

# **Judicial Separation and Divorce in the Circuit Court**

**By Roisin O'Shea (R.O'S.)**

**Awarded Doctor of Philosophy, 2014**

**I hereby certify that this material, which was submitted for assessment on the programme of study leading to the award of Doctor of Philosophy, is entirely my own work and has not been taken from the work of others save to the extent that such work has been cited and acknowledged within the text.**

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## **Abstract**

While family law is not a unique subject matter for research, it is however, a much neglected area. What sets this work apart, is the significant volume of cases observed and analysed in the Circuit Court, in all 8 Circuits. Information was extrapolated to definitively answer the questions, that to date have been informed by anecdotal conjecture. The effects of a deep recession during the court research period, October 2008 to February 2012, highlighted the serious failings of an opaque and costly system, with long delays and over-burdened lists, which resulted in particularly poor outcomes for children, male litigants and lay litigants.

While case reporting is not in itself an innovation, the development of a large database resource is. For the first time, comprehensive empirical data has been gathered, from 1,087 cases observed during the period of the research. This statistically significant sample size, gives confidence levels of between +/-3% and +/-0.6%, indicating that the findings are good indicators of what happened across all courts during the research period.

Judicial interviews were carried out, which assisted with the examination of the decision making of the court, on judicial separation and divorce. While it was expected that inconsistencies would be evident from court to court, what was unexpected, was the difficulty in identifying consistencies. Comparative international research carried out in New Zealand, Canada and America, indicated that hearing the views of the child is a priority for most courts. However, a finding in the Irish family courts is the absolute disconnect between the courts and children, who have no voice. This research unequivocally shows we are utterly failing the vulnerable members of our society, post the breakdown of the 'family'; particularly children, by refusing to hear their voices, or offer appropriate support, in matters that are central to their lives.

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## Preface

The structure of the family in Ireland has undoubtedly undergone significant changes over the last number of decades. There has been a move away from marriage as the norm, to a more diverse range of families. Following international trends, we are seeing increasing numbers of informal relationships, shifting gender roles, international families and multi-cultural diversity. The significant demographic changes have not been adequately reflected and accommodated within the Constitution. The ever changing concept of the ‘family’, increasingly conflicting with the narrow confines of the principle source of law and fundamental rights, enshrined in the Constitution.

Family law in Ireland operates in a highly discretionary regime based on individualised determinations of need. Most family law applications are brought by women, and there is now clear evidence that outcomes for men are poor, particularly where men are not the primary carer of children.

Brehon law, one of the earliest forms of law in Ireland, recognised divorce and equal rights between the genders, parties could divorce by mutual consent. It was followed by the imposition of English common law from the late twelfth century. By 1800 Ireland was integrated into the United Kingdom by the Act of Union. The Provisional Constitution of the First Dáil Eireann was signed into law on January 21<sup>st</sup> 1919, and the 1922 Constitution subsequently created the independent ‘Irish Free State’ of 26 counties, 6 counties remaining part of the United Kingdom. The 1922 Constitution carried forward all previous laws enacted, into Irish law [Article 73] and a similar provision under the 1937 Constitution had the same effect [Article 50].

Articles 40.3, 41 and 42 are the main provisions dealing with the family, and their impact permeates throughout the entire family law system in Ireland. The Catholic and conservative ideology of these Articles conflicts with the increasing secularisation of Irish life and law, creating a constant debate about the boundary between the two institutes, the State and the

Catholic Church. As stated by Seán T. O' Ceallaigh in 1937, later to become President of Ireland, "...a text worthy of a Catholic nation".

