% of the available assets might fail to relieve the spousal hardship.
[61] See further at section 6.3 below.
[62] Wilson N "Ancillary Relief Reform: response of the judges of the Family Division to Government Proposals" [1999] Fam Law 159 at 161.
[63] The wording and application of section 9(1)(a)-(e) are discussed in detail below at section 4.4.

Finally in this context, the impact of the post-divorce economic burden arising from caring for a child was also considered, with recognition of the career and earning sacrifices often required in such circumstances.[64] The 1981 Report identified the importance of the sharing of the economic burden of child care between both spouses post-divorce. In recognising the reality that one of the parties, typically the woman, takes on the burden of child care, the Commission identified the need for some form of "equitable adjustment of the financial burden", be it payment for the actual financial cost of child care and/or payment in respect of the career sacrifices made by one parent in order to take responsibility for the care of the children.[65] Whatever the child care circumstances post-divorce, the Law Commission admitted that where a spouse is unable to work or to work fulltime because of the presence of young children or where she does work but is required to incur the expense of child care, there should be no question of an equal financial division and "some form of equitable adjustment of the financial burden of caring for children of the marriage is required".[66] In assessing the possibilities for statutory reform, the Commission rejected both the notion of a child care wage payable by the other parent and the suggestion that the burden be shared through increased levels of aliment for the child. The Commission was of the view that whilst there can be no question of a clean break where child care responsibilities arise, it regarded the payment of a wage to the homemaker spouse as attracting the "objectionable connotation" that she was now an employee of her former husband. As regards the payment of increased aliment for the child to cover the child care costs, the court preferred to keep distinct, the issues of child aliment and aliment in respect of child care costs. Ultimately the Commission proposed the principle of the fair sharing of the economic burden arising from the care of the children of the marriage, requiring the court to have regard to arrangements made regarding child maintenance, any expenses and losses incurred by the need to care for the child, as well as the age, health and other circumstances of the child and the cost and availability of any necessary child care. The suggestion that in the case of ongoing child care obligations post-divorce, the three year period of inter-spousal

[64] This issue was ultimately expressly provided for by section 9(1)(c) of the 1985 Act.
[65] *Supra* n. 2 at para 3.100.
[66] *Ibid* where the Law Commission considered the purpose and scope of the fair sharing of the economic burden arising from child care obligations.

support should only commence upon the termination of those obligations, was rejected by the Commission as unjustifiable. Rather the post-divorce period of child care should equally be regarded as a transition period within which the spouse could adjust to the new arrangements.[67] Ultimately the reform proposals of the Law Commission resulted in the legislative inclusion of two governing principles relevant to this issue; section 9(1)(b) requires the court to take 'fair account' of any economic disadvantage suffered in the interests of the family and section 9(1)(c) requires the court to share fairly between the parties any economic burden of caring for a child of the family.[68]

3.8 Inadequate judicial powers

Considered in tandem by the Commission, was the need to enhance the statutory powers of the judiciary to provide as necessary for the parties. In its preliminary section the Report highlighted the absence of any judicial power under the 1976 Act to order the transfer of property or to regulate the use and occupation of property. Rather the existing law limited the judicial powers to ordering the payment of a capital sum or a periodical allowance or both, and/or to varying marriage settlements. Although clearly in favour of the enhancement of the powers of the courts in respect of property orders, the Commission was anxious to restrict the court's power to award long-term periodical payments orders except where absolutely necessary.[69]

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[67] *Ibid.*

[68] See section 4.4 below.

[69] Such a need might arise with the presence of young children or other such circumstances, where not to order periodical payments would cause grave hardship. Given this restriction, Bissett-Johnson highlighted that for a "wife in her 40's, the problem in Scotland is generally one of establishing that a clean break using s 9(1)(b)-(c) is inappropriate or unavailable given the resources of the would be transferor." Bissett-Johnson A "Lifestyle support of provision for the middle aged wife" 1999 SLT 37 at 37, 38. Ultimately, as noted, the law regulating the payment of long-term maintenance was reformed and such orders can now only last for up to three years except in exceptional circumstances. For further discussion of the limited time frame for the payment of spousal maintenance see section 4.7 below.

3.9 Conclusion

Having identified the many shortfalls of the existing system, the 1981 Report aimed to identify the rightful objectives of the redistribution of marital wealth on divorce. It called for the introduction of comprehensive legislative enactments, regarding it as unlikely that "any systematic body of case law will develop" to fill the existing gaps.[70] The Commission, in identifying the five principles that were eventually transported into the 1985 Act, took into account the importance of the need for a balance between strict legislative principles and judicial discretion, particularly in light of the existing unfettered judicial discretion exercisable by the Scottish judiciary.[71]

4 Family Law (Scotland) Act 1985

4.1 Introduction

The primary outcome of the 1981 reports of the Law Commission was the enactment of the Family Law (Scotland) Act 1985 which introduced a two-tier test to be applied by the court prior to the making of any order for financial relief. To this end the 1985 Act firstly sets out guiding principles, one or more of which must justify the financial order(s) made[72] and, secondly, highlights the need for any orders to be reasonable in light of the financial resources of the parties.[73] The dual test to be satisfied has been regarded by the

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[70] *Supra* n. 2 at para 1.5. In essence the detailed proposals contained in the 1981 report were adopted in full and enacted as the essential features of the 1985 Act.

[71] These five principles, the merits of their elevation to statutory guidelines and the manner in which they have been statutorily framed will be considered below at para 4.4 with reliance upon case law to date, to illustrate their application in practice. The approach advocated by the Scottish Law Commission was reiterated in two subsequent reports dealing with property ownership in the context of an ongoing marriage; *Law Commission Consultative Memorandum (No. 57) Matrimonial Property* and *Family Law – Report on Matrimonial Property* Report of the Scottish Law Commission No. 86 (1984).

[72] Section 9(1)(a)-(e).

[73] Section 8(2). Although the pursuer in *Adams v Adams* 1997 SLT 144 sought to retain sole ownership of the family home, thereby requiring the court to depart from the norm of equal division, the court was restrained from doing so because of the financial pressure and budgetary constraints such an order would impose upon the lifestyles of the pursuer and the children of the union. Bissett-Johnson noted that relative to the approaches adopted in other jurisdictions such as England, Canada or Australia, "[W]hen it comes to making awards of financial provision on divorce, the level of judicial discretion is less in Scotland..." Bissett-Johnson A "Cases From the Trenches but only Modest Legislative Responses" contributor to *The International Survey of Family Law* 2006 Edition, 329 at 334, discussed further at section 4.4 below.

courts as "cumulative" in nature, "with the result that unless both are satisfied the court has no power to make an order".[74] In enacting the 1985 Act it appears that the legislature has created a statutory, goal-orientated structure of laws within which judges can exercise subjective judgment as to the best outcome in the circumstances. Thus on the rules/discretion continuum, the Scottish law-makers have recognised the merits of both rules and discretion and ensured that the regulatory approach combines a mix of the two. In light of the use of both presumptions and principles, the benchmarks of democracy and certainty appear more attainable; but not at the expense of fairness, which remains within reach, whatever the circumstances before the court. The effect of this legislative approach and the extent of any residual judicial discretion will be considered below in the course of the analysis of these statutory provisions.

4.2 Statutory objectives and principles

When enacted, the 1985 Act was drafted to reflect the Law Commission's concept of a system based upon a combination of principles, regarded as necessary to deal with the variety of circumstances that might arise.[75] Sutherland regards the approach adopted by the 1985 Act in a very positive light, regarding it as providing the courts with "a principled approach to financial provision on divorce and sufficient flexibility to meet most cases".[76] This principled approach presents a system which in her view has the important consequence of enabling "practitioners to advise clients on what is a reasonable settlement to agree, thus avoiding much costly and acrimonious litigation."[77] In seeking to give effective guidance to the decision-making process, the Act outlines the five fundamental principles identified by the Scottish Law Commission, one or more of which must justify any financial relief orders to be made, in order to guide the judiciary, the conflicting parties and their legal advisors.

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[74] *Wallis v Wallis* 1993 S.C. (H.L.) 49 at 56 per Lord Jauncey of Tullichettle.
[75] *Supra* n. 2 at para 3.60. The Law Commission concluded that to create laws premised upon a single policy objective would "fail to cover all the situations in which an award of financial provision may be called for."
[76] Sutherland E "Scotland Consolidation and Anticipation" *The International Survey of Family Law* 2000 Edition, 329 at 339.
[77] *Ibid.*

4.3 Definition of matrimonial property

Section 10(4) of the 1985 Act defines matrimonial property as

> "...all the property belonging to the parties or either of them at the relevant date which was acquired by them or him (otherwise than by way of gift or succession from a third party), before the marriage for use by them as a family home or as furniture or plenishings for such home; or during the marriage but before the relevant date."

The 1984 Report of the Law Commission[78] considered a number of quite varied approaches to the ownership of matrimonial property in an ongoing marriage, ultimately preferring a continuation of separate property rules of ownership to be supplemented by principle-driven rules for the division of property upon the dissolution of the marriage.[79] Although outside the remit of the 1984 Report, the Commission suggested that "there is room for a more principled approach" to the division of matrimonial property on divorce; referring specifically to the earlier recommendations contained in its 1981 report.[80] As a starting point, the Commission stated "that the key idea is that of sharing what is acquired by the spouses' efforts or income during the effective period of marriage."[81] The Commission relied upon the work of Manners and Rauta,[82] utilising the data collected to ensure that their conclusions were supported by public opinion. Thus the basis for determining the definition of matrimonial property was the idea that what should be at issue is property acquired by one or both spouses during the marriage. It was concluded that such property should, as the norm, be divided equally between the spouses.[83] Any danger of this approach giving rise to inequity or unfairness could be prevented by the co-existing judicial power to depart from this norm where property was deemed not to be derived from the spouses' efforts or income during the marriage; in such instances "the

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[78] *Supra* n. 71.
[79] *Ibid*, the conclusion and recommendations of the report are set out in para 3.13-3.14.
[80] *Ibid* at para 3.13.
[81] *Ibid* at 3.69.
[82] *Supra* n. 48.
[83] *Supra* n. 70 at 3.72.

court could take a fairly broad axe."[84] Thus, for example, where a spouse could show that pre-marital funds had been used in the course of the marriage to purchase an asset, it would remain within the remit of the court, where appropriate, to exclude such an asset from the presumption of equal division. Thus whilst for the most part the Scottish regime relies upon a broad definition of matrimonial property, there remains residual scope for a more restrictive approach to be adopted in particular circumstances, where justice so requires. In a regulatory system premised upon legislative presumptions requiring the exercise of judicial discretion, this approach to defining matrimonial property is not surprising. In essence it reflects the over-all approach of Scottish law-makers to asset distribution on divorce, relying upon a presumptive starting point, with scope for judicial freedom to avoid where necessary. Whilst such residual discretion does provide scope for dispute and uncertainty, the co-existing benchmark of fairness arguably necessitates its existence.

4.4 Judicial application of section 9 Family Law (Scotland) Act 1985

The primary aim of the enunciation of the five statutory principles was the creation of policy-driven laws which would require the judiciary to make orders for financial relief with a view to securing one or more of those policy aims. Whilst sensibly the legislation is framed in a manner that permits the court to be affected by the extent of the parties' capacity to pay, ultimately the identification of the goal of fairness, pre-determined typically to require equal division, together with the stated objectives of the regulatory process, has created purpose-driven statutory powers of asset distribution. As a result, the purpose of state intervention might be less influenced by the subjective preferences of a presiding judge and more likely to conform to the overall aims of state regulation as debated and decided by the legislature.[85] Dick favours this combined approach, noting that the "1985 Act provides a starting point with potential discretionary variations".[86] Judicial commentary on the revised approach has recognised this shift from "what had

[84] *Ibid.*
[85] For a more general discussion of the role and impact of principles, policies and standards on the regulation process, see section 2.3 of chapter 1 above.
[86] Dick A *supra* n.49 at 186.

been an unfettered discretion in the court" to a legislative approach that includes specified principles which "certainly impose some constraints on the court's discretion, but some areas remain in the application of the principles for the court to exercise its own judgment on the facts of the particular case so as to achieve a fair result".[87] However Dick has noted that no "clear shape has emerged from case law as to the use of the discretionary elements of the 1985 Act". In particular she refers to the complications that have arisen in respect of the use of "special circumstances" as a means of interpreting the concepts of financial advantage and disadvantage and in considering the economic burden arising from child care responsibilities.[88] Given these case law shortcomings, Dick emphasises the importance of identifying and understanding the underlying statutory principles, noting that Scots law has traditionally "relied on principle rather then precedent".[89]

The five governing principles are set out in section 9 of the 1985 Act as follows:

Section 9(1)(a): The net value of the matrimonial property should be shared fairly between the parties to the marriage;

Whilst the use of the nebulous term 'fairly' might suggest a resulting judicial freedom to make whatever orders deemed appropriate by the presiding judge, section 10(1) explains that property shall be deemed to be shared fairly when it is "shared equally...save in special circumstances". Thus the primary presumption governing the process is that the equal division of matrimonial property is the "normal result which the legislation contemplates".[90] Where special circumstances are established and proven to justify a departure from equal division, the court has discretionary power, subject to the five

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[87] *Jacques v Jacques* 1997 SLT 459 per Lord Clyde at 462. Lord Clyde further noted that "the task of applying the Act and in the working out of the detail of the matter must essentially be one for the judge who first hears the case." Similarly in *Ali v Andrew or Ali* [2001] SCLR 485 at 493 Lord Hamilton stated that whilst the court continues to have a discretion in relation to claims for financial provision on divorce, sections 8 and 9 of the 1985 Act have directed the court "to exercise it within more precisely defined parameters."

[88] *Supra* n. 49 at 186.

[89] *Ibid* at 187.

[90] Per Lord Gill, *Adams v. Adams supra* n. 72.

governing principles and various section 11 factors,[91] to determine the nature of the asset division.

This norm of fairness and its resulting presumption of equality has regularly been applied by the Scottish courts, confirming that "sharing [was] required to be equal unless one or more special circumstances could be averred and proved to justify a different proportion."[92] It was similarly confirmed by Lord Keith in *Wallis v Wallis* that the "effect of sec. 9(1)(a) combined with sec. 10 is that in the absence of special circumstances the net value of the matrimonial property at the relevant date...is to be shared equally between them".[93] Thus as a "matter of construction" it has been noted that "it is sufficient to understand that in the ordinary course an equal division will be fair".[94]

The use of a presumption rather than a rule of equal division allows scope for flexibility depending on the facts before the court and thus alternative sharing arrangements will be permitted where they are "justified by special circumstances".[95] However the fact of the identification of a special circumstance is not sufficient to depart from equal division; rather such departure must also be justified by those circumstances.[96] To control this exercise of judicial discretion, the legislature has enacted detailed and "intricate"[97] statutory provisions to direct the court in its dealings with the assets of the parties. These statutory provisions, considered in detail below in section 4.6, have been commended as retaining scope for the court in the particular circumstances, "to divide a particular item

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[91] See below at section 4.6.
[92] *Calder or Crockett v Crockett* (1993) Inner House Cases 30 June 1993 per Lord Murray.
[93] *Supra* n. 73 at 53 per Lord Keith of Kindel.
[94] *Jacques v Jacques* supra n. 87 at 462 per Lord Clyde, later relied upon by Lord MacFadyen in *Cummings or Jackson v Jackson* [1999] Fam. L.R. 108. Thomson considers the meaning of "fair" as the basis for the division of matrimonial property, using a series of fictional cases to emphasise the need for both assets and debts to be divided equally, if fairness is to be achieved; Thomson J "When is fair division fair?" 2007 SLT 192.
[95] Section 10(1) 1985 Act.
[96] *Jacques v Jacques supra* n. 87 at 24-25. See para 4.5 below, for further consideration of the concept of special circumstances as a means of deviating from the principle of equal division, with reference to decided case law and judicial interpretations.
[97] Per Lord Gill, *Adams v. Adams supra* n. 73 at 145.

separately from the rest [of the property] to meet a special circumstance which bears on it primarily".[98] In this regard:

> "...a court does not have to confine itself to the global approach in assessing and dividing matrimonial property and...there is room for the scheme to be applied in different ways in different situations, that being very much a matter for the discretion of the Lord Ordinary."[99]

More recently the requirement that the court must be satisfied as to whether the orders are reasonable, was again evident in *Sweeney v Sweeney*,[100] regarded by Innes as creating a three-tier approach to financial provision on divorce; the identification of the matrimonial property, the division of that property between the parties whether in equal shares or otherwise, and the consideration of the parties' resources in order to test whether the 'fair' division arrived at in stage 2 is reasonable.[101] This final stage requires the court to ensure that the orders made can reasonably be achieved given the circumstances of the parties, and acts as a means to allow the courts to avoid the otherwise-presumed equal division. Bissett-Johnson relied upon the awards made in *Fraser v Fraser*[102] to illustrate the significance of this statutory subjective "reasonable resources" test.[103] The case involved spouses who were in their sixties with four adult children. At the time of separation the collective matrimonial property, valued at £800,000, consisted of the family home and the husband's pension schemes. On separation the husband had already given the wife £106,000 to purchase a new home and subsequently paid her £1,000 maintenance per month. Later, on divorce, equal sharing would have entitled the wife to a further £274,000 which in the view of Sheriff Evans would have been unreasonable as the husband required the use of the family home for the foreseeable future. Consequently the court ruled that section 8(2) permitted the court to omit the value of the family home

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[98] Per Lord Murray *Calder or Crockett v Crockett supra* n. 92 at 4.
[99] *Ibid.*
[100] (No 1) 2004 SLT 892. Innes regards this judicial approach as demonstrating "that after application of the various statutory provisions, the court is to look at the result as a whole and consider whether the outcome is justified by the principles set out in the Act and reasonably having regard to the parties' resources." Innes R "Financial Provision on Divorce: the Scottish Perspective" [2008] IFL 241 at 243.
[101] *Ibid.* The three steps are in essence, the two tier test established by the 1985 Act, with an additional preliminary judicial obligation to both identify and value the matrimonial property at issue.
[102] 2004 Scot (D) 28/2.
[103] *Supra* n. 70 at 40.

from its calculations and ultimately award the wife a further lump sum of £150,000 payable in monthly instalments. Thus the inclusion of this statutory, safety-net provision allowed for significant judicial scope to be exercised to avoid the unnecessary equal division of assets. One shortcoming arising from the inclusion of this test of what is 'reasonable in the context of the parties' resources', was however highlighted, by Bissett-Johnson, where a wife's interrupted career might have produced a substantial loss to her, but the assets available for distribution on divorce are relatively modest.[104] Unless that wife can prove hardship, she may not be in a position to be compensated, pursuant to the principles of the Act if she fails to show that the order(s) so permitted are reasonable given the resources of the parties. This inability to deal with individual cases formed the basis of the criticisms expressed by Lord Hope in *Miller v Miller/McFarlane v McFarlane*,[105] to be considered later in the context of spousal support at section 4.7 below.

In the context of the equal-division versus equitable-division debate, the Scottish legislative position is an interesting hybrid of a regime reliant upon judicial discretion to divide the assets equitably, exercisable within the confines of very detailed statutory guidelines, with an underlying presumption in favour of the equal division of community property. Thus whilst equal division remains the expected outcome in the calculation of spousal financial provision, the court is required to assess, *inter alia*, the contributions, sacrifices and advantages made by each spouse during the course of the marriage.

Section 9(1)(b): Fair account should be taken of any advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of the family;[106]

The impact of the compensation-based approach to justify asset distribution was considered by Lord Gill in *Adams v Adams*, where the career prospects of the pursuer

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[104] *Ibid.*
[105] *Supra* n. 1.
[106] See the comments of Dick, *supra* n. 49 at 188 where she refers to this complex principle as giving rise to "a heady brew" which has to be "uncorked" by the courts.

wife were recognised by the court as having been disadvantaged by her role as the primary caregiver for the couple's two children. The court readily accepted that as a direct result of this role she had not fulfilled her career ambitions and that she would have had better prospects for promotion if she had not been so restricted. However the significant financial contributions of the defender to the household finances in the course of the marriage were deemed to fulfil the 'counterbalancing consideration' referred to in section 11(2) and thereby had adequately compensated her sacrifices. Given this net balancing of the different spousal contributions, the court refused to depart from the principle of equal sharing, thereby necessitating the sale of the large family home requiring the pursuer and two children to move to a smaller property. As noted earlier, Bissett-Johnson was critical of section 9(1)(b)-(c) insofar as it makes it difficult for "a wife in her 40's" to convince the courts that a clean break is inappropriate.[107] He noted the Scottish "legislative quest" for a clean break prevents the courts from ordering the payment of periodical maintenance where a property transfer would be inappropriate or insufficient in the circumstances.[108] He highlighted the inability of the existing provisions to provide "continuing support for older wives", noting that the rights of the "middle-aged wife" are further restricted by the general limitation on the payment of maintenance to a three-year period. This unsympathetic approach to the particular circumstances of the homemaker was also evident in the very recent case of *P v P*.[109] The judgment of Sheriff Cusine referred to the homemaker's own recognition of her "very fortunate" position having had the benefit of staying at home with the three children of the union. In addition it was noted that she "had the benefit of not requiring to seek employment".[110] This approach had been considered by Lord MacFadyen in the earlier case of *Cummings or*

[107] *Supra* n. 69.

[108] *Ibid* at 37-38. The distinct approaches to property orders and spousal maintenance under Scottish law, as distinct from the collective view adopted by Irish law is considered at section 5 below and again in the overall conclusion to the thesis, with reference to the other approaches adopted by the jurisdictions assessed in this thesis.

[109] 2009 WL 6525.

[110] *Ibid.* The court equally recognised the benefits of the defender's role as the homemaker to the husband and the negative impact it had on her capacity or opportunity to establish a pension or build upon her career. Thus the court was ultimately satisfied that the wife had suffered economic disadvantage during the marriage, justifying the award of a capital sum of £462,204 under section 9(1)(a) and £77,400 under section 9(1)(b). However the defender was denied her claim of ongoing spousal support as the court was satisfied that the capital payment ordered was sufficient to meet the requirement of fairness and equal sharing between the parties, with specific reference being made to the brevity of the marriage and the defender's failure, to date, to enquire after employment.

Jackson v Jackson[111] where it was argued on behalf of the defender that in the course of the marriage "the pursuer had enjoyed an economic advantage in the form of gaining capital which had been contributed by the defender." Thus it was argued that it was an "obvious case" for the application of the section 9(1)(b) principle in order to restore some of the capital which had been gained by the pursuer. Having previously regarded the presumption of equal sharing not to have been displaced, the court refused to reconsider the issue with reference to section 9(1)(b). This ruling suggests a judicial preference for an overall view of whether fair sharing in the circumstances means equal division, as distinct from a willingness to rely upon the remaining section 9 principles to uncover 'special circumstances'' as required by section 10, the former approach arguably requiring a greater use of judicial discretion and subjective adjudication. Indeed, overall, the capacity for subjective judicial treatment of the contributions of the homemaker is just one example of the quite weighty judicial discretion which underlies the Scottish system of asset distribution. Notwithstanding the enunciation of governing principles and presumptions it is evident that there remains quite extensive judicial latitude to depart from equal sharing, depending on the circumstances of the case and the manner in which they are regarded by the presiding judge.

Section 9(1)(c): Any economic burden of caring, after divorce, for a child of the marriage under the age of 16 years should be shared fairly between the parties;

As noted at section 3.7 above, the Commission in its 1981 Report intended that this principle should require the court to have regard to future financial arrangements and their impact upon the care required for the child(ren). Norrie has noted that the effect of section 9(1)(c) is to allow the court to "make an order that will share the actual costs of bringing up the child".[112] In this regard he notes that whilst it can give rise to a periodical

[111] *Supra* n. 94.

