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RESEARCH ARTICLE

Autonomy and prenuptial agreements in Ireland: a relational analysis

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Abstract

Unlike England and Wales, Ireland has not yet moved from the traditional common law rejection of prenuptial agreements. Nevertheless, similar policy concerns continue to be debated in both jurisdictions, particularly regarding the balance between autonomy and fairness concerns, and gender equity. In 2007, an Irish ministerial Study Group recommended limited recognition of prenuptial agreements, foreshadowing similar proposals by the Law Commission for England and Wales in 2014. However, the Irish recommendations were never implemented, despite sustained lobbying. This paper draws on relational theory to scrutinise the Study Group's proposals, identifying its core assumptions and their implications. The paper contends that Irish courts dealing with spousal agreements have tacitly accepted liberal conceptualisations of autonomy, which may lead to injustice. Furthermore, the Study Group's recommendations have been overtaken by events. Recent decisions on spousal agreements emphasise respect for party autonomy, without interrogating what this means. This could be problematic if applied to prenuptial agreements. Accordingly, the paper suggests modifications to the Study Group's proposals, to address relational concerns. In this regard, the paper speaks to the broader debate on family autonomy, and draws on comparative perspectives, including the recommendations of the Law Commission for England and Wales, and the Canadian experience.

Keywords: family law; prenuptial agreements; relational autonomy

Introduction

Prenuptial agreements have traditionally been considered void in Ireland, as they were regarded as encouraging marital breakdown.[1] Although this argument is weaker following the removal of the constitutional prohibition on divorce, other policy concerns remain, particularly in relation to the balance to be drawn between autonomy and fairness, and the gender impact of upholding agreements.[2] These concerns were addressed by a ministerial Study Group in 2007,[3] which recommended limited legislative recognition of prenuptial agreements in the light of social and economic changes.[4] However, the Study Group's recommendations were never implemented, notwithstanding sustained media and lobby group pressure.[5] Although legislative action seemed imminent in

[1] *Brodie v Brodie* [1917] 33 TLR 525. There are some limited exceptions to this broad rule, eg under the Succession Act 1965 and the Hague Protocol on the Law Applicable to Maintenance Obligations (Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations).

[2] For a discussion of the policy background, see LA Buckley 'Ante-nuptial agreements and proper provision: an Irish response to *Radmacher v Granatino*' (2011) 14 IJFL 3.

[3] Department of Justice, Equality and Law Reform *Report of the Study Group on Pre-nuptial Agreements* (Dublin: Government Publications, 2007) [Study Group].

[4] Ibid. Such changes included 'the rise in the average age of marriage, the greater wealth of many at the time of marriage, second marriages, and the increase in cohabitation' (ibid, p 41).

[5] The most prominent lobby group in practice has been the Irish Farmers Association, which has maintained a consistent media campaign and lobbied politically for legislation on prenuptial agreements. See eg J Reilly 'Seven out of ten farmers

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2015,[6] this now seems less likely, apparently on policy grounds.[7] However, the pressure to legislate has not abated.[8]

The Study Group's recommendations were broadly similar to the recent recommendations of the Law Commission for England and Wales.[9] The national contexts are somewhat different, primarily due to Irish constitutional requirements and the judicial recognition of prenuptial agreements in England and Wales in *Radmacher v Granatino*,[10] but also for demographic and social reasons.[11] However, there are also strong similarities between the two jurisdictions in terms of their legislative approaches to financial provision on divorce: both operate a discretionary system, involving the application of a broad fairness-type standard, based on the consideration of similar factors.[12] These similarities suggest that the Study Group's recommendations, though now dated, may be regarded as complying with international 'best practice' – or at least, that they are unlikely to be bettered, should the Irish legislature eventually choose to act.

In this context of sustained lobbying and parallel developments, it is opportune to review the Study Group's proposals in more detail than they have received to date. Accordingly, this paper addresses five key questions. First, how does the Study Group seek to balance autonomy and fairness in the prenuptial agreement context? Secondly, in addressing this balance, how does the Study Group conceptualise autonomy? Thirdly, what core assumptions does the Study Group make? Fourthly, are these core assumptions still valid? Fifthly, if the core assumptions are no longer (fully) valid, are there ways to address any concerns?

In addressing these questions, the paper particularly draws on relational autonomy theory. The enforcement of marital agreements is commonly justified by the need to respect autonomy,[13] yet the exact meaning of this has not yet been properly analysed in relation to family property agreements in Ireland. Rather, the Irish courts have, in this context, tacitly accepted liberal conceptualisations of autonomy and contractual bargaining, which may lead to injustice. This has significant implications for the enforcement of prenuptial agreements. The paper therefore explores whether these concerns might be ameliorated through the adoption of a more relational approach. In discussing how this issue might usefully be addressed, the paper speaks to the broader debate on family autonomy, and draws on comparative perspectives, including the recommendations of the Law Commission for England and Wales, and the Canadian experience.

The first section of the paper briefly outlines some key issues in the autonomy debate, with particular reference to liberal and relational theorisations. The second section outlines the Irish legal context for the enforcement of family property agreements in the marital breakdown context, and highlights relevant aspects of the constitutional background, statutory position and case-law to date.[14] The third section outlines the key proposals of the Study Group, and compares these with

want "prenup" agreements' (Dublin: *Irish Independent*, 26 April 2015); O Ryan 'Farmers want prenups to protect them from "gold diggers"' (Dublin: *thejournal.ie*, 24 September 2015), available at http://www.thejournal.ie/farmers-prenups-2348495-Sep2015/ (last accessed 30 September 2016).

[6]M O'Regan 'Now Coalition considers pre-nup agreement law' (Dublin: *Irish Independent*, 25 April 2015).

[7]In response to continuing media and lobby group pressure, the Minister for Justice, Equality and Law Reform referred the issue of prenuptial agreements for a policy evaluation, but a recent media report suggests that further legislative action has now been postponed in the light of unspecified 'policy concerns'. See M O'Regan 'Pre-nuptial law ditched due to legal problems' (Dublin: *Irish Independent*, 26 June 2016).

[8]Ibid.

[9]Law Commission *Matrimonial Property, Needs and Agreements* (Law Com No. 343, 2014) [Law Commission].

[10]*Radmacher v Granatino* [2011] 1 AC 534.

[11]Key differences include population size and ethnic composition, labour market participation rates for men and women, family type, and the rate of divorce. For the most recent UK population data, see Office for National Statistics, available at https://www.ons.gov.uk/. Statistical data for Ireland is available from the Central Statistics Office, http://www.cso.ie/en/; some key figures are discussed below in relation to the Irish social context.

[12]The Irish provisions on financial provision on divorce, contained in the Family Law (Divorce) Act 1996 (the 1996 Act), s 20, are broadly similar to those contained in the Matrimonial Causes Act 1973, s 25.

[13]See eg B Hale 'Equality and autonomy in family law' (2011) 33 JSWFL 3.

[14]For this paper, all judgments of the Irish Circuit Court, High Court, Court of Appeal and Supreme Court, relating to the enforcement or variation of separation agreements and consent orders on divorce and judicial separation, were examined.

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the proposals of the Law Commission for England and Wales. It then discusses and evaluates the underlying assumptions of the Study Group, particularly, but not exclusively, from a relational perspective. The fourth section focuses on strengthening the Study Group's proposals, in the light of the issues raised; some of the suggestions may also apply to the Law Commission's proposals. The paper concludes that the Study Group's proposals could be considerably enhanced through mechanisms that would promote a more relational approach to autonomy concerns and buttress provision requirements in relation to meeting family needs.

1. Conceptions of autonomy: liberal and relational perspectives

In classical liberal theory, individuals are seen as rational and atomistic actors, who make agreements based on considerations of personal utility. Enforcing agreements therefore not only respects personal decision making, but enhances overall efficiency, since (in the absence of duress or undue influence) individuals would not agree to bargains that they did not regard as personally beneficial. Accordingly, state intervention with personal bargains should be minimised. These views are taken further by neoliberalism, which emphasises the role of the individual as a responsible citizen-actor. Stressing the individual's duty to make responsible, self-reliant choices, neoliberalism effectively assigns accountability for disadvantageous bargains to the poor choice of the affected party. Again, the individual is perceived as rational, informed and emotionally disengaged, able to make considered choices based on personal utility, and morally culpable for failing to do so.[15]

These views have been strongly challenged by relational theorists, including many feminists, who have highlighted the effects of economic inequalities, socialised gender roles, race, class, cultural location and connection on the development of personal preferences and bargaining capacities.[16] The actor is conceived as embedded in his or her cultural, social, economic and familial role, with a wide range of considerations, including emotions and relational connections, which may influence personal choices.[17] Feminists have also highlighted the significance of gender in personal decision making: women generally earn less and are excluded from the labour market for long periods, or have their earning capacity reduced, because of their social role as caregivers.[18] This affects their ability to bargain. Accordingly, ascribing poor economic decisions to 'personal choice' ignores the gendered nature of the bargaining context, and the impact of economic and social power disparities, as well as the pressures that may derive from other relational contexts. In this view, liberalism and neoliberalism screen out the effects of structural conditions, and help to maintain and foster a context of gender disadvantage.[19]

The effects of social, cultural and economic context on bargaining capacities are wide-ranging, particularly in the family context. For instance, a Muslim woman might come under community or family pressure to permit financial claims on divorce or succession to be finalised under Sharia norms.[20]

Cases were identified by searching the most comprehensive case databases, BAILII, available at http://www.bailii.org/, and JUSTIS, available at http://www.justis.com/, from the removal of the constitutional ban on divorce in 1995 to 31 October 2016. Three additional unreported cases in the research period were identified from other sources (specified herein). Separation agreements were generally irrelevant to judicial decision making prior to the introduction of divorce, because the existence of a valid separation agreement precludes an application for judicial separation: *O'D(P) v O'D(A)* [1997] IESC 10; [1998] ILRM 543.

[15]For a detailed discussion of liberal, neoliberal and relational views of autonomy, see LA Buckley 'Relational autonomy and choice rhetoric in the Supreme Court of Canada' (2015) 29 CJFL 251 at 256.

[16]Ibid; C Mackenzie and N Stoljar (eds) *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford: Oxford University Press, 2000) p 4.

[17]Ibid.

[18]MA Fineman 'Cracking the foundational myths: independence, autonomy, and self-sufficiency' in MA Fineman and T Dougherty (eds), *Feminism Confronts Homo Economicus* (Ithaca, NY: Cornell University Press, 2005) p 179.

