

Forum shopping and the differences of approach between Ireland and England to financial relief in separation and divorce cases

As practitioners we are all very aware of the increasing prominence of forum shopping in family law, particularly in view of the application of EU law. It is important, therefore, to understand the position in relation to the law of Separation and Divorce in other member states and this article will focus on the differences in the approach to financial relief between the Irish and English courts.

Ireland has long had close ties to England and these close ties have manifested themselves in the similarity not only of their legal systems but also of their matrimonial legislation. Though all legal ties with England and the Commonwealth were severed in 1948, English case law is often referred to in the Irish courts as there is a much larger body of case law in England. However, while English and Irish legislation relating to matrimonial disputes is similar, there are some key differences which might encourage a spouse to institute proceedings in one or other of the jurisdictions

In this paper, we seek to highlight some key differences between the English and Irish courts. The Irish Courts are led more by the principal of proper provision for each spouse, rather in the equal division of assets, being the approach adopted in England. We shall look at recent Irish cases, which give definition to the term “proper provision” and compare these with the yardstick of equality which is emphasised in the judgments of the English judiciary.

Brief history of divorce and separation in Ireland

Up until the amendment to the Irish Constitution by referendum in 1995 the Irish legislature was prohibited from enacting legislation providing for divorce. The Family Law (Divorce) Act 1996 (the “1996 Act”) came into operation in February 1997. Previously separating couples relied primarily on two pieces of legislation, the Judicial Separation and Family Law Reform Act 1989 (the “1989 Act”) and the Family Law Act 1995 (the “1995 Act”). The 1989 and 1995 Acts provide for the granting of Judicial Separations and ancillary relief, effectively allowing parties to legally separate and empowering the Courts to make far reaching orders relating to assets and income of every nature including property adjustment orders, pension adjustment orders and maintenance orders.

The 1996 Act empowers the Court to grant a decree of divorce and to make similar ancillary Orders to those set out in the 1989 and 1995 Acts. The key provisions for the granting of a divorce in the 1996 Act is Section 5 which states that a Court can only grant a divorce if it is satisfied that:

- (a) at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,
- (b) there is no reasonable prospect of a reconciliation between the spouses, and
- (c) 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,

The reality of the present situation is that Ireland has effectively ended up with a two step system for divorce. Most parties want to resolve all issues relating to property, finances and the children as soon as possible after the marriage breaks down. However, because couples have to be living apart from one another for four out of the last five years, they cannot obtain a divorce and are limited to resolving matters by means of a Separation Agreement or a Decree of Judicial Separation.

What does “living apart” mean?

The first question to be addressed in relation to the section 5 is what is meant by ‘living apart’? This issue was considered by McCracken J in the case of *McA v McA*¹ in which the Applicant and the Respondent lived in the same house but effectively led separate lives. McCracken J noted that the 1996 Act did not provide any definition of living apart and he therefore referred to English precedents, in particular the judgments in *Mouncer v Mouncer*² and the judgment of Sachs J in *Santos v Santos*³. McCracken J accepted the approach of Sachs J in *Santos v Santos* as a case which recognised that “*the view that the intention of the parties is a very relevant matter in determining issues of whether they live apart and of whether there has been desertion.*” In *McA v McA* McCracken J held that the parties had been living apart and said:

“I do not think one can look solely at where the parties physically reside, or at their mental or intellectual attitude to the marriage. Both of these elements must be considered, and in conjunction with each other.”

Notwithstanding the judgment of McCracken J in *McA v McA*, in practice it is uncommon for the Court to accept that a couple are entitled to a divorce unless they have been living in separate dwellings for the requisite four out of the previous five years.

