**Foreign Divorce Recognition and Residence: a Critical Analysis of *H v H***

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INTRODUCTION

Prior to the introduction of domestic divorce, Irish law allowed for the recognition of a foreign divorce pronounced in a country where either spouse was “domiciled” in the common law sense. This facilitated the recognition of the marital status of foreign domiciliaries, whilst also reinforcing the domestic principle of indissolubility of marriage and restricting opportunities for evasion. This recognition policy was enshrined in the Domicile and Recognition of Foreign Divorces Act 1986 for foreign divorces granted after 2 October 1986, and was effective as a matter of common law for foreign divorces granted before that date.

After the introduction of domestic divorce pursuant to the Family Law (Divorce) Act 1996, and the adoption of divorce jurisdiction rules based on the domicile or ordinary residence of either party,[[1]](#footnote-1) the Irish High Court held in 1999 in *McG v W* that the common law recognition criteria should mirror these jurisdictional rules.[[2]](#footnote-2) In allowing for the recognition of foreign divorces on grounds of *either* residence *or* domicile in the granting country, *McG v W* had the effect of liberalising Irish law on recognition of foreign divorces and bringing it into line with international norms.[[3]](#footnote-3) Following *McG v W* it was no longer necessary to demonstrate the more permanent connections embodied in common law notions of “domicile”;[[4]](#footnote-4) instead it would be enough to prove that one spouse resided in the granting country. This had the practical effect of reducing the incidence of “limping marriages” (marriages which are valid and subsisting in one country but not in another). However, a subsequent Irish High Court judgment[[5]](#footnote-5) cast doubt on the soundness of the reasoning in *McG v W* and the Irish law on recognition of foreign divorces fell into a state of uncertainty for more than a decade.

In 2015 in *H v H* the Irish Supreme Court was asked to determine if *McG v W* was correctly decided.[[6]](#footnote-6) This question of law had been complicated somewhat by the adoption in the interim period of the Brussels II *bis* Regulation.[[7]](#footnote-7) The Brussels II *bis* Regulation allowed for automatic recognition of EU Member State divorces, and introduced new jurisdictional rules (in substitution for those laid down in the Family Law (Divorce) Act 1996).

The Supreme Court in *H v H* held (by a majority of 3:2) that *McG v W* was *incorrectly* decided, thereby confirming that recognition of non-EU divorces depended entirely on domicile. Mere residence in the granting country would not justify recognition in Ireland. It followed that the anachronistic divorce recognition criteria of the indissolubility era were to remain applicable.

The Supreme Court was unanimously of the view that the existing law on recognition of foreign divorces was fundamentally flawed and in urgent need of reform,[[8]](#footnote-8) but the majority thought that any reform must be implemented by the Oireachtas.[[9]](#footnote-9) Dunne, Clarke and Hardiman JJ. (“the majority”) were of the opinion that the doctrine of separation of powers precluded any judicial expansion of the common law grounds for recognition following the enactment of the Domicile and Recognition of Foreign Divorces Act 1986. Clarke J. (with whom Hardiman J. concurred) also expressed particular concern as to the uncontrolled retrospectivity of a judicial expansion of the divorce recognition criteria, preferring a more nuanced legislative solution. O’Donnell J. dissenting (with whom Denham C.J. concurred) emphasised the human cost of the existing regime (insofar as it compounded the misery of marital breakdown) and the silence of the Oireachtas in the face of repeated calls for legislative intervention.[[10]](#footnote-10) O’Donnell J. also highlighted the irrationality of the continued application of restrictive domicile-based recognition rules, following the introduction of domestic divorce and the State’s participation in the Brussels II *bis* Regulation.[[11]](#footnote-11)

In this article, it is argued that the dissenting judgment of O’Donnell J. is preferable to the approach adopted by the majority. However, insofar as the minority approach is anchored in English common law developments, it is submitted that O’Donnell J. ought to have given more emphasis to the House of Lords judgment in *Indyka v Indyka[[12]](#footnote-12)* and less to the earlier English Court of Appeal judgment in *Travers v Holley*.[[13]](#footnote-13) In following *Travers v Holley*, O’Donnell J. overstated the need for symmetry between jurisdiction and recognition criteria and ultimately arrived at a test which is logically indefensible.

FACTS AND LEGAL BACKGROUND TO *H v H*

The Supreme Court judgments give relatively little detail as to the underlying facts in *H v H*; however, it is clear that the case concerns an entirely regular English divorce obtained by an Irish woman in 1982 at a time when she was a long-term resident in England. The question of recognition arose many years later when the woman in question returned to Ireland and petitioned the Irish courts for a decree of divorce and financial relief, and sought a declaration that her English divorce was not entitled to recognition in Ireland because she was not domiciled in England at the date of institution of the English proceedings.