[19]A Dobrowolsky 'Introduction: neo-liberalism and after?' in A Dobrowolsky (ed) *Women and Public Policy in Canada: Neo-liberalism and After?* (Toronto: Oxford University Press, 2009) p 14.

[20]See eg AC Korteweg 'The Sharia debate in Ontario' (2006) 18 ISIM Review 50; F Ahmed 'Remedying personal law systems' (2016) 30 Int'l J L Pol'y & Fam 248 at 257.

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Family pressure may also be brought to bear in the prenuptial context: for example, in Ireland, there is anecdotal evidence of parental reluctance to transfer the family farm to a child without a prenuptial agreement.[21] In the event of marital breakdown, a parent might feel obliged to pay over the odds in the interests of child welfare or to maintain a family connection – or indeed, might accept a low offer to maintain smooth family relationships. Other commonly relevant factors include a history of domestic violence, significant economic disparities (for instance, where one party is bargaining from a position of urgent economic need), and the different emotional pressures or vulnerabilities that might arise in the prenuptial or marital breakdown contexts.[22] On marital breakdown, the parties may experience child welfare concerns or extreme personal distress, anger or bitterness arising from the end of the relationship. In the prenuptial context, pressures might include external family pressures, requests to demonstrate disinterested affection, or fear that a wedding might be cancelled. Intending spouses may also be unduly optimistic in their expectations of marriage duration, or may assume that agreements will never be enforced in practice.[23] Additionally, since many couples now cohabit and may have children before marriage, relational pressures arising from patterns of abuse, economic disparities and concern for children may also arise at the premarital stage.

Although relational theory highlights these contextual factors, it does not consider them to preclude autonomous decision making.[24] Rather, it emphasises that autonomy is far more nuanced and complex than liberal and neoliberal theories presume.[25] Decision making is not necessarily self-interested or atomistic, and may be influenced by context, personal connections and interdependencies, though not necessarily in a negative way. Individuals may have non-economic priorities, and may opt to forgo material gain for this reason. Relational theory respects such decisions, and does not suggest that either emotion or the application of emotional pressure, as such, necessarily precludes autonomy.[26] The question is whether such pressures, connections and power imbalances impact on the individual to such an extent as to undermine significantly the quality and freedom of personal decision making.[27] This is not always a question of being completely autonomous or non-autonomous; like capacity,[28] autonomy is often a matter of degree and context, since the level of autonomy the individual exerts may vary with the issue and the parties. Nor does relational theory necessarily require that agreements should be entirely void or voidable, as under traditional legal doctrines such as duress or undue influence,[29] although it may certainly be used to broaden the understanding and operation of traditional doctrines.[30] Many legislative systems do not accord decisive weight to spousal agreements, but simply specify that courts should have regard to them when making financial orders. In the marital breakdown context, therefore, it may be possible simply to reduce the weight accorded to a questionable agreement, rather than according it decisive weight or setting it completely aside. Such 'discounting' may be considered appropriate where one spouse was effectively exploited or pressured into signing an unfair bargain, or lacked any real choice in terms of how he or she responded to a particular situation.

[21]See eg S O'Carroll 'Could pre-nups help Ireland's young farmers?' (Dublin: *thejournal.ie*, 12 December 2013), available at http://www.thejournal.ie/pre-nups-farming-1219519-Dec2013/ (last accessed 30 September 2016).

[22]For a full discussion of relevant factors, see Buckley, above n 15, at 263–267.

[23]H Mahar 'Why are there so few prenuptial agreements?' (Discussion paper no. 436) (Cambridge, MA: Harvard, 2003), available at http://www.law.harvard.edu/programs/olin_center/papers/pdf/436.pdf (last accessed 30 September 2016).

[24]J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011) p 47.

[25]Buckley, above n 15, at 263–267.

[26]Ibid.

[27]Ibid, at 266; J Llewellyn and J Downie (eds) *Being Relational: Reflections on Relational Theory and Health Law* (Vancouver: UBC Press, 2012) p 4.

[28]E Jackson *Medical Law: Text, Cases and Materials* (Oxford / New York: Oxford University Press, 2006) p 193.

[29]S Thompson *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice* (Oxford: Hart Publishing, 2015) p 143.

[30]See eg the decision of the Supreme Court of Canada in *Rick v Brandsema* [2009] 1 SCR 295, 2009 SCC 10, discussed below.

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Relational theory also highlights the relevance of timeframing. Liberal theory assumes that respect for autonomy means upholding the parties' agreement, but at what point, and in what form, is this agreement to be assessed? Marriage is a continuing relationship, where family roles, responsibilities and expectations may change and be reformulated over time, as circumstances change. It is not always possible to anticipate such changes: hence, many jurisdictions have developed doctrines on significant changes in circumstances. However, where there are no significant unexpected circumstances, but the parties have in effect gradually modified their agreement and expectations (often over many years, through their conduct or by informal agreement), the courts may be powerless to intervene. Ideally, a regular review process would lead to such modifications being recorded in a revised documentary agreement, but this may not often happen in practice. From a relational perspective, therefore, respect for autonomy should not simply mean upholding a formal written agreement, which may reflect only the parties' expectations at a specific moment in time, but should include a consideration of the lived reality of their relationship.[31] Again, an element of discounting may be appropriate where the parties have clearly mutually modified their original expectations.

Overall, relational theory suggests a more thorough and detailed scrutiny of agreements where it appears that significant relational or contextual pressures may have undermined the real degree of choice exerted by either party. However, it also suggests that agreements based on genuine and constructive relational concerns (such as a desire to maintain a relationship) should be respected, even where they are disadvantageous.[32] It also suggests that courts should view an agreement in the context of the whole relationship, and take account of changing roles and expectations.

2. The context for prenuptial agreements in Ireland

(a) Social context

Until recently, Ireland was a very homogenous and conservative society. Divorce was constitutionally prohibited until 1995, and Ireland still has a relatively low incidence of marital breakdown.[33] The anti-divorce campaign in both constitutional referenda on the issue was largely driven by strong Catholic lobby groups, which emphasised the potential impact of divorce on the financial security of families.[34] Accordingly, the constitutional amendment eventually adopted stipulated that divorce could not be granted unless 'proper' provision was made for the spouses and any dependent children of the marriage.[35] A key issue therefore is the extent to which this constitutional criterion is compatible with personal choice, in the form of prenuptial agreements.

Ireland's socio-religious background has also contributed to a particular model of the family. The Irish Constitution is fundamentally patriarchal,[36] with a repeated emphasis on different gender roles within marriage, society and the labour market.[37] Although women's employment participation has

[31]For a detailed analysis of the contractual implications of changes in the relational context over time, see Thompson, above n 29, pp 142–146.

[32]Buckley, above n 15, at 265–266.

[33]In 2014, the most recent year for which data is available from the Central Statistics Office, there were 2629 divorces granted in Ireland. This represented a drop of over 10% from the 2013 figure. See website available at http://www.cso.ie/en/releasesandpublications/er/mcp/marriagesandcivilpartnerships2015/ (last accessed 4 October 2016). However, according to figures released by the Courts Service, applications for divorce and judicial separation rose in 2015, by 9% and 11% respectively: Courts Service, *Annual Report 2015* (Dublin: Stationery Office, 2016) p 43.

[34]J Burley and F Regan 'Divorce in Ireland: the fear, the floodgates and the reality' (2002) 16 Int'l J L Pol'y & Fam 202.

[35]Art 31.3.2.iii of the Irish Constitution.

[36]See M Eichler *Family Shifts: Families, Policies, and Gender Equality* (Toronto: Oxford University Press, 1997) ch 1, for a discussion of models of the family and their implications. Patriarchal features of Irish law include a repeated constitutional emphasis on different gender roles and standards within marriage, society and the labour market: see Arts 40.1, 41.2.1 and 41.2.2 of the Irish Constitution.

[37]Arts 40.1, 41.2.1 and 41.2.2 of the Irish Constitution.

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increased considerably over recent decades,[38] specialised gender roles within the family remain commonplace.[39] It is therefore particularly important in the Irish context to consider autonomy and fairness issues from a gender perspective, given the impact of traditional caring roles on women's financial security and independence.

(b) Constitutional context

Ireland is unusual as a constitutional dimension affects the enforceability of spousal agreements. This is because of the pre-eminent constitutional role given to the (marital)[40] family. Art 41 of the Irish Constitution states that the family possesses 'inalienable and imprescriptible rights, antecedent and superior to all positive law';[41] the state must therefore 'guard with special care the institution of Marriage, on which the family is founded, and … protect it against attack'.[42] In relation to marital agreements, Art 41 might be variously interpreted as prohibiting any term that pre-empted marital breakdown (the traditional common law approach, buttressed in Ireland by the special constitutional position of marriage), or as requiring courts to respect internal family decisions (to the extent of upholding separation agreements that the court deems inappropriate). This second approach is supported by the recognition in Irish constitutional law of an implicit right[43] to marital privacy[44] and a right to family[45] as well as individual autonomy.[46] The right to make family decisions without unwarranted state intervention is a consistent theme in the case-law and has resulted in the rejection of legislation conferring automatic spousal property entitlements.[47] However, the right has generally been used in the negative sense, to restrain unlawful state interference with family decision making, and (to date) there has been no case alleging a positive right to financial self-regulation.[48]

Constitutional rights may be restricted for the common good, conceptions of which may change over time.[49] Hence, the courts may have a mandate to amend or overrule settlements or agreements that undermine the public interest. The right to make family decisions free of state interference is also implicitly limited by the explicit constitutional requirement that 'proper' provision must be made on

[38]In 2014, 55.9% of women participated in the labour market, compared with 65.7% of men. This represents a fall from the peak employment rates in 2007, when 60.6% of women were in employment, compared with 77.5% of men: CSO *Women and Men in Ireland 2013* (Dublin: Stationery Office, 2013), available at http://www.cso.ie/en/releasesandpublications/ep/p-wamii/womenandmeninireland2013/employmentlist/employment/#d.en.65815 (last accessed 4 October 2016). However, it is a huge rise from previous decades. For instance, '[a]pproximately seven in every ten women in the 35–44 and higher age groups were engaged in home duties in 1986' (CSO Ireland: Census 86 Vol 6, *Principal Economic Status and Industries* (Dublin: Stationery Office, Pl 9819) p 12).

