

# ULRR

## Child Maintenance reform in Ireland: Lessons from abroad

Item Type	Article
Authors	O'Sullivan, Kathryn
Citation	Child and Family Law Quarterly, 2022, 34 (1), pp. 41-60
Publisher	Jordan Publishing
Download date	2026-06-13 03:05:30
Item License	<a href="https://creativecommons.org/licenses/by-nc-sa/4.0/">https://creativecommons.org/licenses/by-nc-sa/4.0/</a>
Link to Item	<a href="https://doi.org/10.34961/researchrepository-ul.22778507">https://doi.org/10.34961/researchrepository-ul.22778507</a>

# Child Maintenance reform in Ireland: Lessons from abroad

Kathryn O’Sullivan\*

**Cite as: Kathryn O’Sullivan, ‘Child Maintenance Reform in Ireland: Lessons from Abroad’ (2022) 34(1) *Child and Family Law Quarterly* 41-60**

**Key words:** Child support; relationship breakdown; financial provision; judicial discretion; law reform

## Abstract

Continuing to vest the judiciary with very wide discretion to determine maintenance issues on a case-by-case basis, the child maintenance system applied in Ireland is now an outlier in the common law world. However, while there are currently few judicially-developed or legislatively-established principles or guidelines to direct the exercise of this discretion – much less any formulae or tables – reform may be on the horizon. With this in mind, this article considers the legal framework for child maintenance in Ireland before drawing on recent empirical studies to highlight the challenges in practice. It places the spotlight on the mounting calls for the adoption of a more predictable and consistent formula-based approach to the quantification of child maintenance and investigates five key issues which would have to be addressed in devising any such reform.

## Introduction

There appears to be momentum building for the reform of the child maintenance system in Ireland. Although child maintenance continues to be addressed through the courts, with judges afforded very wide discretion to determine the scope of any maintenance ordered, the UN Committee on the Elimination of Discrimination against Women recently expressed its ‘concerns’ about the Irish approach.<sup>1</sup> In particular, it recommended that Ireland ‘[c]onsider establishing a statutory maintenance authority and prescribing amounts for child maintenance in order to reduce the burden of women to litigate for child maintenance orders.’<sup>2</sup> In late 2020, seemingly in response to the former recommendation, the Irish Government set up a Child Maintenance Review Group to investigate the potential for establishing a ‘State Child Maintenance Agency’ which ‘could assist families in determining matters connected with child maintenance thereby removing the requirement (but not necessarily the entitlement) to go to Court’.<sup>3</sup> While it remains unclear whether, or to what extent, the Irish government will also consider the UN Committee’s latter recommendation regarding the potential introduction of

---

<sup>1</sup> CEDAW, *Concluding Observations on the Combined Sixth and Seventh Periodic Reports of Ireland* (2017), [57].

<sup>2</sup> *Ibid* (emphasis added).

<sup>3</sup> Department of Social Protection, *Child Maintenance Review Group Consultation Process* (2021) 6.

prescribed amounts of child maintenance, an investigation into the viability of such reform, at a minimum, would appear on the cards.<sup>4</sup>

In this context, this article seeks to investigate the law and practice surrounding child maintenance in Ireland before turning to consider how it could most appropriately be reformed. Part I sets out the legal framework for child maintenance in Ireland before drawing on recent empirical studies to highlight the challenges in practice. Part II then considers the increasing calls for the adoption of a more predictable and consistent formula-based approach to the quantification of child maintenance. Learning from the experiences of other common law jurisdictions, Part III investigates five key issues which would have to be addressed in devising any such formula-based reform in Ireland while Part IV considers the likelihood of success of any such amendments.

## **Part I: Child Maintenance in Law and Context**

### *Child maintenance law in Ireland*

Various legislative enactments empower the Irish courts to make child maintenance orders in different family circumstances.<sup>5</sup> Where a divorce or judicial separation is not being sought, or where the parents are unmarried, the Guardianship of Infants Act 1964 and the Family Law (Maintenance of Spouses and Children) Act 1976 are the most important sources of financial protection. Section 11(2) of the 1964 Act empowers the court to order a parent to pay towards the maintenance of a child ‘such weekly or other periodical sum as, having regard to the means of the parent, the court considers reasonable’. Section 5 of the 1976 Act also empowers the courts to make an order against a parent where they have not provided such maintenance for the family as was ‘proper in the circumstances’ having regard to a list of statutory factors and ‘all the circumstances of the case’.<sup>6</sup> The Act under which an application ought to be made will depend on the precise circumstances of the case and mindful of the definitions of ‘father’ and ‘child’ applied in the 1964 Act and 1976 Act respectively.<sup>7</sup> Moreover, although maintenance orders under both Acts may be made in the District Court, its jurisdiction is capped in both cases at setting a maximum obligation of €150 per week per child.<sup>8</sup>

Where a married couple wish to obtain a judicial separation or divorce, applications for child maintenance are more commonly dealt with under the Family Law Act 1995 and the Family Law (Divorce) Act 1996. With a view to ensuring ‘proper provision’ for a dependent child or

---

<sup>4</sup> In moving to an administrative system for child maintenance disputes, jurisdictions including Australia, New Zealand and the UK also simultaneously introduced a formula-based approach to child maintenance determinations.

<sup>5</sup> For a history of child maintenance laws in Ireland, see K O’Sullivan, ‘Irish Maintenance Laws’ “Direction of Travel” & The Likelihood of Reform’ in S Gilmore and J Scherpe (eds) *Family Matters – Essays in Honour of John Eekelaar* (Intersentia, 2022) (forthcoming).

<sup>6</sup> See below for monetary limits, however.

<sup>7</sup> The definition of ‘father’ in GIA 1964, s 2, was originally limited to married or adoptive fathers. While it has been progressively broadened to include various non-marital contexts, some cases remain outside its scope (see eg *SM v NM* [2015] IECA 258). The definition of ‘child’ in FL(MSC)A 1976 also originally excluded children born outside of marriage, but children in various non-marital contexts have since been included (see s 5).

<sup>8</sup> See GIA 1964, s 5(2) and FL(MSC)A 1976, s 23(2)(a). The Circuit Court and High Court have unlimited discretion in determining quantum in making an order for child maintenance under either Act.

children (as constitutionally mandated under Article 41.3.2°), these Acts empower the courts to make a wide range of orders as part of a ‘package’ of provision.<sup>9</sup> First, the court may make orders for periodic payments or lump sum payments.<sup>10</sup> As such applications may only be initiated in the Circuit Court or, potentially, High Court, there is no limit on the amount of child maintenance that may be ordered. Second, conscious of children’s need, ‘in particular’, for ‘proper and secure accommodation’ on marital breakdown,<sup>11</sup> the Acts also allow the courts to make orders for the exclusive occupation of the family home or orders for the sale of the home, ‘subject to such conditions (if any) as the court considers proper’, and division of proceeds.<sup>12</sup> Third, albeit less commonly used, property adjustment orders,<sup>13</sup> pension adjustment orders,<sup>14</sup> and lump sum orders<sup>15</sup> may also be made for the benefit of a dependent child. Notwithstanding that the ‘definition or development of a clear framework for “proper provision” is absent to a large extent in the Irish case law’,<sup>16</sup> in determining whether or not to make any order, the courts are guided by a non-hierarchical list of statutory factors and all the circumstances of the case.<sup>17</sup> They may, moreover, not make any order unless in the interests of justice.<sup>18</sup>

### *Shortcomings of the child maintenance regime*

Each of the schemes governing child maintenance in Ireland is thus grounded in the exercise of strong judicial discretion. Child maintenance is determined on a case-by-case basis pursuant to a budget-based system with the courts enjoying wide latitude in determining how much child maintenance to order. On judicial separation or divorce, a court may also make a range of property-based orders, in lieu of or in addition to any periodical payments ordered, as a means of meeting the needs of a child or children. There are few judicially developed, or legislatively established, principles or guidelines to direct the exercise of this discretion, much less any formulae or tables.

Such a highly discretionary approach to child maintenance has long been known to generate significant inconsistency in outcomes. Although prior to the 1970s, many US states gave judges ‘wide discretion’ to award whatever child support amount they saw fit, ‘awards varied tremendously’.<sup>19</sup> Until 1997, an approach based on judicial discretion also governed child maintenance in Canada. While, as in Ireland, the scheme was meant to ‘tailor awards to the

---

<sup>9</sup> J Scherpe, ‘Marital Agreements and Private Autonomy in Comparative Perspective’ in J Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart, 2012), 476.

<sup>10</sup> FLA 1995, s 8; FL(D)A 1996, s 13.

<sup>11</sup> FLA 1995, s 10(2)(b); FL(D)A 1996, s 15(2)(b).

<sup>12</sup> FLA 1995, s 10(1)(a); FL(D)A 1996, s 15(1)(a).

<sup>13</sup> FLA 1995, s 9; FL(D)A 1996, s 14.

<sup>14</sup> FLA 1995, s 12; FL(D)A 1996, s 17.

<sup>15</sup> FLA 1995, s 8; FL(D)A 1996, s 13.

<sup>16</sup> Law Society of Ireland, *Divorce in Ireland: The case for reform* (2019), 8.

<sup>17</sup> FLA 1995, s 16; FL(D)A 1996, s 20.

<sup>18</sup> FLA 1995, s 16(5); FL(D)A 1996, s 20(5).