The applicant wife sought to rely on the law as laid down by the Irish Supreme Court in *W v W*.[[14]](#footnote-14) In *W v W* the Supreme Court had ordained that divorces granted prior to 2 October 1986[[15]](#footnote-15) should be recognised if either spouse was domiciled in the granting state at the date of institution of proceedings. This marked a departure from the traditional common law position which insisted on the divorce being granted in the jurisdiction of the common domicile but viewed the wife’s domicile as being dependent on the husband’s and, in substance, therefore, made recognition contingent on the husband being domiciled in the granting state. In *W v W* the Supreme Court accepted that the concept of dependent domicile had not been carried over by the 1937 Constitution (insofar as it offended the art. 40.1 equality guarantee). If the dependent domicile doctrine were stripped out and the common domicile doctrine were left intact, this would have resulted in a much more restrictive recognition regime than that which had heretofore applied (one which required both spouses to be independently domiciled in the granting state – and one which could not countenance any divorce recognition where spouses had different domiciles). In order to avoid this outcome, the Supreme Court in *W v W* determined that the common law should be amended so that the domicile of either spouse in the granting state would be sufficient to support recognition. This approach chimed with the rule laid down in s. 5(1) of the 1986 Act for divorces granted after 2 October 1986 and it therefore had the merit of promoting consistency in divorce recognition, whether the divorce was granted before or after 2 October 1986.

The respondent husband in *H v H* sought to rely on *McG v W* and argued that the 1982 English divorce was entitled to recognition in Ireland because the petitioner wife was resident in England at the time of instituting proceedings there. The *McG v W* case had similarly involved a divorce pronounced in England in the early 1980s and McGuinness J. had accepted that the divorce should be recognised in Ireland because the wife was ordinarily resident in England at the date of institution of proceedings.

While *McG v W* accepted the adequacy of residence as a basis for common law recognition of foreign divorces, the *ratio* of the case is not entirely clear. McGuinness J. emphasised the use of ordinary residence (for one year) as a jurisdictional basis for divorce in Ireland (following the coming into force of the Family Law (Divorce) Act 1996), a jurisdiction rule which mirrored that underpinning the grant of the English divorce in *McG v W*.[[16]](#footnote-16) She also referred approvingly to *Travers v Holley*,[[17]](#footnote-17) an English case which emphasised the need for courts to “recognize a jurisdiction which they themselves claim”.[[18]](#footnote-18) This raises the question as to whether the test laid down in *McG v W* permitted recognition only where the granting court’s jurisdictional rules correspond to those of the recognising court. However, McGuinness J. in *McG v W* also referred approvingly[[19]](#footnote-19) to the House of Lords decision in *Indyka v Indyka* which sanctioned recognition on the basis of a real and substantial connection to the granting court, without requiring any correspondence between the jurisdiction rules of the granting and recognising courts.[[20]](#footnote-20)

*McG v W* left open the question as to the temporal scope of application of the common law. While the English divorce at issue in *McG v W* was decreed prior to the coming into force of the Irish 1986 Act, and was therefore unquestionably governed by common law recognition principles, McGuinness J. noted that the language of the 1986 Act suggested a legislative intention to modify the common law and not to displace it.[[21]](#footnote-21) In McGuinness J.’s view, the 1986 Act was primarily concerned with the (prospective) abolition of dependent domicile, and the adjustment of divorce recognition rules was merely incidental.[[22]](#footnote-22) It was therefore suggested that the common law recognition rules could supplement the statutory recognition provisions even for foreign divorces granted after the coming into force of the 1986 Act.[[23]](#footnote-23)

REASONING OF THE MAJORITY IN *H v H*

Dunne J. (Clarke and Hardiman JJ. concurring) thought that the doctrine of separation of powers (and the need to avoid trespassing on the domain of the legislature) precluded any judicial extension of the common law to include residence, as well as domicile, as a basis for divorce recognition. Dunne J. accepted that such an extension would have been permissible if the Oireachtas had not adopted legislation on the recognition of foreign divorces,[[24]](#footnote-24) but thought that the adoption of the Domicile and Recognition of Foreign Divorces Act 1986 ruled out any such judicial intervention (in particular insofar as that Act envisaged only domicile-based recognition, and failed to follow the Law Reform Commission recommendations for residence-based recognition[[25]](#footnote-25)).

Dunne J. noted that the Supreme Court in *W v W* had envisaged that judicial modification of the common law could be justified “as a matter of public policy … to do justice” but had also cautioned that such modification should reflect the “present policy of the court” which “policy” included the terms of the 1986 Act.[[26]](#footnote-26) In modifying the common law, the Supreme Court in *W v W* had emphasised that the adjustment “was wholly consistent” with the scheme of the 1986 Act.[[27]](#footnote-27)

McGuinness J. in *McG v W* had relied on *W v W* and had determined that the “policy of the court” regarding divorce recognition had been altered by the introduction of domestic divorce legislation in 1996 and the acceptance of divorce jurisdiction based on domicile *or* ordinary residence.[[28]](#footnote-28) Dunne J. disagreed. For Dunne J. it was highly significant that the Oireachtas in adopting the Family Law (Divorce) Act 1996 had declined to amend the 1986 Act and had not altered the statutory provisions affecting divorce recognition when it could have done so: “[i]f the Oireachtas considered it appropriate to do so, there was no reason why such a change could not have been introduced”.[[29]](#footnote-29) On that basis, Dunne J. held that the “policy of the court” remained to be determined by reference to the terms of the 1986 Act which based divorce recognition on domicile only, and she concluded that *McG v W* was incorrectly decided.[[30]](#footnote-30) Making the assumption that the common law recognition rules applied only to pre-1986 Act divorces, Dunne J. also noted that the rejection of residence-based recognition at common law was necessary in order to avoid an anomalous distinction in the treatment of pre-1986 Act and post-1986 Act divorces.[[31]](#footnote-31)