[112] Norrie K "Marital Agreements and Private Automy in a Comparative Perspective" at 7. Unpublished paper presented at Cambridge University on 26-27 June 2009, as a prelude to the forthcoming publication of a research project of the same title, which will compare how marital agreements function in national legal and social contexts in Australia; Austria; Belgium; England; France; Germany; Ireland, The Netherlands; Scotland; Singapore; Spain; Sweden and USA. It will also examine whether there are underlying principles that are to be found in most or even all jurisdictions. Based on the comparative analysis, the project will conclude with recommendations for the regulation of marital agreements.

allowance payment order, it is "frequently used to justify that transfer to the parent who has residence of the child the half share of the family home that belonged before divorce/dissolution, to the non-resident parent."[113] Interestingly, in *Adams v Adams* the court rejected the pursuer's attempt to secure unequal division of the matrimonial property despite her economic burden arising from the caring required for the children after the divorce. In the particular circumstances this was rejected by the court given the likelihood of the defender shortly being in a position to resume the payment of aliment.[114]

In seeking to provide for the parties in such circumstances, Jackson et al have identified from their empirical research a tendency for practitioners to seek to

> "...secure individualized justice, using discretion not simply for its own sake but in order to re-allocate (usually) scarce resources by giving first priority to meeting the needs of the custodial parent and dependent children, and, secondly providing for the basic needs of the non-custodial parent/husband, only after that redistributing the remaining matrimonial resources."[115]

It was further noted in this context that whilst they identified "a clear preference for achieving a clean financial break between spouses, where possible...many solicitors thought this clashed impossibly with the practical need to maintain a continuing financial commitment where there were still dependent children."[116]

Section 9(1)(d): A party who has been dependent to a substantial degree on the financial support of the other party should be awarded such financial provision as is reasonable to enable him to adjust, over a period of not more than three years from the date of the decree of divorce, to the loss of that support on divorce;

Section 9(1)(d) is designed to provide on a relatively short-term basis, for the spouse, who prior to the divorce, has been financially dependent upon the other spouse. Clive

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[113] *Ibid.*
[114] *Supra* n. 73 at 148.
[115] Jackson E, Wasoff F, Maclean M and Dobash R E, "Financial Support on Divorce: The Right Mixture of Rules and Discretion?" (1993) 7(2) IJL&F 230 at 245.
[116] *Ibid.*

speculates that whilst one possible purpose for such an order might be "to enable a spouse who has been economically dependent on the other spouse to undertake a course of education or training" he recognises that it should not be limited to such a purpose.[117] However he does regard section 9(1)(d) as a provision that allows for *adjustment* on the part of the dependent spouse. Whilst internationally, and particularly in common law jurisdictions, this might be regarded as a standard judicial power aimed at lessening future economic disparity between the parties, the Scottish approach seeks to ensure that for the most part, such continued financial dependency does not survive the three-year anniversary of the divorce decree. The durational limitations imposed by section 9(1)(d) have been recognised by Norrie and formed the basis of much of the criticism levelled at the Scottish regime by Lord Hope in the House of Lords in *Miller v Miller and McFarlane v MacFarlane.*[118] In addition, given that its scope is narrowed further and the section demands proof of dependency "to a substantial degree", it "would not cover, for example, a woman who compromises but does not give up completely her earning capacity and therefore is not so dependent".[119] This inability to provide for future economic disparity between the spouses, where such disparity does not give rise to one party experiencing financial hardship has been emphasised by the House of Lords where it has been suggested that the manner in which the 1985 Act currently operates, "excludes compensation aimed at redressing a significant prospective disparity between the parties arising from the way they conducted their marriages."[120] Lord Hope expressed the view that a judicial discretion should be introduced to Scots law whereby in the absence of available capital, a spouse, who has sacrificed her career, or the optimal development of her career to otherwise contribute to the marriage, ought to be compensated from the other party's future income. It was further claimed that such a judicial power would avoid the current regime which has given rise to harsh results, particularly where resources are predominantly income rather than property.[121] This critical view has, however been challenged by a number of commentators, arguing that despite the limitations imposed by

[117] Clive E *The Law of Husband and Wife in Scotland (*W Green) (Edinburgh) (4th ed) (1997) at 467-468.
[118] *Supra* n. 1.
[119] Norrie K "Clean Break Under Attack" 2006 51(7) JLSS 16.
[120] *Supra* n. 1 per Lord Hope at para 114.
[121] *Ibid* at para 127 per Baroness Hale. In this context, Baroness Hale at para 141, commends the flexibility offered by section 25 of the Matrimonial Causes Act 1973 which in her view, has permitted "practice to develop in response to changing perceptions of what might be fair."

section 9(1)(d), the 1985 Act does not serve to defeat a claim from such an applicant. Rather, Norrie warns against seeing this provision "in isolation", emphasising "the cumulative nature of the principles in s 9(1)"[122] and the capacity of the judicial powers created by the 1985 Act to order division of the marital assets, equally or unequally as well as periodic payments, either for a fixed *or* indefinite period, as outlined below.

Section 9(1)(e): A party who at the time of the divorce seems likely to suffer serious financial hardship as a result of the divorce should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period.

This is an interesting 'safety-net' type provision, which can be invoked to protect a particularly vulnerable spouse, typically arising from long-term dependency and/or career sacrifices where future independent income generation is not feasible. Thus despite a general perception[123] that spousal maintenance in Scotland can never exceed a three-year period, section 9(1)(e) *does* permit the ordering of an indefinite periodical allowance payment.[124] It formed the basis of the pursuer's claim for a periodical allowance order in *Haugan v Haugan*[125] where, aged 51 and after 27 years of marriage, the pursuer was in poor health and unfit for employment. Given her circumstances, Lord Marnoch was of the view "that this is clearly a case in which an award for an unlimited period under section 9(1)(e) of the Act would be appropriate".[126] He noted that without the support of the defender, she would "be likely to suffer serious financial hardship and...that hardship would continue indefinitely". Whilst the wording of section 9(1)(e) certainly provides scope for the ordering of long-term spousal support payments, an overly-generous

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[122] For further discussion of this issue and the contrasting views of the impact of the 1985 Act on the dependent spouse, see the discussion of spousal support at section 4.7 below.

[123] As discussed above in the context of the general, although not absolute, limitation imposed by section 9(1)(d) regarding long-term maintenance.

[124] In a private communication with the writer, Wasoff F has indicated a general public misconception of the regulation of maintenance under Scottish law, criticising the widely-held view that maintenance can only ever be ordered for a three-year period, and a general ignorance of the financial hardship exception, which permits indefinite maintenance and has been utilised by the courts.

[125] (No.1) [1996] SLT 321. The defender sought to deny the claim on the basis that the hardship claimed under section 9(1)(e) was not "as a result of the divorce" given that the pursuer had not sought support upon their separation. However this was rejected by the court, being satisfied that the loss of this right to aliment would in itself be a hardship brought about by the divorce, not the separation.

[126] *Ibid* at 324. Lord Marnoch was of the view that given the "penurious circumstances of the pursuer, as high a sum as could reasonably be paid by the defender should be paid".

application of this measure is likely to be limited by the general tenor of the principles of section 9 of the 1985 Act which indicates a strong preference for asset allocation on dissolution and a relatively swift severing of financial ties. Norrie has commented that as all five principles are looked at collectively, a generous award under section 9(1)(a) may very well "obviate the need for an award under...s.9(1)(e)."[127] However the inclusion of this provision is necessary and serves to highlight the severity of a stricter clean break regime which could not provide the payment of ongoing spousal support in circumstances where, to avoid an injustice, such an order is required.

The manner in which the Scottish legislation is drafted is to be commended for its willingness to tackle this difficult issue. The inclusion of such provisions demands a greater element of judicial accountability and transparency. However notwithstanding these carefully-drafted guidelines, and their helpful directing of the judiciary it has been suggested that there remains scope for subjective interpretation resulting in quite different outcomes for similar applicants. Dick identifies some of these shortcomings, citing Clive's concern regarding the confusing practice of the courts in dealing with "any serious imbalance at the stage of sharing the net value of matrimonial property under section 9(1) (a) using the imbalance as a special circumstance justifying an unequal sharing." Further and perhaps more importantly, Dick suggests that the decision to enact legislative guidelines in the form of a series of principles has encouraged and facilitated the courts to "consider all the appropriate principles...as well as that of economic advantage/disadvantage to reach an overall financial settlement without the need to quantify amounts due under each principle."[128] Dick thus appears to suggest that this bundling of principles together has the capacity to permit the courts to make generalised orders, resulting in a lack of transparency and judicial accountability. Ironically, except for those practitioners deeply involved in the practice of divorce law, it is arguable that the net effect of this approach is in fact a lack of predictability and consistency of legal

[127] *Supra* n. 119 at 17.

[128] Dick *supra* n. 49 at 190. This generalised judicial approach is evident in the ruling of the court in *Orr v Orr* 2006 Fam LB 83-5, where in awarding the wife 60% of the matrimonial property and a periodical allowance, the court cited the view enunciated in the earlier decision of *Little v Little* 1990 SLT 785, that the "matter is essentially one of discretion, aimed at achieving a fair and practicable result in accordance with common sense".

advice. Despite the benefits to democracy and certainty of legislatively enunciated principles, the outstanding need for fairness and the consequential inclusion of residual discretion can in practice weaken the delivery of those aims of democracy and transparency.

4.5 Special circumstances

The section 10 exception to the requirement of equal division, "save in special circumstances" is further informed by section 10(6) which provides that the term "special circumstances", without prejudice to the generality of the words, may include the following:

> "(a) the terms of any agreement between the parties on the ownership or division of any of the matrimonial property;
> (b) the source of the funds or assets used to acquire any of the matrimonial property where those funds or assets were not derived from the income or efforts of the parties during the marriage;
> (c) any destruction, dissipation or alienation of property by either party;
> (d) the nature of the matrimonial property, the use made of it (including use for business purposes or as a matrimonial home) and the extent to which it is reasonable to expect it to be realised or divided or used as security;
> (e) the actual or prospective liability for any expenses of valuation or transfer of property in connection with the divorce."[129]

This list of relevant circumstances, although non-exhaustive in nature, serves expressly to identify those special circumstances and events which the legislature has deliberately highlighted as justifying a deviation from the norm of equal division. Whether this legislative approach succeeds in achieving its aim of limiting the scope of judicial freedoms in the decision-making process has not been proven (or disproven) to date. It is arguable that at the very least, judicial discretion is lessened and those exercising the

[129] It was confirmed by the House of Lords in *Wallis v Wallis supra* n. 73, that this list of special circumstances is not exhaustive in nature. These circumstances were identified in the 1981 report of the Scottish Law Commission, *supra* n. 2, at paras 3.78-3.86 following much debate and consideration, in consultation with the public as well as those with an interest and/or expertise in the area of law and social policy.

powers are at least obliged to make orders in accordance with the democratically created governing principles. In their 1990 report, Wasoff et al state that the evidence suggests that (up to that point) there had been a "limited exercise of judicial discretion, whether by judicial inclination nor lack of opportunity."[130] Although they accepted that the effectiveness of the Scottish system might ultimately depend on the judiciary, they suggested that it is "likely to depend to a much greater extent upon solicitors themselves and how they use the Act in their work with their clients and in their negotiations with other solicitors".[131]

Clive has noted the significant weight the courts have given to the section 10(6) circumstances. For example, in *Anderson v Anderson*,[132] the court relied upon section 10(6)(a) where, on leaving his wife for another woman, the husband signed a document agreeing to transfer everything over to the wife. Despite his subsequent protestations and claims for a fair share of the matrimonial assets, the court relied upon section 10(6)(a), which allows the court to take into account any agreement between the parties, to give full effect to the agreement in question.[133] It is evident from the reported case law that the judiciary do at times refer to the relevant principle or principles upon which they premise the property orders made. In this regard it has been stressed that it is a matter for the court to determine whether a set of circumstances amounts to the statutorily required "special circumstances", and in addition whether such circumstances justify a departure from the norm of equal division.[134] In *Cummings (Jackson) v Jackson*[135] the court refused to grant the defender's application for an unequal division of the matrimonial property in his favour. He had argued that there were special circumstances justifying unequal sharing, given the derivation of part of the parties' wealth from his previous employment and the take-over of his company. He claimed that the purchasers had paid not only for the stock

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[130] Wasoff F, Dobash R E and Harcus D S *The Impact of the Family Law (Scotland) Act 1985 on Solicitors'' Divorce Practice* Scottish Office: Central Research Unit 1990.
[130] *Ibid.*
[131] *Ibid* at 6, 7. More recent research focussing on the impact of the 1985 Act on parties' willingness to negotiate a settlement is discussed at section 4.9 below.
[132] 1991 SLT 11.
[133] *Ibid* at 13, as highlighted by Clive, *supra* n. 119 at 458-459.
[134] *Jacques v Jacques*, *supra* n. 87 per Lord Jauncey of Tullichettle at 22.
[135] *Supra* n. 94.

but also for his 'know-how' and other indemnities and covenants given by him, which reflected his work both during and prior to the marriage. With reference to the sale of this business, the court was not satisfied that the evidence disclosed any special circumstances which were capable of displacing the presumption that equal division was fair. Similarly, despite an acceptance by the court in *Sweeney v Sweeney*[136] on appeal, that a contingent liability to capital gains tax could constitute special circumstances justifying a departure from equal division, the court was satisfied that the defender's business was capable of supporting such an order. Conversely, much debate has surrounded the issue of whether a certain instance or set of circumstances might qualify as "special circumstances" thereby allowing deviation from the principle of equal sharing. In *Farrell v Farrell*[137] the court accepted the fact of special circumstances pursuant to section 10(6) where failure to depart from the principle of equal division would necessitate the sale of the pursuer's home in circumstances where she had voluntarily assumed the defender's share of the mortgage. In *Bremner v Bremner,*[138] despite strong arguments to the contrary, when considering the fair division of the property, the court was prepared to regard the conduct of the parties as a circumstance that would permit a deviation from the principle of equal division where such conduct had adversely affected their resources. The court held that it was not unjust to have regard to the misconduct of the wife where such misconduct had an adverse effect on the husband's capacity to work and thus was the cause of a diminution in his resources. Further the court did not regard it appropriate to require proof of any element of intention or foreseeability.

Finally, with reference to several existing decisions,[139] the court in *Day or Wilson v Day*[140] justified its departure from the principle of equal division given that the primary source of the funds used to acquire the matrimonial property was the wife's pre-marital inherited property. More practically, with reference to the earlier views of Lord Eassie in

[136] (No. 2) 2005 SLT 1141.
[137] [1990] SCLR 717.
[138] [2000] SCLR 912.
[139] *Jesner v Jesner* 1992 SLT 999; *Davidson v Davidson* 1994 SLT 506; *MacLean v MacLean* 2001 Fam LR 118.
[140] [2009] Fam LR 18.

R v R,[141] the lower court noted that where a significant amount of the matrimonial property is derived from assets donated or inherited by one party, this does amount to a special circumstance that justifies the departure from the presumption of equal division.

Although section 10(6) sets out a list of circumstances which might constitute special circumstances and justify a departure from equal division, it serves merely as "guidance to the court...[but does not] ....fetter its discretion in applying the principle set out in sec (9)(1)(a)",[142] i.e. a fair division of the property. The outstanding need for underlying discretionary scope for the judiciary is regarded as necessary,

> "...in a field where individual cases vary so greatly, where legislation cannot reasonably provide for so many different eventualities and where the court which has heard the evidence is best equipped to deal with each situation as it arises."[143]

Ultimately Clive emphasises the need for the special circumstances cited to "always be such as to *justify* a departure from the norm of equal sharing."[144] However the list of special circumstances included in section 10(6) of the 1985 Act is not exhaustive and they are listed "without prejudice to the generality of the words" and the over-riding statutory aim of fairness.[145]

4.6 Statutory factors

As well as the five key principles outlined in s. 9(1) (a)-(e), section 11 sets out a number of 'factors' to which the court must have regard in determining what orders to make. It has been suggested that this presents an opportunity for decisions to be made and

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[141] [2000] Fam LR 43.
[142] *Jacques v Jacques*, *supra* n. 87 at 22.
[143] *Ibid.* Lord Jauncey was of the view that "the matter is essentially one of discretion, aimed at achieving a fair and practicable result in accordance with common sense."
[144] *Supra* n. 117 at 460.
[145] *Ibid* at 461, quoting from the judgment delivered in *White v White* [1992] SCLR 769, involving a marriage of very short duration.

retrospectively justified with reference to the 'matching' factor.[146] Another instructive feature of the 1985 Act is the specific categorisation of factors relevant to each of the underlying principles contained in section 9. Uniquely section 9(1)(a) which requires the net value of the matrimonial property to be shared fairly between the parties, is not assisted by the identification of any relevant factors. It is arguable that it is the impact of the other four principles,[147] and their associated guiding factors, detailed below, which will determine what constitutes a fair division of the property, thereby satisfying the over-riding aim of the Act.

Where the circumstances of the case cause the court to be influenced by section 9(1)(b) (fair account of any economic advantage/disadvantage derived by a party from the contributions of the other), section 11(2) requires the court to have regard to the extent to which –

> (a) the economic advantages or disadvantages sustained by either party have been balanced by the economic advantages or disadvantages sustained by the other party, and
> (b) any resulting imbalance has been or will be corrected by a sharing of the value of the matrimonial property or otherwise.

In applying the principle set out in section 9(1)(c), (fair sharing of the economic burden of caring after divorce for a child of the marriage), section 11(3) sets out eight factors to which the courts must have regard. These factors refer to any child aliment order, cost or loss of earnings arising from child care, need for suitable accommodation for the child, age and health of the child, the education, financial and other circumstances of the child, the availability and cost of suitable child care facilities or services, the needs and resources of the parties and all other circumstances. Section 11(4) focuses more closely on the financial position of the claimant spouse, deemed to be of particular significance in relation to the section 9(2)(d) principle (adjustment of dependent spouse over three-year period). The factors deemed relevant to such a decision are fivefold: the age, health and earning capacity of the claimant, the duration and extent of the dependence, any

[146] *Supra* n. 55 at 18, where Dick notes the difficulties of assessing what particular "pik-n-mix" of principles, factors and orders are appropriate in any one case.
[147] Sections 9(1)(a)-(d), set out above at section 4. 4.

intention of the claimant to undertake a course of education or training, the needs and resources of the parties and all other circumstances of the case. Finally for the purpose of applying section 9(2)(e) (reasonable financial provision for a spouse who on divorce is likely to suffer serious financial hardship), section 11(5) sets out five factors that are relevant: the duration and nature of the marital relationship; the age, health and earning capacity of the claimant, the standard of living of the parties during the marriage, the needs and resources of the parties and all other circumstances of the case.

On the one hand, in identifying specific factors relevant to individual principles, the legislature has attempted to reduce the scope of judicial discretion and require the courts to select from a series of pre-identified statutory factors. However, given the repeated inclusion of the "all other circumstances of the case" factor, there does remain scope for the courts to identify any other factor as relevant. Clive regards the inclusion of the section 11 statutory factors as essentially a means of further expanding the section 9 guiding principles and the section 10 special circumstances.[148] Further the 1985 Act does not expressly require the courts to account for the decisions made nor to refer to those factors that have influenced the decision-making process.

4.7 Spousal support

The manner in which the issue of spousal support is governed by the provisions of the 1985 Act, is premised upon a number of presumptions and stated objectives, similar to those governing the provision of financial support generally. Periodical allowance orders can be made by the court under section 8(1)(b), in circumstances where such an order is justified by the principles contained in section 9 of the 1985 Act, and would be reasonable having regard to the resources of the parties. However one obvious distinction between lump sum and property transfer orders on the one hand and maintenance orders on the other is the statutory preference for the former, more easily to facilitate a clean financial break between the parties. Thus, typically, orders for post-divorce spousal support payments are not made where the division of the property, equal or otherwise,

[148] *Supra* n. 117 at 473.

sufficiently provides for the parties. The making of an order for a periodical allowance, which is considered in more detail in section 13(2) of the 1985 Act, directs that such an order should *not* be made unless it is justified by a principle set out in section 9(1)(c), (d) or (e) and an order for the payment of a capital sum or transfer of property would be inappropriate or insufficient. Thus, the starting point for the periodical allowance payment under the 1985 Act is negative, with the legislature preferring the courts to make provision for the spouses through all other means, prior to considering the merits of a periodical allowance order.[149] Where ongoing spousal support is deemed necessary, section 9(1)(d), as discussed above at section 4.4, expressly limits the payer's obligations to a maximum of three years. As mentioned, only where the proof of "serious financial hardship" arising "as a result of the marriage" are met can the court consider ordering the payment of spousal support beyond this term.[150]

Generally in respect of the issue of spousal support, the legislative approach is once again to limit the scope of the judicial discretion exercisable, yet without eliminating judicial freedom to do justice where necessary. It was expressly recognised by the Law Commission in the 1981 Report that justice might require the courts to provide for a 'transitional measure', designed to ease the change in marital status and circumstances. Such an approach recognises the significant impact of the divorce decree but equally demands that both parties eventually take responsibility for their individual circumstances, "to look towards an independent future, and to effect so far as possible a "clean break" with the past".[151] The Law Society of Scotland has equally emphasised the

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[149] *Supra* n. 2 at para 3.43, the Scottish Law Commission noted that with the exception of one dissenting voice, there was "no support for the view that the objective of financial provision on divorce should be the continuation of the obligation of life-long support which existed during the marriage." It was further noted by the Commission that such an approach would be inconsistent with the idea that divorce terminates a marriage. The fact of the periodical allowance option being of secondary consideration to the making of a capital sum award was considered with reference to the particular facts and circumstances of the defender in *P v P*, *supra* n. 109. Although recognising that a periodical payments order should only be made where the capital sum award would be inadequate and equally that in this instance the capital sum was sufficient, the court conceded that had it been required to make a periodical payments order it would have awarded such payments for the full three-year period.

[150] Section 9(1)(e), see further section 4.4 above.

[151] *Supra* n. 2 at para 3.44. The research carried out by Jackson E, Wasoff F, Maclean M and Dobash R E, *supra* n. 115, noted at 245 that an analysis of the positions adopted by the conflicting parties indicates a "clear preference for achieving a clean financial break between spouses, where possible", although

importance of recognising the end to the marriage, noting that financial provision on divorce is based on "a fair winding up of a dead marriage, rather than an attempt to keep the parties in the financial position in which they would have been had the marriage continued".[152]

Although the courts have been willing to grant orders for post-divorce spousal support where necessary, they have often placed short timeframes on the life span of such payments. For example, in *Atkinson v Atkinson*,[153] whilst the wife received a capital settlement on divorce, she was also awarded periodical allowance, but only for the usual three-year period. Although she had independent earnings, these were only deemed insufficient in light of the standard of living enjoyed by the parties in the course of their marriage. Similarly the court in *Tyrell v Tyrell*[154] made an order for the payment of a periodical allowance, but only for a 12-month period, where the parties had been married for 18 years, there were no children of the union, and the applicant wife was in part-time employment at the time of the divorce. In those circumstances, the court held that although the pursuer was unlikely to suffer serious financial hardship in the absence of the defender's financial periodical assistance, given her financial dependency upon him in the course of the marriage, a short and definite period of extended support was appropriate.

The Scottish statutory preference for a clean financial break has been strongly criticised by the House of Lords. For example, Lord Nicholls has expressed his failure to comprehend why the absence of capital assets should prevent a spouse from securing compensation deemed owing to her.[155] In his view such an entitlement should always triumph over the desire for finality. The three-year restriction on the payment of

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practitioners have conceded that seeking to achieve such a goal has often "clashed impossibly with the practical need to maintain a continuing financial commitment where there are still dependent children."

