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## Irish Matrimonial Property Division in Practice: a Case Study<sup>1</sup>

### **Introduction**

Ireland operates a separation of assets regime, in which property rights (apart from inheritance rights) are not automatically conferred by matrimony. This has often led to difficulties in the marriage breakdown context, where a dependent spouse might be deprived of any share in the assets of the breadwinner. Equitable relief, though important, has been limited in scope (Mee, 1993; Delany, 2003), and property rights, even in the family home, are not conferred by the Constitution.<sup>2</sup> For these reasons, the groundbreaking redistributive power accorded to the courts in marital breakdown legislation since 1989 has been crucial. The current provisions, contained in the Family Law Act 1995<sup>3</sup> and the Family Law (Divorce) Act 1996,<sup>4</sup> empower the courts to make orders in respect of property owned by either spouse.<sup>5</sup> Such orders include property adjustment orders, pension adjustment orders, orders for the sale of assets, orders for periodic payments (maintenance) and financial compensation orders.<sup>6</sup> The only statutory caveats are that the order(s) made must be in the interests of justice<sup>7</sup> and must constitute ‘proper provision’ for both the spouses and any dependent children.<sup>8</sup> The court must also have regard to specified factors in reaching its decision, for example, the ownership of the property, the needs of the spouses and any children, the parties’ conduct, income and earning capacity, the duration of the marriage and so forth.<sup>9</sup> Theoretically, therefore, the courts have an almost unlimited jurisdiction to alter the property rights of both spouses, irrespective of when the property was acquired.<sup>10</sup>

The rate of divorce in Ireland has been steadily increasing over the last number of years – 3,411 divorce orders were granted in 2005, compared with 2,740 in 2000. The rate of judicial separation has more constant, and is now running under a third of the divorce rate – 973 judicial separations were granted in 2005, compared with 1025 in 2000, with some fluctuations in between (Courts Service, 2005). However, there are grave difficulties in assessing the practical effects of the legislation, with regard to property. Hitherto, the *in camera* rule has rendered the systematic reporting of cases and analysis of judgments all but impossible. Cases frequently settle before hearing, orders are often consensual, there are few written judgments (particularly at Circuit Court level)<sup>11</sup> and most of those contain little theoretical analysis. Accordingly, it is difficult to establish with any degree of certainty what approach is taken by the courts, and whether the courts are inclined to take advantage of the formidable range of powers at their disposal. Only anecdotal evidence has been available in relation to the working of the property division system.<sup>12</sup> Although section 40 of the Civil Liability and Courts Act 2004 has since mitigated the strict effects of the *in camera* rule in some contexts (for instance, by permitting the publication of case reports, subject to criteria), it does not explicitly authorise legal researchers to attend at hearings other than for the purpose of preparing a report of the judgment, or to access family law files for other purposes. Furthermore, it may be some time before case reporting reaches a sufficient level to permit in-depth quantitative analysis.

The dearth of information makes it difficult to predict probable outcomes. Practitioners may be unable to advise their clients fully, thus increasing the already high level of stress and uncertainty undergone by spouses during marriage

breakdown. The lack of data also makes it difficult to comment authoritatively on the family property provisions, so that legislative policy must largely operate in a vacuum. To date, no research has been done to fill this gap; the only empirical or sociological evaluations of family law<sup>13</sup> are a study on the areas of maintenance and the deserted wives scheme (Ward, 1990) and a detailed analysis on the operation of family law generally in the context of marital breakdown (Fahey and Lyons, 1995). Although Fahey and Lyons' study did touch on the issue of property, this was not the key focus, and since the study was carried out prior to the coming into force of the current divorce legislation, it is now dated.

### **Background and Methodology**

A key objective of the current study was to obtain data regarding the application of the marital breakdown legislation to the division of matrimonial property. As the *in camera* provisions prevented access to court files, data was obtained from solicitors practising in the area of family law. Private practitioners were first approached following recommendations by regional Circuit Court offices, where officials were asked for the names of solicitors dealing with family law in their locality. Some of the solicitors originally approached in turn recommended others specialising in family law. Legal Aid solicitors in Law Centres were also approached, with the support of the Legal Aid Board. A total of 44 solicitors participated in the study, including 13 Legal Aid solicitors.<sup>14</sup>

Participating solicitors were asked (as part of a larger family law project) to examine a number of their most recently completed divorce and separation files and to supply

data in accordance with a detailed questionnaire. Respondents were generally presented with a range of responses, with occasional 'open' questions. Although the primary focus of the case study was on the type of orders made and the reasons given for them, key contextual information was also obtained, e.g. whether the spouses were both employed, how long they had been married or living apart, and whether there were dependent children.

Cases were categorised as consensual or non-consensual, though not always without difficulty. Ancillary property orders in divorce and judicial separation cases are frequently made on a 'consent' basis, that is, in line with a previously negotiated settlement between the parties. Spouses making separation agreements often have the agreement made a rule of court,<sup>15</sup> both for enforcement reasons and to allow for future variation; sometimes it will be necessary to initiate judicial separation proceedings solely for this purpose. At other times contested judicial separation cases may involve a last minute settlement, which then forms the basis of a consent order. Consent orders may also be made in divorce cases; again, the agreement may be last minute or reached well in advance. In any consent case, the court should carefully examine the circumstances prior to granting a decree, to ensure that 'proper provision' is being made. This frequently may not happen in consent cases, due to time pressures, and the agreement between the parties is usually not disturbed, unless manifestly inappropriate. Consent cases therefore do not concern a spontaneous judicial decision, and accordingly were distinguished from contested cases, which did not include an agreed financial settlement. However, it must be noted that many so-called 'consent' cases are in fact bitterly contested until the last minute, so that last minute settlements could arguably have been included with contested cases.

## Case questionnaires<sup>16</sup>

Questionnaires were completed in accordance with details supplied by participating solicitors, and most solicitors supplied data for two questionnaires. Confidentiality was assured and no client names or identifying details were sought. One of the greatest difficulties related to case selection, as practitioners were inclined to offer ‘interesting’ cases, reducing the random element of the sample. To avoid this, participants were asked to locate their two most recently completed divorce or separation files, on the basis that this would be sufficiently random, and the cases would be fresh in the practitioners’ minds, and (most likely) still to hand.

In all, 89 case file questionnaires were completed, almost three quarters by private practitioners (‘private cases’) and just over a quarter by Legal Aid practitioners (‘Legal Aid cases’).<sup>17</sup> Cases sampled are summarised in *Fig 1*. Court levels and practitioner types are summarised in *Fig 2*.

Total cases:	89	100%
Private cases:	65	73%
Legal Aid cases:	24	27%
Divorce cases:	32	36%
Judicial separation cases:	53	60%
Separation cases:	4	4%

*Fig 1: Overall case breakdown*

	Divorces	Judicial separations	Separation agreements
Circuit Court	30	47	n/a
High Court	1	5	n/a
Private cases	23 (72%)	39 (74%)	3 (75%)
Legal Aid cases	9 (28%)	14 (26%)	1 (25%)

*Fig 2: Case breakdown: court levels<sup>18</sup> and case types*

Practitioners supplying case data were based in multiple locations<sup>19</sup> and the cases were heard in multiple venues (*Fig 3*). The cases were completed between 1999 and 2003.<sup>20</sup>

Case venue	Divorces	Judicial separations	Separation agreements	Total
Not applicable / unknown	1	2	4	7
Dublin	14	14		28
Cork	8	11		19
Galway	2	7		9
Limerick	2	3		5
Other	5	16		21
Total cases	32	53	4	89

*Fig 3: Case types by venue*

Using figures provided by the Courts Service (Courts Service, 2001-2004), the percentage of the national total of divorces and judicial separations granted by different Circuit Courts can be calculated. Comparing the calculations with the sample (albeit including the six High Court cases), the sample proportions for Dublin and Limerick are within expected limits, but the figures for Cork are high for both judicial separation and divorce and those for Galway are high for judicial separation. Overall, the sample does not tally exactly with national averages.

The proportions of divorce and judicial separation cases in the sample were also unusual, as the proportion of judicial separations (62%) far exceeded the proportion of divorces. This was a complete reversal of average national rates, as divorces nationally outnumber judicial separations by almost three to one (Courts Service, 2004). The sample is therefore not representative in this regard. This was surprising, given that practitioners interviewed were asked for their most recently concluded

cases, which should have ensured a random sample in line with overall case patterns. However, it must be recalled that the judicial separation cases included ruled separation agreements. The disparity does not appear problematic for analytical purposes, as outcomes in divorce and separation cases may still be evaluated.

All but six of the cases heard by the courts were Circuit Court cases. This is consistent with national trends (Courts Service, 2004).<sup>21</sup> Most of the High Court cases were heard in Dublin. All six High Court cases were private cases, as might have been anticipated from jurisdictional limits.<sup>22</sup>

Finally, in only six of the 32 divorce cases had the parties previously obtained a judicial separation, while in five they had a previous separation agreement. Hence, 21 of the divorces provided a complete 'blank canvas' and there was no issue regarding a 'second bite of the cherry'.