In a separate majority judgment, Clarke J. (Hardiman J. concurring) emphasised the undesirability of retroactive interference in status (and the impact on those who have ordered their affairs in reliance on the pre-existing law).[[32]](#footnote-32) For Clarke J., springing divorces were as problematic as limping marriages, in particular where foreign divorces obtained very many years earlier were validated by a widening of common law recognition principles.[[33]](#footnote-33) Clarke J. also expressed concern as to the implications of a Supreme Court affirmation of residence-based recognition for those who had obtained a judicial determination of non-recognition in reliance on the “old” view of the common law.[[34]](#footnote-34) Clarke J. thought that these considerations reinforced the view that a legislative solution was more appropriate. Legislators could weigh up the advantages and disadvantages of retrospectivity and impose tailored solutions, and this was preferable to the blanket retrospective effect of a judicial modification of the common law.[[35]](#footnote-35)

ANALYSIS OF THE MAJORITY APPROACH

The majority approach in *H v H* is open to criticism on a number of grounds. Dunne J. contrasts *McG v W* with *W v W* and opines that the approach of the Supreme Court in *W v W* was “entirely consistent with the statutory policy apparent in the provisions of the Act of 1986”.[[36]](#footnote-36) This is a questionable statement insofar as the Supreme Court in *W v W* had chosen to give retrospective effect to a policy which had been adopted by the Oireachtas on a prospective basis only. Applying the logic of Dunne J. with respect to the refusal to amend the 1986 Act, one might argue that the Supreme Court in *W v W* was interfering with and undermining a legislative choice expressed in the 1986 Act.[[37]](#footnote-37) To paraphrase Dunne J.’s own reasoning, if the Oireachtas had considered it appropriate to do so, there was no reason why retrospective effect could not have been given to the terms of the 1986 Act. Therefore the logic of Dunne J.’s judgment suggests that *W v W* was also wrongly decided, yet Dunne J. clearly approves of and relies on *W v W* in expounding the law.[[38]](#footnote-38)

Dunne J.’s assumption that the common law can only apply to foreign divorces granted prior to 2 October 1986[[39]](#footnote-39) – and her rejection of residence-based recognition at common law in order to avoid the anomalous implications of that assumption[[40]](#footnote-40) – are also problematic. In fact, as was noted by McGuinness J. in *McG v W*, the language of the 1986 Act may allow for the continued application of the common law even to post-1986 Act foreign divorces – and if this interpretation is correct,[[41]](#footnote-41) there would be no anomaly as between pre-and post-1986 Act divorces even with an expansion of the common law grounds: all foreign divorces (other than those benefitting from the EU rules) would be entitled to recognition based on *either* residence *or* domicile irrespective of the date of grant.

The language of s. 5(1) of the 1986 Act provides explicit support for this idea of a continuing role for the common law – it provides: “For the rule of law that a divorce is recognised if granted in a country where both spouses are domiciled, there is hereby substituted a rule that a divorce shall be recognised if granted in the country where either spouse is domiciled.” This provision is clearly intended to substitute the pre-existing common law rule (based on common domicile) with a new “rule of law” enabling divorce recognition on the basis of the domicile of either spouse. The 1986 Act also provides in s. 5(4) for the Irish recognition of divorces recognised in the country or countries where the spouses are domiciled at the date of institution of proceedings, even if neither was domiciled in the granting country – and in s. 5(3) for domicile in any part of the United Kingdom to support recognition of a divorce granted in any other part of the United Kingdom. These provisions do not use explicit language of ‘substitution’ or ‘modification’ (as s. 5(1) does); however, insofar as they seek to clarify and modify the common law principles of divorce recognition,[[42]](#footnote-42) they still tend to support a view of the Irish 1986 Act as a measure which leaves foreign divorce recognition to the common law.[[43]](#footnote-43) This sense that the Irish 1986 Act did not intend to place foreign divorce recognition on an exclusively statutory basis is reinforced when one contrasts the provisions of the Irish 1986 Act with those of the United Kingdom Family Law Act 1986. The UK Act sets down a comprehensive statutory recognition regime, and uses the formula ‘if, and only if’ to emphasise the exclusivity of those statutory rules, and to rule out any further reliance on the common law.[[44]](#footnote-44) Shatter in his 1997 *Family Law* text shares this view that “[o]ur recognition rules are essentially a product of the common law”.[[45]](#footnote-45)

The Supreme Court in *H v H* was only asked to determine the law applicable to recognition of divorces granted prior to 2 October 1986,[[46]](#footnote-46) and, to that extent, was not formally required to consider the scope of the recognition regime for post-1986 Act divorces. However, insofar as the two matters are inextricably linked, it is undesirable and impractical that the recognition of pre-1986 Act divorces should be considered in isolation. If the Oireachtas intended the common law to have a continuing role even with respect to post-1986 Act divorces, this clearly has significant implications for any consideration of the separation of powers doctrine with respect to pre-1986 Act divorces.

In this context, one would have expected that the Supreme Court in *H v H* would give careful consideration to the question of the role of the common law with respect to post-1986 Act divorces, but this did not happen. Instead it is simply assumed by the majority[[47]](#footnote-47) that there is no scope for common law recognition for divorces granted after 2 October 1986, and there is no detailed consideration of the merits of this standpoint. It is most disappointing that such an important issue is disposed of by way of an unreasoned assumption.