[152] "Law Reform: family law" (1992) 37(6) JLSS 235.

[153] [1988] SCLR 396.

[154] 1990 SLT 406.

[155] *Miller v Miller; McFarlane v MacFarlane supra* n. 1 at 11. This point is repeated by Ellman who stresses that many longer marriages end with the parties "in very disparate financial circumstances that cannot be addressed appropriately with a clean break philosophy." Ellman IM "Financial settlement on divorce: two steps forward, two to go." [2007] LQR 2 at 8.

maintenance was equally denounced by Lord Hope, who commended the English Law Commission's co-existing goals of certainty and flexibility. By way of contrast with the approach of the Scottish Law Commission, Lord Hope noted that the English Commission had "attached greater importance to the flexibility than they did to certainty ... [and thus]... avoided an approach that was too prescriptive".[156] These criticisms of the Scottish approach have however been rejected as unfounded. Both Norrie[157] and more recently Clive[158] have dismissed the suggestions of Lord Hope as a misinterpretation of the Scottish regulatory provisions. Clive explains very clearly how a Scottish court can in fact make a compensatory award to a wife who has sacrificed her career to care for the interests of the family, even where the husband does not have any available capital on divorce. He outlines how the court has the power to make a lump sum order, payable in instalments over a period of years, pursuant to section 12(3), which is in effect, akin to a maintenance order. This scope for providing for the dependent spouse from the future earnings of the breadwinner spouse is further facilitated by section 27(1), which provides that for the purposes of adjudicating upon the concept of fairness, "resources" shall include the "present and foreseeable resources" of the parties. To illustrate this power, Norrie cites the example of *Cunniff v Cunniff*[159] where the pursuer wife received 100% of the matrimonial property "explicitly because the husband had high earning potential and she had none".[160]

Finally, despite the desire on the part of the legislature to limit both the making of periodical allowance orders and, where made, to restrict the period of such orders, the Scottish courts have shown themselves willing to make periodical allowance orders of indefinite duration. In *Johnstone v Johnstone*[161] the court ordered a weekly periodical

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[156] *Supra* n. 1 at para 105, with reference to para 21 of the *Report of the Law Commission on the Financial Consequences of Divorce (Law Com no 112)* (England and Wales). Lord Hope noted that in publishing its report, the Scottish Law Commission included "a fully worked out system... [with]...no recommendation that the legislation that was proposed should be subject to monitoring or review. It was intended to establish the law not just for a generation. Like the Forth Bridge, it was built to last for a very long time."
[157] *Supra* n. 119.
[158] Clive E "Financial Provision on Divorce" [2006] Edin LR 413; reacting to the comments of Lord Hope in *Miller v Miller* and *McFarlane v McFarlane*.
[159] [1999] SLT 992.
[160] *Supra* n. 119.
[161] [1990] SLT 79.

allowance order of £100 until the death or remarriage of the applicant wife, given the almost complete lack of available assets and her ongoing ill-health which rendered her unable to work. Sheriff Ireland noted that although

> "...in ordinary circumstances it should be possible for the parties to make a clean break so that one spouse should not be entitled to lifelong support from the other...her inability to work would mean that she would be totally dependent on state benefits and would therefore suffer serious financial hardship".[162]

Similarly in *McKenzie v McKenzie*,[163] involving a 16-year marriage with no children, the court awarded both a capital sum and an indefinite periodical allowance to the applicant wife. In the course of his judgment, Lord Prosser explained his reluctance to limit the duration of the spousal support, given that he was satisfied at the time of ordering the decree of divorce that, "in the near future...the pursuer will be seriously short of money". Further he accepted as reasonable, a description of her situation as one of "serious financial hardship" and thus, given the respondent's substantial income and the fact that the pursuer was 60, he did "not think it appropriate to limit this to the three year adjustment period, but would leave it open-ended, with a view to relieving the pursuer of the hardship which I expect to continue beyond that period."[164] Thus the Scottish courts undoubtedly are vested with scope to maintain inter-spousal financial ties post-divorce. Whilst it is evident that the over-riding aspiration of the 1985 Act is to encourage and facilitate the parties to become financially independent as quickly as is feasible after the divorce, the Act is sufficiently broadly-drafted to allow the courts the leeway, where necessary, to provide for the dependent spouse who, because of her circumstances, and the circumstances of the marriage, will "suffer serious financial hardship as a result of the divorce." It appears, however, that whilst the courts have exercised their powers in this regard, they have done so very reservedly, thereby reflecting and promoting the general over-riding clean break policy of the governing provisions.

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[162] *Ibid* at 80.
[163] [1991] SLT 461.
[164] *Ibid* at 464.

4.8 Role of the judiciary

In a similar fashion to the existing Irish legislative position, traditionally the Scottish judiciary were accorded a significant amount of discretion in ordering financial relief. These powers were premised on the application of general principles of reasonableness and fairness. Interestingly, following an overview of the various legislative regimes under Scottish law, (the then) Lord President Hope concluded that the current approach to the ordering of financial provision under section 8 of the 1985 Act remains "essentially one of discretion, aimed at achieving a fair and practicable result in accordance with common sense".[165] Such a judicial interpretation of the provisions, together with the statutory requirement that "the net value of the matrimonial property should be shared fairly between the parties to the marriage",[166] suggests a distribution scheme that remains heavily reliant upon subjective judicial discretion. Conversely, however, Baroness Hale was more recently critical of the effect of the provisions of the 1985 Act, noting that "these can operate harshly in some cases, particularly where the resources consist largely of income rather than property."[167] With reference to these views, Lord Hope, in his elevated capacity in the House of Lords, regards Baroness Hale as having identified where the problem lies.

> "The flexibility which sheriffs and judges need to adapt the law to what would be regarded as fair today as compared with what was regarded as fair 25 years ago is denied to them."[168]

The 1985 Act has attempted to place the role and powers of the judiciary within the confines of the enunciated statutory provisions. This statutory guidance and governance, although not absolute in nature, narrows the freedom of the judiciary insofar as the decisions reached must be premised upon the underlying principles of the Act. The most robust of the statutory presumptions contained in the 1985 Act is that of the equal division of matrimonial property, which is to be the starting point of every judicial

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[165] *Little v. Little supra* n. 130 at 787 per Hope LP. Similarly in *McCaskill v McCaskill* [2004] Fam. L.R. 123 it was affirmed by the court that in adjudicating upon the most appropriate order to be made, the decision was essentially a matter of discretion.
[166] Section 9(1) Family Law (Scotland) Act 1985.
[167] *Supra* n. 1 at para 127.
[168] *Ibid* at para 115.

adjudication. However the unbending rigidity of the Californian equal division of community property system[169] is avoided by the statutory scope for divergence from this presumption. Whilst section 10 develops the section 9 requirement of fairness by equating it to equal division, the Scottish Law Commission, in drafting their proposals which ultimately formed the basis for the 1985 Act, was unwilling to adopt this as an absolute principle and hence section 9 includes four other governing principles, and further, section 11 sets out those matters that should influence the particulars of the financial relief orders. By definition, as these factors must be considered, there exists a very real possibility that the matrimonial assets will not be divided equally, permitting one or more factors to justify an unequal division of the assets. Notwithstanding this, the structured approach adopted serves to direct the court in a variety of pre-identified generalised circumstances, with the intention of providing relatively predictable solutions to many, as yet, unheard cases. The impact of this deliberate legislative approach was recognised by Lord President Hope when he set out his analysis of the significant shift introduced by the 1985 Act.

> "Important new powers have been conferred on the court which extend the possible ways in which the financial provision may be made. But the whole structure of the legislation is also new. The Act sets out in considerable and almost clinical detail the nature of the property with respect to which orders may be made, the principles which are to be applied and the factors which are to be taken into account. No stone seems to have been left unturned in this analysis. The court is taken step by step through a complicated check list of provisions to which it must have regard, so that no point that might conceivably be relevant is at risk of being forgotten as it proceeds through the exercise to the result."[170]

This judgment of (the then) Lord President Hope, delivered in 1990, recognised the progressive developments in reforming the law of asset division introduced to Scottish law by the 1985 Act as advocated by the Scottish Law Commission. However by 2006, in

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[169] See generally part 4 of chapter 4 above, which outlines the operation of the equal division rule under Californian divorce law.
[170] *Little v Little*, *supra* n. 128 at 786-787.

delivering his ruling in the House of Lords in *Miller v Miller* and *McFarlane v McFarlane*, Lord Hope was less complimentary in his commentary, as noted above.

4.9 Private ordering in the shadow of the Family Law (Scotland) Act 1985

It has been suggested by Dick that in most cases of marital breakdown in Scotland,

> "...financial arrangements following separation are resolved by agreement between the parties rather than by order of court. So using negotiation is how most couples unscramble their finances at the end of a relationship."[171]

Whether private ordering is an equal or better alternative to judicial determinations of matrimonial dispute is always hard to gauge. Wasoff has highlighted the difficult realities of the negotiation process, rejecting the oft-used term of 'agreement', noting that what is more typically reached is a settlement, representing the best possible, though not ideal, outcome for each of the parties.[172] She regards the term 'settlement' as better capturing "the sense of reluctance, duress, perceived absence of reasonable alternatives, and a best possible and often grudging solution in the circumstances."[173]

When considering the role of the governing legal structure in influencing private ordering on divorce, the ability to identify the objectives of the governing regime and reasonably predict the approach of the court, does assist in creating an environment more suited to settlement. The combined work of Jackson, Wasoff, Maclean and Dobash presents an assessment of the weighting of rules and discretion in the asset distribution process on marital breakdown and considers the impact of various regulatory approaches on the

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[171] *Supra* n. 49 at 187.

[172] Wasoff F "Mutual Consent: Separation Agreements and the Outcomes of Private Ordering in Divorce" (2005) 27 JSWFL 237.

[173] *Ibid* at 247. Wasoff states that whilst agreements suggest "a civilised response to separation that is less conflictual and acrimonious than a court-mediated outcome", her research indicates that the outcome of her interviews with those who entered into such settlements reported "high emotion, conflict antagonism and compromise" as the norm.

possibility and success of private ordering.[174] Jackson et al have highlighted the importance of private ordering, its ability to facilitate individual autonomy, bespoke and more durable arrangements that are more likely to be implemented and less likely to cause ongoing conflict. In relation to the Scottish data gathered in the course of their study, they report that "there was a strong norm favouring a non-adversarial mode of negotiation, which sought to identify common ground and minimize conflict", regarded by the writers as arising from a "desire to conserve the matrimonial resources by minimizing legal costs... [and]...to minimize the uncertainty of the outcome of a prolonged or defended legal battle".[175] This view is supported by Dick insofar as she acknowledges that the

> "...underlying principles of the 1985 Act encourage a civilised approach to resolving the financial aspects of the significant transition a separation entails. They foster fairness and respect, encourage a bespoke approach and discourage apportionment of blame."[176]

The support of the courts in enforcing the agreed terms can further enhance the parties' willingness to utilise the negotiation process to resolve disputes. Approving this position, Wise notes that

> "...in Scots law, unlike other jurisdictions of the UK, where parties to a marriage ...enter into a contract regulating their financial affairs on divorce, that contract is enforceable and the courts will not interfere with, or enquire into the substance of its terms unless it is challenged by one party or the other".[177]

In the course of their research on the impact of the 1985 Act on divorce practice, Wasoff, Dobash and Harcus have concluded that, despite the research being carried out only 2-3 years after the legislation came into force, "the main broad objectives and concepts of the

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[174] *Supra* n. 115. The research considers the contrasting legal frameworks existing in England/Wales and Scotland, and the workings of "the informal legal processes which operate during divorce between solicitors and their clients".
[175] *Ibid* at 244.
[176] *Supra* n. 49 at 192.
[177] Wise M "New Developments in Mediation in Scotland" [2009] IFL 42. See also Junor G "Challenging Separation Agreements" 1998 SLT 185.

Family Law (Scotland) Act 1985 had become integrated into normal divorce practice."[178] Further they concluded that the "principles and concepts introduced by the Act had had a major impact in setting the agenda or framework for early discussion of financial arrangements".[179] This was regarded by parties engaging in settlement negotiations as providing clearer rules thereby reducing the scope for dispute and ultimately was regarded by Wasoff et al as encouraging voluntary agreements to avoid determination by the courts. Similarly Dick has sought to assess the extent to which the objectives which underpin the 1985 Act can assist in negotiations.[180] She identifies the usefulness of being able to emphasise to clients the starting point of equal sharing and the certainty with which such clients can be advised as to the absence of any circumstances that give rise to an automatic right to more than half of the assets. Further, the need for both parties to agree to the compromised settlement requires a mutual acceptance that realistically both parties and any children must benefit in some manner from the settlement reached. If accepted as a basic requirement of any negotiated settlement, she suggests the clients are more likely to accept the need for "an objective, rather than subjective test of fairness".[181] Ultimately Dick concludes that the

> "...principled basis for the Act can be used gently to assist parties to step out of a restricted and reactive view of their circumstances and see a picture which in turn can help in the process of adjustment to the reality of a separation."[182]

Thus private ordering, although 'owned' by the parties, operates within a broader context influenced significantly by public policy issues and needs.[183] Given that the Scottish system is fundamentally premised upon a presumption of fairness demanding equal sharing, the individual and social perceptions of this concept are vitally important. Dick

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[178] *Supra* n. 130 as part of opening 'summary'.
[179] *Ibid.*
[180] *Supra* n. 49 at 189.
[181] *Ibid.*
[182] *Ibid.* Later at 192 Dick states that the "combination of a starting point for division but with the flexibility of some discretion is particularly well suited to negotiation."
[183] *Supra* n. 130 at 249, per Wasoff et al. Private ordering is far from private, it does not operate independently; rather it "is framed and constrained by the statutory framework on divorce". Wasoff et al emphasise the financial and social public interest in the process and outcomes of the negotiation process, with reference to the cost to the public purse and the over-riding need for fair and reasonable outcomes which serve the best interests of the children.

highlights the difficulties in attempting to convince the conflicting parties to agree to "an objective benchmark for fairness" given the likelihood of "any shared vision of fairness" being likely to recede quite quickly at the end of a relationship. Thus Dick regards the express inclusion of the section 9 governing principles as providing the benchmark for identifying fairness in such circumstances.[184]

5 Conclusion - prioritisation of legislative principles over judicial law-making

The Scottish regulatory approach to asset division on divorce represents an interesting hybrid of the contrasting practice of rigidly applied rules of equal division and the more discretion-based concept of equitable division. When compared with the Irish legislative position, it is arguable that the Scottish system for asset distribution and financial provision represents a more structured and purpose-driven approach, insofar as its statutory provisions are underpinned by identified objectives and supplemented with guiding factors to assist the judiciary in their decision-making process. What has been achieved is the clear identification of the policy goals and principles to be followed.

As regards the process of asset and wealth distribution, unlike in Ireland where the available assets and future earnings are examined collectively and the court is empowered to make whatever ancillary relief orders required by justice, under Scottish law the judicial power to order property transfers and lump sum payments on the one hand, and periodic spousal maintenance on the other, are dealt with separately. Section 13(2) demonstrates the stated legislative preference for the making of a property order where possible, prohibiting the court from making an order for a periodical allowance under section 8(2) unless it is satisfied "that an order for payment of a capital sum or for transfer of property under that section would be inappropriate or insufficient..." The regulation and practice regarding the making of property and/or maintenance orders is an issue which is treated quite differently in the jurisdictions considered in this work, and will be discussed later in the conclusion, with a view to identifying the reasoning and outcome of the varied approaches. It is interesting to observe and worthy of mention that

[184] *Supra* n. 49; Dick considers the extent to which the section 9 principles can assist parties to secure an agreed settlement of the issues on marital breakdown.

irrespective of the regulatory approach adopted in respect of asset distribution, there remains scope in each of the four jurisdictions considered, for the ordering of indefinite post-divorce inter-spousal periodic payments.

Whereas in other jurisdictions parliamentary debates and contemporary social norms might be utilised to identify the fundamental aims of legislation, the inclusion of underlying principles in section 9 of the 1985 Act serves to expressly indicate the aims of the Scottish provisions, thereby guiding the decision-making process and more successfully eliminating excessive judicial freedoms. Whether they are effective is always difficult definitively to determine, a weakness identified generally in this work. The success of any approach might best be determined by its capacity to limit inappropriate judicial discretion, equally it may be measured by the 'fairness' of the outcome of the cases and the certainty and democracy a particular approach attracts. Under Scots law, the identification of detailed statutory guidelines for the judiciary, which comprise both underlying principles to indicate policy aims in allocating marital assets, and also the pronouncement of the factors to be taken into account, represent attempts to steer the judiciary in directions that have been settled following much public and learned consultation. Against this background Lord Hope has critically noted that the 1985 Act remains "almost unaltered for over twenty years",[185] and has effectively eliminated the scope for the "development of general judicial practice."[186]

In assessing the Scottish position, it appears that the system in operation successfully achieves all three benchmarks of democracy, predictability and fairness. By legislatively articulating policy goals which place parameters upon the judicial discretion exercisable, the laws are both democratic and relatively predictable in their application. In addition, the residual scope to avoid equal division where it would be unfair in the circumstances, allows the rigidity of the Californian rule-based approach to be avoided. Thus, although it is difficult to pronounce definitively upon the success or otherwise of a particular

[185] *Supra* n. 1 per Lord Hope at para 110.

[186] Judicially developed policy is a well-utilised practice in England and Wales, as mentioned by Lord Cooke of Thorndon in *White v White* [2001] AC 596. This scope for the judicial development of practices and principles has formed the basis of the development of divorce laws in many common law jurisdictions where judicial discretion forms the basis of the regulatory process.

approach in the abstract, the impact of the Scottish regime will, in the final chapter, be considered in comparison with the other approaches examined in this work, with a view to identifying considered and effective reforms for the Irish regulatory approach.

Chapter 6 - The Regulation of Asset Distribution on Divorce – The New Zealand approach

1. Introduction

New Zealand divorce laws occupy a relatively central position on the rules/discretion continuum, operating from presumptive starting points but also dependent upon the exercise of limited judicial discretion. The system is guided largely by the identified underlying aims that are expressed as statutory principles, and represents a very clear illustration of the mix of rules and discretion advocated by Schneider[1] as the optimum approach to regulation. As the last jurisdiction to be considered in this work, the New Zealand system demonstrates a considered and goal-driven approach to the regulation of asset division on divorce and consequently positions itself well to secure all three benchmarks identified earlier[2] as components of an effective regulatory system: democracy, predictability and fairness. As with Scotland, the legislative enunciation of both the purpose and principles of the governing legislation gives rise to democratically-created laws which, given their application in light of stated aims should be immediately more predictable in their outcome. In addition, the enhanced statutory-based judicial powers, to bring about substantive equality through the equalisation of post-divorce economic disparity, represent an effective means of guaranteeing fairness whatever the circumstances.

In its approach to governing the division of assets on marital breakdown, New Zealand presents an interesting history of evolving laws and processes resulting most recently in a detailed statutory framework with scope for individualised and creative justice where necessary. As part of this legislatively-driven system, the New Zealand lawmakers have primarily recognised the merits of identifying underlying policy aims and have expressly

[1] The views of Schneider are explained at length in section 2 of chapter 1 above.
[2] The identification of these criteria as the basis for an effective system of regulation is first mentioned in section 2 of the introduction to this work, and subsequently they form the benchmarks for the critical assessment of the regulatory systems operating in the four jurisdictions considered in the course of this work.

incorporated such aims into recent law reforms. The expansion of the asset distribution system to provide scope for a multitude of remedies will be assessed, with these remedies being examined as to their capacity singularly or collectively to provide appropriately for all parties to a marital dispute. In critically examining the interesting mix of rules and discretionary powers which form the foundations of the New Zealand regime, this chapter will usefully illustrate an alternative approach which might instruct any critique or reform of the Irish approach to asset distribution. The value of selecting New Zealand as the basis for comparative study is twofold; firstly New Zealand governance is premised upon a system of co-existing lawmakers, with both the legislature and judiciary recognised as holding valid and vital roles in the creation of law and policy. Thus whilst the recent reforms are founded upon detailed legislative provisions, they equally rely upon judicial law and policy making within that considered context. Secondly, the reforms have recognised the importance of identifying the underlying social policy goals of state regulation of marriage breakdown, establishing an agreed structure and set of objectives within which individual cases can be adjudicated and resolved.

2. Matrimonial Property Act 1976

2.1 Introduction

When first enacted, the New Zealand Matrimonial Property Act 1976 was regarded as innovative in its attempt to bring about financial equality between divorcing spouses. It replaced the Matrimonial Property Act 1963 and removed broad-based discretionary powers as the basis for deciding issues of asset distribution, substituting for them a strong presumption of equal sharing.[3] Of its time, Atkin notes the "underlying revolutionary nature of the legislation" whereby

> "...marriage was seen as a partnership, not as before as two separate individuals, to be dealt with not according to the property law that applies to strangers but according to a specialised law that better

[3] See section 2.2 below which sets out the legislative provisions enacted by the 1976 Act which imposed the presumption of equal sharing.

reflects the overall realities of relationships."[4]

At the time of its enactment McLay, the then Minister for Justice, regarded this new presumption of equal division as representing "a very important social advance and... a bold step forward"[5] whilst Vaver regarded it as "the first true matrimonial property system in [New Zealand] history".[6] The long title stated that the purpose of the 1976 Act was

> "...to reform the law of matrimonial property, to recognise the equal contribution of husband and wife to the marriage partnership, [and] to provide for a just division of the matrimonial property between the spouses when their marriage ends by separation or divorce."[7]

The 1976 Act was very detailed in its content, which was regarded as necessary, given the complexities of the issues to be resolved. McLay noted that whilst some lobby groups were critical of this level of detail, their representations were rejected by the Statutes Revision Select Committee charged with considering the Bill. The Committee concluded that "any substantial simplification" would be deceptive and illusory because it would simply "transfer to the unpredictable process of judicial interpretation the answering of important questions that pose themselves in any attempt to reform Matrimonial Property law."[8] Thus a very deliberate policy choice was adopted by the New Zealand legislature in favour of statutorily-created rules as the decision-making basis for asset distribution on divorce.

The Court of Appeal in *Z v Z*[9] presented an overview of the critical functions of the 1976 Act, noting that the dual purposes of the Matrimonial Property Act were to recognise "the

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[4] Atkin B "Harmonising Family Law" 2006 VUWLR 465 at 467-468. This chapter commences with a detailed consideration of the 1976 Act and its effect in practice, in order to demonstrate the shortfalls of a presumption of equal division and to illustrate the benefits of a reflective and policy-driven approach to reform, as subsequently adopted by New Zealand law-makers.

[5] JK McLay *The Matrimonial Property Act, 1976* Legal Research Foundation Inc Seminar 2 February 1977, Auckland University at 12.

[6] Vaver P *Notes on the Matrimonial Property Act, 1976* Paper presented at the Legal Research Foundation Inc. Seminar 2 February 1977 Auckland University at 55.

[7] The long title was repealed by section 4 of the Property (Relationships) Amendment Act 2001.

[8] Quoted by McLay, *supra* n. 5 at 13.