The difference between the English and Irish approach - Proper Provision versus Division of Assets

Whether a spouse is seeking a Judicial Separation or a Divorce, the key consideration for the Irish Court is to determine what is ‘proper provision’ given the particular circumstances of the case. The issue of what is proper provision has vexed the Irish Courts for many years. In deciding what is proper provision the Courts must have regard to the factors set out in Section 20(a)-(1) of the 1996 Act in the case of divorce and Section 16 of the 1995 Act in the case of Judicial Separation. Both of these sections closely mirror the legislation in England and Wales. However, in deciding what

¹ [2000] 2 ILRM 48

² [1972] 1 WLR 321

³ [1972] 2 All ER 246

constitutes proper provision the Courts in Ireland have shied away from the yardstick of equality which has been adopted in the English Courts, as is evident from discussion of the case law below. This is especially so in the case of “big money” cases or, as the Irish Supreme Court calls them, “ample resources” cases.

T v T

The landmark decision in this area is the case of *T-v-T*⁴ (a divorce case) in which the Supreme Court upheld the decision of the High Court to make a lump sum Order in favour of the Respondent’s wife in the sum of IR£5 million, which amounted to approximately 38% of the total net assets. All five Judges of the Court gave judgments with the majority upholding the judgment of the High Court by four to one. Even though the various Judges took different approaches, a number of clear principles emerge, including the following:-

- The court should not discriminate against the dependent spouse.
- Only conduct that is gross and obvious should carry any weight in deciding what is proper provision.
- A clean break, although not envisaged by the Irish legislation, should be facilitated by the Court if the assets are such as to allow for this.
- There is no provision under Irish law which requires or mandates a yardstick of equality.
- The Supreme Court should be slow to interfere with the discretion of the trial Judge in deciding what is proper provision in the particular circumstances of a case.

All of the Judgments in this case emphasise that what is envisaged by the Irish legislation is proper provision and not a division of property. The former Chief Justice, Mr. Justice Keane, expressed the following view in his Judgment:-

“the Court in divorce proceedings [in England] is primarily concerned in dividing assets as fairly as possible between the parties rather than making proper provision for the spouses and their dependent children. As I have already indicated, such an approach should not be adopted in this jurisdiction where the appropriate criterion is the making of proper provision for the parties concerned”.

Regarding the issue of discrimination against the dependent spouse the Court was clear that there should be no discrimination based on the respective roles of the parties. The Chief Justice referred in his Judgment to Lord Nicholls’ speech in *White v White*⁵ as follows:

“Lord Nicholls, in the course of his speech, also emphasised that the whole tenor of the legislation was the avoidance of a discriminatory approach... There can be no doubt that this is also the law in this jurisdiction”.

⁴ [2002] 3 IR 334

⁵ [2001] 1 All ER 1

Mr. Justice Fennelly also referred to the speech of Lord Nicholls in *White v White* in relation to proper provision and said:-

“It is fair to say that Lord Nicholls, in the ensuing passage, proceeded to advocate a ‘yardstick of equality’. The Act of 1996 does not, in my view, warrant the introduction of a yardstick in those terms. It certainly does not ordain an approach based on the division of assets.”

It is interesting to note that four out of the five Judges in this case made a point of warning against the dangers of relying on English case law in deciding what is proper provision in the particular circumstances of a case in Ireland and made a point of distancing themselves from any yardstick of equality.

As regards what the yardstick should be, Mrs. Justice Denham in *T v T* appears to have endorsed, at least to a certain extent, the use of a fraction of one third of the assets as a useful benchmark to fairness. She said:

“Each case must be decided on its own circumstances....I agree with the Chief Justice that a figure of one-third of the assets may be a useful benchmark of fairness. As against that benchmark may be aligned, both positively and negatively, specific circumstances of a case and in particular the factors set out in Section 20(2)(a)-(l) of the Act of 1996.”

M.B v V.B

Equivalence of lifestyle in the context of proper provision was addressed in the recent divorce case of *M.B. v V.B.*⁶, in which Judgment was given in October 2007. Following separation in 1988 the husband had gone on to enjoy what Birmingham J called a “very comfortable lifestyle indeed.” However, Birmingham J stated:-

“While that is the factual background I do not believe there is any necessary entitlement to equivalence of lifestyle. Particularly in a situation where a separation has occurred well in the past, the paths of each spouse is likely to have diverged significantly and it may be that it would be an artificial and illogical exercise to try and re-establish an equivalence. The relevance of lifestyle now enjoyed by the Respondent and his new partner is that it gives context to the real value of assets and income and in that limited sense only does it have relevance”.