[39]For example census data from 2006 showed that 64% of unpaid caring work was done by women: see website available at http://www.cso.ie/en/media/csoie/releasespublications/documents/labourmarket/2009/carersq32009.pdf (last accessed 20 December 2016). For a further discussion of Irish women's care responsibilities, see K Lynch and M Lyons, 'The gendered order of caring', in U Barry (ed) *Where Are We Now: New Feminist Perspectives on Women in Contemporary Ireland* (Dublin: New Ireland Press, 2008) p 163; J O'Riordan, F O'Hadhmaill and H Duggan 'A consideration of love labour in informal caring: family caring in Ireland' (2010) 18 IJS 82.

[40]The Irish Supreme Court has held that the constitutional provisions relating to the family are limited to the marital family only: *State (Nicolau) v An Bord Uchtála* [1966] IR 567 at 643.

[41]Art 41.1.1°.

[42]Art 41.3.1°.

[43]The Irish Supreme Court has held that rights under the Irish Constitution are not confined to those specifically enumerated, but include 'unenumerated' rights implicit in those that are enumerated or flowing from the 'Christian and democratic nature of the State': *Ryan v Attorney-General* [1962] IR 294 at 312.

[44]*McGee v Attorney General* [1974] IR 269.

[45]*Re Article 26 and the Matrimonial Home Bill 1993* [1994] 1 IR 305.

[46]*Re Ward of Court (withholding medical treatment) No. 2* [1996] 2 IR 79.

[47]*Re Article 26 and the Matrimonial Home Bill 1993* [1994] 1 IR 305 at 326 (Finlay CJ).

[48]But see *Re Tilson, Infants* (No. 3) [1951] 1 IR 1, where a prenuptial agreement regarding the religious upbringing of the children of the marriage was upheld.

[49]*Ryan v Attorney-General* [1962] IR 294 at 312.

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divorce;[50] for instance, the Supreme Court recently emphasised that 'It is … for the court to be itself satisfied that the provision, whether present or future, is proper and the court, therefore, has a separate role in being so satisfied even where the parties have come to an agreement about financial provision of one sort or another.'[51] Hence, the duty to make full disclosure of resources has a constitutional aspect in Irish law, since this impacts on the court's ability to evaluate whether proper provision is being made.[52]

Overall, this suggests that post-nuptial agreements, at least, should be upheld unless the constitutional 'proper' provision standard is violated, although this particular point has not been argued. The question of whether the same applies to prenuptial agreements remains open, since, by definition, the couple were unmarried and hence not a 'family' in constitutional terms at the time of the agreement.[53] To date, Ireland has not moved from the traditional common law view that prenuptial agreements are void on public policy grounds, insofar as they contemplate marital breakdown.[54] It has been contended that the removal of Ireland's constitutional prohibition on divorce sufficiently alters the public policy context to permit prenuptial agreements.[55] Although the Study Group advocated limited statutory recognition for prenuptial agreements, as discussed below, it emphasised that such agreements must be reviewable to ensure constitutional compliance.[56] However, as previously noted, these recommendations have not yet been implemented.

(c) Legislative context

Notwithstanding the constitutional emphasis on family authority, Irish legislation places little emphasis on self-determination in relation to financial arrangements on marital breakdown. Provision under the Family Law (Divorce) Act 1996 is discretionary, and very extensive orders are permitted to make 'proper' provision.[57] However, although proper provision must be evaluated in the light of specified factors,[58] there is little guidance on what the term actually means, though it has been held to incorporate principles of fairness.[59] Nor can spouses define proper provision for themselves as there is no power to opt out of the statutory regime. Legal advisors must inform spouses of the possibility of mediation,[60] but mediation is not obligatory; nor is a mediated agreement binding on the court. The only explicit statutory recognition of private agreements is that a court must 'have regard' to an existing separation agreement, but as noted early in the case-law, the legislation gives no indication of how much 'regard'

[50]Art 31.3.2.iii of the Irish Constitution; *LB v Ireland, The Attorney General and by order PB* [2008] 1 IR 134 [50].

[51]*In the matter of the Judicial Separation and Family Law Reform Act, 1989, AA and BA and In the matter of the Family Law (Divorce) Act, 1996 BA and AA and by order CD* [2014] IESC 49 [4.2] (Clarke J).

[52]Ibid [4.3].

[53]For a contrary argument, see R Aylward, *Pre-nuptial Agreements* (Dublin: Thomson Round Hall, 2006) p 169.

[54]*Brodie v Brodie* [1917] 33 TLR 525; *Wilson v Carnley* [1908] 1 KB 729.

[55]Aylward, above n 53, pp 6, 65; Buckley, above n 2 .

[56]Study Group, above n 3, p 20. It was hoped that this, combined with procedural safeguards to prevent emotional exploitation (Study Group, p 85), would avert the 'feminisation of poverty' (Study Group, p 62). The Study Group considered that dependent spouses could be protected by retaining judicial discretion to vary the terms of the agreement or to give it only such weight as the court felt proper (Study Group, p 63).

[57]1996 Act, s 20(1).

[58]Although 'proper' provision is not constitutionally defined, s 20(2) of the 1996 Act lists numerous criteria for consideration, including financial and caring contributions, need and the effect of marital roles on each spouse's earning capacity.

[59]There is no *statutory* yardstick of equality or fairness, but the Supreme Court has implemented a standard of fairness in practice, with some reference to equality and partnership as a means of gauging that fairness (*T v T* [2002] 3 IR 334). Most recently, the Supreme Court has defined 'proper provision' as being 'reasonable in all the circumstances' (*YG v NG* [2011] 3 IR 717 [25] (Denham CJ)), which does not particularly advance understanding. In this paper, 'proper' provision is roughly equated with a fairness standard insofar as it incorporates ideas of fairness and reasonableness and prescribes a substantive threshold for provision on divorce. However, proper provision may also encompass other principles.

[60]The Judicial Separation and Family Law Reform Act 1989, ss 5–6, and the 1996 Act, ss 6–7, require family law practitioners to inform their clients of the possibility of mediation.

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must be had.[61] There is no statutory requirement that the court must have regard to the terms of a prior consent separation order, though in practice the courts generally do so.[62]

(d) Structural context

Notwithstanding the lack of a statutory emphasis on agreement, structural considerations have contributed to a strong, informal pressure to settle cases out of court. The lack of specialised family courts[63] means that the general courts typically set aside a few days a month to deal with extensive lists of family cases.[64] In practice, this leads to long delays, and cases may drag on for many months, with partial hearings on various dates.[65] Court facilities are generally poor: for instance, there are typically no designated waiting or consultation areas.[66] For many litigants, the length of the process[67] may lead to considerable pressure to settle cases, which is then exacerbated by the inhospitable nature of the bargaining environment. From this perspective, the quality of party autonomy must be seriously questioned, particularly since information on the broader legal picture is generally lacking,[68] making clients reliant on professional expertise. Obviously, these structural concerns relate primarily to divorce and judicial separation settlements, as negotiations on prenuptial agreements are conducted in a different environment. However, as discussed below, the little jurisprudence Ireland has on family autonomy essentially arises from the separation agreement and divorce settlement context, making the environment in which marital breakdown negotiations are conducted highly relevant.

Further, Ireland's current system for financial provision on marital breakdown dates only from 1989, with the enactment of the first legislation on judicial separation.[69] For this reason, combined with Ireland's small population, and the fact that most separation and divorce cases are heard in the Circuit Court (where there are few written judgments),[70] the Irish jurisprudence on marital breakdown is relatively undeveloped. This comparative dearth of case-law has been exacerbated by the operation, until recently, of a strict in camera rule, which meant that family law cases were heard in private and largely went unreported. Although the in camera requirement has now been modified,[71] it leaves a serious legacy issue, as there is little reported case-law on spousal agreements.

(e) Jurisprudential context

Given its traditional policy concerns, it is unsurprising that Ireland has almost no jurisprudence on prenuptial agreements.[72] However, it has a reasonable number of written judgments on the weight

[61] *MG v MG* [2000] 7 JIC 2503. In *SN v PO'D* [2010] 1 ILRM 317, the Supreme Court noted that the phrase 'have regard to' 'is an expression of a very broad discretion', and that the exercise of the duty 'will depend on a review of all the circumstances' (ibid, [31] (Fennelly J)). However, in *YG v NG* [2011] 3 IR 717, discussed in detail below, the Supreme Court held that a pre-existing separation agreement should generally be enforced, as long as it represented 'proper' provision, thus greatly strengthening the level of judicial 'regard' for such agreements and reducing the court's previous wide discretion.

[62] See eg *RG v CG* [2005] IEHC 202. In the Supreme Court decision of *SN v PO'D* [2010] 1 ILRM 317, Fennelly J seemed to treat a consent judicial separation as if it were a separation agreement, in terms of the statutory obligation to 'have regard' to the terms of the settlement.

[63] At the time of writing, the only specialised family courts are in Dublin, though there are plans to expand this.

[64] See eg C Coulter *Child Care Reporting Project: Final Report* (Dublin: Child Care Reporting Project, 2015) [Coulter *Final Report*] p 36, citing 100 family cases listed for hearing in a single day; C Coulter *Family Law in Practice* (Dublin: Clarus Press, 2009) p 125.

[65] C Coulter *Child Care Reporting Project: Interim Report* (Dublin: Child Care Reporting Project, 2013) p 24.

[66] Ibid, p 32.

[67] Coulter *Final Report*, above n 64, p 52.

[68] LA Buckley 'Irish matrimonial property division in practice: a case study' (2007) 21 Int'l J L Pol'y & Fam 48 at 49.

[69] The Judicial Separation and Family Law Reform Act 1989.

[70] In 2015, there were 4314 applications for divorce, of which only 24 were made in the High Court. There were also 1419 applications for judicial separation, of which only 35 were made in the High Court (Courts Service, *Annual Report 2015*, above n 33, p 43).

[71] Liability and Courts Act 2004, s 40(3); Civil Liability and Courts Act 2004 (S 40(3) Regulations) 2005, SI 2005/337.