[9] [1997] NZFLR 241.

equal contribution of husband and wife to the marriage partnership" and to provide for a "just division of the matrimonial property" on the dissolution of the marriage.[10] In defending its provisions, McLay explained that the 1976 Act had evolved from the experiences of the 1963 Act and had essentially sought to address the shortfalls of that Act. In this regard he identified a "certain rigidity in the presumptions that are to be applied and the rules that are laid down", a reaction to the shortcomings and excessive judicial discretion arising from the 1963 Act and related judicial decisions.[11]

2.2 Presumption of equal division of matrimonial property

Section 11 of the 1976 Act provided that all matrimonial property was to be divided equally on divorce, subject to exceptions, including the right to opt out of the statutory rules generally. The 1976 Act, in defining property, created the subcategories of separate, matrimonial and balance of matrimonial property, with each category receiving different treatment on divorce. Matrimonial property was defined in section 8 by reference to an exhaustive list:

> "Matrimonial property shall consist of –
>
> (a) The matrimonial home whenever acquired; and
> (b) The family chattels whenever acquired
> (c) All property owned jointly or in common and in equal shares by the husband and wife; and
> (d) All property owned immediately before the marriage by either the husband or the wife if the property was acquired in contemplation of his or her marriage to the other and was intended for the common use and benefit of both the husband and wife; and
> (e) Subject to subsections (3) to (6) of section 9 and to section 10 of this Act, all property acquired by either the husband or the wife after the marriage, including property acquired for the common use and benefit of both the husband and the wife out of property owned by

[10] *Ibid* at 244-245. The court in *Z v Z*, per Richardson J regarded the 1976 Act as having four relevant features; the classification of property, the presumption of equal contributions and consequently equal division on breakdown, the identification of assets available for distribution and the requirement that, where possible, the court should make orders permitting a clean financial break between the parties.
[11] *Supra* n. 5 at 22. The 1976 Act also removed the need for spousal contributions to the marriage to be reflected, directly or indirectly, in the property held by one or both spouses. See further Parker W *New Zealand Property Rights Legislation: A Changing Landscape?* AIFS Conference Paper 2000.

either the husband or the wife or both of them before the marriage or out of the proceeds of any disposition of any property so owned; and

(f) Any income and gains derived from, the proceeds of any disposition of, an increase in the value of, any property described in paragraphs (a) to (e) of this section; and

(g) Any policy of assurance taken out by one spouse on his or her own life or the life of the other spouse, whether for his or her benefit or the benefit of the other spouse (not being a policy that was fully paid up at the time of the marriage and not being a policy to the proceeds of which a third person is beneficially entitled), whether the proceeds are payable on the death of the assured or on the occurrence of a specified event or otherwise; and

(h) Any policy of insurance in respect of any property described in paragraphs (a) to (e) of this section; and

(i) Any pension, benefit, or right to which either the husband or the wife is entitled or may become entitled under any superannuation scheme if the entitlement is derived, wholly or in part, from contributions made to the scheme after the marriage or from employment or office held since the marriage, and

(j) All other property that the spouses have agreed, pursuant to section 21 of this Act, shall be matrimonial property; and

(k) Any other property that is matrimonial property by virtue of any other provision of this Act or by virtue of any other Act."

Conversely, section 9 provided that separate property, defined as "all property of either spouse which is not matrimonial property", and deemed to include gifts, bequests and property brought to the marriage, was not to be subject to the presumption of equal division. Section 15 referred to property which could not be categorised as either matrimonial or separate property as balance of matrimonial property and provided that it should be shared equally unless the contribution of one of the spouses to the marriage partnership had clearly been greater than the other spouse. Notwithstanding this over-riding presumption of equality of division, section 13 provided for an exception in the case of a short marriage.[12] In such circumstances, the division of property was to be

[12] A short marriage was defined by section 13(3) as "a marriage in which the spouses have lived together as husband and wife for a period of less than 3 years". The subsection also allows the court to regard a marriage as one of short duration where the spouses have lived together as husband and wife for a period of more than 3 years where it would be just to do so having regard to all the circumstances of the marriage. Atkin and Parker note that this might arise where there have been long periods of separation during the relationship, or where some other factor exists that has affected the quality of the relationship. In such circumstances justice might demand that the marriage is categorised as one of short duration. Atkin B and Parker W *Relationship Property in New Zealand* (Butterworths) (2001) at 75. This special treatment of relationships of short duration has been maintained by section 2 of the Property (Relationships) Act 1976.

determined in accordance with contributions to the marriage partnership. Where the court determined that equal division would be repugnant to justice it was then required to determine the division of the relevant property "...in accordance with the contribution of each [spouse] to the marriage partnership".[13]

2.3 Exceptions to equal sharing

Section 14 created a second exception to the presumption of equal division as follows:

> "Where there are extraordinary circumstances that, in the opinion of the Court, render repugnant to justice the equal sharing between the spouses of any property to which section 11 of this Act applies or of any share of each shall, notwithstanding anything in section 11 or 12 of this Act, be determined in accordance with the contribution of each to the marriage partnership."

One of the first applications decided under the 1976 Act, *Castle v Castle*,[14] considered the nature of the circumstances that should exist before the general presumption of equal division could be rebutted. Notwithstanding the factual context of gifts and dispositions received from the wife's parents and the limited contributions of the husband, Quilliam J considered that as a starting point, equal division of all matrimonial property was "the primary and governing intention of the legislature".[15] It was emphasised that the fact of a disparity of contributions was not enough. Rather, to order the unequal division of matrimonial assets, the governing legislation demanded evidence that "the disparity in contributions is so gross as to compel the court to conclude that equal division of the property would be repugnant to justice".[16] Similarly in *Barton v Barton*[17] Woodhouse J stated that the onus of proof on the spouse seeking to avoid equal division "involves a positive demonstration that the contribution is greater to a significant degree so that the

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[13] Section 14. This test applies to the unequal division of matrimonial property and, pursuant to section 15, to non-domestic matrimonial property which was also to be shared equally unless one spouse's contribution to the marriage partnership had clearly been greater than that of the other.
[14] [1977] 2 NZLR 97.
[15] *Ibid* at 102.
[16] *Ibid* at 103. Later Woodhouse J in *Martin v Martin* [1979] 1 NZLR 97 stated himself to be "in complete agreement" with the views expressed by Quilliam J.
[17] [1979] 1 NZLR 130.

disparity really stands out in the circumstances of the case".[18] In the earlier case, Quilliam J emphasised that "no mere imbalance in the contributions of the spouses, nor even a substantial imbalance, is intended to be treated as an extraordinary circumstance".[19] However in *McGill v Crozier*,[20] the court emphasised the importance of the residual discretionary power not to apply the equal division rule.[21] To adhere to the presumption of equal division would have been repugnant to justice in the circumstances, given the husband's malevolent attempts to re-classify the wife's primary asset as marital property and simultaneously to avoid her claim to other assets by creating a trust for the benefit of his daughter for that purpose. Despite a pre-marital agreement to the contrary and even-though the wife's total contributions were overwhelmingly greater than his, the husband sought to limit her claim in respect of the family home. Although ultimately the circumstances of the parties and their marriage caused much of the property to be classified as separate property and thus not subject to equal division under section 11, it was noted by the court that had it been necessary to do so, it would have declared the circumstances so extraordinary as to warrant a non-equal division of the assets.

Section 18 provided direction as to what might be regarded as a contribution relevant to the calculation of unequal division; section 18(1) provided that a contribution to the marriage partnership meant all or any of the following:

> "(a) The care of any child of the marriage or of any aged or infirm relative or dependant of the husband or wife;
> (b) The management of the household and the performance of household duties;
> (c) The provision of money, including the earning of income, for the

[18] *Ibid* at 132.
[19] At the original hearing of *Castle v Castle*, Quilliam J, having considered the circumstances of the case before the court, ordered that the matrimonial property be divided equally between the parties. On appeal, *Castle v Castle* [1980] 1 NZLR 14, the assets were divided 75:25 in favour of the appellant-wife. Whilst Richardson J supported the views of Quilliam J regarding the very strong presumption in favour of equal division, new evidence before the court persuaded him to order an unequal division.
[20] [2001] NZFLR 870.
[21] *Ibid* per Inglis QC, who presiding at the hearing, concluded that "the husband has grossly and untruthfully overstated his tangible and intangible contributions to the marriage partnership and...the wife's total contributions of both kinds were overwhelmingly greater than his. Apart from the extent to which the husband shared in day-to-day living, he was essentially a passenger in the marriage in the preservation and creation of capital."

purposes of the marriage partnership;
(d) The acquisition or creation of matrimonial property, including the payment of money for those purposes;
(e) The payment of money to maintain or increase the value of –
(i) The matrimonial property or any part thereof; or
(ii) The separate property of the other spouse or any part thereof:
(f) The performance of work or services in respect of –
(i) The matrimonial property or any part thereof; or
(ii) The separate property of the other spouse or any part thereof:
(g) The forgoing of a higher standard of living than would otherwise have been available;
(h) The giving of assistance or support to the other spouse (whether or not of a material kind), including the giving of assistance or support which –
(i) Enables the other spouse to acquire qualifications; or
(ii) Aids the other spouse in the carrying on of his or her occupation or business.

Thus the court's scope to determine what was to be regarded as a contribution worthy of recognition or recompense was expressly limited by this legislative list. However, although exhaustive in nature, the breadth of the possible contributions was recognised by Cooke J in *Reid v Reid*,[22] who regarded the list as "showing that Parliament had in mind a wide conception of the marriage partnership".[23] This view was supported by Tapp who regarded the Act as "framed around the concept of marriage as a partnership of equals in which each spouse, by his/her unique effort, contributes to the acquisition of the partnership assets".[24] Unsurprisingly, in practice, the courts focussed upon those aspects of section 18 which applied to the individual case, as per the approach adopted by Richardson J in *Castle v Castle* where he identified three section 18 factors as relevant to his determination.

In the circumstances, he regarded the sale of the station wagon in 1971 and the allocation of the proceeds to the wife for her own use and benefit as a reflection of her greater contribution to the marriage partnership up to that point. In respect of the property purchased at that time, he noted that the husband did not make any monetary contribution

[22] [1979] 1 NZLR 572.
[23] *Ibid* at 598.
[24] Tapp P "The New Zealand Matrimonial Property Act 1976" 1 OJLS 3 (Winter 1981) 421 at 422, with reference to the judgment of Richardson J in *Martin v Martin*.

to its purchase whereas the wife paid the purchase monies from what he regarded to be her separate property, a contribution that was "over and above regular contributions made in the course of the operation of the marriage partnership."[25] Finally he noted that following these two events the marriage lasted for only another three years and two months and that upon the spouses living apart, the wife, whilst in full-time employment, had responsibility for the care of the three children of the marriage. These disparities in contributions caused Richardson J to assess the wife's contribution at 75% and the husband's at 25% of the matrimonial property.

Notwithstanding the legislative attempts to create a quasi-rule based system of equal division of matrimonial property, the inclusion of scope for unequal division in exceptional cases granted the judiciary the scope to act as law-makers, and not surprisingly caused most contested cases to focus on the fact and scope of such exceptional circumstances. Further the absence of a clear statement regarding the policy aims of the 1976 Act invariably encouraged the judiciary to take ownership of the policy direction of its provisions.

2.4 Impact of presumption of equal division upon spousal inequalities

The 1976 Act employed very few traditional property law rules relating to ownership and/or property distribution. Rather it sought to ensure that in the event of the breakdown of a marriage, both spouses were treated fairly and in line with their moral as well as legal entitlements:

> "Although the Act operates upon "property" as a subject-matter the law it lays down is not a part of the law of property in any traditional sense. Instead it is social legislation aimed at supporting the ethical and moral undertakings exchanged by men and women who marry by providing a fair and practical formula for resolving the obligations that will be due from one to the other in respect of their "worldly goods" should the marriage come to an end. In that respect it can be regarded as one facet of the wider legislative purpose of ensuring the equal status of women in society."[26]

[25] *Supra* n. 19 at 26.
[26] *Supra* n. 22 at 580, per Woodhouse J.

Much has been written about the theoretical aims of the equal division rule under the 1976 Act. Parker regarded the 1976 Act as a "groundbreaking piece of legislation", noting its significant impact on social policy and its reflection of the push for liberal equality, driven predominately by the feminist movement in the 1970s.[27] Tapp confirmed the view that the 1976 Act was intended as social legislation of the widest general application, "concerned with furthering the legislative purpose of ensuring the equal status of women in society".[28] Similarly Vaver identified the policy behind the 1976 Act as reflecting "society's concept of marriage as a partnership".[29] By giving each spouse a fixed interest in the matrimonial property on divorce, she noted that the 1976 Act "gives security and certainty of interest to the wife thereby granting her the independence and dignity denied her by the 1963 Act which placed her in the position of a dependant asking for a share in her 'husband's property'".[30] In this regard the 1976 Act eliminated the more traditional concept of actual contributions to ownership of property, preferring to recognise the spousal contributions to the partnership, ultimately rejecting the practice of placing a monetary valuation on such contributions.[31]

Woodhouse J in *Reid v Reid* recognised that the 1976 Act represented evidence of "the statutory recognition of the equal contribution made to the marriage partnership."[32] The presumption of equal division was firstly premised upon the fact of the marriage and secondly upon the equal weighting of the monetary and non-monetary contributions, representing a significant but necessary departure from traditional principles of property law. The legislation in its operation eschewed a market-place valuation and comparison of the respective contributions of each of the spouses. The need for the equalisation of the spousal contributions was emphasised in the pre-enactment parliamentary debates as being driven by a desire to prevent the impoverishment of the dependent homemaker post

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[27] *Supra* n. 11. Parker cites the Equal Pay Act 1972 as an example of another statutory response to the fight for liberal equality.
[28] *Supra* n. 24 at 422.
[29] *Supra* n. 6 at 55.
[30] *Ibid.*
[31] Section 18(2) of the 1976 Act stated that there shall be no presumption that a contribution of a monetary nature is of greater value than one of a non-monetary nature.
[32] *Supra* n 22 at 579.

divorce.

> "...it is no more than a belated recognition of the contribution to the property that is made by the partner who works in the home and with the children, who gives support and encouragement, and in many cases puts up with a lower standard of living to enable the other partner to advance a career or build up a business. Without this contribution the value of the matrimonial property would in many cases be far less, and it is therefore no more than just to give the partner making it a proper share in its ownership."[33]

The traditionally-held view that equal division rebalanced any inequalities for the dependent wife has long been questioned in many jurisdictions.[34] Similarly in the New Zealand context, despite a lack of empirical research on the issue, it has been noted that there exists a "large amount of circumstantial and anecdotal evidence which corroborates the view" that equal division does not bring about equality of financial position between the spouses post divorce.[35] With reference to such evidence of post-divorce economic disparity between spouses and the existing, similar overseas research, "it became de rigueur [at that time] to accept that we had a problem".[36] The uncertainty as to how to best tackle the issue was where the challenge arose.

The *Report of the Working Group on Matrimonial Property*[37] in 1988 observed that however radical the equal sharing regime may have appeared in 1976, it had in effect "failed to secure an equitable division of what might be called the product of the

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[33] 408 *New Zealand Parliamentary Debates* at 4565; second reading of the Matrimonial Property Bill.
[34] In his reflection upon the enactment of the 2001 reforms, Atkin has noted that the recognition of the fact of post-divorce inter-spousal economic disparity "can be traced back at least 20 years [and] was not a sudden thought that someone had overnight." He refers to the "rumbles" arising early on from the equal division rule of the 1976 Act: Atkin B "Economic disparity – how did we end up with it? Has it been worth it?" (2007) 5 NZFLR 299 at 301. As regards international views on the impact of equal division, chapter 4 has already highlighted the research and views of Weitzman L and others regarding the 'feminization of poverty', commenting on the widely held, yet misguided belief, that equal division gives rise to equality between the spouses. At the very least the strong ongoing earning capacity of the breadwinner places him far ahead of the homemaker in terms of future earning capacity and financial security.
[35] St John S *Income Expectations of Men and Women after Separation* Family Law Conference (1995) as cited by Atkin "The Rights of Married and Unmarried Couples in New Zealand – Radical New laws on Property and Succession" 2003 15 CFLQ 173.
[36] Per Atkin, *supra* n. 34 at 301.
[37] *The Report of the Working Group on Matrimonial Property and Family Protection* (1988) is considered in detail section 2.6 below.

marriage".[38] This view was supported by the analysis presented at the same time by the Royal Commission on Social Policy.[39] In its chapter dedicated to the issue of matrimonial property, the Royal Commission presented a very critical analysis of the impact of the 1976 Act insofar as it governed property relations between spouses once a marriage had ended. Notwithstanding that the "principles and functioning of the [Act]... are centred on the need to achieve a form of equality between men and women" the Commission relied upon the many submissions received to highlight the "perceived lack of equality of outcome and...consequent sense of injustice to women and to the children of a marriage relationship".[40] In referring to the Act as "giving rise to severe injustice" and the consequential "deprivation" experienced by women and children, the Commission was damning of the effect of the rule of equal division.

> "An equal division of the family assets has been unable to give both the husband and the wife an equal springboard from which to begin their new and separate lives."[41]

Ultimately the Report noted that the equal division of existing assets at the time of the separation/divorce often failed to produce true equality as the spouse with fewer or no career prospects was invariably disadvantaged. The Commission thus noted that the Act was fundamentally flawed and incapable of achieving equality between the parties as it neither compensated the wife for her financial losses nor could it attack the future earnings of the husband.[42]

Similarly the court in *Z v Z* was critical of the effect of the provisions of the 1976 Act notwithstanding its laudable aims.

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[38] *Ibid* at 6. See further at section 2.6 below.
[39] *Royal Commission on Social Policy Report* (NZ Government Printer, April 1988) Volume IV, 217-29. The Royal Commission on Social Policy was established by the New Zealand Government in 1986 to examine social policy in New Zealand. Thus the focus of the Commission was not limited to family law but rather encompassed a whole range of social behaviour. Important aspects of social policy identified and examined by the Commission were the areas of employment, education, housing, the justice system and health.
[40] *Ibid* at 217. The Commission regarded women and children as being "economically handicapped by marriage breakdown".
[41] *Ibid* at 218.
[42] *Ibid* at 219. Consequently, it was noted, a reduced standard of living for the wife and the children was the usual outcome of divorce.

> "...while it achieves formal equality between the spouses in that the conventional items of property are divided equally, it does not achieve actual equality when the husband is left with the ability to earn a significant income and the wife is left with little or no ability to earn a living and possibly little or nothing in the way of material assets from the marriage to assist her...Such an outcome cannot be easily reconciled with the objectives of equality and justice underlying the Act".[43]

Miles supports this position, regarding the presumptive equal division rule under the 1976 Act as "achieving equality in name only".[44] She refers to the often "uneven economic impact of marriage on the parties" which would leave one spouse, typically the wife, "in a substantially weaker financial position then the other [spouse] following the property settlement".[45] Similarly Atkin is critical of the manner in which the 1976 Act was originally framed, highlighting its failure to consider future needs and the fact that post-divorce, the parties may have distinctly unequal earning power. Typically he notes, it is the woman who is impoverished, be she "the woman with custody of the children...[or]...the older woman who had assisted her professional husband without developing any career for herself".[46] More recently, Hammond J in his analysis of the 2001 amendments noted that despite the original 1976 Act being premised upon the philosophical basis that "marriage was to be seen as a partnership with both parties contributing equally (albeit in different ways) to the relationship and the family", the law as enacted was "inadequate".[47] Relying upon statutory rules to bring about equality had clearly failed, and attention was now focussed upon alternative means of regulation in order to achieve substantive equality.

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[43] *Supra* n. 9 at 275-276.
[44] Miles J. "Dealing with Economic Disparity: An Analysis of Section 15 Property (Relationships) Act 1976" 2003 NZ Law Review 535 at 536.
[45] *Ibid.*
[46] *Family Law Policy in New Zealand* (LexisNexis) (Heneghan M and Atkin B ed) (1993) Chapter 5 "Family Property" Atkin B at 205.
[47] *M v B* [2006] NZFLR 641 at 679-680. Hammond J was of the view that the 1976 Act had "failed to resolve the problem that the parties might have distinctly unequal earning power. This gave rise to the situation that sometimes the woman came away in the worse position from a divorce. This was not because she did not have half of the "family assets", but rather she was simply not in as good a position to support herself after divorce".

The Royal Commission concluded its report by stating that the division of marital property should reflect and take account of the reality of the disparity of earning powers post divorce and as a result should seek to achieve equality of result rather than equality *simpliciter*. This would typically involve an element of compensation for career sacrifices and responsibility for children, whilst protecting the living standards of the children who are likely to be adversely affected by any insecurity regarding housing.

> "A principle of equality of result would look to the future and attempt to ensure that both spouses had equal ability to attain a reasonable standard of living."[48]

The Commission proposed the development of a multi-faceted approach to securing equality of result; incorporating a judicial capacity to compensate for marriage-related economic disabilities, together with an assessment of (and capacity to provide for) future needs.[49] The Commission concluded by noting the significant "social impact" of legislation regulating marriage and the family and thus warned that "its application must reflect the utmost concern with the social ramifications" of its provisions. To this end the Report emphasised the importance of drafting any legislative changes with a view to achieving an equality of result between the spouses over all other outcomes.[50]

2.5 Judicial views of the 1976 Act

The courts in their application of the 1976 Act appeared immediately anxious to identify the Act's aims and objectives. The consensus reached was that the aim of the 1976 Act was the equal division of matrimonial property, unless the circumstances, and in particular the contributions of the parties, were so unbalanced as to warrant a departure from that approach.

At first instance, Quilliam J in *Castle v Castle* regarded the Act as "expressly designed to exclude a division of property arrived at by a consideration of respective contributions"

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[48] *Supra* n. 39 at 223.
[49] *Ibid* at 224.
[50] *Ibid* at 226. In particular the Commission noted that achieving an equality of result between the spouses should supersede the satisfaction of immediate property rights.

which by contrast reflected the "basic theme" of the 1963 Act.[51] Similarly in *Martin v Martin*[52] Woodhouse J noted the reference in the long title of the 1976 Act to the concept of equality and to marriage as a partnership, which "becomes the foundation of the operative provisions of the legislation".[53] Thus, the effect of the 1976 Act was to equalise the spousal contributions, irrespective of their form. It was, he believed, the "statutory acceptance of the unique relationship of marriage as a partnership of equals".[54] The important social significance of the marital union and the deliberate legislative choices evident in the 1976 Act were regarded as indicative of a social and state policy in favour of the dependent homemaker spouse who deserved to share properly in the collective marital wealth and assets.

For the most part, the judiciary were reluctant to limit the application of the 1976 Act. Cooke J in *Dalton v Dalton*[55] warned against the self-imposition of rule-based restraints, encouraging his colleagues to "be slow to fetter themselves by enunciating major principles stated nowhere in the Act itself."[56] He rejected the suggestion that Parliament had in any way limited the matters that could be taken into account in deciding whether extraordinary circumstances existed in any given case. Equally he stated that the circumstances which would make it "repugnant to justice" to divide assets equally were not statutorily defined. Insofar as this approach empowered the judiciary to decide the central issues of any case, he complimented the legislature for being "both deliberate and wise in saying no more."[57] He further noted that the broad responsibility of the court was

> "...to arrive at a result which is just in terms of the policies reflected in the legislation. It would be wrong to lay down inflexible rules which might fetter the discretion of the Court under s 2(2) to do justice in a practical way. Factual distinctions should not be elevated to the status of matters of principle."[58]

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[51] *Ibid* at 103.
[52] *Supra* n. 16.
[53] *Ibid* at 99.
[54] *Ibid.*
[55] [1979] 1 NZLR 113.
[56] *Ibid* at 117.
[57] *Ibid.*
[58] *Ibid* at 159.