<sup>19</sup> K Baker, ‘Homogenous Rules for Heterogeneous Families: The Standardization of Family Law when There is No Standard Family’ (2012) *University of Illinois Law Review* 319, 329.

specific situation of each family’, it also created ‘significant variation in awards across cases’.<sup>20</sup> As a result, it was observed at the time,

‘most custodial parents can find someone in a similar situation who is receiving higher child support payments, and most non-custodial parents can find others paying less. Many view this variability as fundamentally unfair’.<sup>21</sup>

Unsurprisingly, similar difficulties have arisen in Ireland. Concerns about ‘judicial inconsistency’ in how maintenance laws were being applied were raised within 10 years of the introduction of the Family Law (Maintenance of Spouses and Children) Act 1976.<sup>22</sup> Empirical research investigating outcomes in judicial separation and divorce cases speak to this continued trend. Róisín O’Shea’s large-scale study conducted between October 2008-February 2012 found ‘inconsistent child and spousal maintenance orders . . . the hallmark of maintenance applications in the Circuit Court’<sup>23</sup> while Evelyn Mahon and Elena Moore reported that ‘child maintenance payments when awarded, varied considerably’.<sup>24</sup> These empirical findings are also backed up by practitioners: the Law Society of Ireland recently noted its concerns over the ‘the considerable range in outcomes [in contested family law cases] depending on the judge hearing the case’.<sup>25</sup>

Apart from the questions it raises as to the fairness of the overall regime, the existence of such high levels of inconsistency also creates serious difficulties for the majority of parents seeking to resolve issues of child maintenance through private ordering.<sup>26</sup> To what extent practitioner experience may offset some of the uncertainty is uncertain, with the Law Society itself reiterating the need for ‘guidance’ to ‘assist practitioners in advising their clients with regard to parameters for settlement’.<sup>27</sup> Where parents seek to reach a settlement without recourse to legal advisors, there is even less direction available to help shape negotiations.

---

<sup>20</sup> R Finnie, ‘Child Support Guidelines: An Analysis of Current Government Proposals’ (1995) 13 *Canadian Family Law Quarterly* 145, 146.

<sup>21</sup> *Ibid* 146-7.

<sup>22</sup> *Report of the Joint Oireachtas Committee on Marriage Breakdown* (Stationary Office 1985) [7.4.21].

<sup>23</sup> R O’Shea, *Judicial Separation and Divorce in the Circuit Court* (PhD Thesis, Waterford Institute of Technology 2014), 131-132. She observed 1,087 unique judicial separation and divorce cases in the eight Irish Circuit Courts and analysed 40 case files.

<sup>24</sup> E Mahon and E Moore, *Post-Separation Parenting: A Study of Separation and Divorce Agreements made in the Family Law Circuit Courts of Ireland and their Implications for Parent-Child Contact and Family Lives* (Office of the Minister for Children and Youth Affairs, 2011), 81. They observed and analysed 87 cases in 2007 relating to separation, divorce, maintenance, custody and access heard in three Circuit Courts. See also LA Buckley, ‘Irish Matrimonial Property Division in Practice: A Case Study’ (2007) 21 *IJLPF* 48.

<sup>25</sup> Law Society of Ireland (n 16 above) 6.

<sup>26</sup> Approximately 10% of judicial separation or divorce cases are contested in a full court hearing, Court Service, *Family Law Matters* (2007–2009) vol 1(1) 2. Moreover, practitioners are reporting serious delays in family law court hearings resulting from Covid-19, with a two-year wait for contested divorce cases, see ‘Rise In Divorce Cases During The Pandemic’ (Today with Claire Byrne, 26 Feb 2021)

<<https://www.rte.ie/radio/radioplayer/html5/#/radio1/21915007>> accessed 21 April 2021. This will likely ensure an even higher number of cases settle. See also K O’Sullivan, ‘Rethinking ancillary relief on divorce in Ireland: the challenges and opportunities’ (2016) 36(1) *Legal Studies* 111, 115.

<sup>27</sup> Law Society of Ireland (n 16 above) 9. Although Buckley (n 24 above) 78 reported that knowledge of the presiding judge was ‘crucial’ in ancillary relief proceedings, she also concluded that this may not be ‘easy’ and that ‘practitioners appearing outside their own locality are disadvantaged’.

Although, as Carol Rogerson explains, ‘[t]he discretionary determination of child support by courts through application of the vague concept of “need” has been identified as contributing to the problem of historically low and inadequate levels of child support’,<sup>28</sup> it remains unclear to what extent this is true in Ireland. When viewed together, the empirical research undertaken by Mahon and Moore<sup>29</sup> and Carol Coulter<sup>30</sup> revealed an average maintenance payment of €60-€100 per week per child.<sup>31</sup> By contrast, O’Shea subsequently reported that in her study, where child maintenance was agreed or ordered, a sum greater than or equivalent to €100 per week per child was set in 60% of the cases before the court.<sup>32</sup> However, in almost one-third of cases maintenance per child was set at €50 per week.<sup>33</sup>

In the absence of information on the broader financial context of the families concerned it is impossible to determine the adequacy or otherwise of the maintenance recorded. What is also impossible to determine is in what percentage of these cases such orders were complied with and how many more financially vulnerable custodial parents, who were unable to pursue such claims in the first instance, are not represented in such studies.<sup>34</sup> In these respects too, there are serious grounds for concern. According to the Oireachtas Joint Committee on Social Protection, just 35% of lone parents in 2016 were in receipt of child maintenance payments in Ireland.<sup>35</sup> Similar findings have been identified elsewhere.<sup>36</sup> Admittedly, restructuring of provision – where, for example, a larger share of the home may be transferred to the custodial parent in lieu of child maintenance – may account for some of this discrepancy given its apparent popularity in Ireland.<sup>37</sup> However, it is equally clear that many more custodial parents do not receive maintenance payments, either due to default on the part of the payor or the well-documented challenges in accessing justice.<sup>38</sup>

## **Part II: Momentum for the Reform of Child Maintenance in Ireland**

---

<sup>28</sup> C Rogerson, ‘Child Support, spousal support and the turn to guidelines’ in J Eekelaar and R George (eds), *Routledge Handbook on Family Law and Policy* (Routledge 2016) 153-154.

<sup>29</sup> Mahon and Moore (n 24 above).

<sup>30</sup> C Coulter, *Family Law in Practice: A Study of Cases in the Circuit Court* (Clarus Press 2009). She conducted research in 2006 in the Irish Circuit Courts.

<sup>31</sup> Mahon and Moore (n 24 above) 81. They found that child maintenance payments were recorded in 54 of the 87 cases analysed with payments ranging from €140 to €3,000 per month.

<sup>32</sup> O’Shea (n 23 above) 410.

<sup>33</sup> *Ibid*, 410.

<sup>34</sup> See J Carbone, ‘A Feminist Perspective on Divorce’ (1994) 4(1) *Children and Divorce* 183, 191.

<sup>35</sup> Oireachtas Joint Committee on Social Protection, *Report on the Position of Lone Parents in Ireland* (JCSP01/2017), 27. It also found at 11: ‘Children in one-parent families are three times as likely (26.2%) to live in ‘consistent poverty’ than families with two adults with one to three children (7.7%)’.

<sup>36</sup> See Mahon and Moore (n 24 above) 81 who reported that ‘few ex-spouses received any maintenance payments’. See also Law Society of Ireland (n 16 above) 23.

<sup>37</sup> See further below.

<sup>38</sup> Default has long been an issue in Irish maintenance laws. For an early discussion of the problems with enforcement in Ireland see, Committee on Court Practice and Procedure: Desertion and Maintenance, *Nineteenth Interim Report of the Committee on Court Practices and Procedure* (Stationery Office, 1974); P Ward, *The Financial Consequences of Marital Breakdown* (Combat Poverty Agency, 1990) 64. For more recent discussion of default and the issues in accessing justice see R Crosse, *Irish mothers, separation and divorce an exploratory study: examining experiences, services and policy* (PhD Thesis, NUI Galway, 2015).

Given the weaknesses of highly discretionary maintenance regimes, in almost all common law jurisdictions ‘[t]he process of assessing...children’s “needs” on the basis of individual budgets has... been abandoned’.<sup>39</sup> Although originally applying a regime based on judicial discretion akin to that in Ireland, the United Kingdom, Australia, New Zealand, Canada and most US states have each successfully adopted child maintenance formulae over the past forty years, moving from an approach largely focused on ‘cost-sharing’ to one based on ‘income-sharing’.<sup>40</sup> Ireland, however, remains an outlier in the common law world in thus far having refused to adopt a more formulaic approach to child maintenance determinations.

Why similar developments have not occurred in Ireland is probably multi-factorial. Irish family law reform, particularly in relation to the regulation of relationship breakdown, has suffered a long and somewhat tortuous past. Efforts to remove the constitutional ban on divorce formerly carried in Article 41.3.2° of *Bunreacht na hÉireann*, dominated much of the political and legislative focus throughout the 1980s and 1990s.<sup>41</sup> Highly effective rights-based and equality-based campaigning in the 2000s and 2010s subsequently saw legislative engagement in relation to family law re-directed towards the recognition of cohabitants’ rights and marriage equality as well as addressing the implications arising from the extension of such recognition.<sup>42</sup> Apparent judicial resistance to restraints being placed on the courts’ broad discretion in relation to ancillary relief provision<sup>43</sup> and misconceptions as to the viability of adopting a more rule-oriented approach in an Irish context<sup>44</sup> also likely contributed to the inertia.

Despite this backdrop, however, momentum towards the reform of Irish maintenance laws appears to now be building.<sup>45</sup> The Law Reform Commission of Ireland intends to consider ‘to what extent any further guidance may be provided in order to ensure a consistency in the approach taken to the exercise of ... judicial discretion’ in determining ‘proper provision’ on

---

<sup>39</sup> Rogerson (n 28 above) 155.

