AROUND THE WORLD IN 80 DAYS: FROM THE ALTAR TO THE COURTROOM

The Implications of Foreign Divorce

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This family law essay examines the implications of foreign divorce in different jurisdictions. A history of this issue precedes in-depth analysis of the topic. The author discusses the topic utilising references from common law to Irish, English and European case law, including judgments to facilitate her points effectively. This article is also supplemented by the relevant legislative (Brussels II Convention) and constitutional (Article 41.3.3) instruments that surround the issue.

This is an extremely contemporary subject, accessorized with contemporary references (as up to date as 2005). The author has examined the law in this area from how it did stand to how it does stand. It is hoped that this essay will be valuable to anyone dealing with the divorce topic, be it in a family or constitutional law sphere. Winner of the Southern Law Association essay competition.

> Gone are the days when we could state with certainty the grounds on which a foreign divorce would be recognised in this jurisdiction.[1]

Sinclair v. Sinclair[2] (the *locus classicus* on the recognition of foreign divorce) as well as the case of *Le Mesurier v. Le Mesurier*[3] postulated the old common law rule that divorces should be recognised here if granted in the jurisdiction where both husband and wife were domiciled at the date divorce proceedings were initiated.

This is a classic conflict of laws issue. While policy requires us to recognise marriages that take place in other jurisdictions (as we expect them to recognise those which take place here) given the pedestal upon which the family based upon marriage is placed within the Constitution,[4] along with Catholic values dominating Irish society for so long, decisions as to the termination of marriages in other jurisdictions are less authoritative. Inevitably, this was to affect the way in which the Courts treated the issue of foreign divorce. While divorce *a mensa et thoro* was available here in the form of judicial separation, divorce *a vinculo* was only available abroad. As Binchy notes:

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[1] Browne D., "Recent Developments in the Law Governing the Recognition of Foreign Divorces", [2002] 4 IJFL 8.
[2] [1896] 1 IR 603
[3] [1895]
[4] Under Article 41.1.2 the State " guarantees to protect the family" and under Article 41.1.1 states the family to be a "moral institution possessing inalienable and imprescriptibly rights antecedent and superior to all positive law."

> The obscurely drafted terms of Article 41.3.3 of the Constitution, in conjunction with the constitutional prohibition on divorce legislation prior to 1995 led to a complex judicial policy in this area.[5]

The recognition of foreign divorces is now regulated by the Brussels II Convention[6] which extends the parameters on recognition and has created considerable controversy. This legislation applies to those divorces obtained after the 1st March 2001. Those obtained before this date and after the 2nd October 1986 are governed by the Domicile and Recognition of Foreign Divorces Act 1986[7] (hereafter the 1986 Act) and those before the 2nd October 1986 are governed by Common Law rules.[8]

It can thus be seen that numerous categories all with separate recognition rules exist and it is therefore little wonder that this is one of the most complex areas of family law today. However, it is not simply as a result of multiple legislative provisions that this uncertainty exists. As a result of a number of some recent conflicting judgments the law relating to certain foreign divorces is unarguably in a state of confusion and it is submitted that excessive judicial activism, which has led to a revolutionisation of the law, is the main cause of uncertainty.[9]

Divorce was not easily acceded to in Ireland.[10] The reluctance of the people to approve was further backed by the constitutional protection afforded to the family based on marriage. This essay examines the development of the law in this area and it will be submitted that the current situation may well be constitutionally unsound as well as asserting Browne's belief that there is no certainty surrounding the grounds upon which a foreign divorce will be recognised.

It was in the 1958 case of *Mayo-Perrot v. Mayo-Perrot*[11] that the Irish courts found a place for the recognition of foreign divorce which was subsequently approved in *Gaffney v. Gaffney*,[12] incorporating the old common law rules.