With regard to the issue of proper provision the trial Judge stated as follows:-

“What emerges very clearly is that the process is not about the division of assets per se and the question of what is to happen to the assets arises only in the context of making proper provision. The Supreme Court eschewed any adherence to any particular mathematical formula, making it clear that there was no automatic principle of assets being distributed on the basis of equality and that equally on the other side of the coin the claiming spouse was not confined to the share of assets that would be required to meet their reasonable needs.

⁶ Unreported 19th October 2007

C v C

The preference in the Irish legislation for “proper provision” rather than “division of assets” usually results in a variety of orders being made by a court in order to ensure that the dependent spouse is properly provided for into the future and, in certain circumstances, may lead to no significant division of assets at all. An interesting case in this context (and in the context of how the Irish Courts treat inherited assets in ample resource cases) is the case of *C v C*⁷ in which the Applicant husband had inherited a landed estate and his assets had a net value in the region of €24 million and the Applicant’s income amounted to €725,000 per annum after tax. The trial judge in this case rejected the wife’s claim to have the manor house and other significant assets transferred to her and instead awarded her a lump sum of €3.3 million to purchase another property for herself and the children. The trial judge also awarded the wife maintenance in the sum of €240,000 net per annum for herself and €20,000 for each of the four dependent children and ordered the husband to pay the substantial boarding school fees for the children. The judge stated:

“The Applicant has a strong claim to the house. Firstly he is the sole owner. Secondly he has had family connections with it for a very long time. Thirdly the Respondent did not contribute either directly or indirectly to its acquisition as the house was inherited.”

In relation to the issue of proper provision the judge summarised his approach as follows:

“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. In the present case the decision that has been reached is on the basis that proper provision for the Respondent requires the purchase of a suitable home and a suitable and proper level of maintenance, having regard to what is proper provision for the Applicant as well..... It appears to me that such an approach is the best way to ensure the future of the business which is the parties’ main source of income while at the same time being fair to both the Applicant and the Respondent. It also takes into account the fact that the properties were inherited by the Applicant and brought into the marriage by him”.

It is interesting to note that at the time this judgment was delivered in July 2005 the English courts were very much opting for the clean break approach and most practitioners at the time would have taken the view that if this case had been heard in England the wife would have received a far greater share of the assets but substantially less, if any, maintenance. However, following the decisions of the House of Lords in the *Miller* and *MacFarlane* cases it seems that there has been, to some extent, a meeting of minds between the jurisdictions on the issue of maintenance for dependent spouses.

There are many other cases that address the area of proper provision and the net result of the case law is that the trial judge has enormous discretion in this area and this makes it

⁷ Unreported 25th July 2005

more difficult, therefore, to advise clients with any real degree of certainty as to the likely outcome of their case. However, it seems to have emerged from the case law in Ireland that while there is no yardstick of equality, the dependent spouse in a lengthy marriage where there are no very special circumstances (such as an inheritance) and where there are ample resources will in all likelihood be entitled to somewhere between one third and one half of all the assets of the family and the figure at the end of the day will depend on the particular circumstances of the case. The different approaches taken in the two jurisdictions may appear subtle but are important; the emphasis in Ireland on proper provision rather than equality may be more beneficial to the non-dependent spouse and less beneficial to the dependent spouse. In an era when forum shopping is possible the different approaches of both jurisdictions may lead a spouse in an ample resources case to conclude that it would be more favourable to issue proceedings in one jurisdiction rather than in the other depending on which is likely to be more favourable to their particular circumstances.

