

**T H E   L A W   R E F O R M   C O M M I S S I O N**

**AN COIMISIÚN UM ATECHÓIRIÚ AN DLÍ**

**(LRC 10-1985)**

**REPORT ON RECOGNITION OF FOREIGN DIVORCES  
AND LEGAL SEPARATIONS**

**IRELAND**

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CHAPTER 1      INTRODUCTION

In this Report the Law Reform Commission examine the subject of the recognition of foreign divorces and legal separations, and make proposals for reform. The subject is a complex one, raising difficult issues of social and legal policy. Because there has been little or no public discussion on the matter up to now, it was decided to deal with it in the first place in the form of a Working Paper rather than a Report. Our Working Paper<sup>1</sup> was published on 25 October 1984. These proposals did not represent our final views. We circulated the Working Paper for comment and criticism, and invited observations on the Working Paper to be made before 1 February 1985. The Working Paper received widespread publicity. In fact no observations from any quarter were sent to us. In our further deliberations, therefore, we have not had the benefit of analysis from professional groups or individuals or from persons with particular expertise or interest in the subject. This is a matter for regret.

This Report represents our final recommendations on the subject. We have sought to establish rules of recognition of foreign divorces which would give effect as far as possible to divorces obtained abroad, while at the same time having regard to the Constitutional law of the State which precludes the grant of a dissolution of marriage. Accordingly, we

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<sup>1</sup> Working Paper No. 11-1984, Recognition of Foreign Divorces and Legal Separations.

**recommend that special rules of recognition should apply to divorces obtained by persons who are habitually resident in Ireland.**

**We also make proposals concerning the recognition of foreign legal separations, where different, and somewhat less difficult, policy considerations arise. Finally we recommend the introduction of a broad discretionary judicial power designed to protect the maintenance and other property rights of spouses habitually resident in Ireland following foreign divorces and legal separations.**

**CHAPTER 2      THE PRESENT LAW****(a) Recognition of Foreign Divorces**

In order to understand the present law relating to the recognition of foreign divorces, it is necessary at the outset to have regard to the relevant constitutional provisions. Article 41 of the Constitution provides as follows:

"1. 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

2. 1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

3. 1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded and to protect it against attack.

2° No law shall be enacted providing for the grant of a dissolution of marriage.

3° No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved."

Initially there was a degree of judicial uncertainty as to the precise meaning of some of these provisions, especially Article 41.3.3°. It was not clear whether the previous rules of private international law, which permitted recognition of a foreign divorce obtained in the country of the common domicile of the spouses, continued to apply with full force.

In Mayo-Perrott v Mayo-Perrott,<sup>1</sup> in 1957, the former Supreme Court held that an order for costs arising from proceedings for divorce in England between English domiciliaries could not be severed from the substantive order for divorce and could not be enforced in Ireland. While "narrowly the decision .... deals only with the recovery of costs",<sup>2</sup> the disagreement between members of the Court regarding the

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<sup>1</sup> [1958] I.R. 336.

<sup>2</sup> Jones, The Non-Recognition of Foreign Divorces in Ireland, 3 Ir. Jur. (n.s.) 299, at 310 (1968). See also Duncan, Desertion and Cruelty in Irish Matrimonial Law, 7 Ir. Jur. (n.s.) 213, at 233: "The Mayo-Perrott case was decided on the narrow issue of whether an English order for costs made pursuant to a decree of divorce would be enforced by the courts in this country."

general question of recognition of foreign divorces has provoked considerable comment.<sup>3</sup>

In the view of Maguire, C.J.:

"[f]ar from recognizing the validity of a divorce obtained outside the country, [Article 41.3.3°] seems to me expressly to deny to such a divorce any recognition for it prohibits the contracting of a valid marriage by a party who has obtained a divorce elsewhere. The sub-section says as plainly as it could be said that a valid marriage which is dissolved under the law of another State remains in the eyes of our law a subsisting valid marriage."<sup>4</sup>

However, Kingsmill Moore, J. was of the opposite view:

"The general policy of the Article seems to me clear. The Constitution does not favour dissolution of marriage. No laws can be enacted to provide for a grant of dissolution of marriage in this country. No person whose divorced status is not recognized by the law of this country for the time being can contract in this country a valid second marriage. But it does not purport to interfere with the present law<sup>5</sup> that

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<sup>3</sup> See generally North, 376-378, Shatter, 152-154, Kelly, 617-621, Jones, supra, fn. 2 especially at 308 et seq., Duncan, The Future of Divorce Recognition in Ireland, 2 D.U.L. Rev. 2, at 4 et seq. (1970), Webb, Case Comment, 8 Int. & Comp. L. Q. 744 (1959), Devitt, Some Aspects of the Constitution and the Law in Relation to Marriage, 57 Studies 6, at 15-16 (1968), O'Reilly, Recognition of Foreign Divorce Decrees, 6 Ir. Jur. (n.s.) 293, (1971), Kerr, The Need for a Recognition of Divorces Act, (1976) 1 D.U.L.J. 11.

<sup>4</sup> [1958] I.R. 336, at 344.