The original version of 41.3.2 of the 1937 constitution envisaged that divorce would never be permitted in Ireland, "no law shall be enacted providing for the dissolution of marriage". The family unit, based on marriage, remains a devout, hetero-normative interpretation, famously defined by Lord Penzance in *Hyde v Hyde & Woodmansee* [1866] as "...marriage, as understood in Christendom, is the voluntary union for life of one man and one woman to the exclusion of all others." However, Catholic Church annulments were possible on the grounds that a marriage was invalidly contracted, and therefore void *ab initio*, from the beginning. While the jurisdiction to declare a marriage null and void initially vested in the ecclesiastical courts, jurisdiction transferred to the civil courts in 1870. The status of women in the home is protected in the Constitution, where the State acknowledges that by her life within the home, she gives the State support "without which the common good cannot be achieved" (Art. 41.2.1). Barr J in *L. v L.* [1992] IR 77 interpreted this provision to mean that a married woman is entitled to recognition for her contribution as homemaker, rejected on appeal by the Supreme Court which held that to grant a 50% beneficial interest purely by reason of a married woman's contribution of homemaker would amount to "a quantum leap in Constitutional law".

The guardian of a child, is a person possessed of legal rights and responsibilities towards another person, who is not capable of managing their own affairs. Custody as stated by Denham J in *W O'R v EH* [1996] 2 IR 248, is the "exercise of physical care and control in respect of bringing up a child on a day to day basis". Guardianship and custody in Ireland is regulated by the Guardianship of Infants Act 1964, as amended. Historically, under common law, children were essentially chattels of a married unity, where absolute paternal rights dominated. The Custody of Infants Act 1839, for the first time addressed this imbalance, enabling the courts to award custody or visitation rights to a mother, subject to certain conditions. The Guardianship of Infants Act 1964 in Ireland reformed and consolidated pre-existing laws relating to guardianship and custody. In line with the Constitution the courts have interpreted the provisions to mean that married parents are automatically joint guardians

and custodians, and the mother of a child born outside of marriage was deemed to be its sole guardian [s 6]. Unmarried fathers are expressly excluded from such automatic rights.

In 1975 the Law Reform Commission's first programme, made a commitment to consider the question of the best type of court structure or structures that would be appropriate to deal with the different matters which fall under the general heading of family law. In contrast, one year earlier the concept of the unified family court was first introduced in Canada, by the Law Reform Commission of Canada, and piloted in four jurisdictions from 1977. It was designed to enable families to resolve all outstanding legal issues in a single forum, providing "one-stop shopping" for family law services. A Free Legal Advice Centre was set up in 1969 in Ireland by four law students, as an independent human rights organisation, to address access to justice issues, which continues to this day, and in 1979 the Legal Aid Board was established as an independent, publicly funded organisation, to provide "a professional, efficient, cost-effective and accessible legal aid service".

Growing pressure for reform, particularly in relation to "illegitimate children" and unmarried father's rights, and the pressure brought to bear by a Commission decision against Ireland (14/10/1986) *Stout v Ireland*, led to the enactment of the Status of Children Act 1987. It removed the statutory bar preventing the 'legitimation' of a child born outside of marriage, abolished all pre-existing discrimination relating to the inheritance rights of non-marital children and provided that the relationship between child and parent would be determined without reference to whether the child's parents had been, or were now, married to one another. Crucially the 1987 Act also provided a statutory mechanism whereby natural fathers could seek to assert guardianship rights, albeit in very limited circumstances [s 12 amends s 6A of the 1964 Act]. The Adoption Act 1998, which came about as the result of a ECHR decision *Keegan v Ireland* [1994] 18 EHRR 342, provided that where a father is appointed guardian of his child, that child may not be placed for adoption without his consent.