Later in *Meikle v Meikle*[59] Cooke J referred to the decision of the court in *Paul v Paul*[60] (regarding the appropriate date for the valuation of property), where Woodhouse J had emphasised that it is the role of the court "to make such order as appears just, and accordingly inflexible rules ought not to be laid down".[61]

Conversely in *Martin v Martin*, Woodhouse J, favourably quoting the aforementioned views of Quilliam J, regarded the 1976 Act as essentially rule-based, referring by way of contrast to the approach under the 1963 Act which had "operated on the basis of a wide judicial discretion to achieve justice between husband and wife by leaving it to the Judge or Magistrate to make "such order as he thinks fit with respect to the property in dispute"".[62] He regarded as the "primary purpose" of the 1976 Act, the substitution "for abstract and individual notions of justice a settled statutory concept which must be taken from the Act itself."[63] Given this attempt to introduce a more regulated approach to asset distribution through statute, Woodhouse J warned against abuse of this underlying judicial discretion and encouraged his colleagues to avoid the "temptation...to bend its language to conform to personal estimates of what some class of case may deserve".[64] In this regard, in the earlier case of *Robertson v Robertson*[65] Quilliam J definitively asserted that judicial discretion must always be exercised "within the predominant provisions of the Act" and must be used only "for the purpose intended by the legislature in conferring it." It appears therefore, that the only certainty on this issue was the lack of agreement amongst the judiciary as to the extent and scope of judicial discretion exercisable.

It is hard to dispute the existence of judicial discretion under the provisions of the 1976 Act, given the potential for varying interpretations of fundamental concepts such as "extraordinary circumstances",[66] "repugnant to justice",[67] and how "justice" should be

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[59] [1979] 1 NZLR 137 at 147.
[60] [1978] 2 NZLR 413.
[61] *Ibid* at 415.
[62] *Supra* n. 16 at 98.
[63] *Ibid* at 99.
[64] "The general aims of the Act are clear enough and some of the history of litigation under the 1963 Act illustrates the danger of judicial glosses"; per Cooke J in *Martin v Martin ibid* at 105.
[65] (1977) MPC 184.
[66] The broad discretion-based decision-making process established by the 1976 Act is outlined in section 2.1 above.

measured. With regard to the meaning of extraordinary circumstances under section 14, Woodhouse J in *Martin v Martin* noted that since the Act came into effect on 1 Feb 1977 "there has been a difference of opinion as to the meaning and effect of the section".[68] He highlighted the views of Jeffries J in *Madden v Madden*[69] where the latter had suggested that such circumstances "must be out of the usual course, or not customarily found" and further explained that extraordinary is "not a complex concept, although the degree of normalcy definitely presents difficulties." Against this background Woodhouse J recognised "the variables and gradations that are associated with justice as an abstract concept".[70] Regarding the concept as difficult to define, he noted that there exists "an underlying and erroneous assumption that the concept is capable of precise definition at the edges: that a given result will always be either just or unjust."[71] In the same case Cooke J, in considering the meaning of the linked concepts of "extraordinary circumstances" and "repugnant to justice" noted that "two broad schools of thought have emerged, although there are various shades of opinion".[72] He mentioned the view espoused by Whits J in *Beven v Beven*[73] that it is enough to show that equal sharing would be "clearly unjust". Conversely he highlighted the view of Quilliam J in *Castle v Castle* where he placed the emphasis on "extraordinary" and "repugnant". Although Cooke J preferred the view of Quilliam J, he was in no doubt that in its operation section 14 required the court to invoke its opinion in each case:

> "The Act has expressly left to the opinion of the Court the question whether in the particular case there are extraordinary circumstances rendering equal sharing repugnant to justice."[74]

The failings of the 1976 Act were clearly evident in the aforementioned case of *Z v Z*, in the determination of the wife's application for a share in her husband's future earnings. In

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[67] Proof that an order for equal division would be repugnant to justice required the court, under section 14, to divide the relevant property in accordance with spousal contributions in the course of the marriage, *supra* section 2.1 above.
[68] *Supra* n. 16 at 101.
[69] (1978) MPC 134.
[70] *Supra* n. 16 at 102.
[71] *Ibid.*
[72] *Ibid* at 106 per Cooke J.
[73] (1977) MCP 23.
[74] *Ibid* at 107.

delivering its judgment, the court acknowledged that the 1976 Act had failed adequately to empower the courts to compensate spousal contributions, as orders could only be sought in respect of marital assets earned or held up to the date of the hearing. Rather than achieving its stated aims of equality by permitting the homemaker spouse to share in the husband's increased earning power, the court critically noted that the 1976 Act "perpetuates the injustice the Act was aimed at remedying".[75] It is quite apparent from the judgment, the redressing of post-dissolution economic disparities between the parties was not a matter the judiciary felt itself empowered to address, despite its willingness to do so.

2.6 Report of the Working Group on Matrimonial Property

The Working Group on Matrimonial Property and Family Protection was established as part of the New Zealand Government's social policy reform programme and issued its report *Report of the Working Group on Matrimonial Property and Family Protection* in 1988.[76] Part I of the Report was concerned with a review of the Matrimonial Property Act 1976 and included a re-examination of the underlying principles and provisions of the Act with a view to considering and ultimately identifying proposals for reform.

The Working Group commenced its analysis by identifying the general principles which it regarded as underpinning New Zealand's divorce laws, in an attempt to place the operation of the 1976 Act within its larger regulatory context. The four principles identified were; that the law ought to reinforce equality of status between the sexes; that the law ought to endorse the concept of marriage as an equal partnership to which both partners contribute equally, although in different ways; that when a marriage fails the resolution of outstanding issues between the parties should not be unduly protracted and; that the State should continue to have an important role in supporting families that have

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[75] *Supra* n. 9 at 280.

[76] Although established at approximately the same time as the *Report of the Royal Commission on Social Policy* was issued, the Working Group was expressly established to consider the related issues of matrimonial property and family protection. Although their proximity in time and subject matter is obvious, (insofar as the Commission Report related to the impact of the current marital breakdown regulatory system on society and social policy), the dedicated and focussed work of the Working Party was necessary in the light of the significant calls at the time for the reform of asset distribution laws on divorce.

lost the support of the principal income earner, as in many cases there will not be sufficient money available after marriage breakdown to support two households.[77]

Section A of the Report commenced by recognising the fact of the wife's domestic responsibilities ordinarily causing her to leave the marriage with a lower capacity to earn a reasonable income by comparison with the husband.[78] Similarly the post-divorce child care responsibilities of the custodial spouse, again, usually the wife, was shown to negatively impact upon her living standard generally. The Working Group considered the approach of some US states, whereby the earning capacity of the breadwinner is treated as an asset of the marriage.[79] By regarding it as an asset the court has the power to distribute between the parties, the future earnings of the breadwinner spouse. However the Group ultimately rejected this approach, noting firstly that it would constitute "a radical departure from the principles of present law" and secondly that the existing law of maintenance was capable of providing for the ongoing needs of the recipient spouse.[80] In addition the Group highlighted the arbitrary nature of valuing future earnings and feared that such an amendment to the law might result in "capricious results".[81] The Group preferred the proposal of the Australian Law Reform Commission[82] which advocated the application of a rule of equal sharing which could be varied where there was evidence of an imbalance of contributions and/or future disparity between the spouses arising from future child care responsibilities or the limits on potential earnings arising from the

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[77] *Supra* n. 37 at 3-4. The Working Group endorsed these existing principles as it was "not convinced that change would bring any attendant advantages".
[78] *Ibid* at 5.
[79] *Ibid*; at 8-9 the Report considered the ruling of the New York Supreme Court in *O'Brien v O'Brien* 66 NY 2d 57, as confirmed by the New York Court of Appeals, where it was determined that a medical licence constituted marital property and on further appeal the Supreme Court identified the wife's interest as a percentage of the present value of her husband's training. Similarly the Report referred to the decision in *In re Marriage of Horstmann* 263 NW 2d 885 where the Iowa Supreme Court drew a distinction between the qualification and the associated increased earning power, determining that whilst enhanced earning power is a property interest, the degree *per se* is not. However the lack of agreement States-wide was acknowledged in the Report, noting that in *De Witt v De Witt* 98 Wis 2d 44 the Wisconsin Supreme Court highlighted the variable outcomes arising from securing a professional qualification and the lack of certainty or predictability as to a persons ability or willingness to realise its potential worth.
[80] *Ibid* at 8-11. The issue of classifying future earnings as matrimonial property also received the attention of the courts in *Z v Z*, considered at section 2.5 above.
[81] *Ibid* at 9.
[82] *Australian Law Reform Commission Report No. 39: Matrimonial Property* (1987) Australian Government Publishing Service Canberra.

marriage. However the Group was concerned with the extent of judicial discretion required to implement such an approach and feared that it might constitute an unnecessary encroachment upon the role and function of maintenance payments.[83]

As regards specific statutory reform to address the issue of spousal inequality post-divorce, the Working Group made a number of recommendations. It advocated a clearer, less complicated approach to the categorisation of property with a reduction to two categories of property; matrimonial and separate property, with all matrimonial property to be divided equally. It proposed the elimination of the category of balance of matrimonial property,[84] to enhance the scope of the property to be subject to the equal division rule, thereby further emphasising "the basic principles of the Act, particularly that of equal contribution".[85] This in turn would acknowledge "the growing acceptance of the philosophy of the Matrimonial Property Act, that marriage is a partnership of equals to which both spouses make equal though often differing contributions".[86] In relation to the division of property, the Group proposed the retention of the right to avoid equal division where not to do so would be repugnant to justice. However it recognised the potential difficulties with such scope for departure from a presumption of equal sharing; citing a number of (then) recent cases which had evidenced very different judicial approaches to the issue.[87] The particular problem of property being placed in trust to avoid the claims of the other spouse was considered and the Group proposed that the court retain a discretionary capacity to deal with such attempts to avoid spousal entitlements.[88] As regards maintenance the Group strongly recommended a greater use of the power to order the payment of capital maintenance and suggested the express inclusion of such an important judicial power.[89]

Thus the Report of the Working Group concluded that the problems arising from the

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[83] *Supra* n. 37 at 11.
[84] Balance of matrimonial property was defined in section 15 of the 1976 Act, as outlined previously in section 2.2 above.
[85] *Supra* n. 37 at 25.
[86] *Ibid.*
[87] *Ibid* at 26, with reference to the aforementioned *Reid v Reid* and *Walsh v Walsh* [1984] 3 NZFLR 23.
[88] *Ibid* at 28-31.
[89] *Ibid* at 39.

application of the existing laws could best be addressed by maintaining the presumption of equal division, whilst extending the property to which the rule applied, by making it easier to reach property that had been placed in family trusts and by revising and enhancing spousal maintenance provisions.[90]

For all its apparent rules and presumptions, the 1976 Act therefore served to encourage the exercise of varying levels of judicial discretion. Conflicting judicial views developed, giving rise to calls for reform. For example, with reference to the date for valuing property to which an application under the Act might relate,[91] Woodhouse J in *Meikle v Meikle* expressed concern about the "divergence of views as to the application of the subsection", highlighting "the need for a clear legislative direction concerning the matter."[92] The case of *Z v Z* served to highlight the weaknesses of the use of a rules-based approach without scope for judicial discretion on the issue of future earnings. The various calls for amendments and the greater empowering of the judiciary to redress injustices and inequalities, notwithstanding the presumption of equal division, began to be addressed in a meaningful way in the late 1990's.

3. Property (Relationships) Act 1976

3.1 Introduction

The calls for reform arising from the shortcomings of the 1976 Act were finally addressed in the reformulated and renamed Property (Relationships) Act 1976. The Property (Relationships) Bill 2000 which introduced the changes was originally tabled as two inter-linked Bills; one dealing with changes to the existing workings of the 1976 Act[93] and the second seeking to create a property regime for heterosexual, cohabiting

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[90] For further commentary see the views of Atkin *supra* n. 46.
[91] As governed by section 2(2) of the 1976 Act, which states that "For the purpose of this Act the value of any property to which an application under this Act relates shall...be its value at the date of the hearing, unless the Court in its discretion otherwise decides."
[92] *Supra* n. 59 at 144 regarding the interpretation of section 2(2) and whether the court could give credit for post separation contributions.
[93] Matrimonial Property Amendment Bill 1998.

couples.[94] However a change in the New Zealand Government following the 1999 general election saw the appointment of a Labour/Alliance government that modified the proposals before they were enacted into law. The reforms were condensed into one Bill; the Property (Relationships) Bill 2000, which sought to introduce reform measures in respect of the 1976 Act to impact upon both married and *de facto* couples. The amended legislation, the Property (Relationships) Act 1976, was effective from 1 February 2002[95] and provides for a two-tiered approach to the issue of asset and income division on marital (and relationship) breakdown. The presumption of equal division is retained,[96] as is the judicial power to divide the matrimonial assets unequally where justice so demands.[97] Co-existing with this is the judicial power to compensate the spouse who is likely to have a comparatively significantly lower income post-divorce, arising directly from the spousal roles adopted in the course of the marriage.[98] Atkin regards the approach of the revised 1976 Act, certainly at "first sight" as appearing

> "...reasonably harmonious, with a clear message that core assets and the product of the partnership are ordinarily to be divided equally. ...the underlying philosophy was reinforced by narrowing the exceptions to equal division..."[99]

3.2 The express identification of purposes and principles

The opening provisions of the new Property (Relationships) Act 1976 state both the purposes of the Act and the principles to guide its implementation, thereby seeking to expressly identify the objectives of the new regulatory system. The decision by the legislature to create enhanced legislatively-based powers premised upon stated underlying principles and purposes reflects its understanding of the role of law as a social tool. The stated purposes and principles together with the individual circumstances of the case now represent the primary influencing factors for the court in applying the provisions of the Act. Equally it acknowledges the need to guide the judiciary to ensure

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[94] De Facto Relationships (Property) Bill 1988.
[95] The Matrimonial Property Act 1976 was amended and renamed the Property (Relationships) Act 1976 by section 5(2) of the Property (Relationships) Amendment Act 2001.
[96] Section 11.
[97] Section 13.
[98] Section 15, discussed at length in section 3.4 below.
[99] *Supra* n. 4 at 471.

an understanding of the purpose of the laws and to bring about consistency in their application. In stating and committing to legislative goals and objectives the New Zealand legislature has created purpose-driven directions for the judiciary. These include the principles which underpin New Zealand family law generally, as cited in the *Report of the Working Group*,[100] and the principle of equality of result as emphasised by the *Report of the Royal Commission on Social Policy.* The Royal Commission had emphasised the importance of retaining a starting premise of equal sharing, particularly if the scope as to what constitutes marital property was to be widened, in order to recognise the equal contributions of the parties.[101]

Section 1 of the amended 1976 Act states as follows:

> "1M Purpose of this Act
> The purpose of this Act is –
> (a) to reform the law relating to the property of married couples and civil union couples, and of couples who live together in a de facto relationship;
> (b) to recognise the equal contribution of husband and wife to the marriage partnership, of civil union partners to the civil union, and of de facto partners to the de facto relationship partnership;
> (c) to provide for a just division of the relationship property between the spouses or partners when their relationship ends by separation or death, and in certain other circumstances, while taking account of the interests of any children of the marriage or children of the civil union or children of the de facto relationship.
>
> 1N Principles
> The following principles are to guide the achievement of the purpose of this Act:
> (a) the principle that men and women have equal status and their equality should be maintained and enhanced;
> (b) the principle that all forms of contribution to the marriage partnership, civil union, or the de facto relationship partnership, are treated as equal;
> (c) the principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses

[100] These four principles are set out in section 2.4 above.
[101] The Working Group, at 25, supported this view, regarding it as giving credence to the growing acceptance of the philosophy "that marriage is a partnership of equals to which both spouses make equal though often differing contributions", as discussed in section 2.4 above.

> or partners arising from their marriage, civil union, or de facto relationship or from the ending of their marriage, civil union, or de facto relationship;
> (d) the principle that questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice."

Whilst the original 1976 Act was premised on the fundamental aims of equality and justice, it appears that, supported by expressly-identified purposes and principles, the 2001 amendments have sought to introduce additional mechanisms to equip the judiciary to serve those aims. Robertson J in *M v B* was anxious to emphasise that these purposes and principles do not "provide the court with a generalised mandate which can avoid or obscure the structural framework which Parliament adopted" but rather represent the "underlying philosophy and inspiration" of the Act.[102] Similarly in *McGregor v McGregor*[103] Clarkson J quoted favourably from Priestley J in *De Malmanche v De Malmanche*[104] as regards the "tight jurisdictional parameters" stipulated by Parliament by the enunciation of stated principles in s 1N. Whilst he agreed with the view of Priestley J that the "policy of the Act as reforming legislation and the s 1N(c) principle clearly permit a liberal and compensatory approach to be adopted", Clarkson J rejected any suggestion that "Parliament had ...conferred a broad and unfettered discretion" on the judiciary.[105] Thus it appears that the stated purpose and principles of the Act simply seek to place the statutory provisions within a social and policy context, thereby avoiding broad-brush judicial powers. Whilst the courts can exercise a power under section 15[106] to eliminate future economic disparity where it arises from the nature of the marital roles and relationship, the provision was not enacted for widespread application. Any powers accorded to the judiciary, including the power to make whatever orders are deemed necessary to achieve the identified purposes and principles, are exercisable within this teleological approach which seeks to give effect to those principles and purposes.

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[102] *Supra* n. 47 at 649 per Robertson J; he emphasised that the principles and purposes "do not permit Courts to go further than Parliament was willing to legislate for."
[103] [2003] NZFLR 596.
[104] [2002] NZFLR 579.
[105] *Supra* n. 103 at 603, quoting directly from the judgment of Priestley J in *De Malmanche v De Malmanche*.
[106] The workings and impact of section 15 are set out in section 3.4 below.

The decision by the New Zealand legislature to include preliminary provisions setting out the principles and purposes of the regulatory provisions is to be generally welcomed. The innovative attitude of the New Zealand legislature is particularly commendable given that neither the *Report of the Working Group* nor that of the Royal Commission on Social Policy had proposed such a set of principles and purposes. Sections 1N and 1M seek to provide a clear, rather than implied statement of legislative intention. The effect is a democratically created policy driven structure with identified principles, to direct the exercise of judicial powers. The limiting effects of this structure seek to allow for a relatively predictable regime of governance whilst retaining scope for dependent spouses to be treated fairly in the circumstances.

3.3 Ancillary relief orders under the Property (Relationship) Act 1976

3.3.1 Expanded concept of relationship property

Although section 11(1) of the Property (Relationships) Act 1976 continues to provide for a starting point of equal division of relationship property, one significant improvement to the rights of the non-owning spouse is the expansion of the scope of property to which that presumption will apply. Relationship property is the new term for matrimonial property and is defined in section 8[107] as consisting of –

(a) The matrimonial home whenever acquired; and
(b) The family chattels whenever acquired
(c) All property owned jointly or in common and in equal shares by the husband and wife; and
(d) All property owned by either spouse immediately before the marriage if-
(i) the property was acquired in contemplation of the marriage,
(ii) the property was intended for the common use or common benefit of both spouses and
(e) Subject to subsections 9(2) to (6), 9A and 10, all property acquired by either spouse after their marriage began; and

[107] The list of relationship property in section 8 also includes references to the rights of *de facto* partners who are deliberately omitted in this explanation of the scope of the definition in section 8.

(f) Subject to subsections 9(2) to (6), 9A and 10, all property acquired, after the marriage began; for the common use or common benefit of both spouses, if –

(i) the property was acquired out of property owned by either spouse or by both of them before the marriage began, or

(ii) the property was acquired out of the proceeds of any disposition of any property owned by either spouse or by both of them before the marriage began; and

(g) the proportion of the value of any life insurance policy, or of the proceeds of such a policy, that is attributable to the marriage; and

(h) Any policy of insurance in respect of any property described in paragraphs (a) to (e) of this section; and

(i) The pro portion of the value of any superannuation scheme entitlements that is attributable to the marriage; and

(j) All other property that is relationship property under an inter spousal agreement made under Part 6; and

(k) Any other property that is relationship property by virtue of any other provision of this Act or by virtue of any other Act; and

(l) An y income and gains derived from, the proceeds of any disposition of, and any increase in the value of, any property described in paragraphs (a) to (k).

The previous category of balance of matrimonial property is eliminated, and the new category of 'relationship property' encompasses that old category of property. Where property can be shown to be categorised as 'separate property', it remains the property of the owning spouse and cannot be divided between the spouses. Section 11 identifies those assets in which each spouse is entitled to an equal share; namely, the family home, the family chattels and any other relationship property.[108] Given the broad scope of the new concept of relationship property, more assets of the parties will be subject to the presumption of equal division, believed to strengthen the position of the homemaker. This expansion of the definition and scope of relationship property has proven a useful tool in broadening the rights of the spouse who may have made indirect contributions to the acquisition or development of an asset that might historically have been regarded as

[108] Where the family home is sold there is a presumption that both parties will share equally in the proceeds of sale, once the court is satisfied that both parties intend to apply all or part of the proceeds towards the acquisition of another home as a family home and that home has not yet been acquired – section 11A. Where there is no family home the court must award each spouse an equal share in such part of the matrimonial property as it thinks just in order to compensate for the absence of an interest in the family home – section 11B.

the separate property of the earning spouse.[109] In making a similar proposal for reform, the Working Group on Matrimonial Property and Family Protection had previously noted that expanding the scope of the category of matrimonial property would "further emphasise the basic principles of the Act, particularly that of equal contribution."[110]

3.3.2 Avoiding the presumption of equal division

Notwithstanding the presumption of equal division of the relationship property, section 13 permits the court to avoid this, if it considers

> "...that there are extraordinary circumstances that make equal sharing of property or money ...repugnant to justice, the share of each spouse ... in that property or money is to be determined in accordance with the contribution of each spouse to the marriage ..."[111]

This is a repeat of the rebuttable presumption of equal division under the original 1976 Act, which could only be avoided in exceptional circumstances. In considering the very recent legislative changes at the time of the hearing, the court in *De Malmanche v De Malmanche* cited very favourably the pre-2001 case of *Kauwhata v Kauwhata*[112] where Baragwaneth J, with reference to the equal sharing policy of the original Act, criticised it for falling "well short" of economic equality. Commenting on the almost mandatory nature of the equal sharing regime under both Acts and the manner in which it lends itself to "uniform and predictable results", Priestley J was of the view that "there is little scope for partners to achieve results other than equal sharing".[113] Interestingly in respect of the

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[109] The importance and impact of the statutory parameters placed on the scope of relationship and separate property are considered in the conclusion of this thesis, with reference to the four jurisdictions considered in this work.

[110] *Supra* n. 37 at 25. The Working Group had also concluded at 25-27 that such an approach would assist in the avoidance of arbitrary results and lead to greater certainty. See earlier at section 2.4 of this chapter for details of the proposals of the Working Group on Matrimonial Property regarding a new approach to the definition and categorisation of the property of the spouses.

[111] Section 13(1) of the revised 1976 Act. Section 13(2) notes that the scope for unequal sharing under section 13(1) is subject to sections 14 to 17A which relate to the power of the court to make additional orders where there is evidence of future economic disparity between the spouses, discussed at length in section 3.4 below.

[112] [2000] NZFLR 755 at 765.