Difference of approach to achieving a clean break

Another difference between the approach in Ireland to that in England is the absence of “clean break” provisions in Ireland. Even though the Irish legislation does not envisage allowing for a clean break, the Courts have acknowledged that achieving finality and a clean break is desirable in situations where the family has enough resources to achieve this. All of the Judges in the *T v T* case commented on this point and the former Chief Justice Mr Justice Keane stated:

“I do not believe that the Oireachtas [Irish Parliament], in declining to adopt the ‘clean-break’ approach to the extent favoured in England, intended that the Court should be obliged to abandon any possibility of achieving certainty and finality and encouraging the avoidance of further litigation between the parties. I am satisfied that, while the Irish legislation is careful to avoid going as far as the English legislation in adopting the ‘clean-break’ approach, not least because of the Constitutional constraints, it is not correct to say that the legislation goes so far as to virtually prevent financial finality. 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”.

It is important to note that the 1996 Act confers powers on the Courts to make ancillary orders “on granting a decree of divorce or at any time thereafter.” The result of this has been that spouses who have legally separated and settled their claims by means of a deed of separation or judicial separation cannot achieve absolute finality at the time of separation or at the time of divorce or even after the date of divorce. This has led to a situation whereby dependent spouses who have entered into deeds of separation or obtained judicial separations are often returning to Court at the divorce stage, or even after divorce, for a “second bite of the cherry”. Similarly, with the recent sharp decline in the economy and housing market there has been a rise in applications by the paying spouse to have earlier agreements and ancillary orders revised downwards.

This position is in marked contrast to the position in England where the legislation is framed in such a manner as to allow for a “clean break” at divorce. Some of the

reasoning can be attributed to the fact that at the time of the 1996 Referendum in Ireland it was feared that women would be prejudiced by the introduction of divorce in terms of their financial security. For this reason the legislation was framed in such a way as to steer away from the granting of a clean break divorce. Rather the legislation allows the Court to make a variety of Orders to protect the dependent spouse into the future. A former spouse therefore can seek further Orders from a Court even after the granting of a decree of divorce and can even, under Section 18 of the 1996 Act, make a claim against the estate of a deceased spouse, provided such a claim has not been blocked by an Order under section 18(10) of the 1996 Act.

Invariably where a couple are separating (as opposed to divorcing) the paying spouse will wish to have as much finality as possible and it is very common therefore for Deeds of Separation or consent terms attached to a Decree of Judicial Separation to contain a “full and final settlement clause”. Such a clause would normally state that the terms represent a full and final settlement of all present and future claims which either of them may have against the other. Notwithstanding the existence of these clauses, the Court on divorce has the right and indeed the obligation to decide if proper provision exists as at the date of the divorce and the weight to be given to any previous settlements and any “full and final settlement” clause is therefore very important at the divorce stage. There have been a number of cases decided in which a previous settlement prior to the grant of a divorce were considered, in particular in the cases of *K v K*⁸, *WA v MA*⁹, *RG v CG*¹⁰, *MP v AP*¹¹ and finally *B v B*¹². Unfortunately from the point of view of the practitioner and the parties the various judgments lack consistency. For example, in the case of *WA v MA* Hardiman J. states;

“Particularly having regard to the terms of Section 20(3) of the Act of 1996, I cannot approach the question of what is “proper” in the circumstances of this case without giving very significant weight to the terms of the Separation Agreement. I must also construe the word “proper” as having regard to its context as part of the statutory provision”.

As against the above, in the case of *RG v CG* Finlay Geoghegan J. stated as follows:-

“The acknowledgement included in the consent of 7th November 2000, if it is to relate to a proper construction of the Act of 1996, must be considered to be an acknowledgement of potential proper provision at an unknown date. What if divorce proceedings had not been brought for a period of ten years? When so properly construed it appears too uncertain to be a matter which this Court should take into account.”