The rights revolution in the second half of the twentieth century, and the women's movement worldwide, combined to bring about a new approach to family law. The shift was not only about giving women rights, but began the move away from laws that were based on morality

and a traditional and patriarchal view of marriage, to laws that dealt with the rights of each spouse on marriage breakdown. The so-called ‘condom train’ of 1971 was Ireland’s response to the contraception revolution of the 1960s. A group of Irish feminists led by writer Mary Kenny flouted the ban on condoms, which were illegal at the time, travelling by train to Northern Ireland and returning with the prohibited items, culminating in well publicised arrests at the Dublin train station. In *Norris v the Attorney General*, Norris sought to challenge the criminalisation of male homosexual conduct, and argued, unsuccessfully, that the unenumerated rights to marital privacy, *Mc Gee* [1974] IR 284, should extend beyond marital privacy. A significant emphasis was placed by O’ Higgins J. on the conflict with Christian teachings. It was a time of significant societal change, where the social mores were seemingly under constant attack.

Modern Irish family law really commenced in the 1980s with the introduction of judicial separation. Prior to this point separation was done by way of agreements, or on application to the higher courts on restrictive grounds, or married couples just moved apart and lived independent lives. Many sought foreign divorces wrongly believing that it would circumvent the constitutional ban, and later be recognised in Ireland. Reliefs could be sought in the District Court in relation to access, custody, spousal support and child support. The Judicial Separation and Family Law Reform Act of 1989, initiated by Minister Shatter, was new and exciting legislation at that time, comprehensively providing the means to legally separate, a move away from the intricacies of separation agreements and divorce *a mensa et thoro*, divorce from bed and board, which were much more common in family law at that point. The first divorce referendum was in 1986, held by Fine Gael, but was rejected by a substantial majority.

1991 heralded in the most significant changes in child care services since the 1908 Children Act, in the form of the Child Care Act 1991. In the words of the State it “...represents a movement away from the concept of children as parental property to an understanding of the child as a person who has rights by virtue of being a child” [Ireland's First Report to the UN Committee on the Rights of the Child, 1996, CRC/C/11/Add.12, at para.20.] The Report of the Kilkenny Incest Investigation in 1993, examined the failure of the State to intervene in the context of long-standing familial abuse and highlighted the perceived higher rights of

parents over the rights of children. Part V of the Child Care Act, 1991 states that in any proceedings before the Court, the welfare of the child ‘must be the first and paramount consideration’ and that the Court “in so far as is practicable, must give due consideration, having regard to his age and understanding, to the wishes of the child”. However, these statements are prefaced by the requirement to have regard to the rights and duties of parents, whether under the Constitution, or otherwise. The Child Care Act 1991 provided the legislative framework to allow the State to intervene in respect of a child who “requires care and protection”. In 1992 Ireland ratified the United Nations Convention on the Rights of the Child 1989.

The Law Reform Commission continued to highlight the problems with the Irish family courts, in its consultation paper on family courts, and in its 1994 final report on family courts 1996. By 1995 Ireland was the only Member State in the European Union to forbid civil divorce, and Fine Gael who had returned to power once again, held a referendum, which was carried by a small margin of 50.28%. It was a deeply divisive and bitter campaign, epitomised by the infamous “Hello Divorce, Goodbye Daddy” posters of the ‘No’ side. While the Fifteenth Amendment removed the strict prohibition on divorce in the State, it did so with certain conditions, including a four year “living part” statutory period before applying for a divorce, and all divorces must go before the court. The Family Law (Divorce) Act 1996 introduced the option of divorce for the first time under Irish Law. The very first Irish divorce was in 1997, *R.C. v C.C.* [1997] 1 FLR 1 HC, granted by Barron J. despite the fact that the 1996 Act was not yet in force.

In December 2003 the European Convention on Human Rights came into force in Irish law, which draws no distinction between marital and non-marital unions [Article 12]. Appellants seeking to enforce their rights under the Convention could now make direct application to the European Courts of Human Rights for relief, provided all domestic remedies had been exhausted. Article 8 provides, “ Everyone has the right to respect for his private and family life...there shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society.” While the Irish courts are obliged under Article 4 to take judicial notice of the Convention, and decisions of the European Court and Strasbourg institutions, the Irish Constitution has been given supremacy, *M.J.F. v Minister for Justice*, unreported, HC [2004].