[113] *Supra* n. 104 at 612.

standards of proof to be satisfied, Parliament, in drafting the 2001 reforms, elected to repeat the concepts of 'extraordinary circumstances' and 'repugnant to justice' as the tests to be applied by the courts, again choosing not to define or provide illustrations of such standards. The concept of 'extraordinary circumstances' has been discussed by the courts, and it is generally accepted that "most inequalities of contribution" are neither extraordinary nor would they cause equal sharing to be regarded as being 'repugnant to justice'.[114] This is most evident in the long-standing decision of *Martin v Martin* where the power to avoid equal division was considered but rejected in the circumstances:

> "It is vigorous and powerful language to find in any statute and I am satisfied that it has been chosen quite deliberately to limit the exception to those abnormal situations that will demonstrably seem truly exceptional and which by their nature are bound to be rare."[115]

More recently in *Kauwhata v Kauwhata* Baragwanath J recognised that;

> "...many marriages entail unequal financial contribution, unequal non-financial contribution, different ages, experience and backgrounds. None of these is likely of itself to warrant a conclusion that the circumstances of the marriage are extraordinary. Still less are they likely to constitute repugnancy to justice the very norm that Parliament has taken elaborate pains to instil into society".[116]

Within this rule-based structure however, it remains within the power of the courts to establish objective findings that extraordinary circumstances do exist.[117] Certainly, when compared with the test of 'extraordinary circumstances' under the pre-existing 1976 Act, it has been judicially confirmed that, there is nothing "to suggest different thresholds or substantive change".[118]

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[114] *Supra* n. 112 per Baragwanath J as relied upon by Priestley J in *De Malmanche v De Malmanche*. Priestley J emphasised the point by stating at 603 that "Factors of age, unemployability, ill-health and economic vicissitudes cannot in themselves, given the diversity of the human condition, constitute extraordinary circumstances or justify a departure from the regime of the Act". In the circumstances the court held that the case fell "considerably short" of constituting extraordinary circumstances.
[115] *Supra* n. 16 at 102. Atkin *supra* n. 46 notes at 210 that whilst "the Martin marriage had some unusual features, it was not so far out of the mould as to be treated differently".
[116] *Supra* n. 112 at 765, quoted favourably by Priestley J in *De Malmanche v De Malmanche* at 602.
[117] *Supra* n. 104 at 605 per Priestley J.
[118] *Ibid* at 601.

Section 13 provides no further statutory guidance regarding any judicial determination as to equal or unequal division but section 18 sets out a definition as to what the term 'spousal contributions' might refer. Section 18(1)(a)-(h) which is almost identical to section 18 of the original 1976 Act, indicates the legislature's view of 'relevant contributions' stating the eight ways in which a spouse might have contributed to the marriage. These contributions include both monetary and non-monetary contributions, referring, *inter alia*, to the provision of money, including income earned and household/ child care contributions. [119] Further, as under the original 1976 Act, section 18(2) expressly provides that there exists no presumption that a contribution of a monetary nature is of greater value than a contribution of a non-monetary nature, thereby ensuring that distinctly different spousal contributions are not subjectively valued by the judiciary. The equalisation of different spousal contributions represents evidence of the express desire to protect the non-earning spouse and to ensure that her contributions to the marriage are recognised upon divorce. However, in applying the amended section 18, the judiciary has continued to take a very restrictive and limited view of their capacity to order unequal division. In refusing to stray from the presumption of equal division, Priestley J in *De Malmanche* v *De Malmanche* noted that;

> "What is "extraordinary" and what is "repugnant to justice" must be approached in the awareness that Parliament has assessed as a matter of public policy, that most inequalities of contribution entail neither."[120]

Interestingly, in the recent Court of Appeal hearing of *X v X*, the parties mutually accepted the presumption of equal division as a starting point and the focus of the court and the parties was upon the making (or not) of supplemental orders as a means of equalising the future economic disparity between the parties, as discussed in the section to follow. Thus whilst the governing legislation continues to permit the avoidance of the equal division rule, the judicial powers introduced in 2001 to permit the equalisation of

[119] The listed contributions set out in section 18 include care of dependents, performance of household duties, acquisition or creation of matrimonial property and the supporting or assisting of the other spouse.
[120] *Supra* n 104 at 602, quoting the judgment of Baragwanath J in *Kauwhata v Kauwhata.*

post-divorce economic disparities appear to have shifted attention to this means of equalising the spouses' position post-divorce.

3.4 Compensatory payments for future economic disparity

3.4.1 Introduction

Section 15 of the new Act creates a residual judicial power to make financial and/or property orders to redress post-divorce economic disparity between the spouses. This innovative power, which has received significant judicial and academic attention since its enactment, was regarded by Atkin as "a leap into the dark for New Zealand law".[121] It can be invoked by the court at its own discretion or at the request of one of the parties, if, following the division of relationship property, equally or otherwise, the court is of the view that the post-divorce income and living standards of one spouse are likely to be significantly higher than those of the other spouse. Importantly, section 15(1) requires that such future disparity must arise from the effects of the division of responsibilities and functions within the marriage. Consequently, these judicial powers are expected to be exercised strictly within the circumstances prescribed by the legislature.

Section 15 has been judicially referred to as "a remedial section" that must result in a fair and just outcome from the perspective of both spouses.[122] Miles regards it as "a key provision", intended to "enable the courts to achieve fairer, and in a real sense more equal, outcomes on relationship breakdown" than had been possible under the original 1976 Act.[123] This novel judicial capacity to make orders to redress future spousal economic disparities represents a significant addition to the less complex equal-versus - unequal-division approach to asset distribution and has been seen to "muddy the waters enormously".[124] Certainly Atkin has observed that sections 15 and 15A "introduce a highly discretionary note into an otherwise largely defined scheme."[125] He debates the

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[121] *Supra* n. 35 at 176.
[122] *Smith v Smith* [2007] NZFLR 33 at 50 per Murfitt J.
[123] *Supra* n. 44 at 536.
[124] *Supra* n. 4 at 472. Atkin is critical of these changes, regarding them as inappropriately confusing the fundamentally different concepts of property division and ongoing maintenance.
[125] *Supra* n. 34 at 299.

merits of this approach, noting that whilst the future improved career opportunities of the breadwinner might very well have arisen by virtue of spousal support in the course of the marriage and thus can in "a loose sense" fit within the notion of a community property system, he rejects the view that the future income of either spouse can be regarded as a product of the period of marital cohabitation.[126]

The co-existence of the section 15 judicial power with the power to order equal/unequal division of matrimonial assets and/or periodical payments[127] certainly reflects a legislative attempt to provide the judiciary with a mix of statutory powers to deal with whatever circumstances come before the court. Atkin notes the anxiety of Priestley J to "keep the new powers well within check",[128] emphasising that

> "...it would make little sense for Parliament to confer a broad discretion under section 15 which would enable the equal sharing regime to be subverted in an unpredictable way. Parliament has wisely delineated the jurisdictional field".[129]

As a means of compensating career sacrifices, Atkin, more positively, notes the similarities between this approach and that adopted by Scotland, highlighting in particular section 9(1)(b) of the Family Law Scotland Act 1985[130] which requires the court to take fair account of "any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of the family."[131] He observes that these new powers allow "a departure from equal sharing, introducing an element of substantive, rather than formal, equality to the scheme".[132]

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[126] *Ibid* at 299-304.
[127] Sections 63 and 64 of the Family Proceedings Act 1980 as amended by the 2001 Amendment Act. See section 4 below for a discussion of the role of maintenance payments in the overall asset and wealth distribution process.
[128] *Supra* n. 35 at 182.
[129] *Ibid*, quoting from the judgment of Priestley J in *De Malmanche v De Malmanche* at para 159.
[130] Section 9(1)(b) is considered within the context of the five principles included in section 9, at section 4.4 in chapter 5 above.
[131] *Supra* n. 35 at 182
[132] *Ibid.*

3.4.2 Calculating quantum – the significance of spousal needs

The extent of judicial discretion exercisable under section 15 is quite significant, with the section requiring retrospective adjudication of the circumstances of the marriage and the prospective assessment of the financial position and earnings potential of the parties post-dissolution. Within these tests, there is much debate as to the relevance of individual needs and the lack of legislative guidance on this point has been criticised by the judiciary.[133] In determining whether to make a section 15(1) order, section 15(2) provides that the court may have regard to

> (a) the likely earning capacity of each spouse
> (b) the responsibilities of each spouse for the ongoing daily care of any minor or dependent children of the marriage or, as the case requires
> (c) any other relevant circumstances.

The Act has thus directed that the decision to make an order must rely heavily upon the circumstances of the parties, with the emphasis being placed upon the post-divorce financial and child care responsibilities of the spouses. This contrasts sharply with the reference earlier in section 15 to the effects of the divisions in the *course* of the marriage, the test that has been applied repeatedly by the courts. Thus it appears that the right to a section 15 order depends upon proof that the effect of the spousal roles in the course of the marriage has given rise not only to post-divorce economic disparity but also requires specific consideration of the section 15(2), forward-looking factors. The wording of these factors suggests that they might more properly inform the court of the extent of the actual disparity, and thus the determination of the amount of any compensatory order.[134] Whilst section 15 does not expressly mention the needs of the applicant spouse, the courts have deemed it appropriate to factor them in. Hammond J, in considering the evolution of the legal concept and treatment of needs tracked the evolution of New Zealand law, noted its dramatically changing purpose and form over a 30 year period:

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[133] In *M v B supra* n. 47 at 685, Hammond J notes the significant dispute within the legal community as to the precise meaning and relevance of 'needs', observing critically that Parliament "has not particularly assisted the resolution of disputes in this subject area by the language it has used".

[134] The issue of quantum and the judicial approach to the calculation of the value of section 15 orders is considered in section 3.4 below.

> "What has happened conceptually, over close to a half century, is that the basis of a woman's claim has been slowly extended from obligations once based on purely moral grounds, through claims grounded on relatively narrowly perceived "needs", to an approach based on real equality. This last concept is based upon the proposition that there are no material differences between men and women in the context of modern, egalitarian marriage. Hence any difference in treatment amounts to discrimination and constitutes a violation of important equality principles. But the argument goes further than that — what may be needed (and the new legislation recognises) is compensation for differences *created* by the very institution of marriage. This is where the notion of substantive — or real — equality comes so strongly into play."[135]

He refers, by way of illustration, to the principle enunciated in section 1N of the new Act which emphasises the notions of equal contribution and just division.[136] Ultimately Hammond J calls for the making of a "just" award, having regard to the principles and purpose of the legislation. However, exactly how the award is constructed is, in his view, a matter for the circumstances of the particular case.[137] Similarly he explains that whilst section 1N(a) provides that equality must be maintained, section 1N(c) requires that regard must be had to economic advantages or disadvantages to a spouse upon the dissolution of the marriage. Clearly Hammond J is against perceiving needs as "something like the necessities of life" and calls for greater judicial flexibility to be exercised in light of the amendments to the 1976 Act. Consequently it appears that the legal entitlements of the dependent spouse have been strengthened by the statutory enactments but have been even more enhanced by the judicial perceptions of the extent of her legitimate claims. Hammond J regards the statutory amendments as "clearly designed to address the further social problems which had revealed themselves in the operation of the earlier statute",[138] specifically the impoverishment of women. Thus whilst the quantification of a spouse's needs will be relevant to the court, it is unlikely to limit the level of provision to be awarded to that spouse.

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[135] *Supra* n. 47 at 685.
[136] *Ibid.*
[137] *Ibid* at 682. See section 3.3.2 above for a discussion of judicial attempts to definite the concept of justice and other goals that remain statutorily undefined.
[138] *Ibid* at 681.

In *McGregor v McGregor* Clarkson J considered compensation to be the true purpose of section 15 and was of the view that such an order should not be determined on the basis of future needs but rather in the light of what has brought the parties to that point. Interestingly she regards needs as only relevant to the calculation of the amount of the order, and only then in rare cases. Rather she suggests that future needs "should normally be the focus of an application for maintenance."[139] When the compensatory function of the section 15 order is considered, the yardsticks of economic disparity and the spousal functions in the course of the marriage appear more relevant and appropriate than basic needs.

3.4.3 Identifying future economic disparity

As regards the burden of proof to qualify for this novel form of relief, section 15 requires that the future income and living standards of the wealthier spouse must be *significantly higher* than those of the applicant spouse. Miller J in *JES v JBC*[140] considered the meaning of the term 'significant' in this context and debated how it might be best determined. In his view "significance must be measured in terms of income and living standards" but such inquiry should not rely upon a relative weighting of what might constitute a significant disparity in the context of the overall disparity. Rather he suggests that the relevant considerations in measuring the disparity in income and living standards between the parties, must include, with reference to the less wealthy spouse; "that spouse's earning capacity, the size of the relationship property pool...and the asset position of each spouse after division."[141] Ascertaining whether a future economic disparity will exist has been referred to as being, in essence, "an evaluative assessment for the Court".[142] Judicial rulings have rejected attempts by counsel to introduce a formulaic approach to the issue, instead placing emphasis on the particular circumstances

[139] *Supra* n. 103 at 606. Clarkson J does qualify her reference to the future needs of the spouse, agreeing with the views of Atkin and Parker, *supra* n. 12 that "the contemplated payment does not merely concern future *needs*."
[140] [2007] NZFLR 472.
[141] *Ibid* at 481.
[142] *Allen v Allen* [2006] NZFLR 735 per France J at para 46.

of individual cases. In *M v B*, the court preferred to regard section 15 orders as "necessarily a matter of impression", [143] rejecting the application of a formulaic approach. Similarly Murfitt J in *Smith v Smith* recognised that there "is no one true way of establishing an award of compensation for economic disparity".[144] In recognising the extent of the judicial discretion afforded to him and his colleagues, Murfitt J similarly suggested avoiding any pre-occupation with formulae for fear that such a debate might be allowed to "overwhelm the purpose for which economic disparity was introduced".[145] Rather he called for the courts to exercise their judicial discretion "in a principled way" and in making any award to recognise "the socio-economic inequality" which can often arise in marital relationships where career advancement is sacrificed for the benefit of the family.[146]

3.4.4 How to quantity a section 15 order

Although the overall objective is to bridge the future economic disparity caused by the spousal functions within the marriage, the Act lacks legislative guidance as to how a court might calculate the value of the order to be made. Despite her generally positive views of the 2001 statutory developments, Miles is critical of the manner in which the legislature has chosen to draft section 15. The basis upon which the judicial scope and discretion is to be exercised is not, in her view, "readily ascertainable from the text of the Act."[147] Conversely she regards the New Zealand legislature as having left "rather a lot of work to be done by the judges, particularly in determining how to quantify awards...".[148] Ultimately Miles, with reference to the approach of both the American Law Institute and the Australian legislature, highlights the value of a statutory quantification scheme for section 15 or other such applications. She identifies the current shortfalls, noting that the

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[143] See further the views of the court in *M v B*, *supra* n. 47. Robertson J at 653 rejected the settling of the amount of compensation by way of the application of a formula, supported by Hammond J, who agreed that the statutory provisions do not demand an outcome of arithmetical equality in determining the level of compensation. However, he did emphasise the importance of the judicial elucidation of the reasoning behind the levels of payment ordered, if any.
[144] *Supra* n. 122 at 45.
[145] *Ibid.*
[146] *Ibid.*
[147] *Supra* n. 44 at 535.
[148] *Ibid.*

quantification of a section 15 order can be measured with reference to many yardsticks, including: loss of future earning capacity; loss of share in enhanced income; loss of relationship living standard; loss of shared wealth; economic equalisation and personal compensation.[149] Further she laments the legislature's failure to identify the overall objectives or possible ceilings for such an award. The consequential scope for judicial creativity was evident in the ruling of *Fischbach v Bonnar*[150] where, once satisfied that jurisdiction to award compensation had been established, the court ordered the payment of $30,000 to the wife, representing an unexplained 40% of the husband's share of the relationship property. Atkin is similarly dissatisfied with the governing provisions, expressing unease with the manner in which this figure was reached by the courts, querying whether "the judge thought up the sum of money or thought up the percentage."[151] Whichever the origin, he notes that it is not "at all clear where either figure comes from".[152] By way of contrast Atkin points to the case of *V v V*[153] as evidence of "a much more sophisticated process of calculating the amount of compensation". Adams J considered and compared the actual and potential incomes of both spouses, deducting amounts for various identified contingencies, including child care costs, in order to identify the appropriate financial order to make. Having identified the shortfall of income between the parties in the 14-month period from the date of separation to the date of the hearing, he ordered the respondent, Mr V to pay past maintenance in the sum of $3618 and a lump sum payment of $33,500 pursuant to section 15, being half the total shortfall, given that in paying that sum to the wife the husband would also be poorer by that amount. In *Smith v Smith*, whilst Murfitt J calculated the section 15 order by halving the identified value of the economic disparity, he noted, for example, the equally valid approach of the High Court in *P v P*[154] where "there was no attempt by the claimant spouse to call expert evidence quantifying the value of the disparity. A more broad-brush approach was taken in fixing the appropriate compensation."[155]

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[149] *Ibid* at 541, 542.
[150] [2002] NZFLR 705.
[151] *Supra* n. 35 at 183.
[152] *Ibid.*
[153] [2002] NZFLR 1105.
[154] [2005] NZFLR 689
[155] *Supra* n. 122 at 45.

Undoubtedly contradictory judicial approaches to the section 15 power have emerged, as is particularly evident in the lengthy litigation between the divorcing spouses in *X v X*; beginning with Clarkson J in the Family Court,[156] followed by Hansen J on appeal[157] and most recently, by the judges of the New Zealand Court of Appeal.[158] What was in dispute was whether the division of marital roles caused the economic disparity between the parties. The parties, having met in university, both worked in industry for nine years prior to the birth of their first child and during that time the husband also completed an MBA. Thereafter the wife managed the family and household, having a second child three years later, whilst the husband was repeatedly promoted, requiring the family to move on a number of occasions. Upon separation, in addition to the equal division of the matrimonial property, the wife sought a section 15 order in respect of the economic disadvantage she had suffered as a result of her fourteen-year absence from the workforce. Very different judicial views were expressed regarding both the wife's entitlement to a section 15 order, and the manner in which the quantum should be determined. The disparity of views serves to illustrate the scope for varying interpretations of the factual circumstances before the court, as regards the extent to which any economic disparity can be related to the marital roles. In addition the lack of legislative guidance as to the means of calculating the amount of the order was a major ground for judicial disagreement.

Hansen J gave the issue of calculating quantum detailed consideration and although he ultimately decided that the decision was a matter to be returned to the lower court, his judgment addresses many of the issues arising. He disagreed with the findings of the Family Court judge, that the division of roles had not caused the economic disparity, and criticised the basis of her refusal to make the section 15 order. He regarded her ruling as "overly influenced by a comparison of assets and lifestyles of the parties at the date of the hearing and [as giving]...insufficient weight to the changes that would follow, including a disparity of income".[159] Significantly, at first instance, Clarkson J had regarded the wife's

[156] [2006] NZFLR 361.
[157] [2007] NZFLR 502.
[158] [2009] NZCA 399.
[159] *Supra* n. 157 at 526.

decision to act as fulltime homemaker at the expense of her career prospects as a matter of choice, and thus not relevant to section 15 considerations. Conversely Hansen J regarded the traditional division of functions within the marriage as the dominant cause of the economic disparity:

> "It is the classic case of a man being given full rein to develop his career and maximise his earning potential while his wife puts her career on hold. The causal link between economic disparity and the division of roles in the marriage could not be clearer."[160]

In recognising the very divergent views, Hansen J emphasised the parameters placed upon the judicial discretion exercisable under section 15, noting, with reference to sections 1M(b) and 1N(b) that the purpose of the Act is "to recognise the equal contribution of husband and wife to the marriage partnership" and that all forms of contribution to the marriage partnership are to be treated as equal. To permit the judiciary to place a valuation on economic and non-economic benefits would, in his view, encourage the exercise of judicial discretion that "would become as broad as it is long. Its exercise would become a subjective assessment of the balance of advantage in a marriage."[161] However, given the differing judicial interpretations of both the law and the circumstances before the court, Hansen J ultimately called for the "opposed views expressed...and other considerations in the exercise of the discretion under s 15... [to] be addressed and resolved by the Court of Appeal. There is a significant public interest in having these matters clarified."[162] Given the extent and scope of the judicial discretion exercisable, clarification from the Court of Appeal could bring welcome clarification. When returned to the lower court to quantify the order to be made, Clarkson J ordered the payment of $240,000 to the applicant wife. The parties cross-appealed the various orders made. Consequently the Court of Appeal of New Zealand was eventually presented with the opportunity to deliver its views in this case.

The outcome of the appeal provides a very interesting illustration of the distinctive

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[160] *Ibid* at 528.
[161] *Ibid* at 529-530.
[162] *X v X* [2007] NZFLR 947 at 951 (Application by the husband for leave to appeal the earlier decision of the High Court).

opinions still held in respect of the workings of these discretion-based judicial powers. Although Robertson and O'Regan JJ[163] both affirmed the orders of Clarkson J, they displayed very different approaches to the calculation of quantum. Interestingly, with a loose reference to the similar approach adopted by the courts in England and Wales in personal injuries cases, O'Regan J advocated that

> "...with some development of consensus over time on appropriate discount factors...the methodology used in this case or something similar [could be used to quantify s.15 awards]...without the need for extensive and expensive expert evidence."[164]

Although he acknowledged that the rigidity associated with the English/Welsh model of calculating personal injury damages would not be necessary in section 15 awards, O'Regan J preferred this system, criticising Hansen J's express preference for individualised justice and an avoidance of a prescriptive approach. In a similar approach to Robertson J, Hansen J based his calculations upon a subjective analysis of the circumstances of the parties and expressly rejected the workability of a formula-based approach. He regarded career projections and analysis as "speculative" and "demeaning" and identified the court as having responsibility for the determination of "the justice of an award on the basis of its assessment of the parties' overall financial circumstances, the value of the loss sustained by the claimant party, and the future earning potential of each party."[165] However, on analysis, the apparently-conflicting approaches do not necessarily represent the very distinctive approaches suggested by the respective judges. Ironically although O'Regan J strongly criticises the approach to quantum presented by Robertson J, the two judges managed to reach the same decision and it appears that a juggling of two formulaic approaches led the two judges to the same conclusion. Thus the positions adopted are, it is suggested, not as divergent as first appears.[166]

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[163] O'Regan J delivered judgment on his own behalf and on behalf of Ellen France J.

[164] *Supra* n. 162 at para 183. O' Regan J did not provide the court with any significant detail regarding the approach in England and Wales, preferring to refer to *McGregor on Damages* (17th ed) (2003). He did note however, that the formulaic approach, which includes reliance upon discount factors published in tables by the Government's Actuary's Department, allows the court to assess and calculate compensatory awards for claimants in personal injury cases without the need for expert evidence.

[165] *Supra* n. 157 at para 129.

[166] Although Robertson J rejected the development or use of any "rote formulae" to result in the awarding

Hansen J steadfastly regarded the "but for" test as the starting point in any question of quantum in a section 15 application, i.e. to commence with a calculation of the applicant's likely earning capacity, "but for" the nature of the division of functions within the marriage. This he regarded as the "crucial determinant" of any section 15 award. This starting point had in turn to be adjusted to take account of contingencies and unavoidable uncertainties in assessing income with the halving of the final figure that represents the applicant's notional loss. Despite conflicting approaches to the issue of quantum, the use of a "but for" figure, howsoever calculated, was the starting point for both judgments delivered in respect of the appeal of the awards in *X v X*. However the different approaches adopted by Robertson and O'Regan JJ and the consequential subjective adjudications inbuilt in this approach to quantum again serve to illustrate the difficulties in assessing the amount of the orders to be made. Ultimately Murfitt J identifies the fundamental need for a presiding judge to "employ a process which is transparent and rational and which results in a just division of relationship property, having regard to the objectives of the Act".[167] Such an approach, if it could be manifested in practice, would arguably have the potential to achieve the optimum balance of judicial discretion exercised with a view to securing the pre-identified aims of the legislation.