<sup>5</sup> I.e., the private international law rules relating to divorce recognition which existed in Ireland before the promulgation of the Constitution and which, in the view of Kingsmill Moore, J., were unaffected by its promulgation.

dissolutions of marriage by foreign Courts, where the parties are domiciled within the jurisdiction of those Courts, will be recognized as effective here. Nor does it in any way invalidate the remarriage of such persons."<sup>6</sup>

Ó Dálaigh, J. (with whom Lavery, J. concurred) said:

"Article 41.3.3° appears to put in the power of the Oireachtas to define from time to time what marriages dissolved by foreign civil tribunals are to be regarded as valid subsisting marriages under our Law, id est, what foreign civil divorces shall not be recognised as valid."<sup>7</sup>

He considered that enforcement by the Irish courts of the costs of a decree of divorce would clearly offend against a moral principle which the Constitution asserted, in respect of the State's pledge to guard with special care the institution of marriage and to protect it against attack.

Maguire, J. stressed the fact that the order for the payment of costs could not be severed from the major part of the judgment. He considered that there were no facts in the case which called for the application of Article 41.3.3° and that it was not relevant. The argument founded on it was of no assistance in solving the problem raised by the case.

The view of Kingsmill Moore, J. was generally preferred by commentators and was followed in an English decision.<sup>8</sup>

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<sup>6</sup> [1958] I.R. 336, at 350.

<sup>7</sup> Id.

<sup>8</sup> Breen v Breen, [1961] 3 All E.R. 225 (High Ct., Karminski, J.), critically analysed by Unger, 24 M.L.R. 784 (1961).



In 1971, in the High Court decision Bank of Ireland v Caffin,<sup>9</sup> Kenny, J. was faced squarely with the issue when called upon to decide, in a succession case, whether a divorce obtained in England by an English domiciliary should be recognised in Ireland, thus entitling the second wife rather than the first to the statutory benefits<sup>10</sup> in the deceased domiciliary's estate.

After a close analysis of Mayo-Perrott, Kenny, J. concluded that the view of Kingsmill Moore, J. was preferable to that of Maguire, C.J. and held that the second wife was entitled to the benefits. Kenny, J. considered, in the light of the historical background, that the purpose of Article 41.3.2°

"was to deprive the National Parliament of its power to pass legislation dissolving a marriage or to give jurisdiction to the courts to grant a divorce. The recognition of orders of divorce made by the courts of another country where the husband and wife had their domicile has no logical connection with the power of the Oireachtas to dissolve a marriage; and the restrictions imposed on it by the Constitution do not involve a general principle that the Courts should not, or cannot, recognise orders for the dissolution of a marriage made by the courts of another country when the parties to the marriage were domiciled in that country at the time of the court proceedings. This gets support from the words 'under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution' for they give the National Parliament jurisdiction to decide by legislation that some decrees of dissolution made by the

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<sup>9</sup> [1971] I.R. 123.

<sup>10</sup> Under section 111(1) of the Succession Act, 1965 (No. 28 of 1965).

courts of other States are to be recognised by our courts ....

The National Parliament has not legislated on the matter and so the law for the time being in force under Article 78 of the Constitution of 1922 and Article 50 of the Constitution of 1937 is that the courts recognise a dissolution of marriage granted by the courts of the country where the parties were domiciled."

Kenny, J. did not accept the view of Maguire, C.J. in Mayo-Perrott that Article 41.3.3° was designed to "double-bar the door closed in sub-s 2". Kenny, J. said:

"The two sub-sections are dealing with different branches of the law and I do not agree with him that 'the sub-section says as plainly as it could be said that a valid marriage which is dissolved under the law of another State remains in the eyes of our law a subsisting valid marriage' - because the sub-section does not say this. If this was the meaning which it was intended to express, the sub-section would have read:- 'No person whose marriage has been dissolved under the civil law of any other State shall be capable of contracting a valid marriage within the jurisdiction of the Government and Parliament established by this Constitution during the lifetime of the other party to the marriage so dissolved.' What Maguire C.J. said ignores altogether the significance of the words 'under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution'."

Kenny, J. concluded by noting that his judgment was not a decision on "the difficult questions" (a) whether a divorce granted by the courts in Northern Ireland to a person

domiciled there will be recognised by our law and (b) whether a divorce granted to a person who was resident, but not domiciled, in another State has any effect in this country.

In C. v C.<sup>11</sup> in 1973, the question arose as to recognition of a divorce obtained in England by a wife resident there, her husband being then domiciled in Ireland. Kenny, J. held that

"The domicile of a wife is that of her husband until their marriage is validly terminated by a divorce a vinculo and as the husband was at all times domiciled in the Republic of Ireland, the Courts in this country do not recognise the divorce in England as having the effect of dissolving the marriage. While a divorce given by the Courts of the country in which the husband and wife are domiciled will be recognised,<sup>12</sup> a divorce granted to a wife who was resident in England against a husband who is domiciled in the Republic of Ireland does not have the effect, so far as the Courts in Ireland are concerned, of dissolving the marriage. I know that the Courts in England now have jurisdiction under legislation to grant divorces to wives who have been resident for three years in England but this jurisdiction did not exist in 1921 and the doctrine of the comity of Courts does not require that the Courts in the Republic of Ireland should recognise this divorce. No legislation has been passed by the National Parliament giving recognition to divorces granted to a wife resident in England who is domiciled in the Republic of Ireland and, in my opinion, the husband and wife are, under our law, married."

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<sup>11</sup> Unreported, High Ct., Kenny, J., 27 July 1973 (1973-144 Sp.).

<sup>12</sup> Citing Re Caffin Deceased: Bank of Ireland v Caffin, [1971] I.R. 123.