<sup>40</sup> Ibid 155. A formula-based approach grounded in income-sharing initially gained traction in the US in the 1980s with federal statutes introduced in 1987 requiring advisory guidelines. For more on the various guidelines applied in the US, see JC Venohr, ‘Differences in State Child Support Guidelines Amounts: Guidelines Models, Economic Basis, and Other Issues’ (2017) 29 *Journal of American Academy of Matrimonial Lawyers* 377; JC Venohr, ‘Child Support Guidelines and Guidelines Reviews: State Differences and Common Issues’ (2013) 47 *Family Law Quarterly* 327; and JC Venohr and RG Williams, ‘The Implementation and Periodic Review of State Child Support Guidelines’ (1999) 33 *Family Law Quarterly* 7. Since then most other common law jurisdictions have followed suit. For New Zealand, see the Child Support Act 1991. For the UK, see the Child Support Act 1991. For Canada, see the Child Support Guidelines introduced by regulation under the federal Divorce Act in 1997. Alternatively, certain civil law countries adopt formula-based guidelines which are based on average costs of supporting children.

<sup>41</sup> See K O’Sullivan, ‘The legacy continues: ancillary relief on divorce in Ireland’ (2019) 25(3) *Journal of Family Studies* 337.

<sup>42</sup> See, for example, the Children and Family Relationships Act 2015.

<sup>43</sup> O’Higgins J in *C v C* [2005] IEHC 276 argued that it ‘desirable that there be considerable discretion vested in the court of trial.’ Similarly, in *T v T* [2002] IESC 68, [2003] 1 ILRM 321 the majority of the court reiterated the importance of judicial discretion in determining ancillary relief.

<sup>44</sup> See O’Sullivan (n 26 above).

<sup>45</sup> Notwithstanding that, as stated, it is not within the terms of reference of the newly established Child Maintenance Review Group to consider how child maintenance is calculated, see <<https://www.gov.ie/en/press-release/f1c9e-minister-humphreys-launches-consultation-process-under-the-review-of-child-maintenance-arrangements/>> accessed 21 April 2021.

divorce.<sup>46</sup> Support for guidelines or formulae in the quantification of maintenance is also growing at grassroots level. In its 2019 report, *Divorce in Ireland: A Case for Reform*, the Law Society of Ireland appeared to be in favour of the introduction of formula-based guidelines to assist the calculation of maintenance, notwithstanding that such reforms would be intuitively contrary to their interests.<sup>47</sup> Moreover, in her submission to the Oireachtas' Joint Committee on Social Protection, Nuala Jackson SC argued:

'Users need predictability, the unfettered discretion of judges results in a considerable variation of approach and outcome. It is difficult to identify any pattern, with outcomes depending on the personal views and disposition of a judge. *We need formulas that quantify maintenance and guidelines for all other matters.*'<sup>48</sup>

At the same time, attitudes that previously stunted the growth of maintenance laws in Ireland are also steadily changing. Recent decisions from the superior courts appear to be indicative of a growing willingness to adopt a somewhat more structured approach to addressing the economic issues arising on relationship breakdown.<sup>49</sup> The adoption of mandatory guidelines for personal injuries assessments – developed and supported by the board of the Judicial Council<sup>50</sup> – illustrate an increasing openness towards constraining judicial discretion. In addition, fears that the Irish constitutional requirement for 'proper provision' would preclude more rule-oriented approaches being adopted for ancillary relief on divorce have been recently debunked.<sup>51</sup>

Consequently, it appears to be increasingly understood that what is required in Ireland is not the theoretical potential for 'Rolls-Royce' individualised justice,<sup>52</sup> but rather the adoption of clear and predictable maintenance laws which, in turn, could promote greater judicial consistency and better support the majority of parents trying to reach a settlement.

---

<sup>46</sup> Law Reform Commission, *Fifth Programme of Law Reform* (2019) 16. The Commission notes it will consider what guidance will prompt a more consistent approach 'in particular to assist spouses to reach settlements and resolve disputes more efficiently and at lower financial or cost'.

<sup>47</sup> Law Society of Ireland (n 16 above) 30. Baker (n 19 above) 365 noted that lawyers have an 'economic interest in more discretionary standards' yet are broadly supportive of formulas.

<sup>48</sup> Joint Committee on Justice and Equality, *Report on Reform of the Family Law System* (2019) 92 (emphasis added). See also Crosse (n 38 above) who at 259 supported 'having set parameters in terms of amounts awarded' for child maintenance. It has also been suggested that the European Union Maintenance Regulation may encourage jurisdictions adopting an approach based on equitable redistribution like Ireland to consider 'a more explicitly principled/pillared approach', see J Scherpe and J Miles 'Property and financial support between spouses' in Eekelaar and George (n 28 above) 145. For more, see L Crowley, *Family Law* (Round Hall, 2013) 767–773.

<sup>49</sup> See, for example, early moves towards the categorisation of assets were evident in *YG v NG* [2011] 3 IR 717; *PB v AB* [2012] IEHC 616.

<sup>50</sup> Although the courts formerly enjoyed broad discretion in determining such assessments, the new guidelines provide a range of values within which an award of damages should ordinarily fall. See <<https://www.piab.ie/eng/news-publications/news/Personal-Injuries-Guidelines.html>> accessed 16 November 2021.

<sup>51</sup> Article 41.3.2° of the Irish Constitution demands that 'proper provision' must be made for spouses and children as a precondition to the award of a decree of divorce. See O'Sullivan (n 26 above).

<sup>52</sup> Scherpe and Miles (n 48 above) 142. See also J Dewar, 'Reducing discretion in family law' (1997) 11 *Australian Journal of Family Law* 309.

### Part III: Five Key Issues in Devising Formula-based Guidelines for Child Maintenance in Ireland

Given their ‘different political and legal contexts’,<sup>53</sup> jurisdictions vary considerably in how they devise and apply child maintenance formulae. Nevertheless, drawing on international experience, there are usually three principal steps involved in designing child maintenance guidelines. First, it is necessary to determine a formula to estimate the ‘cost’ of the child or children; second, a formula to allocate those amounts between the parents or to the payor parent must be adopted; third, consideration must be given to the rules or principles to govern departures, if any, from the formulaic amounts. In addition to these issues, it is further necessary to establish who, precisely, would be responsible for applying the formula and how any such formula-based system would interact with the governing social welfare regime. In seeking to propose a viable and appropriate approach for the Irish context, each of these questions needs to be considered.

#### 1. *Establishing a formula to estimate the ‘cost’ of the child or children.*

Most child maintenance formulae adopted in the common law world are founded, at a base level, on a so-called marginal cost approach.<sup>54</sup> To establish the marginal cost – namely the percentage of income that is spent as a child is added to a household – it is typically necessary to calculate the average parental spending on children in intact families at various income levels. This is usually achieved by conducting household expenditure surveys to which equivalence scales are then applied.

However, despite the almost ubiquitous reliance across the common law world on this methodology, it is not without its challenges. The shortcomings of such an approach – which he described as the ‘continuity-of-marginal-expenditure’ model – were most notably highlighted by Ira Ellman.<sup>55</sup> While recognising the ‘obvious appeal’ of relying ‘on a seemingly neutral principle (continuity-of-expenditure) and upon neutral technical experts who implement that principle through the application of a value-free methodology’ in delivering the numbers to put in the guideline grid, he argued such a choice was

‘...an illusion because the ... continuity-of-marginal-expenditure: (1) is not neutral, (2) is not coherent ... and (3) the method employed for implementing this flawed principle – the equivalence scale – is empirically unverifiable, theoretically questionable, and made operational by reliance upon flawed data, the defects of which are typically hidden from policymakers by an impenetrable barrier of technical jargon.’<sup>56</sup>

---

<sup>53</sup> Rogerson (n 28 above) 156.

<sup>54</sup> As TJ Espenshade, *Investing in Children: New Estimates of Parental Expenditure 1-2* (Urban Institute, 1984) highlighted, despite the terminology, the focus is placed on parental *expenditure* on children, not on the *cost* of the children.

<sup>55</sup> I Ellman, ‘Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines’ (2004) (1) *University of Chicago Legal Forum* 162.

<sup>56</sup> *Ibid* 215. He explained at 197: ‘Treating the child as the marginal member of the household has the effect of excluding most of the household public goods from the child support calculation... While it vindicates one legitimate interest – that of the noncustodial parent in avoiding subsidy of the other parent via child support – it attaches no weight to the child’s legitimate interest in living in a household with an economic level not

In this context, and in the absence of a better alternative, he emphasised the need for those involved in writing guidelines to ‘understand the nature of the inquiry and the limitations of available knowledge’.<sup>57</sup> Accepting that the ‘construction of child support guidelines is a difficult task’, he highlighted the need for policymakers to recognise their important role in process from the outset:

‘Expert consultants can assist in [the construction of guidelines], but they cannot perform it, because there is no technical expertise that resolves the conflicting, legitimate claims of the parties affected by any set of support guidelines. Resolution of that conflict is a policy judgment. In making that policy judgment, those charged with the responsibility for writing child support guidelines can make use of expert assistance, but they must also understand the limits that available data and methods place on the usefulness of the expert advice available to them.’<sup>58</sup>

In undertaking the process to generate the ‘cost’ of children in an Irish context, it is therefore important that Irish policymakers, specifically, are alive to these limitations. While difficult decisions invariably have to be made in establishing the marginal cost, it is important that such choices are by made by the relevant policymakers and are not devolved, consciously or unconsciously, to expert consultants as has proved problematic in other jurisdictions to date.<sup>59</sup>

## 2. *Choosing a formula to allocate costs between the parents or to the payor parent.*

### a. The ‘percentage of obligor income’ approach versus the ‘income shares’ model

Once this ‘cost’ is established, key questions then arise as to how it ought to be allocated. In this regard, two alternative approaches dominate. The first is the so-called ‘percentage-of-obligor-income’ approach.<sup>60</sup> Under this approach, currently adopted in Canada (other than Quebec) and the UK, the child maintenance formula is dependent on just two key inputs: the number of children to which the order would apply, and the income of the payor parent. However, a second, and increasingly popular option for reform, is that based on an ‘income shares’ model.<sup>61</sup> Since child support guidelines were first required in the US in 1989, there has been a steady shift away from the first to the second. Today, of 51 US states (including the District of Columbia), 42 now use an income-shares model, six rely on a percentage-of-obligor-

---

grossly below that of either parent. Second, assuming one nonetheless wishes to employ a marginal expenditure methodology, ... there is no empirical or principled basis for choosing among the available equivalence scales, which yield very different estimates of marginal expenditures.’