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5 Binchy W., Annual Review of Irish Law, (Dublin, Roundhall 2001)
6 This came into force in Ireland on the 1st March 2001 and is prospective in effect. It does not apply to Denmark.
7 This came into force in Ireland on the 1st October 1986.
8 Within this area alone there have been a number of significant developments which will be discussed below.
9 Although arguably excessive this author believes that this intrusion is justified as a result of the failure of the legislature to produce comprehensive and constitutional legislation.
10 It in fact took two referendums to amend the constitution. The first referendum failed to pass the introduction of divorce by a majority of 66% to 34%. The second referendum however succeeded but by a bare majority with 50.28% of the electorate voting in favour of the introduction of divorce. These figures show that while those in favour of divorce had increased, the population was still more or less equally divided. The Judicial Seperation Decree Act 1989 proved that society could continue to function normally even after a marital break up and the 1995 Bill which outlined in close detail the form the Divorce Act would take put people's fears to rest and the electorate were well informed before a second referendum took place.
11 [1985] IR 336.
12 [1975] IR 133.

These old common law rules encapsulated the private international law rule of dependant domicile. It seems most appropriate to deal with the concept of domicile first.

One can never be without domicile, of which there are two categories, domicile of origin (which is that of your parents) and domicile of choice (which can be acquired through a number of factors.) The legal test for determining where a person is domiciled is divided into two parts. Firstly, there is the fact of residing at a particular place at the time a divorce is granted. Secondly, the mental intent to reside at that place indefinitely or permanently must be proven. Mental intent can be manifested in outer conduct.[13] It is a matter of fact and law. The rationale was to prevent limping marriages but the situation was complicated by post–1986 legislation as well as Brussels II which provides for recognition on grounds of residency.

In *T v. T* Henchy J. stated that "[t]he rebuttable presumption is that a person retains his domicile of origin".[14] This is indicative of the high burden placed upon the person asserting his acquisition of a different domicile. In *CM v. TM* Barr J. held there was an "important distinction between setting up home for an indefinite period in a particular place and setting up a permanent home there"[15] in certain circumstances which seems to undermine the legal test set out above. Recently however the practice of the courts has been to marry the concept of permanence and indefiniteness. The determination of domicile of choice is therefore very subjective with a lack of criteria to be satisfied leaving the ultimate decision to the court and is dependant on the particulars of the case. It is this uncertainty which inclines this author to agree with McGuinness' judgment in *GMcG v. DW*[16] in which she preferred recognition on the grounds of residency. This approach may also be supported by the fact that the first half of the legal test requires residency at the place in which the divorce was granted along with the uncertainty surrounding the second leg of the test.

Perhaps one of the best cases to illustrate the confusion in this area is that which arises when trying to determine domicile when dealing with families who maintain cultural ties with one state while living in another, as demonstrated in *RB v. AS*.[17] This highlights the problem for people who travel frequently and is increasingly important in the context of an ever–expanding Europe. This case was decided solely on the concept of domicile. The dependant domicile rule simply represented the idea that a woman had the same domicile as her husband.[18]

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[13] Prior to 1986 a number of things went towards proving domicile of choice, for example a long term job, property, the purchase of grave plot, banking in the currency of the country.
[14] [1983] IR 29.
[15] [1988] ILRM 457.
[16] [2000] 1 ILRM 107.
[17] Power C., Case and Comment, [2001] 3 IJFL Here, the petitioner and respondent were wed in Germany but the petitioner had lived in Ireland since 1955 and the respondent had lived here also since 1962. Neither had spent much time in Germany since.
[18] As a result a divorce would only be recognised if obtained in the jurisdiction where he was domiciled regardless of whether the wife was also domiciled there.

This inequality along with the need for clarification of legal principles led to the enactment of the 1986 Act. The purpose of its enactment was to implement more flexible rules, thus liberalizing recognition. The costly feature of this legislation, however, was that it is prospective in effect. Therefore, divorces granted prior to 2nd Oct 1986 continued to fall at the hands of the unmerciful rule of dependant domicile. It is worthwhile to note that a number of judgments prior to the enactment alluded to the question of constitutional compatibility hanging over this common law rule[19] and it is interesting that the legislature did not consider this when drafting this new piece of legislation. This unsatisfactory state of affairs along with a desire to move family law into a more modern context and away from what Lord Denning referred to as "the last barbarous relic of a wife's servitude,"[20] led to the landmark judgment in *W v. W*.[21] It is from here judicial activism in this area has stemmed. The Supreme Court stated that the law to be applied to foreign divorces granted prior to 2nd Oct 1986 was that such a divorce is to be recognised if granted by a court of the country in which either of the parties to the divorce proceedings was domiciled at the date the proceedings had been instituted. It cannot be argued that this was neither a progressive or an unwelcome decision of the court but its consequences have been significant. Ultimately, *W v. W* diminished the importance of the 1986 Act which was proved not to be as revolutionary as once thought.[22]