[72] One of the few exceptions, *In Re Tilson (Infants) (No 3)* [1951] 1 IR 1, dealt with a prenuptial agreement regarding only the religious upbringing of the children of the marriage, and was upheld on this basis. However, agreements contemplating

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to be accorded to separation agreements and settlements, which offer some insights into judicial conceptualisations of family financial autonomy.[73] These insights are limited, as there has been little discussion in the case-law of why marital agreements should be upheld.[74] The general approach appears to be one of balancing normal contractual principles (with implicit assumptions of autonomy) with the constitutional and statutory standard of proper provision (fairness), with regard also to the desirability of certainty and finality.[75] Changes in the parties' circumstances are considered as an aspect of proper provision, but other issues that might impact on either autonomy or fairness have received little attention. These silences are themselves indicative. For instance, there is no reference in Irish case-law to systemic gender disadvantage in the negotiation process, even though this is likely to be greater in discretionary marital property systems where spouses have no defined bargaining endowments.[76] Nor is there any reference to the implications of marital agreements for gender equity and the so-called 'feminisation of poverty'.[77] There is no definitive judgment analysing what is meant by volition or capacity in the marital agreement context, or discussing the emotional or financial pressures that may apply on marital breakdown.[78] This may be because the constitutional and legislative emphasis on proper provision has encouraged a practical concentration on that aspect: in simple terms, the cases have not presented an autonomy-based argument but have focused on what is essentially a narrative of fairness.[79]

Thus, in *K v K (No. 2)*,[80] the High Court emphasised that proper provision must exist or be made at the time of divorce, and that this is less likely if a separation deed is very old. In that case, a separation deed concluded nearly 20 years previously was found not to constitute proper provision in the light of the circumstances prevailing at trial.[81] The separation agreement was not involuntary; nor had there been any unforeseeable change in circumstances, yet the Court's focus was on the proper provision standard.

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future marital breakdown have been rejected as null and void: *Marquess of Westmeath v Marquess of Salisbury* (1830) 5 BL 1 339.

[73]This paper focuses on cases concerning prenuptial or post-nuptial agreements (including separation agreements and consent orders) dealing with property division or spousal support on marital breakdown. Most cases examined concerned the weight to be accorded to separation agreements in subsequent divorce proceedings, or in applications to vary the agreed provision. The paper does not analyse the variation of previous non-consensual orders, as the focus is on autonomy rather than variation as such.

[74]Indeed, there is no statutory definition of a separation agreement, and it seems that not all agreements relating to marital breakdown will be recognised as separation agreements within the meaning of the legislation: see eg *O'M v O'M* [2004] 5 JIC 0502.

[75]Irish divorce legislation does not provide for a 'clean break', but the Supreme Court has now held that, where resources permit, the court should strive for as much finality as possible under the circumstances: *T v T* [2002] 3 IR 334 at 385–386.

[76]Mnookin contends that 'the primary impact of the legal system is not on the small number of court contested cases, but instead on the far greater number of divorcing couples outside the courtroom who bargain in the shadow of the law': RH Mnookin 'Divorce bargaining: the limits on private ordering' in J Eekelaar and SN Katz (eds) *The Resolution of Family Conflict: Comparative Legal Perspectives* (Toronto: Butterworth & Co (Canada) Ltd, 1984) p 364. Legal entitlements or 'endowments' are therefore not only normative, but may impact on bargaining outcomes, although, as Mnookin emphasises, they are just one factor that may influence the outcome (Mnookin, p 372).

[77]The only real recognition of gender equality issues is contained in the Supreme Court's emphasis on respect for home making contributions in *T v T* [2002] 3 IR 334, discussed in LA Buckley '"Proper provision" and "property division": partnership in Irish matrimonial property law in the wake of *T v T*' (2004) 7 IJFL 8.

[78]This contrasts with the Irish law of nullity of marriage, where the courts have taken a very broad view of the pressures that might undermine the validity of an apparent consent to marriage: see *N (orse K) v K* [1985] IR 733.

[79]In *LB v Ireland* [2008] 1 IR 134, the husband's challenge to (inter alia) the constitutionality of aspects of the 1996 Act, particularly the section on proper provision, was rejected. However, the judgment focused on the constitutional provisions regarding property rights and the state's duty to protect the institution of marriage, rather than autonomy as such.

[80]*K v K (No. 2)* [2003] IR 326.

[81]O'Neill J considered that although the couple had lived apart for many years they were not 'disconnected', as the wife remained as primary carer for their children until she was over 50 years old. He also considered that the basis for the husband's later success was already in place by the time the marriage broke down, and was created during the marriage; the husband's career had also benefited from his wife's childcaring role.

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More recently, in *G v G*,[82] where the Supreme Court finally addressed the weight to be accorded to a separation agreement when making provision on divorce, it repeatedly emphasised that proper provision is for the Court to determine, and that 'the statutory duty prevails' over the parties' agreement.[83] However, the Court also emphasised the significance of autonomous decision making, stating that a separation agreement 'should be given significant weight'[84] and is 'a significant factor'[85] because it is 'entered into with consent by both parties'.[86] This applies particularly where the agreement was intended to constitute a full and final settlement, as a clean break is 'a legitimate aspiration'.[87] No comment was made on the nature of consent or autonomy (as these issues did not arise on the facts).[88]

This is possibly the greatest lack in the Irish jurisprudence in this area – there is no analysis of the nature of consent or agreement in the family context, or of why either should matter, other than a policy emphasis on finality. There appears to be no judicial notice of the pressures that may apply in the marital breakdown context or of the possible vitiation of consent, outside the traditional contractual and equitable doctrines.[89] Quite apart from the financial and emotional pressures that may apply, the highly pressured environments in which family negotiations are frequently conducted may contribute to agreements that fail to reflect either what a spouse truly wants or what he or she might hope ultimately to obtain in court. Can such an agreement truly be considered voluntary? This point has never been raised in the case-law, perhaps because pressure of this kind does not fit within the accepted autonomy framework. Alternatively, it may simply be easier to raise an argument on the point of proper provision than to try to expand existing contractual and equitable doctrines (at least prior to *G v G*).

The nearest approaches to judicial analysis of why agreements should be respected are contained in two unreported judgments of the High Court, both given by Abbott J. In *JC v MC*,[90] Abbott J stated that spouses might go further than they were willing to do, financially or otherwise, to achieve finality. The benefits of closure were not only financial, but could also be non-material, such as 'physically, emotionally and even spiritually clear personal spaces' for the parties.[91] The emphasis here is more on policy than on autonomy, though the standard liberal view of autonomy and volition is implicit.

In *SJN v PCO'D*,[92] Abbott J went further and summarised the interest of divorcing spouses and of the public in upholding 'full and final settlement' clauses as being based on four factors: commercial and economic reasons; the sharing and avoidance of risk; the avoidance of emotional turmoil and unresolved conflict due to uncertainty and the risk of continued litigation; and the avoidance of further costs. He emphasised that 'relieving social legislation' should not inhibit the pursuit of commercial goals, and that the court was obliged to consider not just the quantitative aspects of the asset division, but also its 'qualitative aspects', relating to matters such as the architecture and sharing of risk.[93] Abbott J commented that 'those who bear the most risk should enjoy the greater reward in economic terms', and that the 'full and final settlement' clause was a means of establishing this 'basic

[82] *YG v NG* [2011] 3 IR 717.

[83] Ibid, [25] (Denham CJ).

[84] Ibid, [22(i)] (Denham CJ).

[85] Ibid, [22(iv)] (Denham CJ).

[86] Ibid, [22(i)] (Denham CJ).

[87] Ibid, [22(ii)] (Denham CJ).

[88] The remainder of the judgment focused on what might amount to a significant change in circumstances, and the scope of proper provision.

[89] Although some judicial notice has been taken of power disparities in the English case-law post-*Radmacher*, Thompson notes that 'unless fairly extreme', these 'do not appear to weigh heavily with the courts when considering whether a prenup should be considered unfair' (Thompson, above n 29, p 29).

[90] *JC v MC* (HC, 22 January 2007; *Irish Times* 19 February 2007; additional details in I Clissman *Trends in Divorce: A Review of Recent Case Law* (Law Society of Ireland CPD Seminar: 'Divorce – Ten Years On', Dublin, 27 February 2007).

[91] Clissman, above n 90, p 69.

[92] *SJN v PCO'D* (HC, 29 November 2006; details taken from Clissman, above n. 90, and the report of the Supreme Court appeal (*SN v PO'D* [2010] 1 ILRM 317)).

[93] Clissman, above n 90, p 50.

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fairness'.[94] Emotionally, it was natural and desirable that spouses might agree to a 'full and final settlement' clause to guarantee stability and security for themselves and their children, and this was legitimate provided there was no undue influence. Abbott J therefore concluded that 'very considerable weight indeed' should be given to 'full and final settlement' clauses.[95]

Abbott J's judgment clearly views respect for the parties' agreement as an aspect of fair or proper provision, and again emphasises policy concerns. The closest the judgment comes to an analysis of autonomy lies in the implicit assumption that the parties have consciously and voluntarily chosen to prioritise what is of most personal concern, and that this should be respected. Other than the brief reference to undue influence, there is no recognition that the emotional and financial pressures of the separation context may undermine autonomy.[96]

The limited judicial discussion of autonomy is of concern because of the increasing emphasis the Irish courts appear to be placing on agreements. This is most evident in the judicial discussion of whether a change of circumstances is required to vary an agreement, or is merely a relevant factor.[97] Obviously, requiring such a change places a greater premium on autonomy. In *MG v MG*,[98] Judge Buckley looked for guidance to Canadian jurisprudence on the variation of orders.[99] Citing the Canadian decision in *Willick v Willick*,[100] Judge Buckley noted the emphasis of L'Heureux Dubé J that it is difficult to foresee future circumstances[101] and that 'sufficiency' of change 'must be defined in terms of the parties' overall financial situation'.[102] Furthermore, the objective foreseeability of a change does not necessarily mean that it was actually contemplated. L'Heureux Dubé J had concluded that a change must be based on 'a material change of circumstances … such that, if known at the time would likely have resulted in different terms'.[103] Judge Buckley also cited L'Heureux Dubé J's judgment in *G.(L.) v B.(G.)*,[104] where (citing Wilson J in the previous Canadian decision of *Pelech v Pelech*)[105] she emphasised both individual responsibility and autonomy, and the objectives of the (Canadian) Divorce Act 1985 as a measure by which to gauge the weight to be accorded to an agreement. Judge Buckley concluded that there were 'good reasons why a court should be slow to alter existing agreements'; these included the protection of children and the promotion of finality and a clean break in appropriate cases, particularly where the parties were 'well-educated intelligent persons, who have had the benefit of competent legal advice before entering into a separation agreement which is of recent date'.[106] Accordingly, there should be a 'sufficient change' to merit intervention.[107] This clearly assumes autonomy since it is expected that persons who are 'intelligent' and 'independently legally advised' will make well-informed, personally beneficial decisions. As previously noted, this is not necessarily the case in practice.

[94]Ibid, p 47.

[95]Ibid, p 48.

[96]A similar approach appears to prevail in other cases where courts comment, even briefly, on enforcing agreements. For instance, in *CO'C v DO'C* [2009] IEHC 248, Dunne J simply stated that 'the courts would uphold agreements freely entered into at arms [sic] length by parties who were properly advised'.