### **Client gender and gender roles**

Interviewed practitioners represented the husband in 36 cases (40%) and the wife in 53 cases (60%). The percentages of husbands and wives represented in divorce and judicial separation cases were remarkably constant.<sup>23</sup> However, while the clients of private practitioners were fairly balanced regarding gender, almost 80% of Legal Aid clients were wives. Even so, the breakdown of case-types for each kind of practitioner remained similar.



In 75% of the recorded cases, the wife was the applicant or sole initiator of proceedings; in only two cases were the spouses jointly responsible for initiating legal contact or proceedings. Wives initiated 72% of divorce cases and 79% of judicial separation cases.<sup>24</sup> These figures tally with the findings of Fahey and Lyons, with regard to the role of wives in initiating proceedings (Fahey and Lyons, 1995). Husbands were slightly more likely to initiate proceedings in private cases than in cases overall. Wives initiated 87.5% of Legal Aid cases,<sup>25</sup> significantly more than wives in private cases.

## Marriages

The questionnaire requested the year the parties married, which permitted an approximate calculation of the legal duration of the marriage.<sup>26</sup> As can be seen from *Fig 4*, most marriages were quite lengthy.<sup>27</sup> Separation periods prior to the hearing or agreement (*Fig 5*) averaged 55 months. Few couples had been separated 121 months or over, suggesting that not many couples had been waiting many years for the introduction of divorce, or else that such couples had already gone through the system prior to the commencement of this study.

Marriage duration	Marriages	Percentage
Up to 5 years	2	2%
6-10 years	12	13.5%
11-15 years	13	15%
16-20 years	22	25%
21-30 years	26	29%
31 years or more	13	15%
Unknown	1	1%
Total	89	100.5%

*Fig 4: Marriage duration*

Separation period	Marriages	Percentage
12 months or less	15	17%
13-24 months	21	24%
25-60 months	23	26%
61-120 months	14	16%
121 months or more	7	8%
Unknown	9	10%
Total	89	101%

*Fig 5: Separation periods*

The separation period in judicial separation cases was generally shorter than in divorce cases,<sup>28</sup> and shorter still in separation agreement cases (*Fig 6*). Couples seeking divorce must have been living apart for at least four years out the five years preceding application;<sup>29</sup> in most cases, this would mean a separation period of at least 48 months, so it puzzling how 12% of divorcing couples could have been separated for under 25-60 months. It is presumed that these couples may have tried for reconciliation (as the four years of living apart need not be consecutive). Alternatively they may have been living under one roof without sharing a common life.<sup>30</sup>

Separation period (in months)	<12	13-24	25-60	61-120	>120	Unknown
Divorce	3%	9%	28%	41%	19%	0%
Judicial separation	23%	30%	26%	2%	2%	17%
Separation agreement	50%	50%				
Private cases	21.5%	21.5%	21.5%	14%	8%	14%
Legal Aid cases	4%	29%	37.5%	21%	8%	0%

*Fig 6: Separation periods by case type*

Almost no Legal Aid couples had been separated 12 months or less by the time of hearing or agreement, while over a fifth of those in private cases had been. The difference may have been due to the waiting period to see a solicitor in Legal Aid cases. Private cases were remarkably evenly divided regarding separation periods, while Legal Aid cases were more uneven. Both groups tailed away in the longest separation periods.

## Children

All but two marriages had children.<sup>31</sup> The mean number of children was 2.6;<sup>32</sup> only three couples had more than four children, and none had more than seven. The mean number of *dependent* children at the time of hearing or agreement was 1.75. There were no dependent children in 20 cases (21.5% of private cases and 25% of Legal Aid cases).<sup>33</sup> The vast majority of dependent children resided mainly with the mother at the time of the hearing or agreement (*Fig 7*).

Residence of dependent children	No of cases	Percentage
Full-time with both parents	4	6%
Mainly with mother	51	74%
Mainly with father	4	6%
Equally with each parent	4	6%
Mainly with neither parent	2	3%
Varies with child	4	6%
Total	69	101%

*Fig 7: Residence of dependent children of the marriage*

## Property

The study sought to ascertain the property available to couples and to uncover the division patterns of such property. It was also hoped to evaluate ancillary property orders in light of the pre-existing property base of couples, to discover whether, for instance, courts were more likely to transfer the family home to a spouse who already had a share in it. Unfortunately, practical difficulties restricted the full utilisation of the data obtained. Although solicitors were asked to supply details of spouses' incomes, many were unable to do this, as they had only incomplete data on file, or had a mixture of gross and net figures. Although it might have been possible to adjust

gross figures to some extent, for instance, by deducting income tax at the standard rate, there could be no assurance that these adjustments were either complete or accurate, given that no details of individual tax credits were available.

Other financial details, such as pensions, were also sketchy. Property valuations and mortgage details were sometimes unavailable, as were details of other assets, particularly assets belonging to the non-client spouse. Some solicitors also expressly doubted figures provided by the other side. Businesses did not generally have a capitalised value. Regretfully, it was decided to abandon precise comparisons and to concentrate instead on obtaining a picture of property ownership patterns – although here the second hand nature of the information must be emphasised, along with the possibility that spouses providing financial details to their legal advisors may tend to understate their means (Fahey and Lyons, 1995).

The effect of gender on property ownership was of particular interest. The financial consequences of divorce and separation are particularly significant for Irish women as their economic position is generally significantly weaker than that of men. In Ireland, as elsewhere, women have consistently had a lower rate of employment than men, although employment rates for both genders are rising. In 2005, the employment rate for women in Ireland was 58%, compared with 76.2% for men. Employment rates for older persons of either gender were much lower, but still far higher for men than for women. The number and ages of children also had a very significant impact on women's employment rates, though not on men's, and those working in home duties were overwhelmingly female. 44% of married men worked at least 40 hours a week, compared with only 26.2% of married women. Married women were far more likely

to work part-time hours than married men. While women were dominant within certain employment sectors, such as health and education, they were poorly represented at senior level positions. Women's income levels were also significantly lower: in 2003, women's income was about two-thirds of men's. After adjusting for hours worked, women's hourly earnings were around 85% of men's. Women represented 91.7% of lone parents by 2005, and were at more risk of poverty than men (Central Statistics Office: 2005). All of this makes the level of financial provision on marital breakdown a matter of vital concern for Irish women: numerous studies have shown only too well that men are far more likely than their former spouses to recover economically after divorce (Weitzman, 1985; MacLean and Eekelaar, 1983). There seems no reason to doubt that this applies in Ireland too: as discussed below, it seems clear that wives in the cases sampled were generally less well-off than their husbands in every respect, and much of the data gathered reflects the national figures.

The principal asset for most couples was the family home, which was privately owned in most cases (*Fig 8*). Contrary to expectations, ownership and mortgage levels were not significantly higher in Legal Aid cases.<sup>34</sup> Where there was no home, this was usually because it had already been sold. Over three quarters of family homes were jointly owned; where solely owned, the husband was almost three times as likely as the wife to be the owner. Only private case wives were sole home owners. Other land (sometimes up to five more properties) was owned in nearly half of cases, predominantly private practice ones. These properties were mostly in joint names or the husband's sole name. Where a family business was given a capitalised value, it was mostly owned by the husband alone.

Asset	Private cases	Legal Aid cases	All cases
Family home (privately owned)	57 (88%)	21 (87.5%)	78 (88%)
Family home (rented)	3	0	3
No family home	4	3	7
Other real property	36 (55%)	7 (29%)	43 (48%)
Family business	7	0	7

Fig 8: Home, land and business ownership

There was considerable disparity between husbands and wives, in terms of financial resources generally (*Fig 9*). Far fewer wives than husbands had any regular earned income or pension,<sup>35</sup> or relied on their earnings as their main source of income.<sup>36</sup> Wives were much more likely to be in receipt of some sort of social welfare,<sup>37</sup> and only wives were in receipt of maintenance (varying considerably in amount). Wives were less likely to have personal savings, shares or other assets, or to belong to a pension scheme (this presumably reflects husbands' higher employment rates).