Secondly, uncertainty and anxiety descended upon clients and lawyers alike as the result of this case was that many clients who had been advised previously that their divorces and subsequent marriages were valid now should be advised that they are in fact invalid and *vice versa*. While one can argue that to apply legislation retrospectively contradicts the rule of law, this serves as a double edged sword — to not apply the legislation in this way, as can be seen, has led to great injustice.

Thirdly, the Court in *W v. W* had regard to the 'current policy' of the Court. This is a worrying trend which continued into, and whose significance was recognised in, the more controversial case of *GMcG v. DW*.[23] One would believe such policy to constitute public policy. The use of the word 'current' however suggests that there will never be certainty in this area of law with different courts being more or less rigorous or flexible.[24] As the area is covered by statute one would also have to question the separation of powers. While this reasoning corrected an oversight of the legislature, the profound effect this reasoning was to have came to the fore in the case of *GMcG v. DW*.

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[19] Most notably *CM v. TM*.
[20] *Gray v. Formosa* [1963]
[21] [1993] ILRM 294. In this case the Supreme Court upheld the ruling of Barr J. in the High Court that the 'dependant domicile' of a wife was inconsistent with the provisions of the constitution.
[22] Section 5(5) which stated the Act to apply to all divorces obtained after the 1st October, 1986 was rejected.
[23] *Supra* n16.
[24] The fluctuation in considerations of different courts can be demonstrated by the fact that although a question of constitutionality so obviously surrounded the rule of dependant domicile no court prior to 1986 addressed the issue head on. It was only in 1993 this was dealt with.

Another interesting thing to observe as regards the 1986 Act is that while it sought to reduce the domicile requirements for recognition of foreign divorce, divorce itself was not even introduced into Ireland yet. The question of reconciliation with the Constitution is an aspect which crops up time and time again and it appears that this is an aspect which has gone untouched.[25] Even more worrying about the legislation is that it contains nothing regarding the control of grounds on which a foreign divorce is granted. It would seem appropriate to have some harmonisation in this area if one is to expect harmonisation on recognition in the area. This is still a prominent problem today and it is highlighted when one contrasts a "quickie divorce"[26] and an Irish divorce which must adhere to strict criteria.[27] On the whole there are deep dissimilarities permeating the legislation of the various states and it is submitted that this will remain a crux in the harmonisation of the recognition of foreign divorces for years to come.

The next significant leap made by the Irish Courts came in the unprecedented judgment of McGuinness J. in *GMcG v. DW* in which she revolutionised the common law rules as they operate outside the statute. Ward observes how McGuinness J. utilised the reasoning in *W v. W* to further alter the recognition rules. She looked to section 5(1) in justifying the extension of the domicile rule to include habitual residence of one year stating that "[t]he section limits itself to amending the rule based on domicile" and does not mention any other form of recognition. The Supreme Court held that common law rules are judge–made law and may be modified depending on the current policy of the court. The introduction of the Divorce Act 1996 with criteria of ordinary residence showed public policy to be in favour of extension. This judgment in effect changes *W v. W* in that domicile is no longer the determining factor in recognising foreign divorces. McGuinness J. also laid particular emphasis on the need to avoid limping marriages as warranting such an extension. Shannon believes the central idea behind this judgment is that since our courts will grant a divorce on the basis of a spouse's ordinary residence in this jurisdiction, our courts should recognise those granted by foreign courts on a similar basis.[28] This author is inclined to agree. This harks back to the idea that if there is to be unification of the grounds for recognition, so as to ensure efficiency, reference needs to be had to the specific