<sup>57</sup> Ibid 218.

<sup>58</sup> Ibid 224.

<sup>59</sup> See also C Rogerson, ‘Child and Spousal Support in Canada: The Guidelines Approach Part 1’ (2011) 14(3) *Irish Journal of Family Law* 72. The need for such care to be exercised would arise each time the guidelines are re-examined to ensure that the amounts set continue to be appropriate. Federal guidelines in the US require a re-examination every four years. A similar time period might be appropriate in the Irish context.

<sup>60</sup> This may also be known as the ‘Wisconsin model’. See I Garfinkel and M Melli, ‘The Use of Normative Standards in Family Law Decisions: Developing Mathematical Standards for Child Support’ (1990-1991) 24 *Family Law Quarterly* 157.

<sup>61</sup> Rogerson (n 28 above) 156 (emphasis added). See also M Henaghan, ‘The Changing Politics of Family Law in New Zealand’ (2012) 2012 *International Survey of Family Law* 253, 268.

income approach and a further three adopt a hybrid Melson model.<sup>62</sup> Elsewhere, Australia<sup>63</sup> and New Zealand<sup>64</sup> have also recently abandoned the percentage-of-obligor-income approach, moving to an income-shares model in 2008 and 2014 respectively.

It seems likely that there would be strong support for the latter approach in Ireland.<sup>65</sup> Indeed, although the formula applied in New Zealand previously only considered the payor's income, the scheme was regarded as 'out of date' in light of mothers' increased labour-force participation and the Child Support Amendment Act 2013 subsequently took both incomes into account.<sup>66</sup> Moreover, the income-shares formula appears better suited to adjusting to more complicated family arrangements<sup>67</sup> and, from a practical perspective, would arguably better support those children most in need. While Katherine Baker suggests that since both formulas are basing their percentages on 'the same marginal expenditure data ... the awards are often comparable' irrespective of which approach is adopted,<sup>68</sup> this only holds true where parental incomes are equal. As Jane Venohr has highlighted, income-shares models tend to produce higher amounts at lower income levels while the percentage-of-obligor-income approach produces higher amounts at higher income levels.<sup>69</sup>

On the other hand, the advantage of simplicity inherent in the percentage-of-obligor-income approach cannot be discounted, particularly in any early iterations of a new child maintenance model. While, as noted, many jurisdictions have since shifted away from this model, its suitability as an ice-breaker into the world of child maintenance formulae does seem appealing.<sup>70</sup> Moreover, even where an approach is chosen which only looks at the non-custodial parent's income as a default, such as in Canada, discretion frequently remains to consider the other parent's income in certain specified circumstances, offsetting some of the difference between the two approaches.<sup>71</sup>

#### b. Desirability of including broader context

---

<sup>62</sup> See <<https://www.ncsl.org/research/human-services/guidelines-models-by-state.aspx>> accessed 13 November 2021. The shift was most recently seen in Illinois (July 1, 2017) and Arkansas (July 1, 2020).

<sup>63</sup> See P Parkinson, 'The Future of Child Support' (2007) 33 *University of Western Australia Law Review* 179. See also L Young and N Wikeley, 'Earning Capacity and Maintenance in Anglo-Australian Family Law: Different Paths, Same Destination' (2015) 27(2) *CFLQ* 129.

<sup>64</sup> M Fletcher, 'New Zealand's Child Support Amendment Act 2013: Some likely short-term effects of the new liability assessment formula' (2016) 30 *Australian Journal of Family Law* 28.

<sup>65</sup> Note that under Irish law a child remains dependent until they have reached the age of 18, or 23 if they continue in fulltime education.

<sup>66</sup> Fletcher (n 64 above) 29. See also G Coleman, 'Child Support Guidelines – New Laws, New Challenges' (1997) 15 *Canadian Family Law Quarterly* 229, 248. Although the Child Support Act 1991 adopted in the UK originally considered both parents incomes, this was subsequently simplified to only have regard to payor's income.

<sup>67</sup> M Takas, 'Improving Child Support Guidelines: Can Simple Formulas Address Complex Families' (1992) 26 *Family Law Quarterly* 171.

<sup>68</sup> Baker (n 19 above) 331.

<sup>69</sup> Venohr, 'Differences in State Child Support Guidelines Amounts: Guidelines Models, Economic Basis, and Other Issues' (n 40 above).

<sup>70</sup> While given the various modifications proposed below to any basic formula, the requirement to consider both parental incomes under an income shares formula hardly seems a demanding addition, it would add another important layer of complexity which might be regarded as undesirable at the outset in particular.

<sup>71</sup> For example, where incomes exceed certain thresholds or where hardship is argued, see respectively Child Support Guidelines, ss 4 and 10.

Irrespective of which formula is adopted, either model can be further calibrated to take account of the broader parent/child context in question. For example, in its *Report on the Position of Lone Parents in Ireland*, the Oireachtas Joint Committee on Social Protection highlighted its concerns about the additional costs of raising teenagers.<sup>72</sup> To address this differential, the age of children could be factored into any formula.<sup>73</sup> Moreover, given the higher costs of living in Dublin in comparison to the rest of the country, it may be worth questioning whether location ought to be relevant to the calculations.<sup>74</sup>

On the one hand, the inclusion of more inputs would better ensure the sensitivity of the formula to broader family circumstances and potentially better guarantee the legitimacy of the regime. Despite originally adopting a relatively basic system, jurisdictions such as New Zealand have recently expanded the range of inputs which feed into their calculations to ensure a more nuanced outcome.<sup>75</sup> Yet, on the other hand, it has been suggested that ‘the more sensitive the formula is to context, the less well the system would work’.<sup>76</sup> For example, the earliest iteration of the UK Child Support Act 1991 was beset by various problems, not least of which was that the formula was dependent on the input of a large amount of data and ‘produced some notoriously inappropriate results’.<sup>77</sup> In light of these criticisms, the approach was revised and streamlined and today ‘is very simple’ with ‘criticism of the current version ... rarely voiced’.<sup>78</sup>

Learning from these experiences, therefore, it appears that in order to best ensure the success of any reform, it would perhaps be advisable to adopt a child maintenance formula with a limited number of inputs, at least at the outset. While it may be possible, and indeed desirable, to add more nuance over time, the inclusion of such refinements could prove problematic and overcomplicate the system if introduced too early.<sup>79</sup>

### 3. *Setting the rules or principles to govern departures or exceptions from the formulaic amounts.*

#### a. General discretion to depart from the formula

---

<sup>72</sup> Oireachtas Joint Committee on Social Protection (n 35 above) [2.14].

<sup>73</sup> See Rogerson (n 28 above) 157. The 2013 reforms in New Zealand also saw the formula taking account of the ages of children for the first time. Henaghan (n 61 above) 268 observed the reforms also sought to ensure the new formula was based on ‘more realistic and up-to-date information about the costs of raising children in New Zealand’.

<sup>74</sup> Issues regarding the differential cost of living in Dublin versus the rest of the country would likely be raised in developing any new formula. However, the inclusion of such context in any formula (whether awarding higher child maintenance amounts given the higher cost of raising children in Dublin or awarding lower child maintenance in recognition of the non-resident parent’s higher housing costs in the capital) would be challenging to implement.

<sup>75</sup> Child Support Amendment Act 2013.

<sup>76</sup> Baker (n 19 above) 362.

<sup>77</sup> Law Commission for England and Wales, *Matrimonial Property, Needs and Agreements*, Law Com 343 (TSO, 2014) 64.

<sup>78</sup> *Ibid.* Notwithstanding that there appears to be more scope in Australia to depart from the formula than in England, Young and Wikeley (n 63 above) 149 note there is ‘little political will in either jurisdiction to expand individualised assessment of child maintenance.’

<sup>79</sup> Compare, for example, the experiences in the UK and New Zealand, discussed above.

The exigencies of the Irish constitutional requirement to ensure ‘proper provision’ may mean it would be necessary to retain a broad over-arching discretion as a final check on any formula-generated determination of child maintenance.<sup>80</sup> While it ought to be *strongly* presumed that a formula-based amount equates to ‘proper provision’ – particularly in light of the potential introduction of a public Child Maintenance Agency<sup>81</sup> and the growing policy focus on better encouraging settlement on such matters – this presumption could arguably be displaced where it is considered that such provision was not made. Guidelines, however, linked to the objectives of the child maintenance scheme (which themselves ought to be expressly stated),<sup>82</sup> ought to be provided to direct the court as to appropriate scenarios for departure under this heading to best ensure consistency in outcomes.

b. Hardship exception

It would also seem probable that both the Irish legislature and judiciary would be more comfortable adopting formula-based guidelines where scope remains for the exercise of judicial discretion to prevent hardship.<sup>83</sup> Yet, although the desire to leave the door open for the exercise of discretion in such cases is understandable, it would be important that such a derogation from the formula-based approach would be framed appropriately so as not to undermine the broader scheme and (re)introduce high levels of uncertainty. Conscious of this threat, a relatively stringent approach is adopted in Canada. Under its hardship exception, the burden of proof rests with the claimant to prove a) an ‘undue hardship circumstance’<sup>84</sup> and b) a lower household standard of living.<sup>85</sup> The hardship, as Julien and Marilyn Payne explained, ‘must be exceptional or excessive, rather than the inevitable consequence of dividing limited resources between two households’.<sup>86</sup> Furthermore, once these elements are established, it still remains at the discretion of the court in Canada whether, and to what extent, a departure from

---

<sup>80</sup> JT Oldham, ‘Lessons from the New English and Australian Child Support Systems’ (1996) 29 *Vanderbilt Journal of Transnational Law* 691 argues for the retention of some discretion within more formulaic approaches. Indeed, discretion has to some extent been brought into the UK scheme through departures and now variations. See also the change of assessment provisions in Australia. In Ireland, while the standard of ‘proper provision’ is only applied under the FLA 1995 and FL(D)A 1996 in relation to marital breakdown, a similar standard appears to be applied under other applicable legislation for non-marital situations and circumstances where a divorce or judicial separation is not being sought. See above for the precise wording of the GIA 1964 and FL(MSC)A 1976. A ‘qualified cohabitant’ can seek redress on the breakdown of a cohabiting relationship under the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 with the court empowered to make property adjustment orders where it would be ‘just and equitable’ to do so. One of the factors to be considered in this regard are the ‘rights and entitlements of any dependent child’ (s 173(3)).