In Gaffney v Gaffney,<sup>13</sup> in 1975, the Supreme Court was faced with the problem of a divorce obtained on a false allegation of jurisdiction. The Court unanimously held that a wife who, under duress imposed by her husband, had successfully petitioned for divorce against him in England (during which proceedings false averments were made that the husband had an English domicile) was not subsequently estopped from challenging the validity of the decree, on the basis that the English Court had no jurisdiction to hear the proceedings, since the husband's domicile was Irish rather than English. Accordingly she, rather than the man's second wife, was recognised as the man's "wife" for the purpose of the Succession Act, 1965.

Walsh, J. referred to the circumstances in which a foreign decree would be recognised as valid by an Irish Court, when he stated:

"In the course of his judgment in Mayo-Perrott v Mayo-Perrott Kingsmill Moore, J. stated the Irish law to have been that the recognition of foreign divorces in Irish Courts depended upon establishing that the domicile of the parties was within the jurisdiction of the court pronouncing the decree. Recognition and application of this principle of private international law was part of the common law in Ireland and, like Mr Justice Kenny in this case, I am satisfied that it is still part of our law. It follows, therefore, that the Courts here do not recognise decrees of dissolution of marriage pronounced by foreign courts unless the parties were domiciled within the jurisdiction of the foreign court in

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<sup>13</sup> [1975] I.R. 133, analysed by Shatter, 155-159, Duncan, Foreign Divorces Obtained on the Basis of Residence, and the Doctrine of Estoppel, 9 Ir. Jur. (n.s.) 59 (1975), Webb, Shotgun Divorces, [1976] N.Z.L.J. 411, Clare Canton, Note, 94 L. Q. Rev. 15 (1978).

question. In so far as the Courts in this country are concerned, the marriage remains as valid and as subsisting in this country as it would have been but for the intervention of the purported decree of dissolution."<sup>14</sup>

**An important aspect of the decision is the observation (obiter) by Walsh, J. that**

"[t]he law has been that during the subsistence of a marriage the wife's domicile remains the same as, and changes with, that of her husband. For the purpose of this case it is proper to adopt this view, although it is possible that some day it may be challenged on constitutional grounds in a case where the wife has never physically left her domicile of origin while her deserting husband may have established a domicile in another jurisdiction."

**Henchy, J. was silent on the private international law aspects of divorce recognition and Griffin, J. stated that**

"[f]or the purposes of the present case, it is not necessary to decide whether and to what extent, if at all, the recognition of a decree of divorce a vinculo made by a foreign court is inconsistent with or repugnant to any of the Articles of the Constitution, and I express no view on this question."<sup>15</sup>

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<sup>14</sup> Cf. K.E.D. (otherwise K.C.) v M.C., High Ct., Carroll, J., 26 September 1984 (1983-No. 3M), at p. 9 where this passage from Walsh, J.'s judgment is quoted.

<sup>15</sup> O'Higgins, C.J. concurred with Walsh, J.'s judgment. Parke, J. concurred "with the judgments that have been delivered".

In the more recent Supreme Court decision of T. v T.,<sup>16</sup> the question arose as to recognition of a divorce obtained in England by an Englishman who had lived for over two years in Ireland with his family but who had returned to England before the divorce. The case as presented raised only one issue - the domicile of the husband. Henchy, J. said:

"The net point is .... at the time of the divorce was the husband's domicile Irish or British? If it was British, the divorce qualifies for recognition in our Courts; if it was Irish, the divorce was given without jurisdiction and cannot be acted on here: see the decision of this Court in Gaffney v Gaffney."<sup>17</sup>

In the High Court case of L.B. v H.B.,<sup>18</sup> a divorced woman took proceedings against her former husband for maintenance and other relief. In determining whether she was entitled to relief Barrington, J. had to consider whether recognition should be afforded to a divorce obtained in France on the petition of the husband and cross-petition of the wife, both parties then being domiciled in France. Ordinarily, such a divorce would be recognised, but the facts of the case were unusual in that the evidence indicated that the divorce had been arranged by the parties by having their lawyers manufacture evidence which would justify the granting of a decree. Barrington, J. was satisfied that there had been such a measure of collusion between the parties in the proceedings before the French Court as to amount to a fraud upon the Court; had the French Court known of the collusion,

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<sup>16</sup> [1983] I.R. 29, analysed by Buckley & O'Mahony, Recognition of Foreign Divorces - A Further Gloss, 76 *Inc. L. Soc. Gazette* (1982).

<sup>17</sup> [1983] I.R. 29, at 33.

<sup>18</sup> Unreported, 31 July 1980 (1979-449Sp.), analysed by Shatter, 160-161, Duncan, Collusive Foreign Divorces - How to Have Your Cake and Eat It, [1981] *Dublin U. L. J.* 29 (1983).

Barrington, J. considered, it would have rejected the petition and the cross-petition. However, it appeared that, under French law, once the decree of divorce had been made final and absolute, it could not be upset though it had been obtained by collusion.

Barrington, J. noted that the case was not one of fraud as to jurisdiction, where parties pretended to be domiciled within the jurisdiction of a particular foreign Court:

"Clearly a decree made by a foreign Tribunal under such circumstances is not entitled to recognition because one cannot confer jurisdiction on a Tribunal by falsely pretending that it has jurisdiction."<sup>19</sup>

Barrington, J. noted that in the case before him there could be no doubt as to the jurisdiction of the French Court to deal with the matter. The situation was that the Irish Court had become aware of certain matters of which the French Court was ignorant, in circumstances where, as a result of fraud, the French Court had been led unwittingly to a conclusion which the parties and their lawyers had prearranged.