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[25] The court in *Mayo-Perrot* found that Article 41.3.3 of the Constitution did not preclude recognition of foreign divorces. Kingsmill Moore J. departed for the traditional interpretation in favour of a more liberal one. Therefore Article 41.3.3 only served as a mechanism by which the Oireachtas could introduce legislation refusing the recognition of such divorces and as no such legislation was introduces such divorces were held to be valid. Although approved in *Gaffney* and subsequently in the Supreme Court in *T v. T*, these cases were decided prior to 1986 thus prior to the relaxation of these rules. It remains to be seen if these are compatible with the provisions on the protection of the family based on marriage.

[26] The new Brussels IIa Regulation came into effect here from the 1st March 2005. As a result of this now a marriage can be ended for good in just one year. The one condition of this provision is that one of the parties has to move out of the family home and live in a different jurisdiction for one year. The implications are discussed further down.

[27] To obtain a divorce here three conditions must be satisfied. Firstly, four years living apart in the previous five must be proved. Secondly, there must be no prospect of reconciliation and finally proper provision must be made for the other spouse as well as any dependant children.

[28] Shannon G., The Changing Landscape of Divorce in Ireland, (Dublin, Roundhall 2001) E-217.

criteria for granting divorce. Not to have this can only prove more troublesome for the process and will almost certainly lead to yet more uncertainty in the area.

The consequence of *GMcG v. DW* is that more flexible rules apply to divorces obtained prior to 1986 then to those obtained thereafter which are governed by statute (which requires domicile). This ultimately usurped the function of the Act. Should *GMcG v. DW* apply, the law will have developed from a stage where the Oireachas by passing the 1986 legislation sought to update the common law, to where the Courts have intervened to equalise the two and has resulted in a situation whereby the extension of the common law has left the Statute lagging behind.[29] Corbett in her article alludes to the failure of the Court to lay down a definitive test for the recognition of foreign divorces in Ireland and states that the "full meaning and extent of the judgment will have to be explored in future cases."[30] This is highly unsatisfactory but the foundations laid by McGuinness could go far in stabilising the law in this area, if developed correctly.

Academic opinion on this area differs. Ward believes this decision was a sensible one providing certainty for those who obtained English divorces on the basis of residency and who subsequently entered into second marriages.[31] However he addresses the divergence between the two jurisdictions as regards clean–break divorce, which may result in a resurgence of applications to English Courts for divorces by Irish couples. This will only be seen in time. Binchy on the other hand believes recognition on residency compromises the protection given to marriage and may give rise to forum–shopping.[32] This is a valid argument unfortunately, as will be shown below, to ensure harmonisation the risk of forum–shopping may be a price we have to pay. As for the protection argument, it is submitted that as residency is a ground provided for in our own divorce legislation the protection of the family is not jeopardised.

The law was still not definitive as to recognition of foreign divorces on grounds of ordinary residency prior to 1986. The Supreme Court in *KED (orse KC) v. MC*[33] refused to consider an English divorce on the test of 'real and substantial' connection as set out in *Indyka v. Indyka*.[34]

McGuinness's judgment is not universally accepted.[35] Kinlen J. in the subsequent case of *MEC v. JAC*[36] argued that this was too big a step for the

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[29] Power C. Cases and Comment, *GMcG v. DW and AR* [2000] 3 IJFL 29-30.
[30] Corbett C., "Recognition of Foreign Divorces in Ireland in Light of *GMcG v. DW and AR*" [1999] Bar Review, p 272.
[31] Ward P., "Residence Basis for Recognition of Foreign Divorces", [1999] April, Family Law
[32] *Supra* n5.
[33] [1987] ILRM 189.
[34] [1969] 1 AC 33.
[35] One important aspect of this judgment is that it was not expressly stated that this ground of residency was not to apply to post–1986 divorces so this remains open for a future court to discuss. Although with the legislation in place it seems highly unlikely a court will want to deal with this of its own motion but it would not be surprising to see an aggrieved party try to seek recognition of a post 1986 foreign divorce under these modified common law rules. This