<sup>81</sup> As Rogerson (n 28 above) 157 highlights, where child maintenance remains within the jurisdiction of the courts there is more scope for judicial discretion to be exercised (or exceptions to be included in the guidelines) than where it is primarily addressed by a public agency.

<sup>82</sup> See further below.

<sup>83</sup> While the ‘proper provision’ exception would be focused on the needs or hardship of any child or children, this hardship exception would be more likely of relevance to payors.

<sup>84</sup> A non-exhaustive list of ‘hardship circumstances’ is set out in subs 10(2) of the Federal Child Support Guidelines. Rogerson (n 59 above) notes: ‘In practice, claims of undue hardship are rarely successful... Canadian courts have on the whole ... been reluctant to create significant opportunities for discretionary departures.’

<sup>85</sup> See subs 10(3).

<sup>86</sup> J Payne and M Payne, *Child Support Guidelines in Canada* (Irwin Law, 2004) 286. This explanation has been referenced in many judgments including *Van Gool v Van Gool* [1998] BCJ No 2513.

the formula-based calculations may be appropriate. A similarly stringent approach could potentially be adopted in Ireland.

c. Shared custody

How a new, more formulaic, child maintenance regime would address situations of shared custody would also have to be tackled. A key question that arises is whether to provide a separate ‘formula’ for such cases or simply grant a discretion to depart.<sup>87</sup> Under the Child Support Guidelines in Canada, where a child spends 40% of their time with the payor parent, the court may depart from the standard formula and use their discretion to determine the child support obligation.<sup>88</sup> A similar position was also formerly adopted in New Zealand.<sup>89</sup> However, such approaches have the potential to prove problematic. Rogerson, for example, suggests that in Canada the shared custody provision ‘has not only generated much litigation over whether the 40 per cent threshold has been reached on the facts of particular cases, but has also had a negative impact on parenting disputes as payor parents seek more time with children in order to reduce their child support obligations.’<sup>90</sup> Others, however, contest this view, believing that such concerns, while true for a small subset of knowledgeable parents, have been overstated.<sup>91</sup>

Whatever the truth, several jurisdictions have developed more refined techniques to deal with such scenarios. In light of the ‘increasing politicization’<sup>92</sup> of shared custody, Australia, New Zealand and the UK have established sliding scales to adjust for time spent with both parents.<sup>93</sup> Moreover, unlike in Canada, these scales typically apply where the payor parent enjoys relatively modest amounts of time with the child or children. For example, in New Zealand such adjustments begin where a child spends equivalent to two nights per week with the payor parent, while in UK and Australia it is just one night.<sup>94</sup> In Ireland, it has been observed that the ‘current default access orders’ made by the District and Circuit Courts in favour of non-custodial parents are for ‘every second weekend and one night during the week’.<sup>95</sup> This equates to approximately 104 nights per year and 28% of time, matching the minimum threshold in New Zealand and significantly exceeding the minimum thresholds in Australia and the UK.

---

<sup>87</sup> See eg M Hakovirta and GB Eydal, ‘Shared Care and Child Maintenance Policies in Nordic Countries’ (2020) 34(1) *IJLPF* 43; M Hakovirta and C Skinner, ‘Shared physical custody and child maintenance arrangements: A comparative analysis of 13 countries using a model family approach’ in L Bernardi and D Mortelmans, *Shared Physical Custody: Interdisciplinary Insights in Child Custody Arrangements* (Springer, 2021).

<sup>88</sup> See Child Support Guidelines, s 9.

<sup>89</sup> Child Support Act 1991.

<sup>90</sup> Rogerson (n 59 above) 72. These difficulties were also frequently mentioned in as yet unpublished empirical research undertaken by this author with lawyers and judges in Canada. Such implications were foreseen, see Coleman (n 62 above) 237. See also Henaghan (n 58 above) 270.

<sup>91</sup> See R Thompson, ‘The TLC of Shared Parenting: Time, Language and Cash’ (2013) 32 *Canadian Family Law Quarterly* 315 and B Ambury, ‘The Cost of Shared Parenting’ (2020) 39 *Canadian Family Law Quarterly* 1.

<sup>92</sup> Rogerson (n 28 above) 157.

<sup>93</sup> For a recent overview of different approaches to parenting-time adjustments across US states, see JT Oldham and J Venhor, ‘The Relationship Between Child Support and Parenting Time’ (2020) 54(1) *Family Law Quarterly* 141.

<sup>94</sup> Thus while New Zealand, like Canada, formerly applied a 40% threshold, this has been reduced to 28%. There, the previous scheme was regarded as ‘out of date’ in not taking better account of shared parenting and required reform given that ‘fathers are more likely to share care’, see Fletcher (n 64 above) 29.

<sup>95</sup> Joint Committee on Justice and Equality (n 48 above) 39.

Again, whether Ireland ought to adopt a discretionary approach associated with a high and fixed threshold as applied in Canada, or pursue an approach based on sliding scales which start from a lower percentage of time but then continuously ‘trade dollars for days’ across a wider set of parenting arrangements, will be a key question. However, given the significant levels of shared custody in Irish practice, an approach whereby defined reductions in the amount payable would be available for a payor parent who has care for the equivalent of one or more nights a week would arguably be preferable and, likely, more politically palatable.<sup>96</sup>

d. High or low-incomes

A further question to be considered is whether it would be desirable to incorporate flexibility to depart from the formula-generated amount where the income of the payor parent is either particularly high or low. At one end of the spectrum, cognisant that the question of the appropriate child support amount is ‘not easily answered’ in high-income cases, most jurisdictions now apply an upper income threshold beyond which a departure from calculated amounts may be permitted.<sup>97</sup> Such an approach would appear reasonable for inclusion in Ireland also.

However, a more challenging issue is whether, at the other end of the spectrum, there ought to be a minimum income threshold below which child maintenance would not be payable. Reflecting on the approach adopted in Canada prior to the introduction of the Child Support Guidelines, Finnie noted that it was ‘often felt’ that child support awards tended ‘to impose too heavy a financial burden on low-income, non-custodial parents...’.<sup>98</sup> Such a perception also appears to be growing in Ireland.<sup>99</sup> Drawing on the findings of her empirical research, O’Shea reported:

‘Of great concern was the common approach of the court to make child maintenance orders where the payor, in 100% of cases the father, was only in receipt of State benefits, the average State benefit observed being €200 per week.’<sup>100</sup>

Noting that at the time the national insolvency guidelines (2013) stated the subsistence level as €237.65 per week, she concluded:

‘The court, in the main, prioritised the legal, moral and constitutional obligation on the payor parent to financially provide for their child/children, making orders that effectively brought many payor fathers below subsistence level...’.<sup>101</sup>

To address this weakness, a minimum income threshold below which child maintenance would not have to be paid could be applied. This would ensure a ‘self-support reserve’ for otherwise

---

<sup>96</sup> Moreover, to avoid any unnecessary litigation and conflict, prescriptive guidelines addressing common issues could be included, such as how time is quantified, what counts as custodial time et cetera.

<sup>97</sup> LW Nelson, ‘High-Income Child Support’ (2011) 45(2) *Family Law Quarterly* 191-218. She notes, ‘The methods for dealing with child support when the parents have an income in excess of a state’s guideline amount are varied [in the US].’ See also Baker (n 19 above) 367.

<sup>98</sup> Finnie (n 20 above) 147. As he then correctly observed, ‘guidelines could smooth out such inconsistencies.’

<sup>99</sup> See Joint Committee on Justice and Equality (n 48 above) 38-39.

<sup>100</sup> O’Shea (n 23 above) 131.

<sup>101</sup> Ibid 131-132.

payor parents where their income is very low.<sup>102</sup> Indeed, a precedent of sorts already exists. Where an order for an attachment of earnings is made, the order shall specify the ‘protected earnings rate’, namely the level below which the court considers it proper that the earnings should not fall.