After a review of several English decisions, Barrington, J. concluded:<sup>20</sup>

"The collusion .... between the parties was such that the entire proceedings became a charade and the French Court was unwittingly led to a conclusion which had been predetermined by the parties. There was a substantial defeat of justice for which the parties, and not the

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<sup>19</sup> P. 25 of the judgment, citing Dicey's Conflict of Laws, 306 (7th ed., 1958).

<sup>20</sup> At p. 34 of his judgment.

Court, bear the responsibility .... This Court is fixed with knowledge of matters of which the French Court had no knowledge. It is accordingly no disrespect to the French Court if it refuses to recognise a divorce obtained in such circumstances. Indeed, once this Court has been fixed with knowledge of what happened in the French divorce proceedings it is hard to see how it could recognise the validity of the divorce and at the same time observe the constitutional duty of the State to uphold the institution of marriage."

The plea of estoppel had not been raised in the Irish proceedings by the husband, but Barrington, J. had raised the issue in the course of the hearing. Counsel for the wife had submitted, on the basis of Gaffney v Gaffney,<sup>21</sup> that such a plea would not lie. Barrington, J. considered<sup>22</sup> that

"[t]he situation which has arisen in this case is not the same as that in Gaffney v Gaffney but, nevertheless, the case raises issues of public policy and the status of individuals so that it would appear that a plea of estoppel would not lie."

Even if such a plea did lie, Barrington, J. did not think that it could be successful "in view of the conclusion which I have reached as to the dominant role which the husband played in what happened".

One commentator has observed that

"a considerable degree of uncertainty has been introduced into this area of the law by the denial of

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<sup>21</sup> [1975] I.R. 133.

<sup>22</sup> P. 35 of his judgment.



recognition to the French divorce decree on the ground that recognition of the divorce would have constituted 'a substantial defeat of justice', a concept that was at no stage fully defined in the judgment delivered by the court."<sup>23</sup>

#### Ancillary Orders

Another aspect of the subject which must be considered is the law relating to recognition and enforcement of foreign orders ancillary to divorce, notably orders for alimony or maintenance pending or consequent on the granting of a divorce decree.

In Mayo-Perrott v Mayo-Perrott,<sup>24</sup> as has been mentioned, the Supreme Court held that an order for costs was not severable from the substantive order for divorce and could not be enforced here. In the High Court case of N.M. v E.F.M.,<sup>25</sup> Hamilton, J. had to consider whether an English maintenance order consequent on divorce,<sup>26</sup> otherwise enforceable here under the provisions of the Maintenance Orders Act 1974, should not be enforced by reason of section 9 which provides that a maintenance order made in a reciprocating jurisdiction should not be recognised or enforceable if (inter alia) recognition or enforcement would be contrary to public policy.

Hamilton, J. disposed of the question as follows:

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<sup>23</sup> Shatter, 161.

<sup>24</sup> [1958] I.R. 336.

<sup>25</sup> Unreported, July 1978 (1977 No. 87EMO).

<sup>26</sup> Made six years after the divorce decree had become absolute.

"What is sought to be enforced here is a maintenance order admittedly made in divorce proceedings and consequent to a grant of dissolution of marriage and the question for determination by me is whether the enforcement of such a maintenance order would be contrary to public policy.

I accept unreservedly that if the recognition or enforcement of a maintenance order would have the effect of giving active assistance to facilitate in any way the effecting of a dissolution of marriage or to give assistance to the process of divorce that such recognition or enforcement would be contrary to public policy.

In the case of Mayo-Perrott v Mayo-Perrott, the Supreme Court decided that the terms of the judgment which was sought to be enforced were not severable.

In this particular case the maintenance order sought to be enforced was made on the 23rd day of July, 1973 and though made in and consequent to proceedings for a decree of dissolution of marriage, such decree had been granted and made absolute on the 7th day of August, 1967.

In enforcing and recognising this maintenance order made on the 23rd day of July, 1973 it can not be said that such enforcement or recognition is giving active or any assistance to facilitate in any way the effecting of dissolution of marriage or is giving assistance to the process of divorce. It is merely providing for the maintenance of spouses and as such can not be regarded as contrary to public policy."

Accordingly Hamilton, J. held that the maintenance order was

enforceable here.

In F.G. v P.G.,<sup>27</sup> in 1984, the facts were as follows. The plaintiff sued the defendant, her husband, for 3,230 dollars, basing her claim first on an agreement made between the parties on 2 April 1979, whereby the husband undertook to pay 40 dollars a week for the support of their child. That agreement was made the subject matter of an order made the same day by the Probate and Family Court of Massachusetts and the plaintiff's claim was also based on this order.

The defendant did not deny that he was in default in the payment of this sum, but he sought to resist payment on two grounds. First that the order was not a final one, and secondly that, even if it was, it formed part of and was inseparable from an order for divorce granted by the Massachusetts court on the same day.

The evidence disclosed that the plaintiff had filed a petition for divorce in April 1978, and a judgment of divorce nisi was granted on 15 May 1980, becoming absolute 6 months later. In the meantime, on 12 February 1979, the plaintiff had filed a complaint against her husband claiming custody of the child, as well as maintenance for the child and an order requiring the defendant to leave the family home. It was in those proceedings, which came to trial for the first time on 2 April 1979, that the agreement and order incorporating it were made.