Insofar as the Supreme Court was concerned about the retrospective effect of residence-based recognition – and the spectre of “springing divorces” – it is respectfully submitted that these concerns were misplaced. *McG v W* gave credence to the idea of residence-based recognition back in 1999 and any sensible legal advice on divorce recognition in the subsequent 16 years would have mentioned the possibility of residence-based recognition.[[48]](#footnote-48) Thus, an affirmation of residence-based recognition in *H v H* would not have brought about any very sudden change in the law,[[49]](#footnote-49) and most affected advisees would have known for some considerable time that residence-based recognition was a real prospect.[[50]](#footnote-50) Furthermore, it seems reasonable to suppose that there are many more affected persons who have divorced abroad and *not* sought legal advice – and such persons are likely to assume that they are divorced in the eyes of Irish law, if they were validly divorced in a country where they were ordinarily resident. As O’Donnell J. points out in his dissenting judgment in *H v H*, while a lawyer can readily conceive of marriage being valid and subsisting in one jurisdiction but not in another,[[51]](#footnote-51) lay persons are much less inclined to think in such terms, and are unlikely to expect their marital status to change when they cross a national frontier. Also insofar as Clarke J. expressed concern as to the implications of an affirmation of *McG v W* for those who had obtained court judgments of *non-recognition* (on the basis of a lack of domicile), it is submitted that an equal but opposite argument can be made in favour of those who had obtained judgments of recognition based on residence. Such a judgment was rendered in *McG v W* itself, and in the Circuit Court in *H v H[[52]](#footnote-52)* and it seems likely that *McG v W* was followed in a number of other unreported High Court and Circuit Court decisions.[[53]](#footnote-53)

DISSENTING JUDGMENT OF O’DONNELL J. (DENHAM C.J. CONCURRING)

O’Donnell J. departed from the majority opinion in accepting that the “policy of the court” was not fixed by the terms of the 1986 Act. In his view, the “policy of the court” was profoundly affected by the introduction of domestic divorce and the adoption of divorce jurisdiction based first on “ordinary residence” (under the Family Law (Divorce) Act 1996) and subsequently on “habitual residence” (under the Brussels II *bis* Regulation).[[54]](#footnote-54) Therefore insofar as the common law is amenable to change having regard to the “present policy of the court”, the common law recognition principles could be expanded to include residence-based recognition.[[55]](#footnote-55) Noting the “distinctive historical context” in which the traditional domicile-based rules were adopted, O’Donnell J. argued that there was no “intrinsic logic or merit” in the application of such restrictive rules in an entirely different socio-legal context.[[56]](#footnote-56) In failing to move beyond the domicile-based recognition policy of the indissolubility era, Irish law created unnecessary distress with a high incidence of limping marriages.[[57]](#footnote-57)

O’Donnell J. noted that the Supreme Court in *W v W* had relied on *Travers v Holley* and *Indyka v Indyka* and had impliedly supported the idea of aligning recognition policy with domestic jurisdictional norms.[[58]](#footnote-58) Endorsing the *Travers v Holley* reciprocity doctrine, O’Donnell J. concluded that a foreign divorce should be recognised in Ireland “if the applicant for the divorce would comply with the provisions contained in Article 3 of … Brussels II *bis*”.[[59]](#footnote-59)

O’Donnell J. thus laid down an Irish recognition doctrine which requires satisfaction of the domestic (Irish) jurisdictional rules in the granting court, but which does not require the foreign divorce court to have applied the same or a similar jurisdictional rule. He therefore abandons the suggestion in *Travers v Holley* (and in *McG v W*) that the granting court must have applied a jurisdictional rule which corresponded with one of the current domestic ones.[[60]](#footnote-60) This refinement of the *Travers v Holley* test is to be welcomed. Logically, the focus of the recognition test should be on the objective adequacy of the personal connection from an Irish perspective, and it should not matter how the foreign jurisdictional rules were formulated or how the foreign court assessed its own jurisdiction. Indeed, in the absence of a jurisdictional dispute in the granting court, the precise jurisdictional basis for the foreign divorce proceedings is likely to be unknown.

The abandonment of any “jurisdictional correspondence” requirement was therefore sensible; however, it is submitted that O’Donnell J. ought to have gone further in refining the *Travers v Holley* test and ought to have given greater emphasis to the more flexible approach of the House of Lords in *Indyka v Indyka*. It is not suggested that the Irish courts should base recognition on a “real and substantial connection” to the granting country (it is agreed that this test is too uncertain[[61]](#footnote-61)); however, the House of Lords in *Indyka* is to be commended for its less rigid approach to the alignment of jurisdiction and recognition policy. The House of Lords in *Indyka* thought that while jurisdictional expansion should inform recognition policy, the resulting recognition doctrine did not need to be formulated in the precise terms of domestic jurisdictional rules.[[62]](#footnote-62) Applying this reasoning, it is argued that O’Donnell J. ought to have focussed on the core jurisdictional principles underpinning Brussels II *bis* (and divorce jurisdiction under the 1996 Act), and should have framed recognition policy along the same broad lines, without transposing the detail of art. 3 Brussels II *bis* into the recognition sphere. Thus it is suggested that O’Donnell J. should have accepted that the habitual residence of either spouse in the granting state would justify divorce recognition, without any need to consider whether the specific requirements of art. 3 Brussels II *bis* were satisfied. There were suggestions of a looser approach along these lines earlier on in O’Donnell J.’s judgment[[63]](#footnote-63) – but in his conclusion he reverted to a test based on a notional satisfaction of art. 3 Brussels II *bis* by the applicant.