However, the adoption of such an approach could prove counter-productive. Arguably, one of the advantages of adopting a formula-based approach to child maintenance calculations is that, unlike a regime based on judicial discretion, the rule-oriented nature of the approach emphasises its mandatory nature: obligations are set out in statute and not merely pulled from the sky by a judge or legal representatives. The inclusion of minimum thresholds could perhaps undermine this goal by intimating that *only certain* parents are subject to such obligations. An alternative approach, drawing on the experience of Australia and New Zealand, could see minimum amounts of child maintenance, perhaps as low as €10 per week, continue to be ordered.<sup>103</sup> Although the provision of such low amounts of maintenance would do little to ease the day-to-day financial burden of the custodial parent, it would perhaps be symbolic, if enforced, in emphasising the important maintenance obligations of *all* parents while simultaneously better reflecting the precarious financial position of low-income payors.

e. Impact of property-based orders for the benefit of dependent children

While it is envisaged that child maintenance ought to stand apart from wider ancillary relief issues (effectively as its own pillar), it remains necessary to consider how a formula-oriented approach to calculation would interact with specific property-based orders frequently made having regard to the needs of dependent children. Orders for the exclusive occupation of the family home or the postponed sale of the property, for example, are quite common in Ireland as a means of providing security for children on divorce.<sup>104</sup> Many financially dependent spouses are, moreover, willing to forego child (or spousal) maintenance in return for a larger

---

<sup>102</sup> This approach is adopted in many jurisdictions and applies in Canada for annual incomes of approximately \$12,000 or less. However, note the difficulty, as Carbone (n 34 above) 190 highlights, that ‘with relatively lower earning fathers, courts tend to consider the hardship an award would impose without balancing it against the hardship lack of an award would impose on the custodial family’. A similar charge could be laid against the legislator if applying a minimum threshold.

<sup>103</sup> The Minimum Annual Rate of child support in Australia currently is \$446 per annum, see <<https://lawhandbook.sa.gov.au/ch07s01s05s02.php#:~:text=Generally%2C%20payers%20who%20have%20a,rate%20is%20%24446%20per%20annum>> accessed 21 April 2021. Whether certain categories of parents ought to be exempt from paying child maintenance would also require consideration, see the Child Support Act 1991, s 89A-89ZE. In terms of how the money would be collected, one option could be that non-resident parents on social welfare benefits be required to pay a nominal amount of child maintenance each week by direct deduction from their benefits. Such an approach would both reinforce the message that child maintenance matters and encourage those who previously defaulted to get back into the habit of paying again. For more on social welfare considerations, see below.

<sup>104</sup> Crowley (n 48 above) 632 notes, ‘it is well settled that where there are younger children and where it is financially permissible, that the parent with custody should remain in the family home’. Note, such orders are only available on the breakdown of a marriage under the FLA 1995 and FL(D)A 1996. Although, as noted, the rights and entitlements of any dependent child are a factor to be considered in an application for redress on the breakdown of a cohabiting relationship under the CPCROCA 2010, and a property adjustment order may be made, this may only be done as a last resort (see s 174(2)). Orders for the exclusive occupation of the home or postponed sale are not available, under the 2010 Act, GIA 1964 or FL(MSC)A 1976. See further below.

share of the equity in the family home.<sup>105</sup> How the introduction of a formula-based approach to child maintenance would fit with these relatively fluid practices is something which ought to be addressed and could prove one of the trickier issues to resolve in introducing any such reform.

On the one hand, the introduction of a formula would likely aid parties in restructuring the provision made for dependent children. While at present there is little to base any calculations on to allow, for example, for the transfer of a share (or greater share) in the family home to the custodial parent, the adoption of a formula could better facilitate accurate and fair restructuring going forward.

On the other, whether child maintenance payments ought to be reduced where an order for the exclusive occupation of the family home or the postponed sale of the property is also made is a question requiring careful consideration.<sup>106</sup> Fortunately, the problem of how to strike an appropriate balance in these circumstances is not unique to Ireland and was recently afforded considerable attention by the New Zealand Law Commission in its comprehensive review of the Property (Relationships) Act 1976. The Commission stressed the importance and ‘practical difference’ of enabling children to remain in the family home ‘for a time to maintain continuity and help ensure an orderly transition from one household to two’.<sup>107</sup> Having noted that orders such as those postponing the vesting of a partner’s share in property,<sup>108</sup> or granting occupation of the family home to one partner, were ‘rare’ in the jurisdiction,<sup>109</sup> it actively sought to incentivise such remedies and encourage the courts to ‘give less weight to a “clean break” in this context’.<sup>110</sup>

To this end, the Commission proposed the introduction of a presumption in favour of granting a temporary occupation or tenancy order on application by a principal caregiver of any minor or dependent child of the relationship.<sup>111</sup> Significantly, it also recommended that certain orders including those for the exclusive occupation of the family home (for such period as the court deems fit), which are made to benefit dependent children,<sup>112</sup> should *not* be grounds for departure from formula-assessed child support obligations.<sup>113</sup> While the New Zealand Law Society raised its concerns that such an approach could ‘lead to unfairness for the non-

---

<sup>105</sup> See eg Mahon and Moore (24 above) 45 and 80. In many cases this is a pragmatic response to the weaknesses inherent in the Irish system and a means of protecting against future non-compliance with a periodical payments order.

<sup>106</sup> This may arise irrespective of whether the custodial parent has a share in the ownership of the property or not.

<sup>107</sup> New Zealand Law Commission (NZLC), *Dividing relationship property – time for change?* (NZLC IP41, 2017) 683.

<sup>108</sup> NZLC, *Review of the Property (Relationships) Act 1976* (NZLC Report No 143, 2019) 296: ‘Postponement orders are typically made in order to postpone the sale of the family home.’

<sup>109</sup> NZLC (n 107 above) 654. Some of these orders were refused because clean break was seen by the court as preferable, see 682.

<sup>110</sup> *Ibid* 683.

<sup>111</sup> NZLC (n 107 above) 309 Recommendation 69 at 316. That this would relate specifically to the family home appears implicit, see 296.

<sup>112</sup> Property (Relationships) Act 1976 ss 26, 27 and 28A.

<sup>113</sup> NZLC (n 107 above) Recommendation 70 at 316. In Canada, the occupation of the family home is dealt with in the division of matrimonial property and thus is independent of child support calculations.

occupying parent’,<sup>114</sup> the Commission concluded that any such unfairness would be relevant to the exercise of the courts’ discretion in deciding whether or not to make such an order in the first place.

At first blush, it might appear that failure to take account of the value of exclusive occupation would be inherently unfair. Given the shortage of housing supply and the high cost of rental accommodation in Ireland,<sup>115</sup> the monetary value of an exclusive occupation order could be substantial. However, if the alternative approach was adopted – whereby the formula-based calculation could be departed from in every case where the custodial parent remains in the home with the children – this too could give rise to the potential for serious problems. First, as was highlighted in New Zealand, allowing the courts to depart from the formula-based calculations where such orders were made could potentially increase the likelihood of children having to *leave* the home as custodial parents may be less likely to seek the exclusive occupation of the home if this would precipitate a reduction in maintenance.<sup>116</sup> Second, such an approach would arguably (re)introduce an excessive element of negotiation into child maintenance calculations. Third, it would potentially raise questions about whether the best interests of the child were really being prioritised.

There is no easy solution to this dilemma. Both approaches have their weaknesses. However, it is contended that, *where possible*, orders for the exclusive occupation of the home or postponed sale, ought to be available *in addition to* child maintenance as a means of best ensuring that ‘proper provision’ and the objectives of the child maintenance system have been met by the child maintenance ordered.<sup>117</sup> All other property-based orders which can currently be made under the Family Law Acts 1995 and 1996 for the benefit of dependent children, ought to be retained and available to the courts in lieu of period payments or in addition to periodic payments on an equivalent basis.<sup>118</sup>

#### 4. *Establishing who will apply any formula-based child maintenance regime*

Once the core issues are addressed, it is important to establish who would apply any new child maintenance formula going forward.<sup>119</sup> Currently, the Department of Social Protection is

---

<sup>114</sup> Ibid 306, for example, in cases where the family home is the only capital asset or where one partner is unable to access their capital for some years

<sup>115</sup> See MJ Doval Tedin and V Faubert, *Housing Affordability in Ireland* (European Commission Economic Brief 061, 2020).

<sup>116</sup> NZLC (n 107 above) 301.

<sup>117</sup> By facilitating such orders ‘where possible’, an element of discretion is retained. Although the inclusion of any discretion is liable to fall foul of the weaknesses highlighted in New Zealand, clear principles could be included in any guidelines developed to identify scenarios where such orders should not be made in addition to child maintenance thereby limiting the potential for this ‘loop hole’ to be exploited in practice.

<sup>118</sup> It is important to highlight that such an approach would continue, if not exacerbate, the two-tier system which currently applies given that such orders are currently only available to meet the needs of dependent children on judicial separation or divorce as discussed above note 104. Whether the courts ought to be empowered to make such orders in other non-marital contexts is certainly worthy of legislative consideration to ensure the needs of *all* children are best met. Full consideration of the potential for such reform is, however, outside the scope of this article

<sup>119</sup> A further issue is whether any new statutory scheme would affect all separated parents (regardless of when they separated) or only those who separate after a certain date. It is probable that the Irish legislature would favour an Australian-style approach whereby the existing scheme would apply to previously separated parents

investigating the ‘possible establishment’ of a non-court ‘State Child Maintenance Agency’.<sup>120</sup> Whether such an agency, if ultimately introduced, ought to be tasked with implementing any formula-based guidelines therefore needs to be considered.

Such an approach – devolving responsibility to a state agency – is already applied in various jurisdictions including Australia, New Zealand and the UK.<sup>121</sup> If adopted successfully, such reform would have the potential to facilitate parents in reaching settlements in a much more efficient and cost-effective manner than the existing court-centred system. However, it is unlikely that the Irish Government would support any reform which would remove the role of the courts entirely. Irish family law has long placed a premium – at both a legislative and constitutional level – on the importance of judicial discretion and it seems highly unlikely there will be any dramatic shift away from this policy in relation to child maintenance.