[97]See eg *RG v CG* [2005] IEHC 202; *B v B* (HC, 8 December 2005); *McM v McM* [2006] IEHC 451.

[98]*MG v MG* [2000] 7 JIC 2503 (Circuit Family Court).

[99]It must be noted that the Canadian provisions on varying financial provision cited by Judge Buckley (Divorce Act 1985, s 17) have no equivalent in Ireland, so that the exercise to this extent must be doubtful.

[100]*Willick v Willick* 119 DLR 4th 405.

[101]Ibid, at 438.

[102]Ibid, at 442.

[103]Ibid, at 460.

[104]*G(L) v B(G)* 127 DLR 385.

[105]*Pelech v Pelech* (1987) 38 DLR 641 at 676.

[106]*MG v MG* [2000] 7 JIC 2503 at 1.

[107]On the facts, the only 'sufficient change' was a significant increase in property values, and the court awarded the husband a small share of the proceeds of the family home, if it should ever be sold. The parties' divorce, the husband's remarriage and subsequent unemployment were not deemed 'unforeseeable'.

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More recently, in *G v G*,[108] the Supreme Court confirmed the need for a significant change of circumstances before an agreement that otherwise constituted proper provision could be revisited.[109] The Court emphasised that, without a change in circumstances from the time of the agreement, 'then *prima facie* the provision made by the Court would be the same, as long as it was considered to be proper provision'.[110] This is not quite giving primacy to the agreement, as the agreement must be evaluated to ensure it constitutes proper provision. Though not explicitly stated, this evaluation must presumably occur in relation to the time of the agreement as well as the time of the hearing. Simply upholding an agreement without further enquiry unless there were changed circumstances could not discharge the court's duty to ensure proper provision. Hence, spouses are not given full autonomy, as they must still meet the required standard. However, if an agreement amounted to proper provision when made, it will be presumed still to do so unless otherwise proven. This gives the parties some measure of certainty and finality and respects their autonomy. However, the Supreme Court placed no emphasis on the need to examine the quality of the initial agreement, and made no reference to the difficult emotional context in which many such agreements are concluded.

G v G was decided in the wake of the seminal decision of the Supreme Court of England and Wales in *Radmacher v Granatino*,[111] although it made no reference to that case and dealt with separation rather than prenuptial agreements. In *Radmacher*, the Supreme Court of England and Wales rejected as obsolete the long-standing public policy rule against agreements providing for future separation. Instead, the majority held that a pre- or post-nuptial agreement should be given effect where it was freely entered into by both parties, with a full appreciation of its implications, unless in the circumstances prevailing at the time of trial it would be unfair to hold the parties to their agreement. Effectively, therefore, the ruling introduced a presumption in favour of enforcing prenuptial agreements, and placed the onus on the spouse challenging the agreement to demonstrate why it should not be upheld. This was justified by the need to respect individual autonomy and avoid paternalism.[112] Although the majority noted the possibility of power imbalances,[113] thus adverting to some relational concerns, it held that the parties must generally be assumed to be capable of looking after themselves.[114] This very limited relational analysis contrasts with the dissenting opinion of Lady Hale, who emphasised the potential effect of changing circumstances and family decisions over time.[115] Noting that spouses 'often compromise their individual best interests'[116] for relational reasons, she also emphasised the different power dynamic applicable in the prenuptial as compared to the commercial context,[117] as well as the broader implications of upholding prenuptial agreements for gender equality.[118]

Arguably, the Irish Supreme Court in *G v G* drew on the strong policy emphasis of the majority in *Radmacher* on autonomy and the vindication of personal choice, while failing to explore these considerations in a meaningful way: the entire autonomy analysis (outlined previously) was contained in two sentences. The Irish Supreme Court made no reference whatever to bargaining inequalities or relational context, falling short of even the limited level of acknowledgement of these concerns by the majority in *Radmacher*. Unfortunately, this lack of analysis has had serious consequences, as later courts have effectively interpreted the Supreme Court's judgment to mean that the parties'

[108] *YG v NG* [2011] 3 IR 717.

[109] Ibid, [22(vi)] (Denham CJ).

[110] Ibid, [22(v)] (Denham CJ). A relevant change in circumstances might include the impact of the economic downturn, if this has made the original orders unviable (*CQ v NQ* [2016] IEHC 486), though this is not to be understood as a 'rogue's charter' (*MO'B v BO'B* [2012] IEHC 621 [13] (Abbott J)).

[111] *Radmacher v Granatino* [2011] 1 AC 534.

[112] Ibid, [78].

[113] Ibid, [42].

[114] Ibid, [51].

[115] Ibid, [175].

[116] Ibid.

[117] Ibid, [137].

[118] Ibid.

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agreement now sets the parameters for what is considered 'proper'. Hence, courts are unwilling to intervene with the agreed level of provision unless one party is clearly left in need.[119] Thus, in *F v F*,[120] Abbott J stated that he would have given 'decisive weight' to the agreement but for the fact that the husband, on the facts, required a small capital sum to enable him to move to a new location.[121] Similarly, in *DT v FL*,[122] Abbott J held that 'The … agreement … should be given almost decisive weight subject to the exception or exceptions indicated by the particular needs arising from the failure of the settlement to address them … It would seem now that where there is a prior agreement the judgment is not "too harsh" if needs are met.'[123] Accordingly, the court could no longer give weight to considerations such as home making contributions or the loss of career opportunities.

It appears therefore that the level of protection afforded by the constitutional proper provision standard has been significantly eroded. This increases the scope for personal decision making, but also reduces the extent to which the proper provision requirement might be used to address issues of timeframing, since what is 'proper' is now assessed by reference to the agreement, rather than the parties' lived reality.[124] This makes it even more imperative to ensure that the agreement truly represents the voluntary choice of both parties. It is troubling that, at present, in Ireland, there is no requirement that the parties to a separation agreement had any legal advice at all. For instance, in *F v F*, the parties had made an oral agreement, which they later reduced to writing without any legal assistance. The agreement was upheld as it 'represented a fair attempt by the parties in layman's terms to finalise their financial affairs', even if it was 'not an agreement which lawyers would draft in the circumstances'.[125] In *DT v FL*, the wife had received long-distance advice from a legal practitioner she had never met. There were significant shortfalls in the advice received (for instance, she was not told that the entitlement to 15 years of maintenance under Dutch law was about to be reduced to 12 years). Again, however, the agreement was upheld, as Abbott J was not convinced that the wife could have obtained a better agreement even with superior advice, in the legal context at the time.[126] Commenting that the wife 'knew well what she was doing',[127] Abbott J held that the agreement was not to be set aside, though he found that it was inadequate in certain respects and accordingly ordered additional provision.[128]

In one sense, if the court is satisfied that the parties made a free and well-informed decision, particularly one that accords with accepted standards for provision, the issue of independent advice becomes less relevant. It is presumably this point that Abbott J intended to make in *DT v FL*, notwithstanding the questionable quality of the legal advice in that case. However, the lack of any requirement for independent advice makes it more difficult to evaluate how well informed the parties were, or the

[119]In fact, *G v G* explicitly left the question more open than this. While the Supreme Court emphasised that the agreement should receive 'significant' weight, it also stressed the need to make proper provision, and the duty to consider all the circumstances carefully, including any changes in circumstances. It specifically mentioned a variety of factors (not all needs-related) that might impact on the level of provision, notwithstanding the agreement, while stating that this list was not intended to be conclusive: *YG v NG* [2011] 3 IR 717 [22].

[120]*F v F* [2012] IEHC 620.

[121]Ibid, [11].

[122]*DT v FL* [2012] IEHC 612.

[123]Ibid, [6].

[124]Since the courts have not yet addressed the issue of prenuptial agreements, it is unclear whether the courts will evaluate the agreed provision in the light of the parties' continuing relationship, even though the emphasis on the need for provision to be evaluated as at the date of the order should in principle allow for this.

[125]*F v F* [2012] IEHC 620 [11]. Significantly, the autonomy of the parties was not challenged in this case, and both parties had acted upon the agreement.

[126]*DT v FL* [2012] IEHC 612 [10].

[127]Ibid.

[128]These orders were partially overturned by the Court of Appeal, though no written judgment is available: T Healy, 'Businessman must pay ex-wife €5,000 monthly maintenance and €300,000 lump sum' (Dublin: *Irish Independent*, 4 December 2015).

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degree of pressure they were under. There is therefore an increased risk of non-autonomous agreements being upheld, as well as unfair ones.

Overall, it appears that autonomy is increasingly prized in Irish divorce law. Although proper provision remains the primary criterion, this is now interpreted as incorporating respect for separation agreements. The change is clearly driven by policy concerns regarding certainty and finality. Although these are legitimate concerns, the increased emphasis on autonomy is disturbing, given the lack of analysis of that concept. To date, the explanation of autonomy is implicitly based on traditional liberal assumptions of rationality, capacity and volition. While the High Court has noted that priorities may be non-financial, there has been no acknowledgement of the pressures of marital breakdown or of the other relational concerns that may affect autonomy. This is in marked contrast to the judicial approach adopted in other contexts, such as nullity of marriage, which is highly developed in Irish law.[129] The restrictive approach to autonomy and the narrow range of policy concerns currently considered by the courts may lead to agreements being upheld irrespective of whether they were truly voluntary, or whether upholding them is socially beneficial. This danger is particularly acute given the new necessity to demonstrate significantly altered circumstances before an agreement will be reviewed. Given the curtailment of proper provision arguments in *G v G* (as subsequently interpreted), a move to pleading autonomy issues may be the next logical step for claimants. It is significant that *DT v FL* involved a (failed) challenge to the agreement itself, based on the lack of adequate advice, which allegedly undermined the quality of the plaintiff's decision making.

3. The Study Group's proposals

The Study Group's recommendations, made in 2007, were broadly similar to the subsequent proposals of the Law Commission for England and Wales, made in 2014. This is particularly noteworthy given that the Law Commission's report was the culmination of several years of public consultation and policy evaluation, whereas the Study Group was allowed only three months to make its recommendations, which did not permit public consultation.[130]

Both sets of proposals advocated recognition for prenuptial agreements, though the Study Group's recommendations did not go as far as those of the Law Commission. The Law Commission recommended that pre- or post-nuptial agreements providing for the financial consequences of future marital breakdown should not be void on public policy grounds.[131] Following *Radmacher*, such agreements would be upheld unless they were unfair in the circumstances applying at trial.[132] In addition, the Law Commission recommended legislating for 'qualifying nuptial agreements', a new class of agreement that would be fully enforceable (subject to procedural safeguards) without reference to substantive fairness, provided only that spouses could not contract out of meeting each other's needs.[133] The Study Group, on the other hand, felt that prenuptial agreements should be a relevant factor for consideration in making financial orders under the marital breakdown legislation, but should not, and could not, be dispositive. Hence, the Study Group recommended legislating for the legal recognition of prenuptial agreements, rather than for their enforceability,[134] or even presumptive enforceability. Its recommendation thus fell short of the *Radmacher* position affirmed by the Law Commission; nor did the Study Group recommend a system of binding agreements.