The judgment for divorce nisi, as well as the provision dealing with the maintenance of the child, also included a provision directing the defendant to convey to the plaintiff

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<sup>27</sup> Unreported, High Ct., 9 October 1984, noted by O'Connor, The Enforcement of Foreign Orders Ancillary to Divorce, 3 Ir. L. Times (n.s.) 41 (1985).

his interest in certain premises in Dublin. It contained no other monetary provision.

It appeared that, under Massachusetts law, the plaintiff had a right "separate from and irrespective of any petition of divorce"<sup>28</sup> to seek orders for the custody and maintenance of her child. It was, however, a matter of procedure in the Massachusetts courts that, on the making of a judgment of divorce nisi, any prior maintenance order for the benefit of a child in the separate proceedings would be incorporated in the judgment of divorce nisi and that the separate complaint for maintenance of the child would thereupon be dismissed.

Finlay, P. considered himself "of course .... bound"<sup>29</sup> by the decision of Mayo-Perrott, not to enforce the order for maintenance unless satisfied that it was clearly separable from the decree of divorce.

The plaintiff sought to distinguish Mayo-Perrott on the ground that the claim for maintenance and indeed the agreement out of which the figure for maintenance at the rate of 40 dollars per week was fixed arose in proceedings wholly separate to and being heard prior to the determination of the petition for divorce, and that the Court should consider the judgment of divorce as being merely a procedural convenience insofar as it incorporated and continued the prior order made in the maintenance claim.

Finlay, P. accepted the plaintiff's contention. He said:

"The law of this country does not recognise divorce and will not aid it. It does, however, recognise and has in

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<sup>28</sup> Page 4 of Finlay, P.'s judgment.

<sup>29</sup> Page 5 of Finlay, P.'s judgment.

recent years developed a strict and efficient code for the imposition of liability on a parent to maintain a child. To revert to the test applied by O'Daly, J. (as he then was) in Mayo-Perrott v Mayo-Perrott a claim by a mother who has custody of a child against the child's father for a payment towards its maintenance is a form of action known to the courts of this country and regularly enforced by them.

It may well be that if in any particular case and it is not this case and I would not like to express a view upon it, where the order for custody of a child was granted to one of the parents for the first time and as an integral part of a decree for divorce in a foreign jurisdiction and the maintenance commenced only upon the making of that order different considerations might apply. It does not seem to me that the principles laid down in Mayo-Perrott v Mayo-Perrott and the true interpretation of the relevant provisions of the Constitution, however, would justify me in relieving the Defendant from his obligation to pay maintenance for the support of his infant child merely by reason of what, on the evidence of [the expert who gave evidence as to the law of Massachusetts], was a procedural convenience altering the forum or particular vehicle whereby that liability was imposed without apparently altering the liability or reaching a separate conclusion about it.

In these circumstances, I have, after careful consideration, come to the conclusion that I am not inhibited by the provisions of the Constitution from enforcing by way of judgment the arrears of maintenance due by the Defendant to the Plaintiff on foot of the maintenance order in respect of the infant."

**Finlay, P. was satisfied on the evidence that the order for**

maintenance was a final judgment capable of being enforced in Ireland.<sup>30</sup>

Reference should be made at this point to the doctrine of divisible divorce whereby a spouse's right to maintenance is not affected by the fact that the other spouse has obtained by default a decree of divorce or legal separation in a State in which the defaulting spouse did not have his or her habitual residence.<sup>31</sup>

(b) Recognition of Foreign Legal Separations

Under Irish law, proceedings for legal separations (known as divorce a mensa et thoro) may be taken by one spouse against the other in certain specified cases where the other spouse has behaved in such a manner as to entitle the petitioning spouse to an order from the Court relieving him or her from the obligation of living with the other spouse. On making the decree the Court may award alimony to the petitioning spouse.

The three grounds for divorce a mensa et thoro are adultery, cruelty and "unnatural practices". Four absolute defences may be raised: recrimination, condonation, connivance and collusion. It appears that conduct conducing to adultery constitutes a discretionary bar.

Proceedings for divorce a mensa et thoro have become practically redundant in recent years. This is probably because legislation has established wide-ranging judicial

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<sup>30</sup> See pages 9 to 14 of Finlay, P.'s judgment.

<sup>31</sup> See the Commission's Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983), para. 29.

proceedings for maintenance and for the custody of children, for protection of the family home and for barring orders. The Law Reform Commission in 1983 made recommendations for reform of the law on the subject.<sup>32</sup>

So far as foreign decrees for legal separation are concerned, the general trend of the law internationally has been to regard such decrees as an adjunct to divorce or even to abolish proceedings for legal separation entirely. Nevertheless most countries still retain proceedings for legal separation and private international law aspects of the subject cannot be disregarded.

In England, before the position was regulated by statute<sup>33</sup> in 1971, there was a surprising lack of authorities. In the only reported decision, Tursi v Tursi,<sup>34</sup> it was held that a decree for judicial separation<sup>35</sup> granted in Italy, the country of the spouses' domicile, should be recognised in England. Sachs, J. noted that

"[a]s regards principle, the main argument pressed against recognition of decrees of judicial separation outside the country of domicile in which they were granted went thus. So far the courts of this country have only accorded recognition to a foreign domiciliary decree when it affected the status of the parties: decrees of judicial separation do not affect the status: accordingly, no such decrees should be here recognised.

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<sup>32</sup> Report on Divorce a Mensa et Thoro and Related Matters (LRC 8-1983).

<sup>33</sup> Recognition of Divorces and Legal Separations Act 1971, as amended by the Domicile and Matrimonial Proceedings Act 1973, s. 2.

<sup>34</sup> [1958] P. 54.