Nevertheless, something in between the retention of our existing exclusively court-based regime and wholesale reform devolving *all* responsibility to any emerging agency could be introduced. The proposals of the Law Society of Ireland in this regard, advanced in its submission to the Child Maintenance Review Group Consultation in 2021, are particularly worthy of note.<sup>122</sup> It suggested introducing a ‘mandatory requirement’ that parents utilise the processes provided by any new agency to resolve maintenance disputes.<sup>123</sup> It added that ‘[c]onsideration’ should then be given to ‘assigning power to the [Child Maintenance Agency] to make a preliminary determination in relation to the appropriate level of maintenance where agreement cannot be reached between the parties’. Furthermore, ‘[i]f such power of preliminary determination is provided to the [Agency], it should be subject to appeal (by either party) to the District Court and consideration should be given as to whether there should be no further right of appeal from the District Court’.<sup>124</sup>

Such an approach has much to commend it. It would ensure that, while ultimate authority to determine maintenance disputes would continue to rest with the courts, an important quasi-judicial pathway could be made available to parents to resolve questions of child maintenance in a more efficient and cost-effective manner.

---

with any new formula limited to newly separated couples. Serious difficulties were encountered in the UK when it originally sought to apply its new scheme in 1993 to all parents, while memories of the failure of the Matrimonial Homes Bill 1993, although not directly comparable, would likely tilt the balance against retrospective effect.

<sup>120</sup> Department of Social Protection (n 3, above) 6-7. The need to introduce a child maintenance agency has been stressed since the mid-1970s. See Wednesday, 10 March 1976, Seanad Éireann debate on the Family Law (Maintenance of Spouses and Children) Bill, 1975: Second Stage per Senator Mary Robinson.

<sup>121</sup> While the experience in the UK has proved somewhat problematic, it has achieved greater success in Australia and New Zealand.

<sup>122</sup> Law Society of Ireland, *Submission to the Child Maintenance Review Group* (March 2021) available at <<https://www.lawsociety.ie/globalassets/documents/submissions/2021-submission-child-maintenance-review-group.pdf>> accessed 14 November 2021.

<sup>123</sup> *Ibid* 7.

<sup>124</sup> *Ibid* 9. The Society also considered whether parties to judicial separation or divorce should be exempt from the requirement to fully engage with the agency given the wider financial issues likely to be involved. If such parties were required to utilise the agency under this framework, appeals would have to go towards the Circuit Court given differing legislative basis and the caps placed on the amount of maintenance capable of being ordered at District Court level, see Part I above.

## 5. *Determining how a new formula-based scheme would interact with the social welfare system*

Finally, it is necessary to consider how such a regime would interact with the existing social welfare system and how this link may be best shaped to ensure the maximum effectiveness of any reforms introduced. Here there is much room for improvement, with state policies governing the interplay of social welfare supports and child maintenance widely regarded as unsatisfactory in Ireland.<sup>125</sup>

First, while social welfare schemes such as the One-Parent Family Payment<sup>126</sup> are payable to parents with care on the condition that an applicant makes ‘efforts’ to seek maintenance from the other parent,<sup>127</sup> such a policy has been shown to increase the financial vulnerability of parents with care.<sup>128</sup> Although originally also adopted in the UK, such an approach has since been abandoned in that jurisdiction: whether it should continue in an Irish context is equally debateable.

Second, whether maintenance payments received by parents with care ought to continue to count against their entitlement to a One-Parent Family Payment or whether, as in the UK, recipient parents on such benefits ought to get a disregard for such payments, further deserves to be reconsidered. Indeed, compounding the issue, maintenance payments are also calculated as a source of income when considering applications for rent supplement and other social welfare payments under Irish social welfare law. While almost 5 years ago the Oireachtas’ Joint Committee on Social Protection’s *Report on the Position of Lone Parents in Ireland* accepted, the ‘effects of this policy on the financial well-being of lone parent families’ warrants ‘closer scrutiny’,<sup>129</sup> no such investigation has yet been published.<sup>130</sup>

---

<sup>125</sup> See the Law Society of Ireland (n 123 above); One Family, *Child Maintenance Position Paper* (2019) available at <<https://onefamily.ie/wp-content/uploads/2019/10/Child-Maintenance-Position-Paper-7-19.pdf>> accessed 14 November 2021; Oireachtas Joint Committee on Social Protection (n 35 above); Crosse (n 38 above).

<sup>126</sup> This is the principal state support for lone parents with children under seven. When a child turns seven, the lone parent moves to a Job Seekers Transition payment and when the child turns 14 the parent is moved to the Jobseekers Allowance. As the Law Society (n 123 above) 4 note: ‘This system appears to be founded on the assumption that lone parents may be in a better position to take up employment when children are at a certain age. However, it ignores the fact that all children are legally dependent on their parents up to the age of 18 years and dependency, in a family law context, extends to the age of 23 years if a child is in fulltime education.’ For more, see One Family (n 126 above) 6.

<sup>127</sup> See

<[https://www.citizensinformation.ie/en/social\\_welfare/social\\_welfare\\_payments/social\\_welfare\\_payments\\_to\\_families\\_and\\_children/one\\_parent\\_family\\_payment.html](https://www.citizensinformation.ie/en/social_welfare/social_welfare_payments/social_welfare_payments_to_families_and_children/one_parent_family_payment.html)> accessed 14 November 2021.

<sup>128</sup> As the Law Society of Ireland (n 123 above) 4 notes, ‘this obligation to make “efforts to seek maintenance” is imposed on the most financially and socially vulnerable, who often do not have the resources, financial and otherwise, to undertake such efforts’. For example, the parent with care has to prove there is consistent non-payment of maintenance in order to receive the full One-Parent Family Payment. While amassing this evidence, they will not be in receipt of maintenance or full social welfare support leaving them in a highly precarious position.

<sup>129</sup> Para 2.19. See also Chapter 4. As One Family (n 126 above) 2 notes ‘current social welfare One-Parent Family Payment and child maintenance regulations can reduce, rather than increase, the level of a family’s income.’

<sup>130</sup> However, it appears it will form part of the Department of Social Protection’s review of child maintenance, see n 3 above.

The full implications of any policy changes vis-à-vis the interaction of child maintenance with the broader social welfare regime lie outside the scope of this article. Nonetheless it is clear that such issues ought to be tackled as a priority to best ensure the practical effectiveness of any reforms, formula-based or otherwise, going forward.

#### **Part IV: The Likelihood of Success of any such Reform**

The idea of adopting a more structured approach to child maintenance in Ireland is not novel. As far back as 1975, Charles Haughey ‘strongly’ supported a proportion of income approach to child maintenance, to be decided at the discretion of the court on a case by case basis.<sup>131</sup> While at the time Haughey believed that an approach whereby a proportion of income could be set out in legislation ‘would be unrealistic and perhaps unworkable’,<sup>132</sup> international experience now shows that such an approach is very much a feasible option for Ireland.

However, the success of any formula-based approach would likely be contingent on the effectiveness of certain precursors to reform as well as the introduction of important scaffolds to support the implementation of any new scheme. First, before any formula is devised, the core objectives of child maintenance laws in Ireland must be established. Precisely what they are has long been open to question. On the Second Reading of then Family Law (Maintenance of Spouses and Children) Bill 1975, Senator Ryan observed that

‘[o]ne aspect of the Bill which is not quite clear... is the extent to which the spouse who is failing to provide for the family is obliged to contribute. Is this an absolute obligation or is it an obligation that arises only where it is proved that there is need for contribution? There may be certain circumstances... where the need is very doubtful. In these circumstances is there no obligation on the spouse... to make a contribution?’<sup>133</sup>

He added: ‘it does seem that there is a very important principle involved here and one on which different courts may take a completely different point of view and make decisions which will be widely different.’<sup>134</sup> The Minister of the day did not address the issue nor was it expressly clarified on the introduction of the Family Law Acts 1995 or 1996.<sup>135</sup>

All that can be said with certainty is that maintenance in Ireland is largely addressed ‘in accordance with needs and means’.<sup>136</sup> Thus, although ‘needs’ remain a core consideration, ‘means’ are also relevant and provision beyond bare needs may be made. There has, however, been no explicit articulation at either a legislative or judicial level of precisely what is guiding

---

<sup>131</sup> Tuesday, 22 Jul 1975, Dáil Éireann debate on the Family Law (Maintenance of Spouses and Children) Bill, 1975: Second Stage. Several other Senators including Senator Kerrigan and Senator Uí Eachthéirn also supported this idea.

<sup>132</sup> *Ibid.*

<sup>133</sup> Per Ryan, Wednesday, 10 March 1976, Seanad Éireann debate on the Family Law (Maintenance of Spouses and Children) Bill, 1975: Second Stage.

<sup>134</sup> *Ibid.*

<sup>135</sup> As the Law Society of Ireland, (n 16 above) 10 noted: ‘It is a criticism of the Divorce Act that at the time of its drafting, greater consideration was not given to the underlying philosophies informing the law on ancillary relief, in particular maintenance...’.