[129]For instance, in *N (orse K) v K K* [1985] IR 733, Finlay CJ stated that marriage required a 'fully free exercise of the independent will of the parties' that is not affected by 'external pressure or influence'. The majority of the Supreme Court identified force of habit, relational influence, ignorance and trauma as factors that might combine to prevent independent decision making, even without explicit pressure.

[130]Study Group, above n 3, p 9. Expert input was, however, invited.

[131]Law Commission, above n 9, at para 4.29.

[132]Ibid, at para 6.4.

[133]Law Commission, above n 9, at para 1.34.

[134]Ibid, p 66. The Study Group also recommended that prenuptial agreements should be reviewable in the event of death: ibid, p 77.

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This difference in approach was largely due to the different national contexts in which the two sets of recommendations were made: Ireland had no equivalent of *Radmacher*, and is constrained by constitutional criteria that do not apply in England and Wales. However, this dissimilarity apart, both reports placed a strong emphasis on (effectively identical) procedural safeguards.[135] Thus, both required that the parties to the prenuptial agreement should have received independent legal advice;[136] that there should be no material non-disclosure;[137] and that the agreement should be signed at least 28 days in advance of the wedding.[138] Unlike the Law Commission,[139] the Study Group made little reference to autonomy concerns,[140] other than the recommended procedural safeguards: the Study Group's report includes just a brief statement that normal contractual doctrines would continue to apply.[141] Also unlike the Law Commission,[142] the Study Group did not stipulate that the parties could not contract out of meeting needs, since it felt this was inherent in the constitutional proper provision requirement.[143]

The Study Group therefore made two key assumptions. First, it assumed that legal advice, disclosure and timing requirements, combined with traditional contractual doctrines, are sufficient safeguards for autonomy. Secondly, it assumed that the constitutional requirement of proper provision would operate as a bulwark against unfairness, avoiding any risk of the 'feminisation of poverty' effect experienced elsewhere.[144] This second assumption was reasonable in the light of the family law jurisprudence at the time. Nevertheless, both assumptions have proved problematic.

The main problem with the Study Group's first assumption is that it is based on a very limited conception of autonomy, premised on a general assumption of free choice and volition. The Study Group does not ask whether traditional approaches to contract, based on liberal ideology, are appropriate in the family context; unlike the Law Commission,[145] it makes no reference to cultural, community and relational pressures, or to bargaining inequalities, and the implications of these factors in the family context. This is important because of the Irish courts' very narrow approach to autonomy in the family financial agreement context: as noted previously, the case-law on separation agreements makes no reference to the emotional pressures that may apply in marital breakdown, or to the presence of systemic gender disadvantage in the negotiation process – points that have received at least some recognition in the case-law in England and Wales.[146]

This is significant because of the increased emphasis on upholding agreements following *G v G*, and the consequent erosion of the proper provision standard (which also undermines the Study

[135]Note however that the procedural safeguards recommended by the Law Commission related to qualifying nuptial agreements only, and did not apply to other marital agreements.

[136]Study Group, above n 3, p 85; Law Commission, above n 9, at paras 6.125, 6.142.

[137]Law Commission, above n 9, at para 6.91; Study Group, above n 3, p 85 (though the Study Group reference is to 'full' rather than 'material' disclosure).

[138]Study Group, above n 3, p 85; Law Commission, above n 9, at para 6.65. There are minor distinctions: the Study Group recommended that the agreement should be 'in writing', whereas the Law Commission considered it should be by deed (at para 6.36) and should include a specific acknowledgement by the parties that they are aware of the effects of the deed (at para 6.40).

[139]The Law Commission noted the potential for relational pressure (Law Commission, above n 9, at paras 5.76, 6.162), although it ultimately failed to address the question of external or third party pressure, since disclosure and procedural safeguards are not really an answer to this: see the discussion at paras 5.28–534 of the report). Ultimately, the Law Commission concluded that the argument for certainty was stronger than argument for autonomy (Law Commission, above n 9, at para 5.35).

[140]The Study Group addressed the issue of family autonomy (above n 3, p 48), but did not address the issue of relational power imbalances.

[141]Study Group, above n 3, p 85.

[142]Law Commission, above n 9, at para 5.84.

[143]Study Group, above n 3, pp 18–19, 62.

[144]Ibid.

[145]Law Commission, above n 9, at paras 5.76, 6.162.

[146]See however Thompson's comments on case developments since *Radmacher*, highlighting the high level of power disparity now apparently required for an agreement to be regarded as unfair: Thompson, above n 29, pp 27–30.

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Group's second assumption). If, as subsequent case-law suggests, the presence of a separation agreement means that the scope of proper provision is now restricted to need, there is clearly more potential for unfairness than previously thought. While the Supreme Court's emphasis on need might be thought to prevent the risk of poverty at least (and the gendered implications of this), this is not necessarily the case, since need – like fairness – clearly has a subjective element. Furthermore, as suggested in *G v G* and subsequently in *DT v FL*, 'need' in this context may be restricted to those needs not already dealt with in the agreement (with no reference as to whether the agreement dealt adequately with such needs).[147] That the interpretation of need can vary significantly is clear: it appears that the orders made by Abbott J in *DT v FL* were significantly reduced on appeal, although no written judgment is available.[148] The courts may even distinguish between 'real need' and 'need', as suggested in *Radmacher*,[149] further reducing the effectiveness of the constitutional safety net.

The increased emphasis on agreements has been particularly troubling in the separation context due to the lack of mandatory safeguards. As outlined previously, agreements have been upheld where the parties did not receive legal advice, or where the advice received was inadequate.[150] Procedural safeguards such as those proposed by the Study Group and Law Commission are by no means foolproof: even adequate legal advice does not really address underlying power disparities. Similarly, cut-off dates for the agreement may reduce pressure immediately before the wedding, but only by shifting the pressure to another, quite close, date.[151] Furthermore, wedding arrangements will commonly be in place long before the 28-day deadline, leading to potentially significant financial losses in the event of cancellation. Disclosure requirements, though more substantive in nature, may also be contentious in practice: how significant must a non-disclosure be to merit intervention?[152] However, while these requirements do not guarantee autonomy, they offer some protection against the most blatant abuses of power, and a guide towards best practice.

The lack of mandatory protections in Ireland is particularly significant since (as in England and Wales) the list of factors to which the court must have regard in making financial orders is not exhaustive. The Irish courts may therefore opt to follow *Radmacher*, and recognise prenuptial agreements as a valid consideration in exercising their statutory discretion.[153] Should this happen, and should the courts then follow the separation agreement jurisprudence, Ireland could end up with the worst of both worlds, with prenuptial agreements accorded significant weight, without any statutory protections.

The courts might, of course, take a different approach to prenuptial agreements, even if they were to recognise them. As Lady Hale suggested in *Radmacher*, there may be strong policy grounds for treating prenuptial agreements differently from post-nuptial agreements.[154] At the marital breakdown stage, many of the issues have already crystallised, and the parties have a feel for their resources and capacities, as well as their needs and responsibilities. Arguably, therefore, much less foresight may be needed than for a prenuptial agreement. The emotional context will also differ greatly. Hence, it might be reasonable to approach the two kinds of agreement differently. However, there is no hint of such a dual approach in current legal discourse, which has so far emphasised the need to 'uphold agreements', without reference to the type of agreement concerned.

[147] *G v G* noted that the 'new' or 'changed' needs of a spouse could be a relevant circumstance for consideration (*YG v NG* [2011] 3 IR 717[22]), or that improved resources might enable the meeting of a 'different' need (ibid, at [34]). However, in *DT v FL*, Abbott J considered that *G v G* required him to give the agreement almost decisive weight, 'subject to the exception or exceptions indicated by the particular needs arising from the failure of the settlement to address them' (*DT v FL* [2012] IEHC 612 [6]).

[148] See Healy, above n 128.

[149] *Radmacher v Granatino* [2010] UKSC 42 [81], though the reference to 'real need' was brief and unexplained.

[150] *Radmacher* itself may be critiqued on this basis: see the comments of Thompson, above n 29, p 28.

[151] This was noted by the Law Commission, above n 9, at paras 6.44–6.45.

[152] The Study Group did not analyse this point, referring only to 'full disclosure' (Study Group, above n 3, p 85), but the Law Commission offered some analysis of its proposed 'material disclosure' requirement (Law Commission, above n 9, at paras 6.77–6.88).

[153] See Buckley, above n 2, for a full discussion of this possibility.

[154] *Radmacher v Granatino* [2011] 1 AC 534 [162].

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The current lack of statutory protections is also troubling, since existing contractual doctrines (such as duress, undue influence and unconscionability) are often inadequate to protect intending spouses who have been subjected to unfair pressures. Duress, in Irish law, is a mutable concept, with no single standard applicable.[155] Generally, however, the pressure of difficult circumstances is insufficient for duress;[156] some element of threat or coercion is required, which goes beyond the 'normal' bargaining process.[157] Similarly, the doctrine of undue influence does not address power disparities, pressures and unequal bargaining power arising from causes other than relational exploitation (for instance, economic inequality). This applies particularly where the plaintiff is considered to have had a viable alternative to signing the agreement.[158] Nor is there any presumption of undue influence in the case of engaged parties;[159] indeed, Thompson notes the possibility that gendered power disparities are so normalised that courts may regard them as insufficiently 'exceptional' to merit intervention.[160] The most potentially useful doctrine is that of unconscionability, which has received a broader application in Ireland than in England and Wales.[161] Thus, a transaction may be set aside where one party was at a serious disadvantage (financial, emotional or otherwise),[162] and the other party took unfair advantage of this.[163] However, it is unclear how far personal bargaining capacity must be affected, or what factors will be taken into account in assessing this, or indeed, how improvident the transaction must be. Further, as Thompson notes, the ability of contractual doctrines to address prenuptial power disparities may be limited by their commercial origins.[164] This is borne out by evidence of extreme reluctance in some jurisdictions to intervene with marital agreements, such as divorce settlements, on grounds of unconscionability.[165]

4. Strengthening the recommendations

Faced with gaps in the 2007 recommendations, and in the face of apparent policy concerns, is there any way to strengthen the Study Group's proposals? It seems unlikely that a longer period of consultation would lead to significantly different recommendations (on the evidence of the substantially similar Law Commission report): if anything, the Study Group's proposals might rightly be regarded as more moderate than those of the Law Commission. However, the gaps identified above may still be addressed to some extent, though it should be noted that, in attempting to do so, the Irish legislature faces possibly unique constitutional constraints.