<sup>35</sup> A "separazione legale", on account of the husband's desertion and cruelty.

Whilst appreciating, of course, the practical distinction between those decrees that cut the bond of marriage and those that leave it subsisting, the above proposition, as stated in the way that appears to attract those who put it forward, savours to my mind somewhat of a blend of dogma and absence of precedent. It is the fact that hitherto the courts here have not accorded recognition to domiciliary decrees for judicial separation: but until now they have not been asked to do so - and, indeed, it is not surprising that before the Act of 1949<sup>36</sup> the occasion for such a request did not arise. So the argument against recognition, as thus stated, seems rather to beg the question of principle."<sup>37</sup>

**Sachs, J. continued:**

"The argument on principle for extra-territorial recognition springs from the fact that by the almost universal view of all civilized countries a special quality attaches to the decrees of domiciliary High Courts touching any contract of marriage between persons domiciled in the country of those courts, and that contract has validly resulted in married status: and then it runs thus. It is that special quality which is 'recognized' in the sense that the domiciliary decrees are treated as operative in other countries. The most drastic way in which a decree of a domiciliary court can affect a marriage is by dissolving it: and if recognition extends to the most drastic decree a fortiori it must cover a decree of lesser effect."<sup>38</sup>

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<sup>36</sup> Law Reform (Miscellaneous Provisions) Act, 1949.

<sup>37</sup> Supra, fn. 34, at 62.

<sup>38</sup> Id., at 62-63.



Sachs, J. approved of the approach adopted in the Australian case of Ainslie v Ainslie,<sup>39</sup> to the same effect as the passage quoted above.

On the possibility of residence as a basis of recognition, Dicey and Morris stated that it "is an open question",<sup>40</sup> submitting that, if both parties, or the respondent are resident where the decree is granted it should be recognised, but that if only the petitioner is so resident, it should not.<sup>41</sup>

There are no decisions on this question in Ireland. Dr North has suggested<sup>42</sup> that the English rules (prior to 1971) should be followed in this country.

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<sup>39</sup> 39 C.L.R. 381 (1957). For criticism of extending the Ainslie rationale beyond inter-provincial recognition, see Grodecki, Note: Effect of a Foreign Decree of Judicial Separation, 20 Modern L. Rev., 636, at 637, fn. 4 (1957).

<sup>40</sup> Dicey and Morris, 337 (8th ed., 1967).

<sup>41</sup> Cf. Hughes v Hughes, [1958] C.L.Y. 502 (judicial separation obtained in Denmark by petitioner resident there but not domiciled there (on account of operation of domicile of dependency, it would appear) not recognised in England, the respondent's domicile and residence remaining English; reliance apparently on English domestic jurisdictional grounds for judicial separation as determinant of recognition of foreign divorces).

<sup>42</sup> North, 386.

## CHAPTER 3 PROPOSALS FOR REFORM

In our Working Paper, we made the following proposals for reform:

1. For divorce recognition purposes a person should be deemed to be habitually resident in the State who, having been habitually resident there, has temporarily ceased to reside here and has acquired a temporary residence abroad for the primary purpose of obtaining a foreign divorce.

2. Where both spouses are habitually resident in the State at the date of the institution of the divorce proceedings, a foreign divorce obtained by them should not be recognised at all in this country.

3. Where

- (i) one of the spouses is an Irish citizen, and
- (ii) only one spouse is habitually resident in the State, and
- (iii) the spouses last habitually resided together in the State,

a foreign divorce should be recognised here only if the spouse referred to at (ii) above submitted to the jurisdiction of the foreign court (by entering an appearance as respondent which was not solely to protest that court's jurisdiction) and the divorce is obtained in the country where the other spouse is habitually resident at the date of the institution of the proceedings.

4. The 1970 Hague Convention on Recognition of Divorces and Legal Separations should be the basis of our rules of recognition of foreign divorces in other

cases and of recognition of foreign legal separations.

5. Following Article 8 of the Convention the legislation should provide for refusing recognition to foreign decrees of divorce or legal separation if adequate steps were not taken to give notice of the proceedings to the respondent or if he was not afforded a sufficient opportunity to present his case.

6. Following Article 9 of the Convention the legislation should include a provision whereby the State may refuse to recognise a divorce or legal separation if it is incompatible with a previous decision determining the matrimonial status of the spouses and that decision either was rendered in the State, or is recognised, or fulfils the conditions required for recognition, in the State.

7. Following Article 10 of the Convention, the legislation should include a provision to the effect that the State may refuse to recognise a divorce or legal separation if such recognition is manifestly incompatible with the State's public policy ("ordre public").

8. Following Article 12 of the Convention, the legislation should include a provision to the effect that proceedings for legal separation in the State may be suspended when proceedings relating to the matrimonial status of either party to the marriage are pending in another State.

9. As permitted by Article 24 of the Convention, the legislation should provide that the recognition rules in the Convention would not be applied retrospectively.

10. For the purpose of giving effect to Recommendation 2 above, the reservation permitted under Article 19(2) of the Convention should be utilized.

11. For the purpose of giving effect to Recommendation 3 above, the reservation permitted under Article 20 of the Convention should be utilized.

12. No special rules of recognition of foreign legal separations should apply to persons habitually resident in Ireland.

13. The rules of recognition of foreign divorces and legal separations proposed above should apply to foreign divorces and legal separations wherever obtained.

14. The legislation should not establish rules of recognition of foreign divorces and legal separations wider than those specified in the Convention.