Court to take and should ultimately be left to the legislature. This was the first occasion on which the High Court gave consideration to the matter. These two cases cannot be reconciled. In *MEC* the argument against recognition on residency grounds was argued fully before the Court. This did not happen in *GMcG v. DW*. It would therefore appear that the former case would be the superior in light of the common law. However, Martin would argue that McGuinness being a senior High Court judge of eminent standing with considerable expertise in the area of family law would match Kinlen J. Disappointingly, *MEC v. JAC* fails to deal with any consideration of the recognition of foreign divorces on the grounds of residency and so the judgment could be said to be lacking somewhat. Further clarification would be welcomed taking into account that this judgment may be cited as binding precedent for future cases.

The Irish Courts have since been reluctant to deal with the issue but the question of residence arose in the recent 2003 case of *DT v. FL*.[37] Unlike the facts in *GMcG v. DW* the recognition rules in respect of a post 1986 divorce were entirely covered by that Act. Morris P. did interestingly approve the decision of McGuinness insofar as it relates to pre–1986 divorces. So it would now seem that the law is settled in this area.

The Brussels II Convention now governs this area. These rules, designed to create harmony, highlight how the previous legislation was lacking but it is not without fault. As Binchy notes, this legislation places emphasis on setting out clear rules for recognition whilst also prescribing limited grounds for non–recognition.[38] Interestingly, little scope is given to public policy thus reigning in the judiciary from the semantics previously displayed.

One worrying aspect of this legislation is that even judgments based on fraudulent assertions as to jurisdiction must be recognised. One must ask how this can be reconciled with Kinlen J's 2002 High Court decision in *Trustees of the Blood Transfusion Services Board Superannuating Fund v. HL*,[39] one of the only cases in which extrinsic evidence as to the grounds on which a divorce was obtained was admissible.[40] Here, a decree of divorce was not recognised as the English Court which granted the divorce did not in fact have jurisdiction and residence was further rejected as a ground. This case also unearthed the newly developed phenomenon of estoppel which the courts have been reluctant to deal with. Perhaps they are simply waiting for the most suitable case. No doubt when it comes along the law will be plunged into further uncertainty and needless complication.

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claim would undoubtedly raise interesting questions of judicial activism in the lawmaking process and on the interplay of common law and statute.

[36] [2001] 2 IR 339; unrep HC March 2001.

[37] [2002] 2 ILRM 152.

[38] *Supra* n5 at 39.

[39] Unreported Circuit Court, 1st Feb 1999.

[40] The courts in these proceedings do not involve themselves with the merits on which a divorce was granted.

An oversight in the Act is the failure to define habitual residence which is a crucial basis for jurisdiction. Unfortunately, this means that the Courts are once again left with the task of the legislature. Were the legislation concise and self–explanatory the Courts could spend their time applying the law as per their function thus spending less time interpreting which, as has been shown, has the effect of throwing the law into utter confusion.

Brussels II establishes the same system of *lis pendens* as the original convention.[41] This adds some certainty to the procedure to be followed but encourages forum–shopping for the jurisdiction best suited to the spouse and as a result of the doctrine of *lis pendens* there now exists a situation where spouses are almost in a race to see who can get to the court first.

The most recent development in this area came on the 1st March this year with the introduction of a 'quickie' divorce, under Brussels IIa in what Jerome Reilly describes as one of the most "significant changes in family law in recent years."[42] He describes the result of this new legislation as being the creation of a situation whereby "a marriage can be ended for good in just one year" which "effectively overrides our strict legal framework covering the dissolution of marriage."[43] Irish law however still encapsulates the four out of the previous five years living apart rule, in most other EU countries this is simply one year. In his article Reilly also alludes to the new fast track system in operation in France whereby a couple can get divorce in a number of months. Geoffrey Shannon, commenting on these regulations stated that this "new regime rewards the party who litigates earlier,"[44] a problem which was addressed above and is in direct conflict with the protection of the family based on marriage. It is obvious this new regulation seeks to harmonise the law across the EU but one must seriously consider the constitutionality of such a system here.[45]

In less than a decade Ireland has gone from not having any divorce system to a situation whereby a divorce obtained after a few months of marriage may be recognised. One, in consideration of the effort taken to get divorce introduced here, must wonder as to whether the bare majority would have acceded to this had they been aware of the developments that were to take place over the following 10 years. It is submitted that they would have not.