Article 3 Brussels II *bis* is wholly unsuited to use as a measure for assessing divorce recognition. Article 3 stipulates strict time requirements where only the applicant’s habitual residence is relied upon.[[64]](#footnote-64) Time requirements are appropriate to jurisdictional rules which arise for consideration before the event but are not desirable features of recognition rules which arise for consideration after the event (often many years later) in circumstances where marginal non-compliance with a time requirement can no longer be remedied.[[65]](#footnote-65) Insofar as art. 3(1)(b) Brussels II *bis* uses joint nationality as a jurisdictional connecting factor and provides for the substitution of common law “domicile” for “nationality” in the case of the United Kingdom and Ireland, one wonders as to how this jurisdictional ground translates into a common law recognition rule. Should it be assumed that joint domicile is the test to be applied to divorces granted in countries with a common law tradition, and joint nationality for all others? What if a country with a common law tradition actually uses nationality rather than common law domicile in its corresponding private international law rules? The reality is that art. 3 Brussels II *bis* was framed for a very particular policy context: as a basis for securing mutual recognition of divorces in the EU. The specific details of the text flow from the various compromises that were necessary to secure the political agreement of all Member States.[[66]](#footnote-66) The Regulation was only intended to deal with internal EU recognition on a prospective basis, and third-country divorce recognition remained a matter for domestic law. From that perspective, it seems bizarre to suggest that in adopting the text of art. 3 Brussels II *bis*, the EU was simultaneously (if unconsciously) setting the terms of Irish recognition of third country divorces.

It is therefore argued that while a general alignment of jurisdiction and recognition policy makes sense (to the extent that both regimes articulate a view as to the kind of territorial connection that should underpin the grant of a divorce), there should be no expectation of perfect alignment. Jurisdiction and recognition rules operate in different contexts and are subject to different influences. The prevention of limping marriages is for example a central concern of recognition policy but not of jurisdictional policy. In particular, where a jurisdictional framework is the result of EU harmonisation (and embodies the policy interests of Member States generally), it should not be assumed to embody Irish domestic policy on recognition.

In summary, art. 3 Brussels II *bis* should not be directly deployed as a recognition test under Irish law. However, it is legitimate (having regard to the reasoning in *Travers v Holley* and *Indyka v Indyka*) for the Irish courts to adapt the common law recognition rules taking account of the fact that ordinary residence was adopted domestically as a basis for jurisdiction under the Family Law (Divorce) Act 1996 and that habitual residence takes centre stage as the basis for divorce jurisdiction under Brussels II *bis*. These developments provide support for a more general use of ordinary or habitual residence as a common law basis for recognition.

CONCLUSION

*H v H* is a disappointing and disquieting decision. The majority of the Supreme Court takes a very narrow technical view of current public policy. The majority defers to the legislature, surely knowing that legislative action is unlikely. Almost two years have elapsed since the judgment in *H v H* and there has been no indication of any intention to adopt legislation on recognition of foreign divorces. There is no mention of foreign divorce recognition in the 2016 Programme for Government[[67]](#footnote-67) and it does not feature on the current agenda of the Law Reform Commission.[[68]](#footnote-68)

A continued adherence to a recognition policy based exclusively on common law domicile is rationally indefensible, with very serious consequences for the marital status of affected individuals, yet neither the legislature nor the judiciary appears to be willing to grasp the nettle,[[69]](#footnote-69) and to deal with the problems so vividly articulated in the judgment of O’Donnell J..

The Supreme Court is right to assert that a tailored legislative solution would be preferable but in the face of ongoing legislative inertia, judicial intervention was desirable. The invocation of the separation of powers doctrine rings hollow in a context where legislative action appears extremely unlikely.[[70]](#footnote-70)

In his dissenting judgment, O’Donnell J. charted an appropriate path for the development of the common law – although, as suggested above, the direct use of art. 3 Brussels II *bis* as a recognition rule should be avoided. If an opportunity arises for reconsideration of *H v H*, it is submitted that the judgment of O’Donnell J. should be followed (subject to the above caveat). Of course, the question of common law divorce recognition will be considered settled after the decision in *H v H* and any re-examination of this issue may be very unlikely. The possibility cannot however be entirely excluded. Insofar as the court in *H v H* was formally only asked to deal with common law recognition of a pre-1986 Act divorce, it is conceivable that a case concerning a post-1986 Act divorce might yet come before the court (although the majority judgments in *H v H* would certainly not provide any encouragement for such an action). It is also possible that the jurisprudence of the European Court of Human Rights on cross-border status recognition might develop further, and this might allow the courts to revisit *H v H*. Equally, if it were recognised by the European Court of Human Rights that art. 12 ECHR guarantees a right of divorce, this might propel a review of Irish recognition policy. [[71]](#footnote-71)