15. Subject to Recommendation 1 above, the legislation should include a provision to the effect that, where the respondent appeared in the proceedings, findings made by the court of the State where the divorce or legal separation is granted as to a party's being domiciled or habitually resident there or being a national of that State, should be binding for the purposes of recognition.

16. Subject to Recommendation 1 above, the legislation should include a provision giving the Court a broad discretion as to whether to accept as proved the findings and inferences (whether of law or fact) of the foreign court where the respondent has not appeared in the foreign proceedings.

17. In cases where a divorce is recognised under Recommendation 2 and 3 above, the Court should have a discretionary power, acting on the principles of our domestic legislation, to protect the rights of a spouse with respect to maintenance, occupation and beneficial ownership of the family home and barring orders.

18. A similar discretionary power should be conferred on the Court in relation to a foreign legal separation where one (or both) of the spouses has (or have) close connections with Ireland of the kind envisaged in Recommendations 2 and 3 above.

These proposals did not represent our final views. After further consideration of the issue raised in the Working Paper, we are satisfied that the proposals we made in the Working Paper offer the most appropriate solution. Accordingly in this Report we reiterate the proposals which we have set out above.

**APPENDIX A      CONVENTION ON THE RECOGNITION OF DIVORCES AND  
LEGAL SEPARATIONS (Concluded June 1st, 1970)**

The States signatory to the present Convention,

Desiring to facilitate the recognition of divorces and legal separations obtained in their respective territories,

Have resolved to conclude a Convention to this effect, and have agreed on the following provisions:

**Article 1**

The present Convention shall apply to the recognition in one Contracting State of divorces and legal separations obtained in another Contracting State which follow judicial or other proceedings officially recognized in that State and which are legally effective there.

The Convention does not apply to findings of fault or to ancillary orders pronounced on the making of a decree of divorce or legal separation; in particular, it does not apply to orders relating to pecuniary obligations or to the custody of children.

**Article 2**

Such divorces and legal separations shall be recognized in all other Contracting States, subject to the remaining terms of this Convention, if, at the date of the institution of the proceedings in the State of the divorce or legal separation (hereinafter called 'the State of origin') -

- (1) the respondent had his habitual residence there; or
- (2) the petitioner had his habitual residence there and one of the following further conditions were fulfilled -
  - a) such habitual residence had continued for not less than one year immediately prior to the institution of proceedings;
  - b) the spouses last habitually resided there together;  
or
- (3) both spouses were nationals of that State; or
- (4) the petitioner was a national of that State and one of the following further conditions was fulfilled -

- a) the petitioner had his habitual residence there; or
  - b) he had habitually resided there for a continuous period of one year falling, at least in part, within the two years preceding the institution of the proceedings; or
- (5) the petitioner for divorce was a national of that State and both the following further conditions were fulfilled -
- a) the petitioner was present in that State at the date of institution of the proceedings and
  - b) the spouses last habitually resided together in a State whose law, at the date of institution of the proceedings, did not provide for divorce.

#### Article 3

Where the State of origin uses the concept of domicile as a test of jurisdiction in matters of divorce or legal separation, the expression 'habitual residence' in Article 2 shall be deemed to include domicile as the term is used in that State.

#### Article 4

Where there has been a cross-petition, a divorce or legal separation following upon the petition or cross-petition shall be recognized if either falls within the terms of Articles 2 or 3.

#### Article 5

Where a legal separation complying with the terms of this Convention has been converted into a divorce in the State of origin, the recognition of the divorce shall not be refused for the reason that the conditions stated in Articles 2 or 3 were no longer fulfilled at the time of the institution of the divorce proceedings.

#### Article 6

Where the respondent has appeared in the proceedings, the authorities of the State in which recognition of divorce or legal separation is sought shall be bound by the findings on which jurisdiction was assumed.

The recognition of a divorce or legal separation shall not be refused -

- a) because the internal law of the State in which such recognition is sought would not allow divorce or, as the case may be, legal separation upon the same facts, or,
- b) because a law was applied other than that applicable under the rules of private international law of that State.

Without prejudice to such review as may be necessary for the application of other provisions of this Convention, the authorities of the State in which recognition of a divorce or legal separation is sought shall not examine the merits of the decision.

#### Article 7

Contracting States may refuse to recognize a divorce when, at the time it was obtained, both the parties were nationals of States which did not provide for divorce and of no other State.

#### Article 8

If, in the light of all the circumstances, adequate steps were not taken to give notice of the proceedings for a divorce or legal separation to the respondent, or if he was not afforded a sufficient opportunity to present his case, the divorce or legal separation may be refused recognition.

#### Article 9

Contracting States may refuse to recognize a divorce or legal separation if it is incompatible with a previous decision determining the matrimonial status of the spouses and that decision either was rendered in the State in which recognition is sought, or is recognized, or fulfils the conditions required for recognition, in that State.

#### Article 10

Contracting States may refuse to recognize a divorce or legal separation if such recognition is manifestly incompatible with their public policy ('ordre public').



**Article 11**

A State which is obliged to recognise a divorce under this Convention may not preclude either spouse from remarrying on the ground that the law of another State does not recognize that divorce.

**Article 12**

Proceedings for divorce or legal separation in any Contracting State may be suspended when proceedings relating to the matrimonial status of either party to the marriage are pending in another Contracting State.