	Wives	Husbands	Joint
Family home	5	14	59
Other real property	6	32	20
Regular earned income or pension	53 (60%)	78 (88%)	
Social welfare	33	7	
Maintenance	41	0	
Personal savings	14	19	9
Shares	7	12	2
Member pension scheme	14	38	
Car	56	62	2
Trust interest			1
Other income or assets	3	9	1
Capitalised business		6	1
Significant debts (excluding mortgages)	4	2	

Fig 9: Spouses' property and financial resources

In respect of every asset other than the family home, the spouses in private cases were significantly better off than those in Legal Aid cases (*Fig 10*). Both husbands and wives in private cases were far more likely to earn an income or to have a pension, savings, shares, a car or other assets. Only spouses in private cases had a capitalised family business. Spouses in Legal Aid cases were far more likely to receive social welfare, and Legal Aid case wives were more likely to have accrued significant debts than those in private cases.<sup>38</sup>

Type of asset	Wives: private cases	Wives: Legal Aid cases	Husbands: private cases	Husbands: Legal Aid cases	Couples: private cases	Couples: Legal Aid cases
Family home	8%	0%	15%	3%	65%	71%
Other real property	9%	0%	42%	21%	28%	8%
Earned income	65%	46%	94%	71%	n/a	n/a
Maintenance	52%	29%	0%	0%	n/a	n/a
Capitalised business	0%	0%	9%	0%	2%	0%
Savings	20%	4%	25%	12.5%	14%	0%
Shares	11%	0%	15%	8%	3%	0%
Pension scheme	25%	4%	48%	29%	n/a	n/a
Car	68%	50%	75%	54%	3%	0%
Trust interest	0%	0%	0%	0%	2%	0%
Social welfare	25%	71%	5%	17%	n/a	n/a
Other assets or income	5%	0%	14%	0%	2%	0%
Significant debts	2%	12.5%	3%	0%	0%	0%

*Fig 10: Comparison of spouses' assets in private and Legal Aid cases*

The degree of financial security also varied with age, particularly for wives. On one level, wives in older age groups were better off: the family home was less likely to be mortgaged, and levels of joint ownership did not decline too steeply until wives were in their sixties. Older wives were more likely to be joint owners of other land, to have joint savings with their husbands and to own shares. However, they were much less likely to be earning any sort of regular wage, or to be in receipt of maintenance (presumably because there were no longer dependent children). Social welfare payments were also highest for those likely to have young children but gradually

declined as women got older, regaining significance in old age. There was a gradual fall in the proportion of wives with pensions as age levels rose; there was a final rise in the oldest age group, but that group was small.

Older men tended to be better off financially in almost every respect. Significant proportions of those aged 50 or over had no mortgage on the family home, though homes were mostly jointly owned. Almost all men owning other land were in their forties or fifties, and the proportion with an earned income was high in all age groups. Few were in receipt of social welfare. The vast majority of husbands with savings were in their fifties or sixties, and almost all of those with shares were over 40. Pension rates were fairly stable throughout most age groups, though highest for those in their sixties.

### **Outcomes and orders**

52 of the cases examined were classified as 'consensual' for analytical purposes, i.e. the outcome was effectively decided by agreement between the parties. This obviously occurred in relation to the four separation agreements included in the sample. There were also 29 judicial separation cases where the court 'ruled' a separation agreement between the parties or made a consent order. Consent orders were also made in 19 divorce cases. Obviously, consent orders may not truly reflect what a judge would have done unilaterally, but may be accepted by the court as representing the optimum outcome for the parties concerned. A further four cases were classified as 'uncontested', i.e., the other side did not defend the proceedings. Hence, only 33 of the 89 cases examined were fully contested.



36 of the consent cases were private cases, while 16 were Legal Aid cases. Three of the four uncontested cases were Legal Aid. Consent rates did not seem to vary significantly with location. Circuit Court cases were marginally less likely than expected to be consensual, while High Court cases were slightly more likely to be.<sup>39</sup> There did not seem to be any major link between the spouses' employment status and the likelihood of settlement.

Overall, spouses in longer marriages were considerably less likely to be involved in consent cases.<sup>40</sup> This might be explained by couples with young children wishing to reach an amicable settlement, or being advised by practitioners that the court would probably make particular orders in light of the children's needs (although, as discussed below, the presence of dependent children did not seem to affect settlement rates overall). Other possibilities include increased bitterness where couples have effectively given their lives to one another, only to have the marriage end, and clashes between 'traditional' expectations and modern views. For instance, a male breadwinner may be unable to accept that a homemaker is entitled to a significant proportion of the family assets, or a homemaker may refuse to accept the loss of the family home. It is probably not linked to financial means, as older couples would be likelier to have paid off any mortgage and to have fewer childcare costs. However, the overall trend is upset by divorce cases, where shorter marriages were *less* likely to be consensual, and longer marriages were *more* likely to be.<sup>41</sup> This seems to negate the above arguments.

Where couples were living apart prior to the final hearing or settlement, those who had been apart for the shortest and the longest periods were likeliest to be involved in consent cases.<sup>42</sup> One might speculate that couples inclined to settle will generally do so early on, and that couples living apart for long periods may also lose some of the bitterness that might inhibit settlement, or otherwise move on enough with their lives to make a financial settlement feasible – or indeed, settle from exhaustion. Childcare arrangements are also likely to be less relevant (or better established) at this time, and parties may be involved in new relationships. Couples recovering from recent breakdowns, who are not ‘settlers’ by nature, may be disinclined to settle due to ongoing psychological factors.

The presence or number of dependent children did not seem to affect the incidence of consent cases. 60% of couples with no dependent children were involved in consent cases, compared with 58% of couples with at least one dependent child. This was unexpected: it was anticipated that couples with dependent children might be likelier to settle cases, given that most practitioners interviewed felt that the children’s needs would receive judicial priority. This would leave little incentive for spouses to continue to fight over resources. No obvious explanation presents itself for this.

## Outcomes in consensual cases

Outcomes in consensual cases are detailed in *Fig 11*:

Outcome	All cases (52)	Divorces (19)	Jud separations (29)	Sep agreements (4)
Periodical payment	34	10	21	3
Lump sum payment	26	7	17	2
Pension transfer/order	17	6	10	1
Property transfer	40	14	23	3
Residence agreement/order	3	0	3	0
Sale of assets	9	2	7	0
Financial compensation order	4	1	3	n/a

*Fig 11: Consensual outcomes by case type*

By far the most common outcomes were periodical payments (i.e. maintenance) and property transfers. Lump sum payments were also quite common. Periodical payments were invariably payable to the wife (though not necessarily for her personal benefit: 31 out of the 34 marriages where periodical payments were agreed had dependent children. Property transfers were also predominantly made to wives, but also to husbands in a significant minority of cases. Most property transfers related to the family home, occasionally in conjunction with other assets. Transfers to husbands also related to the family home or a share in family assets. In most of the cases where property transfers occurred, the family home was jointly owned. Property transfers to both husbands and wives also occurred instead of lump sum orders in appropriate cases.

Wives were almost the exclusive beneficiaries of pension transfers (though these were not particularly common, as in many cases there was no pension to be transferred, and the legislation implicitly suggests that the court should consider a pension adjustment order only as a last resort, where proper provision cannot be made by other means). However, the proportion of the pension benefit transferred is unknown and it must be

remembered that ‘nil’ orders are common.<sup>43</sup> Residence arrangements were uncommon, presumably because in most cases the family home was sold or transferred.

The sale of assets was not very common (in the separation agreement cases, there were no assets to be sold). Sales were probably also unusual because the principal asset, the family home, was being transferred to one of the spouses. Where a sale was agreed, the asset to be sold was almost always the family home, and the lump sums to be paid most frequently represented a transferring spouse’s interest in the home. Financial compensation orders were very uncommon (again, the legislation makes these a measure of last resort), and again always favoured the wife. The overall picture is therefore one dominated by transfers to wives, but featuring a significant number of transfers to husbands as well.

### **Outcomes in non-consensual cases**

33 of the cases sampled were fully contested and a further four were undefended. It was difficult to decide whether these should be analysed together (as non-consensual cases) or separately (given potential differences between the two categories). As there were only four undefended cases, it was decided to summarise the findings for all 37 cases together. Outcomes for all non-consensual cases are detailed in *Fig 12*.

Outcome	All cases (37)	Divorces (13)	Judicial separations (24)
Periodical payment	26	11	15
Lump sum payment	21	5	16
Pension adjustment order	8	3	5
Property adjustment order	20	5	15
Residence order	2	1	1
Sale of assets	11	3	8
Financial compensation order	3	1	2

*Fig 12: Non-consensual outcomes by case type*

Periodical payments were again the most common order, and were always made in favour of the wife. It is again unclear what proportion of orders benefited the wife personally, as 21 of the 26 cases where periodical payments were ordered featured dependent children. Periodical payment orders were much more common in contested than consent divorces,<sup>44</sup> but this may be because more contested divorces featured dependent children.<sup>45</sup> Periodical payments were not the most common order in non-consensual judicial separations.<sup>46</sup> This was surprising, as one might expect maintenance orders to be more common in judicial separations than in divorces; furthermore, there was little difference in the proportions of consent and non-consensual judicial separation cases featuring dependent children.<sup>47</sup>

Lump sum payments and property transfers were also very common, and were more common in non-consensual than consent judicial separations.<sup>48</sup> Lump sum orders were nearly always in favour of the wife, whereas in consent cases they had favoured husbands and wives almost equally. The purposes of the orders favouring wives varied from providing a share of the value of the family home or other family assets to arrears of maintenance or prospective maintenance. Orders to husbands mostly represented their share of the family home. Most of the lump sum orders were made in the context of other family assets.

Property adjustment orders were much less common than in consent cases, where they occurred in over three quarters of cases.<sup>49</sup> They were more common in non-

consensual judicial separations than divorces.<sup>50</sup> Most of the orders related to the family home, occasionally combined with another asset, and most favoured the wife. (The family home had been jointly owned in many of these cases, though in only six of the judicial separation cases where the home had been jointly owned was it transferred outright to the wife). Most of the other orders gave the recipient spouse a share in the family assets, and these equally favoured both spouses.