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 S. 39(1) Family Law (Divorce) Act 1996. [↑](#footnote-ref-1)
2. *McG v W* [2000] 1 I.R. 96. [↑](#footnote-ref-2)
3. See Hill, “The Recognition of Foreign Divorces in Ireland: The Return of *Travers v Holley*” (2001) 50 *International and Comparative Law Quarterly* 144 at 150; Wardle, “International Marriage and Divorce Regulation and Recognition: a Survey” (1995) 29 *Family Law Quarterly* 497. [↑](#footnote-ref-3)
4. At common law a person is normally “domiciled” in the country where he or she intends to reside in the longer term. Thus a person who resides in a particular country for the short or medium term, with the intention of leaving in the longer term, will not be domiciled there. For a detailed account of the differences between “domicile” and “residence”, see Hill and Ní Shúilleabháin, *Clarkson & Hill’s Conflict of Laws*, 5th edn (Oxford: Oxford University Press, 2016) 315-352. [↑](#footnote-ref-4)
5. *MEC v JAC* [2001] 2 I.R. 399. [↑](#footnote-ref-5)
6. *H v H* [2015] 1 I.L.R.M. 453. [↑](#footnote-ref-6)
7. Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L338/1. [↑](#footnote-ref-7)
8. *H v H* [2015] 1 I.L.R.M. 453 at 479, 485, 489. [↑](#footnote-ref-8)
9. *H v H* [2015] 1 I.L.R.M. 453 at 478 and 485. [↑](#footnote-ref-9)
10. *H v H* [2015] 1 I.L.R.M. 453 at 488-489. [↑](#footnote-ref-10)
11. *H v H* [2015] 1 I.L.R.M. 453 at 488. See also Ní Shúilleabháin, “Marriage, Divorce and Stagnation in the Irish Conflict of Laws” (2014) 50 *Irish Jurist* 68 arguing that Brussels II *bis* swept away any remaining rational basis for restrictive common law divorce recognition rules. [↑](#footnote-ref-11)
12. *Indyka v Indyka* [1969] 1 A.C. 33. [↑](#footnote-ref-12)
13. *Travers v Holley* [1953] P. 246. [↑](#footnote-ref-13)
14. *W v W* [1993] 2 I.R. 476, as applied in *MEC v JAC* [2001] 2 I.R. 399. [↑](#footnote-ref-14)
15. The date of coming into force of the Domicile and Recognition of Foreign Divorces Act 1986. [↑](#footnote-ref-15)
16. *McG v W* [2000] 1 I.R. 96 at 98, 105. [↑](#footnote-ref-16)
17. *McG v W* [2000] 1 I.R. 96 at 103-105. [↑](#footnote-ref-17)
18. *Travers v Holley* [1953] P. 246 at 251. [↑](#footnote-ref-18)
19. *McG v W* [2000] 1 I.R. 96 at 104-109. [↑](#footnote-ref-19)
20. *Indyka v Indyka* [1969] 1 A.C. 33. [↑](#footnote-ref-20)
21. *McG v W* [2000] 1 I.R. 96 at 106. [↑](#footnote-ref-21)
22. *McG v W* [2000] 1 I.R. 96 at 106. [↑](#footnote-ref-22)
23. *McG v W* [2000] 1 I.R. 96 at 106-107. [↑](#footnote-ref-23)
24. *H v H* [2015] 1 I.L.R.M. 453 at 477. [↑](#footnote-ref-24)
25. *H v H* [2015] 1 I.L.R.M. 453 at 462 referring to Law Reform Commission, *Report on Recognition of Foreign Divorces and Legal Separations* (LRC 10-1985). [↑](#footnote-ref-25)
26. *H v H* [2015] 1 I.L.R.M. 453 at 464 (and 476) referring to *W v W* [1993] 2 I.R. 476 at 505-506. [↑](#footnote-ref-26)
27. *H v H* [2015] 1 I.L.R.M. 453 at 464 referring to *W v W* [1993] 2 I.R. 476 at 505-506. [↑](#footnote-ref-27)
28. *H v H* [2015] 1 I.L.R.M. 453 at 467 referring to *McG v W* [2000] 1 I.R. 96 at 106. [↑](#footnote-ref-28)
29. *H v H* [2015] 1 I.L.R.M. 453 at 477. [↑](#footnote-ref-29)
30. *H v H* [2015] 1 I.L.R.M. 453 at 477. Dunne J. accepted that if divorce recognition hinged on domicile only, there would be an inconsistency in Irish law between the recognition and jurisdiction criteria, but she did not think that such inconsistency provided a reason for modifying the common law rule (see *H v H* [2015] 1 I.L.R.M. 453 at 478). [↑](#footnote-ref-30)
31. *H v H* [2015] 1 I.L.R.M. 453 at 478. If the common law only applied to foreign divorces granted prior to 2 October 1986, and *McG v W* were otherwise affirmed as correct, it would follow that pre-1986 Act divorces could be recognised on the basis of *either* residence *or* domicile whereas more recent post-1986 Act divorces would be subject to a more restrictive recognition policy based on domicile only. [↑](#footnote-ref-31)
32. Dunne J. shared this concern: *H v H* [2015] 1 I.L.R.M. 453 at 478-479, referring to *MEC v JAC* [2001] 2 I.R. 399 at 412. [↑](#footnote-ref-32)
33. *H v H* [2015] 1 I.L.R.M. 453 at 484-485. [↑](#footnote-ref-33)
34. *H. v H.* [2015] 1 I.L.R.M. 453 at 486. [↑](#footnote-ref-34)
35. *H v H* [2015] 1 I.L.R.M. 453 at 482-486. [↑](#footnote-ref-35)
36. *H v H* [2015] 1 I.L.R.M. 453 at 478. [↑](#footnote-ref-36)
37. This was the view of the dissenting judge (Hederman J.) in *W v W* [1993] 2 I.R. 476 at 486. [↑](#footnote-ref-37)
38. As indicated above, the Supreme Court in *W v W* was constrained by the Constitution (art. 40.1) in holding that dependent domicile was not carried over by art. 50; however, the determination that the domiciliary connections of *either* party would henceforth justify recognition was not mandated by any constitutional principle and to that extent the Supreme Court in *W v W* was voluntarily reversing a legislative choice expressed in the 1986 Act (the decision to give s. 5(1) 1986 Act prospective effect only). [↑](#footnote-ref-38)