**Article 13**

In the application of this Convention to divorces or legal separations obtained or sought to be recognized in contracting States having, in matters of divorce or legal separation, two or more legal systems applying in different territorial units -

- (1) any reference to the law of the State of origin shall be construed as referring to the law of the territory in which the divorce or separation was obtained;
- (2) any reference to the law of the State in which recognition is sought shall be construed as referring to the law of the forum; and
- (3) any reference to domicile or residence in the State of origin shall be construed as referring to domicile or residence in the territory in which the divorce or separation was obtained.

**Article 14**

For the purposes of Articles 2 and 3, where the State of origin has in matters of divorce or legal separation two or more systems applying in different territorial units -

- (1) Article 2, sub-paragraph (3), shall apply where both spouses were nationals of the State of which the territorial unit where the divorce or legal separation was obtained forms a part, and that regardless of the habitual residence of the spouses;
- (2) Article 2, sub-paragraphs (4) and (5), shall apply where the petitioner was a national of the State of which the territorial unit where the divorce or legal

separation was obtained forms a part.

**Article 15**

In relation to a Contracting State having, in matters of divorce or legal separation, two or more legal systems applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

**Article 16**

When, for the purposes of this Convention, it is necessary to refer to the law of a State, whether or not it is a Contracting State, other than the State of origin or the State in which recognition is sought, and having in matters of divorce or legal separation two or more legal systems of territorial or personal application, reference shall be made to the system specified by the law of that State.

**Article 17**

This Convention shall not prevent the application in a Contracting State of rules of law more favourable to the recognition of foreign divorces and legal separations.

**Article 18**

This Convention shall not affect the operation of other conventions to which one or several Contracting States are or may in the future become Parties and which contain provisions relating to the subject-matter of this Convention.

Contracting States, however, should refrain from concluding other conventions on the same matter incompatible with the terms of this Convention, unless for special reasons based on regional or other ties; and, notwithstanding the terms of such conventions, they undertake to recognize in accordance with this Convention divorces and legal separations granted in Contracting States which are not Parties to such other conventions.

**Article 19**

Contracting States may, not later than the time of ratification or accession, reserve the right -

- (1) to refuse to recognize a divorce or legal separation between two spouses who, at the time of the divorce or legal separation, were nationals of the State in which recognition is sought, and of no other State, and a law other than that indicated by the rules of private international law of the State of recognition was applied, unless the result reached is the same as that which would have been reached by applying the law indicated by those rules;
- (2) to refuse to recognize a divorce when, at the time it was obtained, both parties habitually resided in States which did not provide for divorce. A State which utilizes the reservation stated in this paragraph may not refuse recognition by the application of Article 7.

#### Article 20

Contracting States whose law does not provide for divorce may, not later than the time of ratification or accession, reserve the right not to recognize a divorce if, at the date it was obtained, one of the spouses was a national of a State whose law did not provide for divorce.

This reservation shall have effect only so long as the law of the State utilizing it does not provide for divorce.

#### Article 21

Contracting States whose law does not provide for legal separation may, not later than the time of ratification or accession, reserve the right to refuse to recognize a legal separation when, at the time it was obtained, one of the spouses was a national of a Contracting State whose law did not provide for legal separation.

#### Article 22

Contracting States may, from time to time, declare that certain categories of persons having their nationality need not be considered their nationals for the purposes of this Convention.

#### Article 23

If a Contracting State has more than one legal system in matters of divorce or legal separation, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its legal systems or only to

one or more of them, and may modify its declaration by submitting another declaration at any time thereafter.

These declarations shall be notified to the Ministry of Foreign Affairs of the Netherlands, and shall state expressly the legal systems to which the Convention applies.

Contracting States may decline to recognize a divorce or legal separation if, at the date on which recognition is sought, the Convention is not applicable to the legal system under which the divorce or legal separation was obtained.

#### Article 24

This Convention applies regardless of the date on which the divorce or legal separation was obtained.

Nevertheless a Contracting State may, not later than the time of ratification or accession, reserve the right not to apply this Convention to a divorce or to a legal separation obtained before the date on which, in relation to that State, the Convention comes into force.

#### Article 25

Any State may, not later than the moment of its ratification or accession, make one or more of the reservations mentioned in Articles 19, 20, 21 and 24 of the present Convention. No other reservation shall be permitted.

Each Contracting State may also, when notifying an extension of the Convention in accordance with Article 29, make one or more of the said reservations, with its effect limited to all or some of the territories mentioned in the extension.

Each Contracting State may at any time withdraw a reservation it has made. Such a withdrawal shall be notified to the Ministry of Foreign Affairs of the Netherlands.

Such a reservation shall cease to have effect on the sixtieth day after the notification referred to in the preceding paragraph.

#### Article 26

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

#### Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

#### Article 28

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialized agency of that Organization, or a Party to the Statute of the International Court of Justice may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 27.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

#### Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of

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which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The extension will have effect only as regards the relations with such Contracting States as will have declared their acceptance of the extensions. Such a declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The extension will take effect in each case sixty days after the deposit of the declaration of acceptance.

#### Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands, at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

#### Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 26, and to the States which have acceded in accordance with Article 28, of the following -

- a) the signatures and ratifications referred to in Article 26;
- b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 27;

- c) the accessions referred to in Article 28 and the dates on which they take effect;
- d) the extensions referred to in Article 29 and the dates on which they take effect;
- e) the denunciations referred to in Article 30;
- f) the reservations and withdrawals referred to in Articles 19, 20, 21, 24 and 25;
- g) the declarations referred to in Articles 22, 23, 28 and 29.

In witness thereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the first day of June, 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.

## APPENDIX B      BIBLIOGRAPHY

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