Pension adjustment orders were also less common than in consensual cases,<sup>51</sup> but this appears to be due to a dearth of pensions, at least in divorce cases. Again, these orders mostly favoured the wife. Residence orders in respect of the family home were uncommon, and favoured the wife. Orders for the sale of assets were more common than in consensual cases,<sup>52</sup> and over twice as common in contested divorces as consent ones.<sup>53</sup> Sales mostly related to the family home. Occasionally the sale was conditional or postponed, e.g. until the children ceased to be dependent. Financial compensation orders were rare, and only granted to wives.

Finally, it should be noted that only two of the above orders (a periodical payment order in favour of a wife and a financial compensation order) featured in the two undefended divorce cases. When the two undefended judicial separation cases were analysed separately, it was found that they both included property adjustment orders (in one case, in favour of both spouses).

### **Comparative frequency of ancillary orders**

While the number of cases in each category varied, it was nonetheless striking that certain orders were considerably more or less frequent in consensual situations than in non-consensual ones.

For instance, maintenance orders were much less frequent in consent divorces than in non-consensual ones,<sup>54</sup> while property adjustment orders and pension adjustment orders were much more common in consent divorces.<sup>55</sup> The rates for lump sum orders were roughly equivalent in each, but orders for sale were more than twice as common in non-consensual divorces.<sup>56</sup> While the presence of dependent children may have some impact on the incidence of periodical payments (as previously noted), another possible explanation for these differences is that parties in consent cases prefer a clean break property division to ongoing obligations such as maintenance. Courts, however, may be less focused on establishing a clean break between the parties and therefore may be less resistant to ongoing obligations. They may also be less likely to transfer property, such as the family home, either in lieu of maintenance or at all. Where assets are insufficient to provide for both parties, they may be more likely to sell the home than to transfer it to one party only. It is hard to comment on the greater prevalence of pension orders in consent cases, particularly as it is unclear how many of the orders were ‘nil’ orders, made purely to invoke the ‘blocking’ provisions of the legislation.<sup>57</sup> It is possible that parties in consensual cases are more inclined to share assets, but equally they may simply be more inclined to view pensions as negotiable assets, to be traded in return for other concessions.

When consent judicial separations are compared with non-consensual ones, discrepancies are also discovered. Oddly, the rate of maintenance orders was higher in

consent cases than non-consensual ones,<sup>58</sup> reversing the trend in divorce cases, though not as markedly. This may be because spouses who are not yet divorcing are less concerned with the clean break issue; as noted earlier, it cannot be explained by relative levels of child dependency. However, as in divorce, the rate of property adjustment orders was higher in consent cases,<sup>59</sup> though the difference was not as marked. If anything, this would tend to point towards a clean break mentality, as would the higher rate of pension orders in consent cases.<sup>60</sup> The rate of lump sum orders was lower in consent cases,<sup>61</sup> as was the rate of sale orders.<sup>62</sup> Parties in consent separations may prefer ongoing maintenance to lump sum provision (perhaps enabling the paying spouse to retain enough to buy a separate dwelling).

Comparing private and Legal Aid consensual cases, it was found that the rate of periodical payments was quite similar in each, as was the rate of lump sum transfers. However, the rate of property transfers was higher in private cases,<sup>63</sup> as was the rate of sale of assets.<sup>64</sup> Pension adjustments were far less common in Legal Aid cases,<sup>65</sup> and residence orders or agreements and financial compensation orders were made only in private cases, though uncommon there too. Overall, it is assumed that these differences reflect the greater asset base likely to be available in private cases (though of course a recipient of Legal Aid may well have a wealthier spouse).

However, when private and Legal Aid non-consensual cases<sup>66</sup> were analysed, the picture was somewhat different. Periodic payments were much more common in the private cases,<sup>67</sup> as were lump sum orders. This might be related to the probable disparity in means, but it is not clear why this should be an issue in the non-consensual cases only. Further, the rate of property adjustment orders was



(surprisingly) lower in the private cases,<sup>68</sup> apparently contradicting the means disparity argument. As expected, pension adjustment orders were less common in Legal Aid cases<sup>69</sup> but residence orders and financial compensation orders were more common.<sup>70</sup> Sale orders were only marginally higher in the private cases.<sup>71</sup> No obvious explanation suggests itself for these disparities.

Case outcomes in different regions were also evaluated, to assess possible variations in judicial approach. This was done by selecting the three venues where most of the non-consensual cases were heard, i.e. Dublin (11 cases), Cork (eight cases) and Galway (six cases). Non-consensual cases (including undefended cases) were considered most likely to represent the natural inclinations of judges. On analysis, it was found that many types of ancillary property order were most common in cases heard in Cork. This included periodic payments,<sup>72</sup> lump sum orders,<sup>73</sup> property adjustment orders<sup>74</sup> and pension adjustment orders,<sup>75</sup> but not financial compensation orders,<sup>76</sup> orders for the sale of assets<sup>77</sup> or residence orders.<sup>78</sup> Of course, much may depend on the resources of the parties, but the differences seemed sufficiently consistent to consider Cork judges likely to be more redistributive than judges in the other two venues.

It was also interesting to consider the extent to which practitioners in the different regions were attuned to the approach of local judges. Obviously there was no direct data on this. However, it was assumed that the data for settled and consent cases would give some indication of practitioners' views of local practice. Presumably practitioners would not recommend agreements unless they believed them to be reasonably in accord with the probable judicial outcomes. On analysis, it was found

that agreements brokered by Dublin practitioners appeared to be reasonably in line with the outcomes in non-consensual Dublin cases, though consensual cases had a slightly lower rate of periodical payments<sup>79</sup> and a significantly higher rate of property transfers.<sup>80</sup> In Cork and Galway, however, consensual cases were much less in line with the outcomes in non-consensual cases. In Cork, far fewer consensual cases included periodical payments<sup>81</sup> or the sale of assets,<sup>82</sup> while far more included lump sum payments,<sup>83</sup> property transfers,<sup>84</sup> pension adjustments<sup>85</sup> and residence agreements.<sup>86</sup> However, it may be that the practitioners concerned felt that the overall ‘package’ was better for their clients than that likely to be ordered by the courts, e.g. a property transfer or lump sum payment might obviate the need for maintenance, and a residence agreement might preclude a sale. Likewise, in Galway, periodical payments,<sup>87</sup> property transfers<sup>88</sup> and residence agreements<sup>89</sup> or orders were much more likely in consensual than non-consensual cases, while lump sum payments<sup>90</sup> and pension transfers<sup>91</sup> were much less likely.

It was hypothesised that the presence of dependent children might increase certain outcomes, e.g. maintenance or the transfer of the family home to the custodial parent (usually the wife). However, over three quarters of the cases examined featured dependent children,<sup>92</sup> reducing the scope for comparison. Dependent children were present in 40 of the 52 consensual cases, and in 29 of the 37 non-consensual ones. On analysis, it was found that the results for the consensual cases were mostly along the anticipated lines, but that the non-consensual cases were not. Consensual cases with dependent children were over three times as likely to include maintenance, and rates of lump sum payments were also higher.<sup>93</sup> This would fit with support obligations in respect of children, though it should be noted that comparatively few lump sum

payments were in respect of maintenance (as discussed previously). The rate of property transfers was much the same in each category, though it had been expected that they would be higher where there was a need to house dependent children. However, the rate of transfers to husbands was lower in cases with dependent children.<sup>94</sup> Pension transfers, residence orders and sale orders were higher in cases not involving dependent children,<sup>95</sup> which would fit with a division of assets concept.<sup>96</sup> The rate of financial compensation orders was similar in each category.

The differences in non-consensual cases were less marked. Maintenance rates were still higher in cases with dependent children, but not as significantly so.<sup>97</sup> Lump sum orders were actually rarer in cases with dependent children,<sup>98</sup> as were property adjustment orders, though rates of property transfers to husbands were still higher in cases without dependent children.<sup>99</sup> Pension adjustment orders were again much lower in cases with dependent children, and residence orders and orders for sale were also less common, though financial compensation orders were more common.<sup>100</sup> It is unclear why lump sum and property transfers should be lower in the cases with dependent children, as a dearth of assets would be expected to average out. It does not seem likely that the difference from consent cases is attributable to judicial miserliness, given the prevalence of orders in cases without dependent children. It is possible that judges may be less inclined to take a 'clean break' approach in cases involving dependent children.<sup>101</sup>

It was hypothesised that the duration of the marriage would affect outcomes; in particular, that dependent spouses in long marriages would do better than those in short marriages. Unfortunately, due to a lack of contested cases where parties had

been married for less than ten years, it was not possible to perform separate comparisons of long and short marriages in respect of consent and non-consensual cases. For similar reasons it was not possible to do a separate analysis of divorce and separation cases. Taking all cases together (i.e., divorce and separation, contested and uncontested), it was found that the parties had been married up to ten years in 14 cases, from 11 to 20 years in 35 cases and for 21 years or more in 39 cases. These three broad groupings (short, medium and long marriages) were then analysed in terms of outcome.