In the cases of *MP v AP* and *B v B* the trial judges expressed the view that the previous settlement in both cases was a matter of considerable importance and all of these cases

⁸ [2003] 1 IR 334

⁹ [2005] 1 IR 1

¹⁰ [2005] 2 IR 418

¹¹ Unreported 2nd March 2005

¹² Unreported 8th December 2005

must now be viewed in light of three recent Judgments of Mr. Justice Abbott, each of which involved a previous settlement. In the cases of *SMcM v MMcM*¹³ and *N v O'D*¹⁴ Mr. Justice Abbott made further provision for the dependent spouse despite the existence of previous settlements. Further, in the case of *JC v MC*¹⁵ Mr. Justice Abbott appears to suggest that the Court should be more reluctant to revisit the terms of a settlement if such terms are concluded in the context of a divorce as opposed to being concluded in the context of a separation. Despite the fact that there appears to be disparity between the Judgments in relation to the issue of the weight to be given to previous settlements and to full and final settlement clauses, a number of general principles do seem to emerge from the case law:-

- If the non-dependent spouse did not make full disclosure at the time of the original settlement in relation to his or her financial affairs then the Court will be much more likely to intervene at the divorce stage.
- If the dependent spouse received a generous settlement at the time of the original settlement and frittered away that settlement or did not properly utilise the resources made available to him or her then the court will be less inclined to make further provision for that spouse at the time of divorce.
- The Court will be less likely to intervene in a recent settlement.
- If the original settlement was, in the opinion of the court, a reasonable one in the circumstances that existed at that time, then the court may be slower to intervene at divorce and grant further provision to the dependent spouse.
- If between the time of the original settlement and divorce events occurred which could not have been foreseen by either party then the court may be more willing to grant further provision to the dependent spouse.
- A Court may be less likely to make further provision for a dependent spouse if the original settlement was intended to be a “full and final” one.

Trusts

Another issue which is pertinent given the recent Judgment in England in *Charman v Charman*¹⁶ is the issue of trusts in the context of family law. In this regard the Judgment of the High Court in *T-M v T-M*¹⁷ is relevant. The main asset in this case was a house and 750 acres of land which were held in a trust established many years before the commencement of the matrimonial litigation between the Applicant and the Respondent. The matter came before the Court by way of preliminary issue as to whether the trust came within the provisions of Section 9(1)(c) of the Family Law Act 1995. It was accepted by all parties that under the terms of the Trust Document the trustees had full discretion to nominate person or persons to be beneficiaries and it would appear that trust had been established in the 1970s in order to deal with certain tax and inheritance issues. The trial Judge was of the view that it was never the intention of the parties that as a consequence of the trust arrangements their major asset, the house and lands, would be

¹³ Unreported 26th November 2006

¹⁴ Unreported 29th November 2006

¹⁵ Unreported 22nd January 2007

¹⁶ [2007] EWCA Civ 503

¹⁷ [2005] 1 IR 321

excluded from consideration in the event that their marriage was unsuccessful. Having reviewed a number of English and Irish authorities Mr. Justice McKechnie summed up his conclusions as follows:-

“In my view, therefore, these cases over a lengthy period of time demonstrate the Courts approach to statutory provisions almost identical, for present purposes to Section 9 of the 1995 Act. That approach leads to a result that once arrangements confer a benefit on the spouses or either of them in their capacity of husband and wife and was provided for, with and by reference to their marriage status, then same should be treated as a settlement within the said statutory provisions.”

Conduct

In relation to the issue of conduct all members of the majority in *T v T* were of the view that for conduct to be taken into account by the trial Judge when deciding what is proper provision it must be “gross and obvious”. This was the approach adopted by the English Court of Appeal in *Wachtel v Wachtel*¹⁸ and the Judgment of Denning J is cited with approval by a number of members of the Court.

Conclusion

In many cases a spouse may be entitled to issue proceedings in either Ireland or England or indeed in another jurisdiction. In such cases consideration must be given to deciding which jurisdiction is likely to be more favourable in the particular circumstances of their case.

The different approaches taken in the two jurisdictions may appear subtle but are important and the emphasis in Ireland on proper provision rather than division of assets is arguably more beneficial to the non-dependent spouse and less beneficial to the dependent spouse.

In an era when forum shopping is possible the different approaches of the two jurisdictions may lead a spouse in an ample resources case to conclude that it would be more favourable to issue proceedings in one jurisdiction rather than in the other depending on which is likely to be more favourable to their particular circumstances.

First published in International Family Law June 2009.

¹⁸ [1973] All ER 827