(a) Promoting relational approaches

(i) Statutory vitiation grounds

It is clear from other areas of law that Irish judges are capable of taking a nuanced approach to autonomy,[166] and it might be possible to encourage the development of similar understandings in the

[155]See eg the comments of Henchy J (dissenting) in *N (orse K) v K* [1985] IR 733 at 745.

[156]*DB v O'R* [1988] IEHC 24.

[157]For a full discussion of the application of duress in the prenuptial agreement context, see Thompson, above n 29, p 109.

[158]Ibid, p 115 (discussing undue influence in the prenuptial agreement context).

[159]*Zamet v Hyman* [1961] 1 WLR 1442.

[160]Ibid, at 119 and 122, citing R Auchmuty 'The rhetoric of equality and the problem of heterosexuality' in L Mulcahy and S Wheeler (eds) *Feminist Perspectives on Contract Law* (London: Routledge, 2005) p 51.

[161]D Capper, 'The unconscionable bargain in the common law world' (2010) 126 LQR 403.

[162]For instance, in *McGonigle v Black* (HC Circuit Appeal, 14 November 1988), Barr J noted that the vendor had been disadvantaged by 'a combination of bereavement, inability to cope, loneliness, alcoholism and ill-health', which made him vulnerable to manipulation.

[163]For a full discussion of the Irish law on unconscionable transactions, see H Biehler, *Equity and the Law of Trusts in Ireland* (Dublin: Roundhall, 6th ed, 2016) p 818.

[164]Thompson, above n 29, p 128.

[165]PE Bryan 'The coercion of women in divorce settlement negotiations' (1996–1997) 74 Denv UL Rev 931 at 933; Thompson, above n 29, p 127.

[166]For example, the approach to autonomy in the nullity context is highly relational, as noted above.

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marital agreement context. For instance, it may be possible to legislate in a way that encourages greater judicial emphasis on relational points, without permitting agreements to be set aside due merely to the presence of vulnerabilities.

In this regard, the Law Commission's proposals do not have much to offer. The safeguards it recommends are already included in the Study Group's report, and the Law Commission's greater normative commitment to enforcing prenuptial agreements led it, if anything, to reduce the scope for intervention.[167] However, it is instructive to examine Canadian developments.[168] Recent legislation in British Columbia (BC),[169] although largely informed by neoliberal perspectives on the value of upholding agreements,[170] nevertheless provides that agreements may be wholly or partly set aside on grounds of defective process or significant unfairness.[171] Section 93(3) of the Family Law Act 2011 states:

> (3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
> (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
> (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
> (c) a spouse did not understand the nature or consequences of the agreement;
> (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.

This statutory list of vitiating factors is exhaustive. Much of it reflects previous Canadian case-law, which is mirrored in the Irish context (for instance, decisions on material non-disclosure, and existing contractual principles). Section 93(3)(c) might address such concerns as an inability to understand the language of the agreement or its legal significance; this last might well be addressed by adequate professional advice. This subsection may therefore not add much to a requirement that professional advice be received, as recommended by both the Study Group and the Law Commission, although it could incorporate some additional elements.

However, s 93(3)(b) is of particular interest, both in Ireland and in England and Wales, as it directly implements the decision of the Supreme Court of Canada in *Rick v Brandsema*.[172] In that case, the

[167]The Law Commission recommended that the presumption of undue influence should not apply to qualifying nuptial agreements: Law Commission, above n 9, at para 6.29. The Law Commission noted that no such presumption exists in any event as between spouses but feared that claims of undue influence might in any event become a 'disproportionate obstacle to … enforceability' (Law Commission, above n 9, at para 6.21).

[168]Although Ireland and Canada are both common law jurisdictions with a similar legal heritage, there are some significant structural differences. Unlike Ireland, Canada distinguishes between marital property and spousal support, and the legislative and jurisdictional aspects of each are separate, due to Canada's federal structure. Marital property is dealt with at provincial level, usually through equal sharing regimes, while spousal support on divorce is dealt with at federal level. This has consequences for autonomy (since the default position of equal sharing in relation to property confers a significant bargaining endowment) and for the courts' willingness to uphold family property agreements (since the right to spousal support still applies). The power to self-regulate on family property issues makes unconscionability a key doctrine in the Canadian context, though it has played a much less significant role to date in Irish family law. For a more detailed discussion of the Canadian family property system, see Buckley, above n 15.

[169]Family Law Act, SBC 2011 (2011 Act), c 25.

[170]R Treloar and S Boyd 'Family law reform in (neoliberal) context: British Columbia's new Family Law Act' (2014) Int'l J L Pol'y & Fam 77.

[171]2011 Act, s 93(a).

[172]*Rick v Brandsema* [2009] 1 SCR 295, 2009 SCC 10.

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wife challenged the provisions of a separation agreement on the grounds that her husband had knowingly exploited her mental instability and had deliberately concealed or undervalued assets to avoid paying her the full sum to which she was legally entitled under Canadian law. She therefore argued, inter alia, that the agreement should be set aside as unconscionable. Although her claim was originally rejected, the Supreme Court of Canada ruled, on appeal, that spouses in separation negotiations were under a duty to avoid exploitative behaviour, and that an agreement that significantly departed from the statutory objectives for spousal support could be unenforceable on grounds of unconscionability.[173] Significant non-disclosure could also justify judicial intervention, since this might affect a spouse's capacity for proper decision making.[174]

Rick is generally viewed as a refinement of the doctrine of unconscionability in the light of family concerns.[175] For instance, the Supreme Court of Canada emphasised the 'singularly emotional negotiating environment' and 'uniquely difficult context' of marital breakdown,[176] which made it essential to ensure that the negotiating process was 'free from informational and psychological exploitation'.[177] The Court therefore recognised the power disparities that might apply in marital breakdown negotiations, although it emphasised that vulnerability alone would not necessarily negate a valid agreement.[178] The Court did not require that the vulnerability of the exploited spouse should arise from the other spouse's conduct: in *Rick*, the husband was not to blame for his wife's instability, and in other cases, a spouse's vulnerability might arise from external factors, such as poverty or community pressure. What matters, therefore, is not the source of vulnerability, but the other spouse's exploitation of it. Furthermore, the Court held that the 'mere presence of professional assistance', such as legal advice, would not necessarily counteract such vulnerabilities, since much depended on the ability of the recipient of advice to benefit from it.[179] *Rick* therefore broadened the consideration afforded to relational factors, while retaining a normative commitment to non-exploitative agreements, the approach now reflected in BC law. Although *Rick* concerned a separation agreement, and different relational issues might arise in the prenuptial context, a broad principle that spouses or intending spouses should not deliberately exploit each other's vulnerabilities would be compatible with the recommendations of both the Law Commission and the Study Group.

BC's normative commitment to upholding contractual agreements is further reflected in a saving provision in s 93(4). This provides that the court may decline to intervene, notwithstanding a defect in process, 'if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement'. This appears rather harsh, since the standard for intervention is already quite high: non-disclosure must be significant, or a spouse must effectively have been exploited, or unable to understand what he or she was signing, or the common law criteria for voidability must be met. Presumably, the objective was to give the court power to uphold agreements where they were not substantively unfair, or where the court might have made substantively similar orders, had a case been contested. While this may reduce litigation, it seems to undermine the point of autonomous decision making. It is also questionable from a fairness perspective: where an appeal is argued under s 93(3), limited evidence on other matters may be presented.

Notwithstanding this arguably unnecessary addendum, an exhaustive list of vitiating factors offers potential benefits. It offers some security to those signing marital agreements, that their arrangements will not be too easily overset. However, it also recognises that agreements can be problematic, and directs the court's attention (and that of contracting parties and their advisors) to particular concerns.

[173]Ibid, at para 63.

[174]Ibid, at para 47.

[175]For a critique of this view, see R Leckey 'Common law of the family – reflections on *Rick v Brandsema*' (2009) 25 CJFL 257; C Rogerson 'Spousal support agreements and the legacy of *Miglin*' (2012) 31 Can Fam LQ 13 at 28, 30, 32.

[176]*Rick v Brandsema* [2009] 1 SCR 295, 2009 SCC 10 [1].

[177]Ibid.

[178]Ibid, [61].

[179]Ibid, [60].

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A key question is whether potential intervention should be restricted to instances of relational exploitation, as under s 93(3)(b). As drafted, the subsection has the merit of recognising a broader range of vulnerabilities, while not permitting them to overset agreements without more, arguably representing a balance between relational and reliance concerns. However, it does not capture situations where intending spouses come under pressure from third parties (such as family members), but where spousal exploitation is lacking. This might apply where either party's family applies pressure to protect an asset (such as a family farm), and might especially affect women from particular cultural backgrounds, who might be pressured to sign agreements in line with their community norms, as opposed to legal norms.

As previously noted, such situations would probably not fall within existing contractual doctrines. It might therefore be useful to specify an additional circumstance for intervention, where a spouse's independent will was overborne by external pressure. This might be difficult to prove, particularly where independent advice was received, but it would capture a particular relational concern. However, the mere presence of pressure would not be sufficient to overset an agreement. Relational autonomy permits the individual to make decisions based on relational concerns, and an individual might well prioritise family peace or community standing over substantive fairness. The question is whether the individual feels a real degree of choice in signing an agreement: if so, it is valid from an autonomy perspective, notwithstanding the associated costs. Again, therefore, a normative commitment to agreements remains possible, while upholding relational values.

(ii) Discounting agreements

A second means of strengthening the recommendations through enhanced recognition of autonomy relies on the particular way the Study Group proposed to recognise prenuptial agreements. The Study Group did not recommend that agreements should be presumptively dispositive, but rather that they should be specified as a factor to which the court could 'have regard' when considering what provision would be proper, in the same way as it might consider the numerous other (non-exhaustive) statutory factors.[180] The Study Group assumed that the court could adjust the weight accorded to a particular agreement in the light of the circumstances of the case, which might well include autonomy concerns. However, this assumption is weaker following *G v G*, since courts might take the same approach to prenuptial agreements as to separation agreements, bringing it closer to the *Radmacher* position in England and Wales.