Murfitt J in *Smith v Smith* identified fourteen "authoritative principles" relating to economic disparity claims, which can be drawn from nine particular decisions of the High Court and Court of Appeal.[168] In assessing whether there existed significant future economic disparity between the parties, he emphasised that the parties' traditional

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of sums that are just, he nonetheless set out his 7-step approach to calculating the sum to be awarded. He commenced with the "but for" figure used in the lower courts by both Clarkson and Hansen JJ, estimated Mrs X's likely future income, incorporating time value and other discounts and then calculated the award in terms of a 10-year life span, which he regarded as an appropriate time span for compensation. Despite criticisms of the approach of Robertson J, O'Regan J adopted a similar approach to his calculations. Having identified Mrs X's future income had she not adopted the role of breadwinner, he calculated a figure representing the cumulative difference between the parties' actual and hypothetical incomes and made appropriate allowances. He then regarded this as the "but for" figure and made a section 15 award of half that amount.

[167] *Supra* n. 122 at 45.

[168] *Ibid* at 42-43. The nine cases relied upon were *De Malmanche v De Malmanche*; *P v P*; *M v B*; *E v E* [2005] NZFLR 313; *Beran v Beran* [2005] NZFLR 204; *Nation v Nation* [2005] NZFLR 103; *Harvey v Harvey* Family Court 9/9/2005; *McLachlan v MacDonald* Family Court 14/2/2006 and *Chong v Spell* [2005] NZFLR 400.

division of spousal roles and the wife's responsibility for the full-time care of the children were jointly-made decisions. The impact of these decisions prevented her from continuing on her career path, which he speculated would have led to a high-earning executive career. Although a judgment of the Family Court and thus of limited precedent value, Murfitt J represented the view of the overall aim of the Act as being to "rehabilitate" one partner for the benefits conferred on the other. Such an aim, given the extensive array of orders available, ensures that where by virtue of the spousal roles adopted in the course of the marriage, a financially vulnerable spouse who will by comparison be significantly less well-off than her husband post-divorce, can be fairly provided for. Equally, the need to prove both a causal link between the future financial imbalance and the marital roles, protects the husband from an obligation to pay simply because of the fact of the marriage. In addition, Miller J in *JES v JBC*,[169] emphasised that, notwithstanding the judicial capacity to make these orders, there remains an obligation on the claimant in a divorce case "to recognise that the marriage has ended, that each party must go its own way, and that to the extent that it is reasonably possible...become self-supporting within a reasonable period of time".[170] He was critical of the trial judge for omitting to apply the principle that the wife is "obliged to take responsibility for meeting her own needs within a reasonable period of time, having regard to the division of functions within the marriage".[171] In the circumstances he confirmed that it was the loss of future income opportunities that was being compensated, not the loss of the marriage. In ordering that the maintenance cease within a period of four months, Miller J allowed the wife some time to secure reasonable employment but equally ensured that a clean break would be quickly achieved between the parties. Similarly, notwithstanding her lack of qualifications and the general difficulty with identifying her work potential, the court in *H v H*[172] regarded it as "reasonable", to expect the applicant wife, "over an extended period of time to gain work experience and become more confident in full-time work".[173] Thus on balance, it appears a fair outcome is achievable for all.

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[169] *Supra* n. 140.
[170] *Ibid* at 485.
[171] *Ibid.*
[172] [2007] NZFLR 711.
[173] *Ibid* at 716.

3.5 Conclusion

It is ultimately left to the judiciary to assess and determine the measure and extent of the compensation to be ordered. Critically Atkin has noted that in respect of a section 15 order,

> "Quantum is not determined according to need. In some cases it may fall well short of remedying disadvantage. In others, it may be too harsh on the paying party...In attempting to cure one injustice another may be created in its place."[174]

Consequently, notwithstanding the commendable aim of compensating the financially-vulnerable spouse, the legislation falls short of providing all the required solutions. Miles criticises the legislation as leaving "key questions regarding quantification unanswered, or at least answered only inexplicitly".[175] Consequently the law and its application becomes difficult to predict. It is not unreasonable to suggest, however, that this approach was deliberately adopted by the legislature. Providing strict rules for the calculation of the division of assets and future income based on the actual economic disparity between the parties would not be an easy undertaking. Neither would it necessarily be a wise one. It appears that the New Zealand legislature has regarded the elucidation of principles and purposes as the most strategic means of guiding the interpretation and application of its laws. By so doing it has not imposed a "how to" regime on the judiciary, rather it has identified the goals to be achieved, with the exact route being determined by the presiding judge in each case. Whatever the approach adopted and irrespective of the subjectivity exercised by a presiding judge, the application of the laws to the particular circumstances should be utilised to achieve those identified purposes and stated objectives. In their 2004 *Update on the Property (Relationships) Act 1976* the Family Law Section of the New Zealand Law Society noted that in the two years since the introduction of the legislative changes, discretionary awards made under the new section 15 "have generally been modest", mainly in their view, because of the continuing principle of equal sharing that underlies the Act in general. They regarded the qualifying

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[174] *Supra* n. 34 at 304, 305.
[175] *Supra* n. 44 at 540.

criteria set out in section 15 as sufficiently precise to allow "relatively few spouses" to qualify for an adjustment award. As regards the approach of the judiciary, the Family Law Section noted the distinctly varying approaches adopted in the first two years, referring to the "scientific accounting approach" adopted by some as compared with the "more broad brush approach" of others. Atkin notes that by 2003 it was still too early to assess the effect of these provisions but stated that early indications were that securing a section 15 compensatory payment would not be easy.[176] He observes that the courts could reject such an application either for lack of jurisdiction or because an award would not be appropriate. At that time he stated that of the eight decided cases to date, compensatory payments under section 15 had only been made in two cases. Further, in support of the view of a judicial reluctance to grant such relief, Heneghan has more recently noted that the maximum compensatory pay-out by a court to date had been $138,000 in *P v P*, following on from a $600,000 claim by the wife.[177]

Evidently, the lawmakers have recognised the importance of rules, albeit in the form of principles and presumptions but equally have incorporated a relatively significant reliance upon judicial discretion. Such discretion, to be utilised to bring about substantive post-divorce economic equality between the spouses, is regarded as a means to secure a fair outcome for both parties, but particularly the economically vulnerable spouse, whatever the circumstances before the court. Thus the New Zealand system of regulation comprises of a mix of quasi rules in the form of principles and significant judicial discretion for their attainment, placing it somewhere at the midpoint of the rules/discretion continuum. Arguably the emphasis upon economic fairness demonstrated by the broad-based judicial powers is at the expense of the criteria of democracy and predictability. The necessary reliance upon judicial discretion in the implementation of the statutory provisions shifts a significant law and policy making function from the legislature to the courts, thereby detracting from the democracy and predictability of the laws.

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[176] Atkin, *supra* n. 35 at 183/184.
[177] Heneghan M "The Normal Order of Family Law" 2008 28 OJLS 165.

There now exists the need for empirical research to identify the nature and impact of the ancillary relief orders being made by the courts. Such research needs to examine the position of the spouses not only on the dissolution of the marriage and the distribution of the assets and wealth, but in the years after the marriage to track the sufficiency of any financial relief orders made on divorce. More recently Atkin has re-emphasised the need for "proper research into how the rules are in fact operating and what alternative options, if any, may more effectively be employed to achieve the ostensible goal of real equity."[178]

4. Spousal maintenance

4.1 Maintenance on the dissolution of the marriage

As mentioned in earlier chapters, in Ireland the courts tend to determine all financial and property issues, including maintenance collectively. Under New Zealand law, as in California,[179] spousal maintenance receives distinct legislative attention. The New Zealand Family Proceedings Act 1980 governs the ordering of spousal maintenance and section 64(1) creates a limited inter-spousal statutory obligation to maintain the other where the need arises:

> "...after the dissolution of a marriage...each spouse...is liable to maintain the other spouse.....where the other spouse...cannot practicably meet the whole or any part of those needs... because of any 1 or more of the circumstances specified in subsection (2)."

These circumstances relate to the impact of spousal roles on the parties' capacity to become self-supporting after divorce,[180] their ongoing custodial and child care responsibilities, the standard of living of the spouses in the course of the marriage and the existence of an undertaking by one spouse to support the other whilst a reasonable period

[178] *Supra* n. 34 at 305.
[179] The distinct treatment of property and spousal support orders has already been considered in the Californian context; see above at section 7 of chapter 4.
[180] When factoring in this circumstance, the court is required to have regard to (i) the effects of the division of functions within the marriage, (ii) the likely earning capacity of each spouse, and (iii) any other relevant circumstances.

of further education or training is completed. This inter-spousal maintenance obligation after divorce is expressly limited to the circumstances set out above, thereby removing scope for the payment of maintenance because 'justice so demands'.[181] In addition section 64A further limits the likelihood of ongoing or easily accessed maintenance by requiring both spouses to "assume responsibility, within a period of time that is reasonable in all the circumstances of the particular case, for meeting his or her own needs". Once such reasonable time has passed the statutory obligation to maintain ceases, irrespective of the success or otherwise of the dependent spouse's attempts to achieve self-sufficiency. However, there remains scope for ongoing ties; 64A(2) permits the court to maintain spousal obligations:

> "...to the extent that maintenance is necessary to meet the reasonable needs of party B if, having regard to the matters referred to in subsection (3), -
> (a) it is unreasonable to require party B to do without maintenance from party A; and
> (b) it is reasonable to require party A to provide maintenance to party B."

Whatever the underlying legislative intentions in choosing to include this residual power, it undoubtedly leaves the issues of long-term jurisdiction, quantum and duration to the significant discretion of the courts.

The limited purpose of post-dissolution maintenance appears relatively clear, especially when section 64 is compared with the provisions governing equal division and section 15 orders, given that it will only be ordered where it is necessary to meet the *reasonable needs* of the claimant spouse. Thus unlike section 15 orders, the fact of division of spousal roles which has impacted negatively upon the earning power of one spouse to the benefit of the other, will not in itself give rise to any obligation for the rebalancing of this economic disparity through the ordering of maintenance. Although such a factor may assist the court in determining the quantum and duration of maintenance, it will not be considered unless the claimant spouse can firstly prove need, thereby invoking the court's

[181] It is presumed that the factors or circumstances set out in section 64(2) were created with a view to the over-riding aim of securing justice.

jurisdiction. The inclusion of this additional burden of proof serves to encourage the courts to *avoid* making maintenance orders, and the very limited scope for jurisdiction serves to ensure that maintenance is only appropriate in very limited cases. The dependent spouse faces a heavy evidentiary burden to succeed with an application for spousal maintenance:

> "Parliament has made it clear that generally speaking a spouse/partner is not liable to pay maintenance at the end of their relationship: s 64(4). It has created a limited exception to this where there is "reasonable need" arising from the different roles the parties took in the relationship."[182]

The change in legislative approach introduced in 2001 caused a shift in emphasis from a tendency to award maintenance as part of the overall settlement of the parties' financial positions to a greater reliance upon property and financial lump sum orders. Vaver notes that whereas under the 1963 Act the courts tended to discount property awards because of the availability of maintenance payments, under the 1976 Act property division was regarded as an automatic right with maintenance representing "the flexible element in achieving an overall just financial result". However the increased powers to make property adjustment orders and/or lump sum awards under the Property (Relationships) Act 1976 have permitted the court to address the financial claims of the parties and empowered the making of orders with immediate effect, often resulting in an absence of maintenance orders where alternative property or lump sum orders can sufficiently provide for the parties. Maintenance must now be regarded as a supplemental and very secondary means of dealing with asset and wealth distribution.

4.2 Spousal Support – reasonable needs and self sufficiency

In *M v B* Hammond J suggested that one of the main consequences of the 2001 amendments is that the concept of 'needs' has been broadened. Certainly in the context of maintenance it can be argued that 'needs' plays a more immediate role in the court's determinations, particularly in the short-term. As distinct from this, although relevant to

[182] *M v B, supra* n. 47 at 664 per Robertson J.

the determination of a section 15 application, bridging the future economic disparity arising from the respective roles of the parties in the course of the marriage is more directly linked to the past losses of the dependent spouse and the consequential need to compensate her, in order to ensure a real equality between the spouses into the future.[183] As mentioned above, in regarding the applicant to be entitled to a maintenance order, Riddell J in *FB v BL*[184] admitted to being influenced by the applicant's responsibility for the care of the children of the marriage, the unfeasibility of her seeking part-time work, and the demands arising from the autism suffered by one of the children. Conversely Miller J in *JES v JBC* emphasised strongly the need for spouses to recognise their obligation to become self-sufficient following the dissolution of their marriage. He was critical of the trial judge for failing to apply the clean break principle, which "remains an important consideration in what remains a no-fault dissolution regime".[185] Failure to do so, he suggests, "is to risk compensating a spouse for loss of the marriage".[186] This approach to the issue of maintenance fits more neatly into the overall compensation-based policy goals of the New Zealand regime as it allows the emphasis to be placed on the impact of the marital roles adopted by the parties, and therefore gives rise to a consequential obligation to maintain. From a policy perspective this is easier to defend and is arguably more in line with the compensatory function of the ancillary relief powers under the 2001 Act, as evidenced equally by the section 15 economic disparity orders, which serve as a remedy for the losses arising from the parties' marital roles.

4.3 Section 15 economic disparity order v maintenance order

Where an application for spousal support is successful, as with a section 15 application, the court is required to examine the effect of the division of spousal functions in the course of the marriage on the earning capacity of both spouses. However, notwithstanding this duplication, the courts have emphasised that "s 15 awards and

[183] Typically it is not solely about the economic and career losses of the homemaker, but also the co-existing gains and career advancements of the other spouse. The aim of the section 15 order is thus to bridge the divide between the two worlds. See the earlier discussion of the relevance of needs to a section 15 application in section 3.4.2.
[184] Family Court 22 June 2006.
[185] *Supra* n. 140 at 485.
[186] *Ibid.*

maintenance orders serve distinct purposes and ...should be considered separately".[187] In *M v B* the court stressed the distinction between a section 15 order which readjusts the division of relationship property, and a maintenance order which seeks to provide relatively temporary support to assist one party to adjust to their new circumstances. In essence maintenance is designed to provide for the spouse's "reasonable needs for a reasonable period of time" but the "need for a maintenance order can only be assessed once the division of relationship property has been finalised".[188]

Whilst the case law to date suggests that the purpose of each award may vary greatly, they remain interlinked insofar as the making of one order may remove the justification for the making of the other. Thus in awarding the appellant wife compensation for future economic disparity, Miller J in *JES v JBC* emphasised that such an award should not be treated as capitalised maintenance, but might yet have the effect of reducing the need for maintenance. Atkin is less convinced as to the distinction between a maintenance order and a section 15 order, particularly as a maintenance payment can be awarded in lump sum form.[189] Atkin argues that in essence an economic disparity claim concerned with future earning capacity and a maintenance application that is concerned with future needs now "deal broadly with the same question".[190] Ultimately he queries the sense of creating "two major strategies with different ground rules for tackling roughly the same problem – namely the income differential between parties on the breakdown of a relationship."[191] This leads him to call for the reform of the law on "the inter-relationship of capital and income" to establish "much clearer parameters".[192] He suggests that "economic disparity claims should be replaced by an enhanced maintenance regime that takes more fully into

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[187] *Ibid.*
[188] *Ibid.*
[189] *Supra* n. 4 at 473.
[190] *Ibid.*
[191] *Ibid.* Atkin cites the decision of the Court of Appeal in *M v B* as an example of the capacity for the co-existing income deficiency remedies doubly to benefit applicants. In that instance, the wife was able to rely upon the regulatory structure to gain a significant amount of relationship property without impacting upon her claims for economic disparity and maintenance. He notes that although William Young P at 27, agreed with the ruling of the court, he did express concerns that "from the husband's point of view, the wife was "having her cake and eating it too.""
[192] *Ibid* at 474.

account the effects of intimate relationships".[193]

5 Conclusion

The New Zealand regulatory system is premised upon legislatively-stated principles to be given effect through a combination of rules, presumptions and judicial discretion. The Property Relationships Act 1976, enacted in 2001, has created a system that regards marriage as a partnership of equals, whilst retaining the power to achieve equitable results. Given the variable nature of the circumstances that can present before the courts, the New Zealand system seeks to provide enough latitude through the exercise of judicial discretion to facilitate exceptional circumstances within an otherwise rule-based system. The arsenal of ancillary relief powers now available to the New Zealand judiciary, to both compensate for sacrificed opportunities and provide for basic ongoing needs greatly empowers the courts to secure real equality between the spouses. Underlying these two corrective powers lies the strong presumption of equal division which must be ordinarily ordered by the courts. However despite this principle-driven system of legal regulation, the lack of available empirical research on the impact and effect of the New Zealand divorce regime makes it difficult to ascertain the success or otherwise of the apparently well-developed governing provisions. Research is necessary to trace the financial circumstances of parties upon the dissolution of the marriage and very importantly, in the subsequent years. Such a project might provide an insight into the real effect of the Property (Relationships) Act 1976.

Under the new 1976 Act, the certainty provided by the presumption of equal division can be avoided where fairness demands an alternative approach. Whilst the legislative source for the enunciated guidelines, expressed in the form of principles and purposes, represents a distinctly democratic approach to lawmaking and adds legitimacy to the outcome secured, the co-existing scope for judicial discretion arguably has the potential to challenge this legitimacy. Despite the statutory guidance, the making of both lump-sum and/or periodic payments orders is a matter to be determined by the presiding judge

[193] *Ibid.*

with reference to the circumstances of the case. Thus the mix of rules and discretion evident in the New Zealand regulatory structure, whilst capable of securing fairness whatever the individual circumstances, may operate at a cost to the benchmarks of democracy and predictability. Notwithstanding the presumption of equal division, the judicial right to make additional compensatory payments to the economically vulnerable spouse appears to identify fairness as the primary aim of this regulatory approach. Whilst representing an approach similar to that operated in Scotland, as outlined in the previous chapter, the avoidance of more definitive limitations, durational and otherwise, has resulted in a less decisive and coherent approach in New Zealand. Whatever the merits of the policy positions adopted by the lawmakers in Scotland, when assessing their approach as a means of regulating law creation and application, their willingness to assert a definitive position certainly attracts predictability through democratically created laws.

The experiences of the New Zealand legal system in the context of divorce offer an interesting illustration of an evolution of purposes and procedures. There now exist identified statutory objectives with co-existing flexible judicial powers to facilitate the goals to be achieved. Such an approach to regulation, where the lawmaking process includes a considered enunciation of the goals of the process, can result in more democratic and predictable laws. The manner in which these laws are structured can also contribute to the securing of the third benchmark of fairness. Whereas the New Zealand courts are expected to decide every case with the relevant, identified policy aims to the fore, Irish cases are decided in a social policy vacuum.[194] The excessive judicial discretion and scope for subjective determination under the Irish divorce system, together with the failure to enunciate overall policy goals serves to highlight the significant gap between the two approaches and the need for the Irish approach to be reconsidered.

[194] See chapter 3 above, which presents an overview and critical analysis of the current Irish regulatory approach to asset distribution on divorce.

Conclusion

1 Introduction

The systems for regulating asset distribution on divorce in Ireland, California, Scotland and New Zealand, were selected at the commencement of this work in order to demonstrate four quite distinct approaches to regulation. It was envisaged that a detailed description and critical analysis of these regimes would lend itself to the identification of an optimum approach to regulation. However what has evolved is a realisation of the general workability of each country's regime, where it has been created within a considered legal and social context. It has been shown that once powers are created, whether rule- or discretion-based, their effectiveness depends on the co-existence of clear pre-identified aims of the regulatory process. In an area of law often less concerned with strict rules of property and title and more centred upon notions of fairness and equity, any potential for inconsistent and subjective determinations can be minimised by adherence to the goal of securing these over-riding social policy aims.

Each of the systems considered has demonstrated a tension between the creation and imposition of strict rules and the need to permit an element of judicial freedom to achieve individualised justice in the circumstances. The mix of legislative and judicial tools created to successfully balance this conflict has been diverse and they have varied in their outcomes and success. Such success or otherwise has been measured in the course of this work with reference to the three benchmarks of democracy, fairness and predictability, which have emerged as the three key criteria for assessing the impact and effect of the laws and processes adopted in each of the four jurisdictions considered. Ultimately the diverse experiences considered serve as a useful guide for Irish law reform, in highlighting the need for such a mix of rules and discretion, and the co-existing need for clearly identified policy aims to provide a principled context within which laws can be applied. The approach to the division of assets also varies, with Ireland uniquely (amongst the jurisdictions considered in this work) regarding all possible financial relief

orders as a collective means of achieving a just and proper outcome. Conversely the approach adopted in California, Scotland and New Zealand mandates a distinct consideration of property and wealth division on the one hand and spousal support orders on the other. Where this distinction has been properly considered and developed there also exist separate motivations and objectives for each element of the financial re-distribution process. Finally the issue of private settlements is beginning to emerge as an area of growth, most likely in response to dissatisfaction with existing distribution regimes. This very current development serves to emphasise the need for Ireland to address the significant shortfalls of its regulatory approach to divorce, if, as a state, it wishes to retain control over the financial responsibilities of spouses on the dissolution of marriage.

2 Rules versus discretion as a means of regulating asset division on divorce

2.1 Introduction

The regulatory approaches considered in this thesis vary from a rule of equal division, to a presumption of equality with scope for unequal division, to unfettered judicial discretion. As distinct from Ireland, the regulatory approaches of California, Scotland and New Zealand all commence at a starting point of equal division, the strength of the rule varying, and typically having evolved over time. The four regimes reflect different responses to the tension between the aspiration for predictable and democratically created laws and the co-existing need for judicial freedom to achieve individualised justice in the circumstances. In turn, judicial interpretations have sought to apply the governing laws in a manner capable of securing either stated or subsequently identified policy aims.

2.2 California

On the face of it, the Californian approach is entirely rule-based; the courts must award an equal division of the community property of the parties. This judicial obligation arises

from relatively stringent legislative provisions which demand equal division, except in an exhaustive number of instances where such equal division is impossible or entirely impractical. Whilst the equal division rule can be understood to reflect the partnership theory of marriage, the decision to create exceptions however limited, reflects a shift from the original policy of absolute equal division, being mandated by social and family policy needs in the context of what is otherwise a relatively unyielding rule.

2.3 Scotland

In Scotland, the current legislative presumption that fair division necessitates equal division, was enacted following a lengthy period of consultation and replaced a regime premised upon judicial capacity to make whatever orders were necessary in the individual circumstances. However, this starting point of equal division co-exists with a judicial capacity to divide the assets unequally, once justified with reference to one or more of the enunciated statutory principles. Thus although the Scottish system commences on a footing of equal division as mandated by fairness, the governing provisions recognise that unequal distribution may be required in order truly to equalise (to the extent possible), the positions of the parties. The creation of the exceptions to the presumption of equal division relies upon the exercise of judicial discretion in order to secure the goal of fairness, but in a controlled manner, limited by pre-determined statutory principles.

2.4 New Zealand

In New Zealand the lawmakers have considered and reformed their laws on a number of occasions, adopting and later rejecting a presumption of equal division. Although the statutory exceptions to equal division under the original 1976 Act were broad enough to allow judicial discretion in "extraordinary circumstances", the very strong presumption of equality reflected the view of marriage as a partnership, "in which each spouse, by his/her

unique effort, contributes to the acquisition of the partnership assets".[1] Consequently, calls for reform led to a detailed legislative response to the financial complexities on divorce, with multiple ancillary relief powers being created for the judiciary. Whilst the starting point of equal division remains, the demands for individualised fairness linked to marital responsibilities and future economic disparity have given rise to significant supplemental judicial powers effectively facilitating a return to the historically significant discretion-based judicial role.

2.5 Ireland

Irish divorce laws accord considerable discretion to the judiciary, and lack any statutory mandate for the equal division of assets. Equally the judiciary have displayed a marked reluctance to identify principles and polices and currently the nature and value of the assets available for distribution appear to dictate policy direction. Consequently, the judiciary tends to allow varying family circumstances to cloud the more significant policy issues and thereby prevent (or perhaps even facilitate the avoidance of) the development of over-arching principles. In comparison with the other jurisdictions studied, the Irish regulatory approach is entirely lacking in rule or principle based direction.