It would have been desirable to compare long marriages with short childless ones, as it was anticipated that the presence of dependent children would skew comparisons. Unfortunately, there was only one marriage of ten years or less without any dependent children. Hence, the data obtained in comparing the short, medium and long marriage groups cannot be relied on as illustrative of different outcome trends related to marriage duration alone.

Periodic payments were most common in short marriages, while being at similar levels in medium and long marriages.<sup>102</sup> Since most periodic payments were likely to be linked to the support of dependent children, this was not considered significant in terms of marriage duration.

Lump sum payments, on the other hand, were least common in short marriages, though at roughly equal levels in medium and long marriages.<sup>103</sup> This would be consistent with the earning spouse being allowed to keep some portion of the family assets, while probably transferring the family home. It would also accord with higher

levels of lump sum maintenance orders in longer marriages (though it must be recalled that these were not found to be common, insofar as data were available). It would also accord with more money being available in longer marriages.

Property transfers were most common in medium marriages. This was somewhat surprising, but the differences were not huge.<sup>104</sup> However, pension transfers were least common for this group.<sup>105</sup> Residence orders were most common in long marriages and least common in short ones, presumably as the family home would frequently be transferred to the custodial parent in short marriages<sup>106</sup> (though this does not quite accord with the rate of property transfers being highest in medium marriages, as noted above). Assets were most commonly sold in long marriages, and least commonly sold in short ones.<sup>107</sup> Again, this would fit with a ‘clean break’ philosophy being present in relation to long marriages, and a transfer of the home in short ones (though the fact that property transfers were not especially high in short marriages might tend to negate this assumption). There was not much difference in the level of financial compensation provisions throughout the three categories.<sup>108</sup>

It was hypothesised that transfers of the family home would be more likely where the home was jointly owned by both spouses. This was difficult to establish, as the subject matter of property transfers was not always specified. 60 cases overall (67%) involved a property transfer; at least 43 of these transfers included an interest in the family home. Where the home was jointly owned, property transfers occurred in 24% of contested cases and 54% of consensual ones. However, property transfers occurred in only 14% of the 14 cases where the husband was the sole home owner, and in no known case did the transfer include the family home. By contrast, transfers occurred

in 43% of consensual cases. In the ten cases where the wife was the sole home owner, property transfers occurred in 40% of contested cases and in 20% of consensual ones. It is difficult to draw firm conclusions in the absence of precise transfer details in all cases, but these findings do suggest that courts are more likely to order transfers of the home in joint ownership situations, but are less likely to do so in general than the parties themselves might anticipate (given consensual figures).<sup>109</sup> Alternatively, the higher rate of transfers in consensual cases may be due to a preference for a different 'package' structure.

Finally, it was hypothesised that fewer orders or transfers would be made in divorce cases where the parties had previously entered into a separation agreement or obtained a judicial separation. This had occurred in 11 cases, compared with 21 divorces where no such agreement or order pertained. Consent and non-consensual cases were examined, in case this factor appeared to affect either the parties' own negotiations or the court's independent order. However, there were comparatively few significant discrepancies between the two categories. Surprisingly, periodical payments were more than twice as common in contested cases where there was a previous agreement or order;<sup>110</sup> it had been assumed that they would be less common, as this issue would have been dealt with at the earlier stage. (Of course, the court may simply have been continuing the earlier arrangement). By contrast, and in line with expectations, property transfers were nearly three times as common in consensual cases where there was no previous order or agreement,<sup>111</sup> and pension transfers were more than twice as common.<sup>112</sup> This appeared to fit with a 'first bite of the cherry' approach.

In divorces involving previous agreements and orders, it appeared overall that consent cases were well in line with non-consensual ones, in terms of the orders made. Exceptionally, periodical payments were nearly twice as likely in non-consensual cases, and the sale of assets was three times as likely in consent cases.<sup>113</sup> Financial compensation orders were also much more likely in non-consensual cases.<sup>114</sup> However, it is possible that these discrepancies simply represent a different ‘financial package’ or structure, and that the financial arrangement imposed by the court is not necessarily the one that the parties and their advisors might have preferred, had they managed to reach agreement. For instance, spouses who preferred a clean break might agree to sell an asset and divide the proceeds; a court might prefer to postpone a sale and opt for ongoing maintenance. This would explain the greater number of financial compensation orders in non-consensual cases, as one of the objectives of these orders is to compensate a surviving spouse or former spouse for the loss of succession rights (Jackson and Coggans, 1998). Alternatively, it is possible that where there is no consent to the orders being made, courts are more reluctant to draw a clear line under the parties’ continuing obligations.<sup>115</sup> This would explain the higher level of maintenance orders and the lower level of orders for sale. Parties who genuinely negotiate may also arrive at a more imaginative solution than a court, as they are necessarily far more familiar with their resources and needs than a court could be, following a relatively brief hearing. In a case where both sides adopt an ‘all or nothing’ approach, a court may have no option but to devise its own solution.

There was less consistency between consent and non-consensual outcomes in divorce cases without a previous agreement or separation order. Most orders were much more likely in consent cases: periodical payments,<sup>116</sup> lump sum orders,<sup>117</sup> property

adjustment orders,<sup>118</sup> pension adjustment orders<sup>119</sup> and residence orders.<sup>120</sup> Orders for the sale of assets and financial compensation orders were equally prevalent in consent and non-consensual cases.

All of this would suggest that practitioners generally have a good idea of what a court might do in cases involving a previous agreement or order, though they might prefer to structure the financial outcome differently. This in turn suggests that the original agreement or order is viewed as ‘proper provision’ in the separation context. However, where no previous agreement or order applies, practitioners seem much more ‘at sea’, and are generally likely to be much more generous in making provision than a court would be (though again allowances must be made for different ‘package structures’). In this context, therefore, it would appear that ‘proper provision’ is much less quantifiable and much more discretionary than might have been supposed.<sup>121</sup>

### **References to statutory criteria**

A considerable focus of interest in conducting this study was the level of judicial reference to the statutory criteria for the making of ancillary orders in judicial separation and divorce cases. Factors to be considered are listed in section 16 of the Family Law Act 1995 and section 20 of the Family Law (Divorce) Act 1996.<sup>122</sup> As noted previously, relevant factors include the present or likely future income, earning capacity, property and other financial resources and the financial needs of each spouse. However, it must be noted that the precise level of reference to the statutory criteria is difficult to determine. Most Circuit Court cases in Ireland do not have written judgments, and references to statutory criteria were therefore taken from the



Order made or from solicitors' contemporaneous notes of judgments; it is of course possible that references to the statutory criteria could have been made orally and not recorded.

When interviewed, most practitioners felt that judges did not commonly refer to the statutory criteria, though many felt that judges did have certain factors in mind in reaching their decisions. Following the Supreme Court decision in *K v. K*,<sup>123</sup> it seemed probable that reference to the statutory factors would become more common, as the ruling emphasised the necessity for clarity and transparency in this regard. At the time of interview, most practitioners felt that *K v. K* had not yet had a significant impact, and it must be emphasised that most of the case data analysed here was gathered prior to or immediately after the *K v. K* decision. Rates of reference may have altered in the aftermath of that decision, and this is slightly supported by the data,<sup>124</sup> and (strongly) by recent anecdotal evidence from practitioners.

Even so, it was surprising how few cases analysed apparently adverted at all to the statutory criteria, on the basis of the information available. Of the 48 consent judicial separation and divorce cases, only one judicial separation case contained any reference to the statutory factors. Of course, judges in those cases were making orders in line with the parties' own agreements, which they presumably felt satisfactorily represented their interests, and judges may also be anxious not to disturb or investigate a settlement unless manifestly inappropriate.<sup>125</sup> However, it is also arguable that 'rubber stamping' agreements is not necessarily in accordance with the statutory emphasis on proper provision. The low reference level also does not accord

with the view of some of the practitioners interviewed, that judges were generally disinclined to make orders without due investigation and evaluation.