A possible solution would be to specify that, when considering the weight to be attached to a prenuptial agreement, the court should consider a range of matters. Again, the BC example is illustrative. Section 93(5) of the 2011 Act provides that, even if an agreement cannot be impugned under s 93(3), the court may set aside or modify all or part of an agreement if satisfied that it is 'significantly unfair', on consideration of particular factors. These are the length of time since the agreement was made, whether the parties had intended the agreement to achieve certainty, and the degree to which the parties relied on the agreement.[181] The first of these may be relevant insofar as a very old agreement may have failed to cater for unforeseen contingencies or material changes in circumstances, thereby recognising a key policy concern in relation to prenuptial agreements. As noted previously, this factor has been recognised in Ireland in relation to separation agreements, and it has additional force in relation

[180]The Study Group recommended that prenups be listed in a separate section, to promote transparency: Study Group, above n 3, pp 71, 75.

[181]Section 93(5) in fact represents a significant departure from previous BC law, which allowed the court to intervene based on a broader consideration of fairness (Family Relations Act, RSBC 1996, c 128, s 65, now repealed). Furthermore, the new law requires 'significant' unfairness, setting quite a high threshold for intervention. Again, this emphasises the legislative desire to increase the ability of parties to rely on agreements, and restrain too ready a judicial intervention. For a further discussion of the 2011 Act, see A Laing and BC McCutcheon 'Marriage and cohabitation agreements: drafting and setting aside agreements under the FLA' Continuing Legal Education Society of British Columbia, January 2013, available at https://www.cle.bc.ca/PracticePoints/FAM/13-MarriageandCohabitation.pdf (last accessed 7 November 2016).

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to prenuptial agreements.[182] The second factor may be relevant if it is clear that the parties were mutually concerned to limit their marital liabilities or to retain assets for children from previous relationships. Again, some parallels may be drawn with the judicial emphasis on the parties' intentions where dealing with 'full and final settlement' clauses in the Irish separation agreement context,[183] and also with the decision of the Supreme Court of England and Wales in *Radmacher*. From this perspective, therefore, the first two clauses add little, though it might be useful to codify them. However, the third factor is of considerable significance, as it opens up the timeframe for evaluating autonomy, and permits an examination of the parties' lived reality. For instance, the parties might have agreed not to mingle their assets, but in practice may have opened joint bank accounts or acquired property as joint tenants, thereby demonstrating an implicit intention to depart from the original agreement. Alternatively, the agreement might have assumed that both parties would remain in paid employment and divide childcare responsibilities equally, whereas in practice one spouse may have left the workforce to care for the children of the marriage and support the other's career. This would demonstrate not only an unforeseen contingency (as under the first criterion),[184] but would render it unjust if the other spouse could nevertheless implement the agreement in full.[185] From the Irish perspective, therefore, it might be useful to have an equivalent provision, highlighting similar factors for the court to consider when evaluating the weight accorded to the agreement. It would also be compatible with the Law Commission's recommendations regarding marital agreements other than qualifying nuptial agreements, and with the principles in *Radmacher*.

(b) Strengthening 'proper' provision

Finally, the Study Group's proposals might be strengthened by focusing on the issue of proper provision, particularly the extent to which the court might discount or modify an agreement in the interests of substantive fairness. This resurrects the central concern when legislating for prenuptial agreements: what is the point of permitting agreements at all, if courts can simply override them? However, as noted above, the assumption that the courts could do just this underpinned the Study Group's proposals.

Given that this assumption has since lost much of its force, and the scope of proper provision has been eroded (in the separation agreement context at least), is there a way to reinforce the statutory and constitutional safety net, while still leaving room for self-regulation? The Law Commission recommended that an agreement should not be enforced to the extent that it would leave either party in need, though for practical reasons it did not propose to define this and recommended that the Family Justice Council should issue guidelines,[186] which it subsequently did.[187] Statutory criteria for provision would be problematic in Ireland, given the constitutional requirement of provision that '*the Court* considers proper'.[188] Accordingly, legislative attempts to fetter the court's discretion could be unconstitutional,[189] and even guidelines might be problematic. However, a rebuttable

[182]A separation agreement made many years ago may no longer provide proper provision at the time of divorce (see *K v K (No. 2)* [2003] IR 326, but also consider the effects of *YG v NG* [2011] 3 IR 717 in this regard). Equally, however, an agreement that has been relied on by both parties for many years may not readily be disturbed, particularly where there is a 'full and final settlement' clause: see eg *WA v MA* [2005] 1 IR 1.

[183]See *WA v MA* [2005] 1 IR 1 and the previous discussion of *SJN v PCOD* (HC, 29 November 2006).

[184]It is in fact doubtful whether a change of this kind would be sufficient grounds for variation under existing Irish case-law: see the previous discussion of *MG v MG* [2000] 7 JIC 2503 and *G v G* [2011] IESC 40.

[185]For a discussion of what s 93(5) might mean in practice, see Laing and McCutcheon, above n 185, at paras 4.1.12–4.1.13.

[186]Law Commission, above n 9, at paras 1.25, 5.82–5.83.

[187]Family Justice Council, *Guidance on 'Financial Needs' on Divorce* (June 2016), available at: https://www.judiciary.gov.uk/wp-content/uploads/2013/04/guidance-on-financial-needs-on-divorce-june-2016-2.pdf (last accessed 14 April 2017).

[188]Art 41.3.2.iii of the Irish Constitution (emphasis added).

[189]It is presumably for this reason that the current legislation takes the form it does: a non-exhaustive list of factors for consideration by the court, which does not fetter the court's discretion. The only explicit fetter on judicial discretion is the stipulation that the court shall make no order unless satisfied that it would be in the interests of justice to do so: Family Law Act 1995, s 16(5), and 1996 Act, s 20(5).

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presumption that a spouse should not be left in need, where this could be avoided, should be possible, as long as it was clear that the court's discretion prevailed.

Would this offer any advantage over the current proposals, given that *G v G* itself, and the subsequent case-law, also emphasise (albeit in the separation agreement context) that spouses should not be left in need? As previously discussed, the *G v G* formulation, as subsequently interpreted, apparently restricts the consideration of 'need' to those needs that have not been specifically addressed in the agreement, and does not consider the adequacy with which needs have already been addressed. Nor is the scope of 'need' clearly defined. From this perspective, a statutory presumption could be useful to prevent a race to the bottom.

There is of course a further consideration of whether modification of prenuptial agreements on substantive fairness grounds should be limited to considerations of need, or should encompass considerations of contribution and compensation. In this regard, distinctions may be drawn between separation and prenuptial agreements: is the *G v G* approach appropriate to the prenuptial context, given the significant differences between the two types of agreement? It is also necessary to be cautious in borrowing from other jurisdictions, where structural conditions and bargaining endowments may differ significantly. For instance, one of the reasons it is possible to contract out of marital property entitlements in Canada is because it is not possible to contract out of spousal support entitlements.[190] The Study Group's proposals did not discuss what the 'baseline' for provision should be (and indeed, could not do so, in the light of the court's overriding constitutional discretion). However, it should be possible to stipulate that the mere existence of a prenuptial agreement should not prevent the court from considering what provision would be proper in the light of the normal statutory factors, perhaps thereby preventing too slavish an application of *G v G*. Indeed, it might be useful here to draw on the alternative approach proposed by Lady Hale in *Radmacher*, and provide that the court should first consider what provision would be proper in the circumstances, and then consider the extent to which the prenuptial agreement should impact on that provision.[191]

Conclusion

The Study Group's recommendations, though in broad accord with the Law Commission's proposals, have been overtaken by events. The decision in *G v G*, in particular, has led to the worst of both worlds – an increased emphasis on party autonomy, without much interrogation of what that means; and an emphasis on upholding agreements, without any mandatory protections, other than whatever lingering meaning still attaches to 'proper' provision. These changes have had significant consequences in relation to separation agreements, and could be highly problematic if applied in relation to prenuptial agreements as well. From this perspective, if Ireland fails to legislate for the recognition of prenuptial agreements, the danger remains that the courts may recognise them anyway, as occurred in England and Wales in *Radmacher*, but without appropriate safeguards or any real policy analysis.

However, simply adopting the Study Group's existing proposals is not sufficient to address the problems identified. Procedural protections, though necessary, are inevitably limited in their scope and effect, and are unlikely to address the underlying relational issues that may impact on prenuptial bargaining processes. It is therefore vital to encourage courts to engage more meaningfully with autonomy concerns in the financial agreement context. A more relational approach would broaden the scope of judicial enquiry, without leading to agreements being too easily overturned on 'emotional' grounds or due to the existence of social or economic pressures. Such an approach could help to ameliorate serious injustice in appropriate cases, for instance, by setting aside or reducing the weight accorded to agreements that did not accord with the parties' lived reality, or which were exploitative. This would permit a normative commitment to autonomy, but in a more nuanced manner. The BC Family Law Act 2011 provides a useful model as to how this might be achieved through statutory means, with some suggested additions.

[190] *Miglin v Miglin* [2003] 1 SCR 303, 2003 SCC 24.

[191] See Buckley, above n 2.

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Legal developments since the Study Group's report require attention, particularly with regard to the reduced scope of 'proper' provision in the spousal agreement context, and the space left for the court to address considerations of need. Again, this is something that could be strengthened through appropriate statutory presumptions, and perhaps greater direction regarding the stage of the judicial decision making process at which a prenuptial agreement should be considered.

Amendments of the kind proposed might lead to an increased risk of litigation, since they offer disadvantaged parties the opportunity to challenge agreements. There is obviously a concern that this could undermine the whole point of prenuptial agreements, which is to give intending spouses a measure of control and certainty. However, it might equally be argued that giving spouses scope to challenge unfair or exploitative agreements is not only appropriate, but is essential for justice. Indeed, clarifying the grounds for challenging agreements might well reduce litigation, by preventing spurious claims. From this perspective, the proposals advanced here strike an appropriate balance between autonomy and fairness concerns.

Ultimately, if we decide to uphold prenuptial agreements in order to respect autonomy, we need to be sure that this is in fact what we are doing. Agreements that are heavily influenced by relational inequalities and exploitation are often lacking in genuine autonomy. This is something that we need to accept and address, insofar as we can, while still upholding the principle of self-determination. This does not require us to disregard all prenuptial agreements, but it does require us to be willing to see and deal with potential problems and injustice, as far as possible.

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