There is now a desperate need for codification on the law relating to the recognition of foreign divorces. As the EU expands, and with the freedom of movement therein, it is essential to have some framework in place. It simply needs to be a better one. Alan Reed was perfectly right is saying that it is

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[41] This ensures that if for example an Irish court has jurisdiction it cannot decline to exercise it while on the other hand if two courts have jurisdiction, eg the Irish and French then the court where proceedings were first filed must exercise jurisdiction while the second court is seised of so doing.

[42] See the Sunday Independent, March 6th 2005.

[43] *Ibid.*

[44] *Ibid.*

[45] Until such time as there is harmonisation of divorce laws amongst the member states, a close watch must be maintained on the development of the law in conjunction with its constitutional compatibility.

inappropriate to impose uniform western principles on the recognition of foreign divorces when one has to consider the effect they have of such religions as Judaism[46] it seems that all the current legislation has failed to take account of the wider picture here. Furthermore, Murphy, in his article, addresses the basis on which the English courts exercise their discretion to refuse recognition of foreign marriages "whose formal validity is beyond question and whose essential validity is probably also satisfied" in the name of public policy.[47] This article highlights the lack of uniformity in recognition of marriages. One would believe that if recognised in the place of marriage, that marriage would be recognised elsewhere. Seemingly not, and it is therefore not surprising that the law regarding recognition of foreign divorces is in such confusion. It is respectfully submitted that to refuse recognition to such marriages is not the duty of the court and is not only discriminatory but reeks of ignorance as to cultural practices elsewhere. This should be left to the legislature.

It has been shown that there is no certainty as regards the grounds upon which such a divorce will be recognised. It is somewhat of a lottery, the date the divorce was obtained will limit the grounds to one of the three pieces of legislation. As regard the different case law within each of these areas, which route a judge will follow is anybody's guess.

The one thing that can be stated with certainty regarding this area is that the current legislation leaves a lot to be desired and no doubt the oversights and indeed injustices, as demonstrated above, will be a playground for the courts and the uncertainty that existed in the 1980s is in no fear of resolving itself anytime soon.

Power correctly opines:

> Any recognition rule must negotiate the fine line between recognising valid divorces, without facilitating forum shopping, while simultaneously avoiding 'limping marriages.'[48]

Yet, in reality:

> Whatever the recognition rule, limping marriages have been created by the very existence of foreign divorces, so perhaps the courts ought to seek

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[46] Reed A., Conflict of Laws, "Non-recognition of transactional divorces", [1995] ILT 265. In the decision of Berkovits the refusal to recognise a transactional divorce by Jewish *get* led to the creation of a limping marriage. This decision, Reed observes, has far reaching implications for the Jewish and Muslim communities where there is extra–judicial divorce. The English legislation, namely the Family Law Act 1986 draws a distinction between overseas divorces which are obtained by means of proceedings and those obtained otherwise than by means of proceedings. The former is much stricter as it is based on domicile and in relation to these proceedings must begin and end in the same place. The current practice therefore is to refuse recognition to divorces obtained in England and therefore subject to UK laws, by any proceedings other than in a UK Court. This highlights the difficulty in reconciling jurisdiction by showing that the much of the problem stems from cultural divergences.

[47] John Murphy, "Rationality and Cultural Pluralism in the Non-Recognition of Foreign Marriages", 2000, Vol.49, International and Comparative Law Quarterly, p 643.

[48] Power C. and Shannon G., Practice and Procedure, The "Brussels 2" Convention, [2001] 2 IJFL pp 20–22.

the most appropriate basis for recognition despite the adverse consequences for some.[49]

[49] Power C., Case and Comment [2001] 3 IJFL.

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