Only 17 of the 37 non-consensual cases (46%) contained any reference to the statutory criteria. Five of these cases related to divorce and the remaining 12 to judicial separation. Effectively, therefore, only 18 of the 85 cases (21%) to come before the courts contained any *overt* reference to the statutory factors. The factors referred to are outlined in *Fig 13*:

Factor	No of cases
Financial needs, obligations and responsibilities	9
Earning capacity	7
Contributions to family welfare	7
Property and financial resources	6
Conduct	5
Accommodation requirements	5
Income	4
Duration of the marriage	3
Length of time parties cohabited	3
Age	2
Physical or mental disability	2
Effect of marriage on earning capacity	2
Standard of living prior to breakdown	1
Other factors	4

*Fig 13: References to statutory criteria in divorce and judicial separation cases*

As illustrated above, most judicial emphasis seemed to be placed on financial and economic factors, and the focus was very much on attempting to meet the needs of the parties from the resources available. Contributions to family welfare, past or future were also taken into account, but (in line with practitioners' views, as expressed at interview) conduct was not hugely taken into account. Where cited at all, it was not always specified, but references were made to alcoholism, adultery and neglect of the family. The duration of the marriage or cohabitation periods was cited, but not as widely as might have been anticipated. Age and physical or mental disability were not

widely cited, but these factors might not arise in many cases. The effect of marital responsibilities on earning capacity was also not much referred to, nor was the parties' standard of living prior to the breakdown of the relationship. Statutory entitlements to income or benefits were not adverted to, nor were benefits lost due to the fact of divorce, the rights of third parties, or the existence of a prior separation agreement. Other grounds cited included the needs of the children, the fact that a site was a gift from one party's parents, and improvements to property with one party's compensation award. Spousal equality and marital partnership were mentioned in only one case, where the judge felt that equal division was appropriate.<sup>126</sup> In a final case, the court felt that proper provision was not made on judicial separation, and hence needed reassessment on divorce. However, in assessing maintenance, the judge in that case also took account of the fact that the applicant was now cohabiting.

It is instructive to compare the citation levels of the various factors with some of those cited by practitioners, when interviewed, as most receiving judicial emphasis. Comparative levels of reference are outlined in *Fig 14*, though it should be noted that exact comparisons are difficult, as factors were not necessarily labelled in the same way in interviews as in cases. Case percentages refer to the 18 cases where factors were cited.

Factor	Solicitors' emphasis	Case emphasis
Needs of children	64%	11%
Financial resources (including income)	49%	38%
Needs of spouses (including accommodation)	41%	61%
Contributions to the marriage	36%	39%
Earning capacity	20%	39%
Duration of marriage	21%	17%
Conduct	13%	28%
Equality and fairness	11.5%	6%
Age	10%	11%
Clean break	5%	Not cited

*Fig 14: Comparative levels of reference to factors*

The most surprising aspect of the comparison is that the heavy emphasis placed by practitioners on the needs of the children was not explicitly echoed in the cases. Presumably, children's needs as well as those of the parents would be encompassed in references to the financial needs, obligations and responsibilities of the parties, referred to in 50% of the cases where factors were cited.<sup>127</sup> However, certain factors cited by practitioners were not cited at all in the cases sampled, including the need for a clean break.

The frequency of reference to the statutory criteria appeared to vary depending on factors such as the type and location of the case and the level of the court. Reference was somewhat lower than expected in divorce cases and slightly higher in judicial separation cases.<sup>128</sup> Cork, Galway and Limerick had slightly higher citation levels than expected, while Dublin was within the expected range. Cases heard in other locations had less than half the level of citation expected, though this includes numerous localities, making generalisation undesirable. All cases referring to statutory criteria were heard in the Circuit Court; even allowing for the vast preponderance of cases heard at Circuit level overall, it was surprising that no High Court cases at all made reference to the statutory factors. Levels of reference were slightly higher than expected in marriages lasting 11-15 years, and lower than expected in marriages lasting 21-30 years.<sup>129</sup> However, this may be purely coincidental. More cases with dependent children featured among those referring to the legislative criteria than might have been expected, and fewer without dependent children.<sup>130</sup> This may reflect the emphasis many practitioners felt courts placed on the needs of the children in a marital breakdown situation, though as has been noted

above, the needs of the children (as opposed to the parties generally) were specifically identified by courts in only two cases.

## **Conclusion**

The comparatively small number of cases analysed for this study, and the difficulties in obtaining data from a greater range of sources, inevitably mean that the information obtained cannot hope to be complete or fully representative; it is also inevitable that later developments will render some of the data obsolete. However, the information gleaned provides an interesting snapshot of the Irish matrimonial property system at work, at a particular time and in particular locations. The data obtained offers much food for further thought on issues such as the kinds of orders being made and the factors apparently being emphasised in making those orders.

Some of the findings of this study were not particularly surprising. For instance, it has long been established that family law cases are more often initiated by wives than husbands, and that wives are more likely to rely on Legal Aid. The data also confirms that wives are much more reliant on maintenance and social welfare, and hence are more in need of financial assistance on marriage breakdown. The question raised then is, do they get this extra assistance? This issue is particularly problematic for wives in Legal Aid cases. The data on this group clearly shows that they are less likely to have personal means, and yet there are also fewer assets available for distribution in Legal Aid cases generally, particularly as their husbands are also far less financially well-off than their equivalents in private cases.

Wives in this study had lower employment rates than their husbands and were significantly less likely to rely on their earnings as their principal income source. They were also far more likely to be engaged in home duties<sup>131</sup> (though even if these wives had all worked full time, the rate of reliance on personal earnings would still have fallen far short of husbands).<sup>132</sup> The problem here seems to be intractable, and is certainly not likely to be resolved by compelling home-makers to seek employment: this would merely require them to obtain and pay for childcare, probably without leaving the family better off (particularly given that an increase in earning would probably be counter-balanced by a reduction in welfare support payments and maintenance).

The study confirmed that the principal asset available for division in many cases is the family home. Rates of home ownership were high, in both private and Legal Aid cases, albeit with a mortgage in many cases. The level of joint ownership was also high, perhaps reflecting a change in social patterns, although it should be noted that homes that were not jointly owned were far more likely to be in the husband's sole name than the wife's. The unexpectedly high level of home ownership in Legal Aid cases does at least mean that there is usually an asset available even in cases with fewer resources, though that asset might be worth less than in private cases, and allocation of the home may be affected by the lack of other means. The broader asset base and higher earning levels in private cases suggest that more extensive orders would be made in those cases, and this was in fact generally the case, though of course the substance of the orders made, as opposed to their nature and frequency, is not analysed here.

The gender differences in property ownership patterns were significant. Husbands were generally better off than wives in relation to most assets, such as pensions and shares, as well as home and land ownership. One would therefore expect property orders largely to favour wives, simply because husbands have more to ‘give’ in this context. One would also expect more provision for older wives, as their husbands were significantly better off.

One of the most interesting findings was that the rates of orders appeared to vary with the type of case (for instance, consent divorces versus contested ones). This may be attributed to incorrect guesswork on the part of practitioners, in terms of the likely ruling, or simply to a preference for a different financial ‘package’ to the court ordered one. If this second alternative is correct, the question is whether courts are truly suitable for resolving property issues in marital breakdown situations, if they do not generally give the parties what they need or would prefer – or whether they are a necessary last resort for those who cannot agree. Whichever, the disparity lends support to the view of many practitioners that settlement gives the parties an element of control and an ability to structure financial arrangements to suit their own requirements.

The difference in outcomes between Legal Aid and private cases presumably reflects the economic differences between the two groups. Clearly, given the data obtained on the earning level and assets of wives, in particular, the lack of certain kinds of orders in Legal Aid cases is not explained by a lack of need. The fact that this trend was bucked in certain types of Legal Aid cases (e.g. the higher level of property adjustment orders in contested cases) suggests either that the parties are more realistic

than the courts in relation to property arrangements, or that Legal Aid clients settle on the mistaken assumption that courts will prove less generous than is in fact the case.

The regional variations found in this study in relation to the kinds and frequency of orders made suggests that the family property provisions are not being applied uniformly on a national basis. It seems clear that judges have different views on the provision that is 'proper' in family situations, and that there are prevailing local trends. For instance, it appears that Cork judges take a more redistributive approach than judges in other areas. This in turn suggests that 'knowing the judge' is crucial, but equally, that this is not easy, and that practitioners appearing outside their own locality are disadvantaged. There are also differences in settlement patterns, with Cork and Galway settlements less in line with judicial outcomes than those in Dublin. This may be due to a preference for a different 'package' structure to that favoured by the local judge, or indeed, changes in the local judiciary, where time is needed to become familiar with the new judge's approach. It is unlikely to be due to poor guesswork or lack of knowledge, as it should be easy to become familiar with a judge's form in a small locality.

The findings of the study in relation to factors apparently influencing decisions were mixed. Contrary to prevailing wisdom, the presence of dependent children did not appear to have a significant effect on settlement rates. However, consensual cases featuring dependent children were more likely to include financial provision than contested ones. Again, it is unclear whether this is due to a preference for different financial packages than those offered by the courts, or to practitioners' mistaken assumptions about a judge's probable approach to a case. However, the duration of



the marriage did seem to affect the frequency of certain orders. This might be based on the needs of the parties (varying over time), or the relative weight given to longer marriages (though not all orders fitted this pattern). There did not seem to be hugely different outcomes in ‘first’ and ‘second bite’ cases (though there were some differences). This would suggest that parties had been well advised the first time round.

Finally, the level of reference to statutory criteria appeared unduly low, though anecdotal evidence suggests that this has changed since the collection of the case data analysed here. Most practitioners interviewed for the project felt that judges did consider the statutory factors, even if they did not explicitly refer to them, but there is no way of establishing the truth of this. The level of reference also appeared to vary with the locality, again suggesting differences in judicial approaches. Where cited at all, the factors receiving most emphasis appeared to be financial in nature, related to the means and obligations of the parties. Contributions to family welfare were also cited, albeit to a lesser extent. Other factors were cited relatively infrequently. Much of this may reflect a pragmatic approach: what is the point of emphasising conduct or contributions or the duration of the marriage when the primary requirement is to provide for a family from very limited means?