<sup>136</sup> *LB v Ireland, Attorney General and by order PB* (2008) 1 IR 134 at 148. See also *TF v Ireland* (1995) 1 IR 321.

the courts in such cases or what objectives they are seeking to achieve. In adopting a more formulaic approach, it would be important to establish, at a base level, what these objectives are<sup>137</sup> as a means of best directing any reform and the exercise of any discretion thereunder.<sup>138</sup>

Second, once a formula is established and guidelines are developed (ideally with the input of stakeholders), extensive testing of any proposed new scheme would have to be undertaken in order to avoid the ‘monumental administrative shortcomings’ experienced, for instance, in the UK in the early 1990s.<sup>139</sup>

Third, any reform would have to include strong financial disclosure provisions. As most child maintenance formulae are grounded in one or both parent’s declared income, accuracy in establishing this income is of the utmost importance. The track record of Irish family law in this regard is poor. Reflecting on the practice under the 1964 Act whereby the *applicant* was required to provide information on the *respondent’s* income, Senator Mary Robinson observed in 1976 ‘that district justices operating in the present procedure would concede that in too many instances they do not have an accurate account.’<sup>140</sup> While the issue was partly addressed through the Judicial Separation and Family Law Reform Act 1989 – and the subsequent Family Law Acts 1995 and 1996 – by requiring both parties to file an affidavit of means when applying for judicial separation or divorce,<sup>141</sup> problems remain. Practitioners have recently observed how there can be months of delays in obtaining such financial information with court summons apparently often required to ensure full disclosure.<sup>142</sup> Even where such documentation is furnished, O’Shea found in her research that ‘un-reliable’ affidavits were common in the Circuit Court.<sup>143</sup> Whether as a result of this unreliability or otherwise, she also found that affidavits were not necessarily afforded due regard by the court.<sup>144</sup>

---

<sup>137</sup> See eg the clear and succinct objectives set out in section 1 of the Child Support Guidelines in Canada. For early literature considering what such objectives or principles should be, see CS Bruch, ‘Developing Standards for Child Support Payments: A Critique of Current Practice’ (1982) 16 *University of California Davis Law Review* 49; J Eekelaar and M Maclean, *Maintenance after Divorce* (1986); J Eekelaar, ‘Equality and the Purpose of Maintenance’ (1988) 15(2) *Journal of Law and Society* 188.

<sup>138</sup> The Law Society of Ireland (n 16 above) 8 recently recommended that a ‘set of principles for the determination of ancillary reliefs, including all maintenance orders’ ought to be established including, for example, ‘that all parties concerned maintain a standard of living as close to that which they enjoyed during the marriage, without undue detriment to the other parties’.

<sup>139</sup> Rogerson (n 28 above) 158. As the Law Commission for England and Wales, *Matrimonial Property, Needs and Agreements*, Law Com 343 (TSO 2013) 64 admitted: ‘The formula itself, combined with well documented IT and operational difficulties encountered by the Child Support Agency, produced chaos.’ While the second and third iterations of the child support regime in England and Wales have also proved somewhat challenging, the difficulties arising have not been at the same scale as those initially encountered.

<sup>140</sup> Tuesday, 23 March 1976, Seanad Éireann debate on the Family Law (Maintenance of Spouses and Children) Bill, 1975: Committee Stage.

<sup>141</sup> Listing assets, income, debts, pension entitlements and day-to-day expenses typically based on the previous two years.

<sup>142</sup> See L McBride, ‘For richer or poorer: how you can limit financial blow of divorce’ *Irish Independent* (26 May 2019) quoting Murial Walls, practitioner.

<sup>143</sup> O’Shea (n 23 above) 131.

<sup>144</sup> *Ibid* 261. She concluded that although the ‘fundamental function of an Affidavit of Means is to clearly set out the financial circumstances of the parties, as they are in reality’ there was ‘a clear disconnect between the intended purpose of such affidavits and the practical application.’

In sharp contrast, detailed mandatory disclosure provisions are applied in Canada under the Child Support Guidelines, ensuring that there is ‘an obligation to provide extensive documentary information upon demand’.<sup>145</sup> These guidelines indicate how evidence of income can most commonly be adduced, for example through income tax returns,<sup>146</sup> while also setting out circumstances where income may be inferred or imputed.<sup>147</sup> There are ‘serious consequences for failing to provide the financial disclosure, including contempt of court and providing the moving party with full costs for his/her trouble.’<sup>148</sup> Similarly stringent requirements are adopted in other jurisdictions<sup>149</sup> and ought to also be incorporated into Irish law to support any reform.

Fourth, the introduction of a formula-based approach to child maintenance would result in a significant change to Irish family law practice and would potentially prove challenging for those involved in overseeing the scheme, particularly in light of the absence of a specialist family court division in the jurisdiction.<sup>150</sup> While reform of the court system appears to be on the horizon,<sup>151</sup> it will nonetheless take some time for further judicial expertise to emerge in family law.<sup>152</sup> In this context, it would be essential to ensure appropriate training of both practitioners and the judiciary prior to the introduction of any new regime for the calculation of child maintenance. Ongoing continuous professional development courses in the area would be equally important to ensure the smooth and consistent implementation of any guidelines or updates thereto.<sup>153</sup>

Finally, the introduction of any reforms incorporating a child maintenance formula would be of little practical value unless the serious difficulties associated with the enforcement of maintenance obligations in Ireland are addressed.<sup>154</sup> Although ‘payments will always be more forthcoming when individuals feel that the system is just’ – and thus the adoption of a formula-based approach ‘which is clear, simple, and perceived to be fair should... have a salubrious effect on non-custodial parent’s willingness to pay’<sup>155</sup> – more robust reform of child maintenance enforcement procedures is required. While there appears to be some understanding at a legislative level of the need for comprehensive reform of this area,<sup>156</sup> what

---

<sup>145</sup> Coleman (n 66 above) 244. Disclosure is addressed in sections 21-26 of the guidelines and, as a result, a court order is not required.

<sup>146</sup> See the detailed rules in ss 15 to 20 and Schedule III.

<sup>147</sup> See DR Aston, ‘An Update of Case Law under the Child Support Guidelines’ (1998) 16 *Canadian Family Law Quarterly* 261, 272; R Thompson, ‘Slackers, Shirkers and Career-Changers: Imputing Income for Under/Unemployment’ (2007) 26(2) *Canadian Family Law Quarterly* 135.

<sup>148</sup> Coleman (n 66 above) 244.

<sup>149</sup> On the equivalent provisions in Australia, see eg Young and Wikeley (n 63 above).

<sup>150</sup> There have long been calls for the establishment of specialised family law court, see eg Law Reform Commission, *Report on Family Courts* (LRC52-1996). Currently, only Dublin has a de facto Circuit Family Court.

<sup>151</sup> General Scheme of the Family Law Bill 2020.

<sup>152</sup> Note the comments of the Bar of Ireland in its submission to the Joint Committee on Justice and Equality (n 48 above) 98 regarding the lack of family law expertise among the judiciary in Ireland.

<sup>153</sup> In this regard, courses and training akin to the Canadian legal training procedures ought to be explored.

<sup>154</sup> See above.

<sup>155</sup> Finnie (n 20 above) 160.

<sup>156</sup> See Department of Social Protection (n 3 above) 6. Note also the Oireachtas Joint Committee on Social Protection (n 35 above) at 41: ‘A state body, similar to that in other countries, should be put in place to appropriately seek and pursue maintenance payments.’

precise direction this will take remains unclear at present. Albeit likely to spark some controversy, one approach might be for child maintenance to be deducted at source by the Revenue Commissioners as is currently undertaken in various jurisdictions including Australia and New Zealand. Such reform would appear to have the support of the National Women's Council who argued that the 'guaranteed payment of maintenance is becoming increasingly important with the growing number of divorces and the increased prevalence of lone-parent families' and questioned 'whether such an issue should be dealt with by our already strained court system'.<sup>157</sup> Whether equivalent reform will come to fruition in Ireland remains to be seen. However, it is essential that some method(s) to ensure better compliance with child maintenance obligations are introduced as a priority.

## Conclusion

The child maintenance regime applied in Ireland is long overdue an overhaul. The Oireachtas Joint Committee on Social Protection's *Report on the Position of Lone Parents in Ireland* noted in 2017: 'As maintenance payments may be necessary to protect lone parent families from poverty, the Irish system does not appear to be well set up to achieve this aim.'<sup>158</sup> Following a nudge from the United Nations, and with the apparent support of at least some practitioners, however, it now appears reform may be on the horizon. While the focus of attention is currently on the viability of introducing a child maintenance agency, it appears likely that the need for a more structured approach to child maintenance calculations will also soon be on the radar. In this regard, it is clear that the introduction of a presumptive, formula-based, approach to child maintenance assessment would go a long way to helping address many issues in average cases. Although the use of a formula or guidelines means '[s]implicity and certainty are brought at the cost of accuracy and lack of case-specific determination',<sup>159</sup> in an Irish context, the benefits would likely outweigh the costs.

In deciding what specific approach to adopt, there are a number of lessons which can be learned from other jurisdictions. In fact, although various regimes have been fine-tuned, no jurisdiction has reverted to a highly discretionary approach to child maintenance assessment after adopting a more formula-oriented scheme.<sup>160</sup> If we in Ireland want to follow these examples, preparatory work needs to commence sooner rather than later.<sup>161</sup> While a 'badly designed formula', generating unfair awards or proving hard to implement, would 'likely worsen rather than improve the child support situation',<sup>162</sup> we can learn from the experience of those jurisdictions who have travelled this road before us to ensure we develop the most appropriate formula and

---

<sup>157</sup> 'Reform of secure maintenance payments' <[http://www.nwci.ie/?/learn/newsflash-article/reform\\_of\\_secure\\_maintenance\\_payments](http://www.nwci.ie/?/learn/newsflash-article/reform_of_secure_maintenance_payments)> accessed 05 April 2021.

<sup>158</sup> Oireachtas Joint Committee on Social Protection (n 35 above) 30.

<sup>159</sup> C Davies, 'The Emergence of Judicial Child Support Guidelines' (1995) 13 *Canadian Family Law Quarterly* 89, 104.

<sup>160</sup> This point was also made by Rogerson (n 28 above) 158.

<sup>161</sup> In England it was noted 'that the lack of preparatory work and testing was one of the reasons for the disastrous failure of the 1991 child support formula', see Law Commission for England and Wales (n 140 above) 56.

<sup>162</sup> Finnie (n 20 above) 148.

guidelines for the Irish context while simultaneously ‘heading off’ any potential areas of weakness.

When compared to equivalent regimes in other common law jurisdictions, Irish maintenance law’s lack of sophistication is striking. The highly discretionary approach adopted may have been justifiable on its initial introduction. However, there appears little justification for it now. As we continue to strive for best practice in Irish family law, let us hope that reform of its child maintenance laws will be soon forthcoming.