39. *H v H* [2015] 1 I.L.R.M. 453 at 471-472 (referring to *DT v FL* [2002] 2 I.L.R.M. 152), also 475-476. [↑](#footnote-ref-39)
40. *H v H* [2015] 1 I.L.R.M. 453 at 478. [↑](#footnote-ref-40)
41. For a contrary argument, see *MEC v JAC* [2001] 2 I.R. 399 at 408-409; also Binchy, “Conflicts of Law – Divorce” (1999) 21 *Dublin University Law Journal* 173 at 175. [↑](#footnote-ref-41)
42. S. 5(4) gives effect to a common law authority (*Armitage v Attorney General* [1906] P. 135). This authority was not previously acknowledged to be applicable in Ireland (see *MEC v JAC* [2001] 2 I.R. 399 at 407-408). However, the legislature perceived some uncertainty in this regard, and it appears that s. 5(4) was intended to confirm (prospectively) the applicability of *Armitage* in Ireland (see 365 *Dáil Debates* Col 2288). S. 5(3) seeks to modify the existing common law practice of treating constituent parts of the United Kingdom (and of other countries comprising several “law units”) as separate countries, and of insisting on the personal connection being with the relevant “law unit” (see Hill and Ní Shúilleabháin, *Clarkson and Hill’s Conflict of Laws*, 5th edn (Oxford: Oxford University Press, 2016) 3-4). S. 5(3) appears therefore to be designed to increase common law recognition of divorces obtained in the UK. [↑](#footnote-ref-42)
43. This view that s. 5 of the 1986 Act does not preclude further development of the common law is arguably also reinforced by the fact that the Act is confined in its effects to divorces obtained by means of “proceedings” (see s. 5(7)). It arguably follows that the recognition of non-proceedings divorces obtained abroad (bare Islamic *talaqs* for example) must remain a matter for the common law, whether pronounced in 1972 or in 2016. By contrast with the Irish 1986 Act, the UK Family Law Act 1986 makes express provision for the statutory recognition of such divorces “obtained otherwise than by means of proceedings” (s. 46(2)). [↑](#footnote-ref-43)
44. See s. 45(1) of the UK Family Law Act 1986; Law Commission (and Scottish Law Commission), “Recognition of Foreign Nullity Decrees and Related Matters” (Law Com No 137 (Scot Law Com No 88) 1984) p. 93. As McGuinness J. notes in *McG v W* [2000] 1 I.R. 96 at 106, a very similar formula “if, but only if” was used in s. 39(1) of the Irish Family Law (Divorce) Act 1996 thus placing divorce jurisdiction on an exclusively statutory footing. [↑](#footnote-ref-44)
45. Shatter, *Family Law*, 4thedn (Dublin: Tottel, 1997), p. 424. [↑](#footnote-ref-45)
46. See *H v H* [2015] 1 I.L.R.M. 453 at 459: the matter came before the Supreme Court by way of consultative case stated. [↑](#footnote-ref-46)
47. O’Donnell J. dissenting, expressly reserves his position on this question (at 504); however, a number of his observations would suggest a degree of support for the view that the common law may play a role in the recognition of post-1986 Act divorces: see *H v H* [2015] 1 I.L.R.M. 453 at 494-495, 498-499, 504-506. [↑](#footnote-ref-47)
48. *McG v W* was very widely reported in practitioner journals: see for example Ward “Residence Basis for Recognition of Foreign Divorces” [1999] *Fam Law* 266; Corbett, “Recognition of Foreign Divorces in Ireland in Light of McG v DW and AR” [1999] *Bar Review* 270. [↑](#footnote-ref-48)
49. This is recognised by the dissenting judgment of O’Donnell J. in *H v H* [2015] 1 I.L.R.M. 453 at 488, 500. [↑](#footnote-ref-49)
50. Even prior to *McG v W*, it was clear (for example, in *W v W* [1993] 2 I.R. 476 at 500-504) that Irish law was based on English common law developments – and that English jurisprudence had sanctioned a widening of common law divorce recognition as the statutory divorce jurisdiction grounds had expanded. It follows that the seeds of change were planted very many years earlier – and, from that perspective, an affirmation of residence-based recognition in *H v H* was the natural and logical culmination of common law evolution. [↑](#footnote-ref-50)
51. *H v H* [2015] 1 I.L.R.M. 453 at 489. [↑](#footnote-ref-51)
52. *H v H* [2015] 1 I.L.R.M. 453 at 458. [↑](#footnote-ref-52)
53. While *McG v W* was condemned as bad law in *MEC v JAC* [2001] 2 I.R. 399, it was referred to with approval – at least as far as pre-1986 Act divorces were concerned – in the subsequent High Court case of *DT v FL* [2002] 2 I.L.R.M 152 at 159. *McG v W* is particularly likely to have been followed in cases where the parties were not engaged in a financial dispute and simply sought to regularise their status (see O’Donnell J., dissenting, in *H v H* [2015] 1 I.L.R.M. 453 at 490). [↑](#footnote-ref-53)