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<sup>2</sup> *L v. L* [1992] 2 IR 77.

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- <sup>3</sup> Hereafter ‘the 1995 Act’.
- <sup>4</sup> Hereafter ‘the 1996 Act’.
- <sup>5</sup> Section 9(1)(a) of the 1995 Act and section 14(1)(a) of the 1996 Act.
- <sup>6</sup> Sections 8 to 15 of the 1995 Act and sections 12 to 19 of the 1996 Act.
- <sup>7</sup> Section 16(5) of the 1995 Act and section 20(5) of the 1996 Act.
- <sup>8</sup> Section 16(1) of the 1995 Act and section 20(1) of the 1996 Act (though note that the court ‘shall ensure’ proper provision in the divorce context, while it merely ‘shall endeavour to ensure’ it in judicial separation).
- <sup>9</sup> Section 16(2) of the 1995 Act and section 20(2) of the 1996 Act.
- <sup>10</sup> The courts may also have regard to property or financial resources which either spouse ‘is likely to have in the foreseeable future’ (section 16(2)(a) of the 1995 Act and section 20(2)(a) of the 1996 Act).
- <sup>11</sup> Judicial separation and divorce cases in Ireland are heard in either the Circuit Court (a lower court with original jurisdiction in such cases) or in the High Court (a superior court with both original and appellate jurisdiction). Most cases are heard in the Circuit Court, with an appeal to the High Court, but claims in excess of specified amounts are heard in the High Court, with an appeal to the Supreme Court.
- <sup>12</sup> Limited data available from the Courts Service does not extend to the granting of ancillary property orders. Maintenance statistics are not related to the figures for divorce and judicial separation (Courts Service, 2004). The Courts Service attempted to obtain data via a special family law reporter mechanism in 2001, but this attempt had to be abandoned (Flockton, 2003).
- <sup>13</sup> Other work done has been on family mediation (Conneely, 2002).
- <sup>14</sup> Data were supplied between June 2001 and November 2003.
- <sup>15</sup> No judicial separation order or ancillary property orders can be made once a separation agreement is signed, as the parties have already been relieved of their duty to cohabit (*PO’D v. AO’D* [1998] 1 ILRM 543).
- <sup>16</sup> Note on data: all percentages are given to the nearest percentile, except where exact half percentiles apply. Deviations of less than 5% from expected outcomes were normally regarded as insignificant.
- <sup>17</sup> The questionnaire did not ask whether a client’s spouse was represented by a private practitioner or had Legal Aid. References to ‘Legal Aid cases’ and ‘private cases’ therefore refer to the type of practitioner supplying the data on a case.
- <sup>18</sup> No court level was noted for one divorce and one judicial separation.
- <sup>19</sup> Practitioners were based in: Dublin (14), Cork and Co. Cork (11), Galway and Co. Galway (7), Limerick (3), Nenagh (3), Ennis (2), Co. Mayo (2), Co. Kerry (1) and Co. Wicklow (1).
- <sup>20</sup> Four of the cases were completed in 1999, ten in 2000, 56 in 2001, 11 in 2002 and seven in 2003. No completion date was provided for one separation case as there were still ongoing issues.
- <sup>21</sup> In 2002, 20 divorces and 28 judicial separations were granted by the High Court, compared with 2571 divorces and 940 judicial separations granted by the Circuit Court.
- <sup>22</sup> Although the possibility of a difference in financial resources between spouses did not render this inevitable.
- <sup>23</sup> 60% of clients were wives and 40% were husbands in both of these case types.
- <sup>24</sup> Wives also initiated two out of four separation cases (a third case was jointly initiated).
- <sup>25</sup> Wives initiated 78% of Legal Aid divorce cases and 93% of Legal Aid judicial separation cases.
- <sup>26</sup> Because only the year of marriage was supplied, it was not possible to calculate the exact duration of the marriage. Accordingly, even though the month and year of the hearing or agreement were supplied, the marriage calculation was calculated as if only whole years applied.
- <sup>27</sup> Differences in the breakdown between private and Legal Aid cases were not significant.
- <sup>28</sup> Under the Judicial Separation and Family Law Reform Act 1989, a minimum waiting period of a year will usually be operative in respect of applications for judicial separation.
- <sup>29</sup> Section 5(1)(a) of the 1996 Act.
- <sup>30</sup> *McA v. McA* [2000] 2 ILRM 48.
- <sup>31</sup> Six husbands and nine wives were said to have dependent non-marital children.
- <sup>32</sup> This applies to private cases as well as cases overall. In Legal Aid cases, the mean number of children was 2.58.
- <sup>33</sup> This is consistent with the finding of Fahey and Lyons (1995) that dependent children were present in 79% of cases they surveyed. They also found (reversing the trend in the current study), that couples in private cases were slightly likelier to have no dependent children than those in Legal Aid cases.
- <sup>34</sup> These figures therefore differed significantly from the findings of Fahey and Lyons, where home ownership levels were significantly higher in private cases (Fahey and Lyons, 1995). The differences may be related to the economic boom prevailing in Ireland from the mid-1990s.

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- <sup>35</sup> Figures varied enormously, as incomes included both part time and full time salaries and pensions, but excluded casual work as this was not 'regular'.
- <sup>36</sup> 39% of wives relied on the earnings as their principal source of income, compared with 81% of husbands.
- <sup>37</sup> Including children's allowance payments, where applicable.
- <sup>38</sup> The debts of husbands in private cases appeared to be business related.
- <sup>39</sup> However, only six cases were heard in the High Court.
- <sup>40</sup> 93% of the cases where the marriages lasted up to 10 years were consensual, while only 62% of couples with the marriages lasting 11-15 years were involved in consent cases. Only 41% of couples in marriages lasting 16-20 years were involved in consensual cases, as were 54% of couples with marriages of 21-30 years and 62% of couples with marriages lasting 31 years or more.
- <sup>41</sup> Nearly two thirds (62.5%) of divorces where marriages lasted 11-20 years were non-consensual, compared with only one third of divorces where marriages lasted 21 years or more.
- <sup>42</sup> 73% of those living apart for 12 months or less, compared with 43% of those separated for 13-24 months and 48% of those separated for 25-60 months. Consent figures rise again for those living apart more than 60 months, with 64% of those separated for 61-120 months, and 86% of those separated more than 121 months, being involved in consensual cases.
- <sup>43</sup> Under Irish law, a pension adjustment order may prohibit a future variation of the order, hence the use of 'nil' orders (transferring miniscule percentages) to utilise these 'blocking' provisions. If no pension order is made, either spouse might seek one later.
- <sup>44</sup> 85% compared with 53% of consent divorce cases.
- <sup>45</sup> 69% of non-consensual divorces featured dependent children, compared with 58% of consensual ones.
- <sup>46</sup> Periodical payments were made in 62.5% of non-consensual judicial separations, compared with 72% in consensual ones.
- <sup>47</sup> 83% of non-consensual judicial separations featured dependent children, compared with 86% of consensual ones.
- <sup>48</sup> 67%, compared with 59% of consent judicial separations.
- <sup>49</sup> These occurred in 54% of non-consensual cases, compared with 77% of consensual ones.
- <sup>50</sup> Property adjustments occurred in 62.5% of non-consensual judicial separations, compared with 79% of consent ones. They occurred in 38% of non-consensual divorces, compared with 74% of consent ones.
- <sup>51</sup> 22%, slightly lower than the 33% of consent cases where this order was made.
- <sup>52</sup> 30%, compared with 17% in consent cases.
- <sup>53</sup> Sales were ordered in 33% of non-consensual judicial separations, compared with 24% of consent ones.
- <sup>54</sup> Periodic payment orders were made in 53% of consent divorces, but in 85% of non-consensual ones.
- <sup>55</sup> Property adjustment orders were made in 74% of consent divorces, but in only 38.5% of non-consensual ones. Pension orders were made in 32% of consent cases but in 23% of non-consensual cases.
- <sup>56</sup> Orders for sale were made in 23% of non-consensual cases but in only 10.5% of consent cases.
- <sup>57</sup> Blocking orders' refer to a variety of provisions which can be utilised to prevent subsequent variation of particular ancillary property orders.
- <sup>58</sup> 72% of consent judicial separations, compared with 62.5% of non-consensual ones.
- <sup>59</sup> 79% in consent cases compared with 62.5% in non-consensual ones.
- <sup>60</sup> 34.5% in consent cases compared with 21% in non-consensual ones.
- <sup>61</sup> 59% in consent cases compared with 67% in non-consensual ones.
- <sup>62</sup> 24% in consent cases compared with 33% in non-consensual ones.
- <sup>63</sup> 81%, compared with 69% in Legal Aid cases.
- <sup>64</sup> 22% in private cases compared with 6% of Legal Aid cases.
- <sup>65</sup> 19%, compared with 39% in private cases.
- <sup>66</sup> Including undefended cases.
- <sup>67</sup> Periodic payment orders were made in 79% of the private cases compared with only 37.5% of the Legal Aid cases.
- <sup>68</sup> Lump sum orders were made in 59% of private cases compared with 50% of Legal Aid cases. Property adjustment orders were made in 52% of private cases compared with 62.5% of Legal Aid cases.
- <sup>69</sup> Pension adjustment orders were made in 12.5% of non-consensual Legal Aid cases and in 24% of the private cases.