3 Property orders versus ongoing spousal maintenance

3.1 Introduction

As tools to secure the goals of the asset distribution process, property and spousal support orders co-exist in all four jurisdictions considered, but are regulated and utilised in quite diverse ways. It is apparent that whilst Ireland regards the spousal support order as merely one of many interchangeable means of resolving the financial claims before the court, the other three jurisdictions considered have created a more segregated approach to these orders, whereby maintenance is very much a secondary consideration after asset

[1] Tapp P "The New Zealand Matrimonial Property Act 1976" 1 OJLS 3 (Winter 1981) 421 at 422, cited previously in chapter 5 at n. 24.

division. In this context two main issues have come to the fore; the restriction of claims through limited definitions of marital property and finite time periods; and the distinctive regulatory treatment of property and maintenance orders by lawmakers. The individual approaches to these issues impact significantly not only upon the courts' powers to grant the relief sought but also provide a means of giving effect to underlying policy objectives.

3.2 Limiting spousal claims through restrictive definitions of rights

Where possible, ancillary relief orders made at the time of the divorce can allow the court to divide the available assets as necessary to best secure the goals of the relevant process. Dividing the available assets at the time of divorce and electing to avoid ongoing maintenance reflects a policy of clean break, and a deliberate identification of the funds deemed suitable for distribution. In this way, the definition of marital (or relationship) property applied in each jurisdiction allows the law-makers to dictate the scope of the parties' possible entitlements. Typically, where a statutory definition is created, it limits the assets and wealth available to gains earned in the course of the marriage. In respect of the homemaker, this limits (typically) her equitable claim to her spouse's assets, marital earnings and career advancements and prevents her from sharing in his pre-marital or post-divorce wealth. Thus whilst marriage may be regarded as a partnership of equals, that partnership and any entitlements are severed with the ending of the union notwithstanding any long-term benefits or losses arising directly from the spousal roles and opportunities in the course of the marriage. In Scotland, in indicating a clear preference for the avoidance of post-divorce spousal support, the lawmakers have expressly categorised post-divorce earnings as non-marital property. Similarly under Californian law, the scope of the community property is confined to assets and wealth earned in the course of the marriage. Conversely, the New Zealand approach to post-divorce earnings has taken a more protective view of the homemaker regarding it as unfair to discount the relevance of future economic disparity where it can be linked to the marital contributions. Thus, career sacrifices and absence from the market place for the benefit of the family mandate a levelling of the spouses' financial positions through the

section 15 compensation order. In addition the broadening of the definition of relationship property to include what was previously categorised as 'balance of relationship property' again strengthens significantly the scope of the homemaker's claim.

Conversely under Irish law, there is little or no limitation placed upon the scope of the spouses' claims, as evidenced by the absolute judicial freedom to consider any assets held legally or equitably by the parties, coupled with the spousal right to apply for further relief at any time after the divorce is granted. It can be surmised that the lawmakers have either deliberately created an open-ended policy or conversely the issues of definition and scope of property rights were simply not considered in the drafting of the regulatory process. Either way, the dearth of legislative statement and the inconsistency evident in the judicial pronouncements in this context have caused great uncertainty about the process. Once again the absence of stated policies leaves Ireland's broadly drafted laws even more vague and inconsistent in their application.

3.3 Distinctive treatment of property and maintenance

All jurisdictions considered in this work allow, to some extent, the making of both property adjustment and post-divorce maintenance orders. However in addition to the different emphases placed on these orders, distinct approaches are also adopted in respect of their regulation. The focus of Californian law is undoubtedly on property division, requiring an equal division of the community property of the parties. Limiting the rights of the parties to marital assets and earnings reflects the view that the non-earning spouse has no valid claim on post-marriage assets. However notwithstanding this primary position, the regulatory regime does operate a residual legislative-based capacity to order indefinite spousal support where necessary. In this regard, as noted in chapter 4, the legislature has developed distinctive governing provisions which require the court to make a subjective determination of the circumstances of the parties. Although it is regarded as a residual power, typically avoided where the equal division of community property satisfies the position of the parties, it represents a very distinct element in the

broader context of Californian divorce laws. Certainly it is the one instance where the court is required to determine the fact and amount of the order on the basis of the individual circumstances of the parties. Perhaps most fundamentally in this context, it can be regarded as evidence of the inoperability of an absolute rule-based system and the importance of scope, however limited, for individualised justice.

By way of contrast to the property-focus of the Californian approach, the New Zealand lawmakers have quite deliberately developed a two-tiered regulatory capacity to provide for the economically disadvantaged spouse. In addition to the presumption of equal division, which is rebuttable where exceptional circumstances exist, the court can identify future economic disparity and make compensatory orders to equalise the position. The quantum of any future disparity order will be determined on the evidence of the career sacrifices of the homemaker and the future income of the wealthier spouse. In addition, a share in post-divorce earnings can be claimed in the light of the additional judicial power to order spousal support based on the needs of the applicant and her inability to support herself because of the circumstances of the marriage. Whilst this period of post-divorce support is not typically envisaged as long-term, it can be ordered for so long as justice demands. Whilst Scotland similarly provides scope for property orders and spousal support, there is a very clear legislative preference for the resolution of the financial position through property orders, with an underlying acceptance that spousal support should be avoided where possible. In addition and to compound this view, the Act requires spousal support orders to be limited, save in cases of sufficient hardship, to a period of three years. Thus in each of these three jurisdictions, the court first divides the marital property between the parties, equally or otherwise, and only then will the court consider spousal support orders and/or orders in respect of post-divorce assets or wealth.

The Irish regulatory approach does not draw a distinction between the treatment of property and/or maintenance, nor does it identify a legislative preference for property orders over maintenance. Rather both the legislature and judiciary regard the assets of the parties as a collective asset-pool and the laws permit the making of whatever orders are required by justice. This encourages a more holistic approach to key issues such as clean

break, post-divorce spousal support and sufficiency of property adjustment orders. Interestingly the New Zealand multi-faceted approach to marital assets and future economic wealth might in fact be regarded as a sophisticated version of the more loosely regulated Irish position. Although the source and effect of the income of the spouses is considered by the Irish courts and may lead to the ordering of a larger lump sum and/or future maintenance, it will do so in a far more generalised manner, but might yet achieve similar outcomes to the New Zealand lawmakers; i.e. a share in the marital assets and ongoing maintenance to redress the economic imbalance between the parties.

4 Evaluating diverse approaches to regulation

4.1 Introduction

Each system of regulation, whether primarily rule- or discretion-based, is influenced by the law makers' priorities in respect of its eventual outcomes. The examination presented has sought to identify the consequences of the varying approaches currently operating in Ireland, California, Scotland and New Zealand with reference also to their individual historical approaches to asset and wealth distribution on divorce. The impact of the existing laws and processes has been critically assessed to demonstrate quite varying emphases on the importance of creating laws that are democratic, predictable and fair. The varying prioritisation of these three criteria has significantly impacted upon the choices of law and policy-makers in the regulation of asset distribution on divorce.

4.2 Democracy

Democratic laws are primarily perceived to be legislatively created with the judiciary being accorded the secondary role of implementation. Notwithstanding the express allocation of precise roles within the Irish legal system, whereby the Oireachtas makes law and the courts administer justice, the judiciary have played a very significant role in attempting to develop Irish divorce law and policy. Indeed in each of the four jurisdictions considered there exists discretion-based judicial powers, resulting in the

delivery of some element of individualised justice. However the breadth of the judicial powers exercisable in the jurisdictions other than Ireland, is limited to varying extents by the co-existing rules, principles or statutory guidelines. The current regulatory approaches in California, Scotland and New Zealand all represent reforms of pre-existing regimes, which had been reliant almost entirely upon the exercise of judicial discretion.

California is easily identified as being most democratic in both creation and implementation insofar as it involves the application of a legislatively created rule with little or no scope for deviation. It is really only in considering the merits of an application for a spousal support order that the democracy of this regime can be queried. In analysing the New Zealand approach, it is arguable that despite focussed legislative attention, there remains a lack of clarity of goals to produce a sufficiently democratic system. Although operated within legislatively created structures and parameters, the current approach continues to rely heavily upon subjective judicial determinations of future economic disparity and the identification of the orders necessary to achieve substantive equality. However the regime remains instructive for Irish law reform; although judicial discretion remains, the legislative confines within which it can be exercised operate to ensure legitimacy and transparency exist within the regulatory process. Similarly in Scotland the regime is premised upon quasi-rules, manifested in stated principles and policies to which the judiciary must adhere on determining property and wealth disputes on divorce. However the particular strengths of the Scottish approach lie with the willingness of the lawmakers to adopt a definite position on a number of key issues, particularly the avoidance of extended post-divorce ties, save in cases of serious hardship. The freedoms of the judiciary are thus severely restricted by the legislative approach which avoids excessive reliance upon subjective concepts of justice and fairness. In considering the need for the reform of the Irish approach to regulation in this context, the distinct lack of democracy is very evident in the Irish regime, with the legislature choosing to effectively delegate all issues and determinations to the judiciary and in turn, the deliberations of the judiciary often remain unknown or unexplained. Ireland lacks a legislative stance on the keys issues for determination and whilst the abstract development of a strict rule might take the democratic debate too far, the delivery of principle-based policy directions

would certainly add credibility and legitimacy to the process. Thus it is suggested that whilst necessarily relying to a point on judicial determinations in the particular circumstances, the Scottish regime is as democratic an approach to lawmaking as is appropriate or possible in the context of financial determinations upon marital breakdown. Critics of any residual judicial role might argue that such powers serve to delegitimize the laws, and encourage subjective adjudications premised upon the individual circumstances of both the judge and the parties involved. However the co-existing aims of predictability and fairness demand that democracy and legitimacy cannot be the sole criterion of lawmaking and thus justice demands a less than absolute rule-based approach to the creation of an effective system of regulation.

4.3 Predictability

In the context of dispute resolution, what might constitute a reasonable outcome can only be ascertained where, *inter alia*, the governing laws permit an outcome to be predicted. In practice, predictable laws and thus identifiable outcomes, lessen the scope for protracted disputes and serve to facilitate private bargaining. Conversely, a system that is premised upon very wide discretion serves as a temptation for the fostering of unreasonable expectations regarding outcomes, and can prevent parties from reaching a reasonable settlement. Nowhere is this more evident and perhaps important than in family law disputes where the cost of a protracted dispute, both financially and personally, can have a detrimental impact upon one or both of the parties involved. Furthermore, inconsistent rulings in relatively similar circumstances cause immense dissatisfaction with the overall regime and can prompt discontent amongst those it seeks to regulate.

Relatively unfettered judicial discretion, as is evident in Ireland, suggests to the parties that *any* outcome is possible, instilling either fear or false hope (or both!) in their minds. This uncertainty is compounded by the *in camera* rule and the general secrecy associated with family law disputes. In essence parties are effectively negotiating, not in the shadow of the law, but rather in the dark. Yet, as with democracy, predictable laws do not necessarily mandate the use of absolute rules, rather there exists a spectrum upon which

the various regulatory approaches can be placed, with quasi-rules such as principles, policies and presumptions being utilised to bridge the gap between absolute rules and absolute discretion. Such tools, although unlikely to provide precise insight into the likely outcome of a case, will place parameters on the nature and scope of the likely outcome which in turn should greatly assist any *inter-partes* negotiations. These tools, in various guises, are utilised in Scotland and New Zealand, adding some element of predictability to the resolution process. Interestingly, the almost absolute predictability of the Californian system appears to have increased the reliance upon such agreements, in being certain about the outcome, parties are equally certain as to their desire to avoid that outcome. In light of this, it must be queried in a jurisdiction such as Ireland, where the predictability of the regime is weak, whether negotiated settlements are motivated by fear of the relatively unbridled judicial powers and the consequential myriad of possible outcomes in any given case. The creation of more principle-driven governance might restrict such judicial freedoms and permit those affected by marital breakdown to rely with a greater degree of certainty upon a more predictable regime.

Principles and policies serve to identify the motivations and the goals of the process whilst reasoned judicial rulings can illustrate the application of these guides in practice. Successful bargaining in the shadow of predictable and certain laws facilitates private settlements, reduces *inter partes* hostility and is likely to result in more acceptable and thus more effective outcomes. Notwithstanding these benefits, predictability equally can not exist as the sole aim of a process that seeks to regulate human behaviour and relationships. A regime that over-emphasises the need for predictable laws may do so at the cost of fairness.

4.4 Fairness

The regulatory processes governing many aspects of family law disputes frequently identify fairness as the ultimate goal. Although a ubiquitously used term, its impact upon the laws and their application depends upon legislative definition and/or judicial interpretation in a particular jurisdiction. Given the unique set of circumstances arising in

every divorce dispute, individualised fairness often necessitates capacity for individualised justice. However, notwithstanding the particular facts and circumstances of each case, fairness equally demands that like cases are treated alike. It is difficult to defend a system which by virtue of its structures and laws allows similar cases to give rise to very different outcomes. Thus where a system gives rise to inconsistent treatment of similar cases, fairness is not secured and predictability is clearly not achieved. Such inconsistency is more likely to arise where the judiciary is accorded discretion to decide simply with reference to what is 'just' in the circumstances, such an adjudication allowing consideration of the subjective views of the presiding judges and/or the strength of argument presented by each party to the hearing. Similarly, the universal criticism of the test of fairness is its indefinable and uncertain nature, and the fundamental need to consider the circumstances of a case in order to assess whether fairness has actually been achieved. A system that relies upon the vague concepts of fairness and justice and which fails to identify what is fair, simply invites subjective determinations and arguably prevents fairness in the more general sense.

Adjudicating on the basis of fairness therefore demands an awareness of the social policy aims of a particular jurisdiction, which in order to satisfy the criterion of democracy, are ideally articulated in the governing laws. Where direction is provided as to the aims and priorities of a distribution regime, this can allow the legislature, supported by the judiciary, to identify what fairness demands, and thus add predictability and consistency to its system of regulation. The Family Law (Scotland) Act 1985 states that fair division is presumed to mean equal division and whilst scope exists for unequal division, with reference to guiding principles, as a starting point there exists an immediate statement of what fairness is presumed to equate to. Interestingly, the equal division rule, applicable in California, also aims for fairness, presuming that equality of treatment is the fairest means of division in the majority of cases, and thus on balance, the best rule to apply universally. Whilst equitable division might more likely ensure fairness in the particular circumstances of a case, the use of equal division as the basis for asset distribution might more readily guarantee an element of fairness in the more universal sense. However the weakness associated with such a simplified view of fairness is evident from the calls for

reform of the Californian rule of equal division, given that it only attracts an "illusion of equality"[2] and has failed to secure true equality for divorced women. Irrespective of the criticisms of the impact of particular legislative approaches, any attempt to define the parameters of the concept of fairness within a jurisdiction can provide direction and guidance to the presiding judiciary and thereby more easily ensure that fairness, howsoever regarded, is secured.

The lack of parameters or guidance in the Irish divorce system, although created to allow fairness and justice to be secured in every instance, lends itself to an unguided regime of boundless possibilities. By contrast the rule-based system in California, however ineffective in securing the aim of equality of outcome, lends itself to a consistent, predictable system of equal treatment. Less rigidly, the regimes in Scotland and New Zealand allow for individual determinations of fairness, but within identified parameters and objectives. Whatever aims of the process might ultimately be identified, the fairness sought by the Irish regime demands greater legislative consideration and control of the judicial powers to ensure all aspects of the process are truly fair.

4.5 Conclusion

The three criteria outlined above, democracy, predictability and fairness have been identified as three useful yardsticks to measure the effectiveness of various regulatory approaches to asset distribution on divorce. The Irish judiciary, whilst having regard to statutory factors, is both empowered and required to make whatever financial relief orders are necessary in the circumstances of each case. Such an approach provides little if any guidance to the presiding judge who is effectively authorised to determine the direction of the governing law and policy. In Ireland, this empowers the judiciary to shape from its inception, the nature and effect of Irish divorce law, thereby usurping the primary law-making role of the legislature. In addition it falls to the judiciary to

[2] This phrase was coined by Weitzman L to reflect the unequal outcomes arising from the rule so equal division. *The Divorce Revolution The Unexpected Social and Economic Consequences for Women and Children in America*, cited previously in chapter 4 at n. 57.

determine what outcomes are demanded by justice, and both to identify and to secure the policy aims of the regulatory process generally. To date, such clarity and direction has not been forthcoming.

It remains unclear whether the Irish legislature has simply abdicated its role as law and policy-maker or whether the judiciary has been identified as better placed to develop policies and principles in this area. Although it is possible to defend such a legislative approach on the basis of necessary judicial freedom to achieve a fair solution in every case, the identification of underlying objectives would better serve to guide and control these otherwise excessive judicial freedoms.

5 Private settlements

Put simply, private agreements are executed for two reasons; either to finalise the divorce process in an efficient and speedy manner or alternatively to avoid the impact of the governing laws. Reliance upon both pre- nuptial and post-nuptial settlements is evidence of attempts by spouses to secure one or both of these aims, and is linked to their acceptance or otherwise of the regulatory process and practices in place.

The right of spouses to execute an arrangement may be an autonomous one but it is undoubtedly exercised in the shadow of the governing regulatory system. This regulatory backdrop will greatly influence the content and enforceability of such an agreement. Whilst it might not be surprising that in such a rigidly regulated system as California pre-nuptial agreements are often utilised, it is unclear whether such reliance upon private settlements is evidence of the inequity resulting from adherence to the rule-based outcomes or simply an individual desire to retain autonomy over the marital relationship. It has already been suggested that the reliance by Californian lawmakers upon its particularly prescriptive regulatory approach on divorce might serve to encourage the wealthier spouse to impose a more restrictive settlement on the dependent party. Whatever the motivations, the effect is the circumvention of the powers and policy aims of the court and the regulatory process generally.

Certainly the willingness of the Irish government in recent years to open the debate concerning pre-nuptial agreements suggests an acceptance either of the unworkability of the current regime or a growing willingness to loosen the grip on individual and family decision-making in Ireland. At the very least, in engaging with the fact and validity of pre-nuptial agreements, the Irish lawmakers seem to indicate both the potential scope and need for a means to by-pass the current regime. Although facilitating settlements permits self-regulation of inter-spousal responsibilities, absolute autonomy in this context allows the parties to avoid entirely the social policy aims that can be secured through the regulatory process. Where a state permits self-regulation and enforces pre- and post-nuptial settlements as a matter of contract law, it demonstrates a willingness to forfeit the state's role in regulating society and the family. In a jurisdiction such as Ireland where the State has historically asserted a significant role in the regulation of the family, the growth in use and acceptance of private agreements, particularly pre-nuptial agreements might allow parties to avoid state preferences for inter-spousal responsibilities. Currently the Irish lawmakers have retained a perpetual power over the rights and property of the parties, with a view to maintaining spousal financial ties and reinforcing the lifelong nature of the marital bond where necessary. Thus to avoid a growing reliance upon private settlements which seek to avoid the overly-broad divorce regime, it is necessary that a more structured approach to the fundamental laws governing the family is developed. If the regulation of the family and post-divorce inter-spousal obligations remains a priority for lawmakers, a more focussed and policy-led system needs to be developed to properly inform the parties to a divorce as to the aims of the process and the impact of state intervention in the ownership of spousal and marital property. Failing that, parties will invariably reject the uncertainty and inconsistency of the current structure and ultimately the State will lose control of this crucial area of social and legal policy.

6 Conclusion – Can Irish family law learn from the experiences of California, Scotland and New Zealand?

The implications of the regulatory choices on divorce are immense and any reform necessitates consideration within the broader social context. In attempting to regulate private relationships and consequential responsibilities it is absolutely imperative that the underlying state policy goals are considered and identified. The lack of informed direction and the judicial uncertainty in the application of current Irish divorce laws has led to unclear and inconsistent attempts to identify and develop such underlying aims. The current dearth of explicit social policy aims leaves the judiciary without a starting point for its key role in relation to the further development of laws and contemporary social policy.

Certainly the discretionary-based regulatory system in Ireland appears to recognise marriage as a partnership of equals and is primarily motivated by the need to equalise the position of spouses on divorce. To this end, the legislature has chosen not to define marital property and thereby makes all assets, howsoever gained, available for distribution and does not place any limit, other than remarriage, upon a spouse's right to seek further relief post-divorce. This stands in marked contrast with the strict and restrictive rule of equal division in California and the less strict yet still highly regulated approaches in Scotland and New Zealand. Whilst it has been suggested by Weitzman and others that the rule of equal division in fact impoverishes women, and the supplemental judicial powers in New Zealand suggest the unworkability of a simple rule of equal division, it is entirely unclear whether the unrestricted approach of the Irish lawmakers is any more successful. However, the reliance upon effectively unregulated judicial powers and the co-existing failure to identify regulatory aims or policy direction suggest that Irish lawmakers have failed to adopt any definitive approach. The Irish system, dependent entirely upon judicial determinations lends itself to undirected social and legal decision-making in a policy vacuum. The starting point for the reform of Irish law must therefore be the gathering of focussed empirical research to identify the impact of the current approach and the financial and social consequences for parties on divorce and at

fixed time periods in the subsequent years. Only then can the implications of the current regulatory approach, for both spouses and children, be identified and measured in context.

This examination of the regulatory systems of Ireland, California, Scotland and New Zealand demonstrates varying attempts at the creation of laws to secure a 'fair' economic outcome to marital disputes. The varying interpretations of what might constitute a 'fair' outcome and the differing underlying aims of each process are reflected in the laws and processes enacted. Whilst generally, the rule-based regime in California regards the certainty and apparent equality of the equal division rule as giving rise to a 'fair' outcome, the more discretionary systems suggest that fairness is more likely if the dependent spouse is sufficiently provided for given the particular circumstances of the marriage. Ultimately the Scottish approach is preferred. In expressly identifying the underlying principles to guide the process, this regulatory approach has ensured that the legislative express priorities do influence the orders made by the judiciary. Statutory presumptions, judicial discretion and identified principles co-exist in order to empower the court to secure the aims of the distribution process. For example, given that the severing of the financial ties in the short-term is a definite policy aim, the governing legislation has deliberately placed a three-year durational limit on claims for spousal support post-divorce. This represents a willingness to reduce the scope for judicial law and policy-making where the issue has been resolved through pre-enactment consultation and debate. In addition, notwithstanding this assertion of a definite policy-aim, the legislature has equally recognised the need for some residual judicial discretion and ensured that however limited, such scope has been retained. In contrast, Ireland has effectively avoided the challenging questions arising upon divorce and the legislature has failed to address the key policy issues, including; the purpose and extent of state intervention in the family, the justification for maintaining financial ties on divorce, the objectives to be achieved in distributing marital assets, and the extent of spousal and state obligations to maintain a previously dependent spouse.

In conclusion, any assessment of the effectiveness of a regulatory process to distribute assets on divorce should be less concerned with the process adopted, and focus more closely upon the objectives that process seeks to achieve. Where lawmakers create a system of regulation which identifies the aims and objectives of that process, the manner in which those goals are achieved becomes less critical. It appears that where the lawmakers provide the principles and purposes of the regulatory process, they can direct the exercise of whatever decision-making powers have been created, with the over-riding objectives becoming the central focus of the process. The current operation of Irish divorce law lacks both purpose and objectives, and consequently the regulatory process can operate neither democratically, predictably nor fairly. The policy vacuum that exists must therefore be addressed within the broader social and legal context to allow a more focussed and purposeful regulatory process to develop.

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