54. *H v H* [2015] 1 I.L.R.M. 453 at 487, 497. [↑](#footnote-ref-54)
55. *H v H* [2015] 1 I.L.R.M. 453 at 487, 497. [↑](#footnote-ref-55)
56. *H v H* [2015] 1 I.L.R.M. 453 at 488-489, 497-498. [↑](#footnote-ref-56)
57. *H v H* [2015] 1 I.L.R.M. 453 at 488-489. [↑](#footnote-ref-57)
58. *H v H* [2015] 1 I.L.R.M. 453 at 487, 491, 495-497. [↑](#footnote-ref-58)
59. *H v H* [2015] 1 I.L.R.M. 453 at 508. [↑](#footnote-ref-59)
60. See *Travers v Holley* [1953] P. 246 at 251, 257 emphasising the commonality of the foreign and domestic jurisdictional rules; *McG v W* [2000] 1 I.R. 96 at 103. [↑](#footnote-ref-60)
61. See Law Commission (and Scottish Law Commission), “Hague Convention on Recognition of Divorces and Legal Separations” (Law Com No 34 (Scot Law Com No 16) 1970) p. 11; North, *The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland* (Amsterdam: North-Holland, 1977) pp. 162-165. [↑](#footnote-ref-61)
62. See *Indyka v Indyka* [1969] 1 A.C. 33 at 91, 106-107, 109. Lord Wilberforce (at 106) expressly rejects “the quasi-mathematical application in reverse of domestic legislation”. [↑](#footnote-ref-62)
63. *H v H* [2015] 1 I.L.R.M. 453 at 488, 495, 499. O’Donnell J. also suggested briefly (at 498) that recognition of historic divorces should be assessed, at common law, by reference to the contemporaneous standards which would be applicable if the same divorce were to be granted abroad at the date of commencement of the recognition proceedings. On the facts of *H v H*, this approach would compel recognition because a UK divorce pronounced in 2005 (the date of initiation of recognition proceedings) would be entitled to automatic recognition under Brussels II *bis*. This approach would however have been extremely problematic and it is fortunate that it was not taken further. Taken to its logical conclusion, it would allow for automatic recognition (at common law) of all EU Member State divorces granted prior to the coming into force of Brussels II *bis*. The automatic recognition obligation under Brussels II *bis* was premised on the undertaking by all Member States to apply the agreed (harmonised) jurisdiction rules laid down in the Regulation, and the idea was that Member States could forgo a check on connectedness at the recognition stage, because the harmonised jurisdiction rules already guaranteed the desired level of connectedness. Where a divorce was granted in a Member State *prior* to the coming into force of harmonised jurisdiction rules, there was no such guarantee, and therefore no logical basis for waiving the check on connectedness at the recognition stage. [↑](#footnote-ref-63)
64. See the fifth and sixth indents to art. 3(1)(a): a petitioner relying solely on his or her own habitual residence as a basis for divorce jurisdiction must prove either a year’s residence in the relevant Member State or six months of residence coupled with proof of domicile or nationality of the relevant Member State. [↑](#footnote-ref-64)
65. See Ní Shúilleabháin, “Marriage, Divorce and Stagnation in the Irish Conflict of Laws” (2014) 50 *Irish Jurist* 68 at 76 (fn 65). [↑](#footnote-ref-65)
66. See Borrás, “Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters” [1998] O.J. C221/27, pp. 38-39 (commenting on the negotiations leading to the “Brussels II Convention” which text was subsequently incorporated into Brussels II *bis*). [↑](#footnote-ref-66)
67. *A Programme for a Partnership Government* (2016), available at <http://www.merrionstreet.ie> [↑](#footnote-ref-67)
68. See <http://www.lawreform.ie>. [↑](#footnote-ref-68)
69. A similar reluctance to reformulate the common law rules for recognition of foreign commercial judgments was apparent in the Supreme Court’s judgment in *Re Flightlease* [2012] 2 I.L.R.M. 461. Critiquing the *Flightlease* judgment, Kenny observes (in a similar vein to the above analysis of *H v H)* an excessive deference to the separation of powers doctrine, placing the common law “in a sort of permafrost, only to be thawed should the legislature decide to intervene” (see Kenny “*Re Flightlease*: the ‘Real and Substantial Connection’ Test for Recognition and Enforcement of Foreign Judgments Fails to Take Flight in Ireland” (2014) 63 *International and Comparative Law Quarterly* 197 at 208). [↑](#footnote-ref-69)
70. O’Donnell J. argues that *McG v W* did not raise an issue touching on the separation of powers, because there was nothing to prevent the legislature altering, overturning, or endorsing with or without qualifications, the approach of the court: see *H v H* [2015] 1 I.L.R.M. 453 at 506. [↑](#footnote-ref-70)
71. See Ní Shúilleabháin, “Marriage, Divorce and Stagnation in the Irish Conflict of Laws” (2014) 50 *Irish Jurist* 68 at 74-76 on the possible implications for Irish divorce recognition of developments in the case-law of the European Court of Human Rights. [↑](#footnote-ref-71)