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- <sup>70</sup> Residence orders were made in 7% of the private cases but in 25% of the Legal Aid cases. Financial compensation orders were made in 12.5% of the Legal Aid cases but in only 10% of the private cases.
- <sup>71</sup> Sale orders were made in 25% of the Legal Aid cases and in 31% of the private cases.
- <sup>72</sup> Periodic payment orders were made in 87.5% of the Cork cases, 73% of the Dublin cases and 67% of the Galway cases.
- <sup>73</sup> Lump sum orders were made in 62.5% of the Cork cases, 36% of the Dublin cases and 50% of the Galway cases.
- <sup>74</sup> Property adjustment orders were made in 62.5% of the Cork cases, 54.5% of the Dublin cases and 50% of the Galway cases.
- <sup>75</sup> Pension adjustment orders were made in 37.5% of the Cork cases, 27% of the Dublin cases and 33% of the Galway cases.
- <sup>76</sup> Financial compensation orders were made in 27% of the Dublin cases, but in none of the Cork or Galway cases.
- <sup>77</sup> Sale orders were made in 33% of the Galway cases, 27% of the Dublin cases and 25% of the Cork cases.
- <sup>78</sup> Residence orders were made in 18% of the Dublin cases, but in none of the Cork or Galway ones.
- <sup>79</sup> 65% of the consent cases included a periodical payment, compared with 73% of the non-consensual ones.
- <sup>80</sup> 76.5% of the consent cases included a property transfer, while only 54.5% of the non-consensual ones did.
- <sup>81</sup> 64% of the consent cases compared with 87.5% of non-consensual cases.
- <sup>82</sup> 7% of consent cases, compared with 25% of non-consensual ones.
- <sup>83</sup> 79% of consent cases compared with 62.5% of non-consensual ones.
- <sup>84</sup> 79% of consent cases compared with 62.5% of non-consensual ones.
- <sup>85</sup> 50% of consent cases compared with 37.5% of non-consensual ones.
- <sup>86</sup> 43% of consent cases compared with 25% of non-consensual ones.
- <sup>87</sup> 83% of consent cases compared with 67% of non-consensual ones.
- <sup>88</sup> 83% of consent cases compared with 50% of non-consensual ones.
- <sup>89</sup> 50% of consent cases compared with 17% of non-consensual ones.
- <sup>90</sup> 33% of consent cases compared with 50% of non-consensual ones.
- <sup>91</sup> 17% of consent cases compared with 50% of non-consensual ones.
- <sup>92</sup> 77.5%, all but 20 cases.
- <sup>93</sup> Periodic payments arose in 77.5% of consensual cases with dependent children but only 25% of cases without them. Lump sums arose in 55% of cases with dependent children but only 33% of those without them.
- <sup>94</sup> Property transfers to husbands were made in only 26% of cases with dependent children, compared with 44% of cases without them.
- <sup>95</sup> Pension transfers were made in 42% of cases without dependent children, compared with 30% of cases with them. Residence arrangements were made in a quarter of cases without dependent children, compared with only 7.5% of cases with them. Provision for the sale of assets was made in one third of cases without dependent children, compared with 12.5% of cases with them.
- <sup>96</sup> Even residence orders would fit with this, for instance, allowing a dependent spouse to live in the family home without depriving the other spouse of his or her interest.
- <sup>97</sup> Periodic payments were ordered in 72% of cases with dependent children and in 62.5% of cases without them.
- <sup>98</sup> Lump sum orders were made in 55% of cases with dependent children and in 62.5% of cases without them.
- <sup>99</sup> Property adjustment orders were made in 52% of cases with dependent children and 62.5% of cases without them. However, transfers to husbands were more than twice as likely in cases without them.
- <sup>100</sup> Pension orders were made in 17% of cases with dependent children and 37.5% of cases without them. Residence orders were made in 7% of cases with dependent children and 12.5% of cases without them. Orders for the sale of assets were made in 28% of cases with dependent children and 37.5% of cases without them. Financial compensation orders were made in 10% of cases with dependent children, but in no cases without them.
- <sup>101</sup> The author is indebted to the editor, Mr John Eekelaar, for this suggestion.
- <sup>102</sup> Periodic payments were specified in 79% of short marriages, compared with 66% of medium ones and 64% of long ones.
- <sup>103</sup> Lump sums were provided for in 50% of short marriages compared with 66% of medium ones and 64% of long ones.

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- <sup>104</sup> Property transfers were made in 64% of short and long marriages and 71% of medium ones.
- <sup>105</sup> It was anticipated that most pension transfers would occur in relation to longer marriages. In the event, they occurred in 36% of short marriages, 20% of medium ones and 33% of long ones.
- <sup>106</sup> Residence of the family home was provided for in 7% of short marriages, 14% of medium ones and 18% of long ones.
- <sup>107</sup> Assets were sold in 21% of short marriages, 17% of medium ones and 28% of long ones.
- <sup>108</sup> These were made in 7% of short marriages, 9% of medium ones and 10% of long ones.
- <sup>109</sup> The transfer figures in contested cases where wives were sole owners in fact represent other family assets, which were transferred to husbands.
- <sup>110</sup> Periodical payments were ordered in 54.5% of non-consensual cases where the parties had no previous agreement or order, compared with 24% where they did.
- <sup>111</sup> Property transfers were made in 18% of consent divorces where there was a previous agreement or order, compared with 57% of consent divorces where there was not.
- <sup>112</sup> Pension transfers were made in 9% of consent divorces where there was a previous agreement or order, compared with 24% of consent divorces where there was not.
- <sup>113</sup> Periodical payments were provided for in 27% of the consent cases and 54.5% of the non-consensual cases. Assets were sold in 27% of consent cases compared with 9% of the non-consensual cases.
- <sup>114</sup> No financial compensation orders were made in consent cases, whereas they were made in 9% of non-consensual ones.
- <sup>115</sup> The author is indebted to Marie McGonagle, of the Law Faculty, NUI Galway, for this suggestion.
- <sup>116</sup> Made in 33% of consent cases and 24% of non-consensual ones.
- <sup>117</sup> Made in 24% of consent cases and 14% of non-consensual ones.
- <sup>118</sup> Made in 57% of consent cases and 14% of non-consensual ones.
- <sup>119</sup> Made in 24% of consent cases and 9.5% of non-consensual ones.
- <sup>120</sup> Made in 9.5% of consent cases and 5% of non-consensual ones.
- <sup>121</sup> Of course, many of these cases data were gathered prior to the Supreme Court decision in *T v. T* (unreported, 14 October 2002).
- <sup>122</sup> Sections 16(2)(a) to 16(2)(l) of the 1995 Act list 12 factors to be taken into account in the making of ancillary orders where the applicant is a spouse. Section 20(2)(a) to 20(2)(l), and section 20(3) of the 1996 Act list 13 factors to be taken into account in the making of ancillary orders where the applicant is a spouse.
- <sup>123</sup> *K(M) v. P(J) (Orse. K(S))* [2001] IESC 69 (Supreme Court, 6 November 2001).
- <sup>124</sup> 28% of the divorce and judicial separation cases citing statutory factors were heard after the Supreme Court decision in *K(M) v. P(J) (Orse. K(S))* [2001] IESC 69, compared with 22% of the divorce and judicial separation cases overall.
- <sup>125</sup> This concern was recently emphasised by a number of judges in informal discussions with the writer.
- <sup>126</sup> This decision (June 2001) was prior to the Supreme Court's ruling in *T v. T* (unreported, 14 October 2002).
- <sup>127</sup> When this is added to the two additional cases where the needs of the children were specifically cited the overall rate of emphasis on the needs of the parties is 61%.
- <sup>128</sup> 28% of the cases referring to the criteria were divorce cases, compared with 38% of the cases to go before the courts (i.e. excluding separation agreements). 72% of the cases referring to the criteria were judicial separation cases, compared with 62% overall.
- <sup>129</sup> 22% of the cases where reference to the criteria was made related to marriages of 11-15 years, compared with 13.5% of court cases overall. 39% of the cases where reference to the criteria was made related to marriages of 21-30 years, compared with 25% of court cases overall. No case referring to the criteria related to a marriage of five years or less.
- <sup>130</sup> 89% of the cases referring to the criteria had dependent children, compared with 77.5% of the court cases overall. 11% of the referring cases had no dependent children, compared with 22.5% overall.
- <sup>131</sup> 19% of wives sampled were in home duties, compared with no husbands.
- <sup>132</sup> 81% of husbands relied on their earnings as their main income source, compared with 39% of wives.

[DISCLAIMER]

This is the author's final version of this article;  
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