Brussels II bis entered into force in Ireland in 2005, providing rules for the automatic recognition of divorces granted in the courts of other EU members States. Council Regulation No. 4/2009 of 18 December 2008 addressed the issue of family law maintenance and the enforcement of cross-border maintenance orders. More reports highlighted problems arising with the family law system, and the rights of the child including; The all party Oireachtas committee on the Constitution 10<sup>th</sup> Report on the family 2006; The Law Reform Commission's Consolidation and Reform of the Courts Act 2010 and 'The Roscommon child care case, Report of the Inquiry Team to the Health Service Executive' 2010.

Up to this point all family law cases were heard *in camera*, attendance was restricted to the parties and their legal representation. The press were excluded, and in the Circuit Court no written or recorded record was kept. The Civil Liability and Courts Act 2004 (s.40 (3) and Regulations 2005 (S.I. 337 of 2005) introduced a procedure for the anonymised reporting of *in camera* cases by a solicitor or barrister, and certain other approved categories of persons, which included bona fide researchers from approved third level institutions. As a result of this measure the Courts Service introduced the Family Law Reporting Project, on a pilot basis. The goal of the pilot project, headed up by Dr. Carol Coulter, was to provide much needed non identifying information and reports on how family law matters were dealt with in the District, Circuit and High Court Family Law Courts, between the years 2007 and 2009. Arising from Dr. Coulter's report, the Courts Service decided to set up a Family Law Reporting Project Committee (F.L.R.P.C) chaired by Mr Justice Kearns.

There were a number of initiatives undertaken subsequently by the Courts Service in consultation with the Presidents of the Courts which included the finalisation of the county town courthouse building development programme, including specialised facilities for family law hearings; the development of a Case Progression system administered by the County Registrars; the development of ancillary services in Dolphin House in Dublin for District Court family law applications including a pilot mediation service and the provision of extensive information on family law on the Courts Service website. Dublin Circuit Court now has continuous family law hearings in five courts in Phoenix House.

Until 2012 the only express reference to the ‘rights’ of children in the Constitution was contained in Article 42, those rights existing within the married family unit, although there have been numerous cases since the adoption of the 1937 Constitution interpreting the Constitutional rights of children beyond Article 42. While a considerable disparity exists in the judicial treatment of children, and by default their parents, based on the status of the relationship of those parents, the Thirty-first amendment of the Constitution may pave the way for the rights of all children in the State, to be recognised and indeed prioritised. The Proclamation of the Irish Republic promised equal rights for all, where children of the nation would be cherished equally in this State, “oblivious to all differences”. However, the 1937 Constitution failed to give effect to these sentiments, creating instead unequal status amongst children. The courts proceeded to discriminate against children who did not belong to the favoured unit of the married family, *O’B. v S.* [1984] I.R. 316. Leaving Article 41 unchanged post the Thirty-first referendum has meant that the marital family remains the basic unit group of Irish society, with superior rights to any other ‘family’, a Constitutional statement that is now at odds with the reality of life in Ireland today.

Developments in recent years indicate that the State recognises the existence of alternative family forms. The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 provided a statutory mechanism for the legal registration of same sex relationships. Further referenda will be required to adapt this ‘living’ Constitution, addressing the gender bias in relation to ‘homemaker’ [Art. 41.2.1], amending Article 41 to include all forms of family [Art. 41.3.1], and to provide for a designated family court. Surrogacy guidelines address how surrogacy issues should be handled, and it is anticipated legislation will follow. On the recommendation of the Constitutional Convention, Minister Shatter has proposed that a referendum will be held in 2015 on same sex marriage, and a number of other proposed constitutional changes. A 2012 Millward Brown poll indicated that 75% of people would vote yes to extend civil marriage to same sex partners, indicating that this referendum may not incite the same bitter debate that occurred pre-divorce, in an Ireland where the Catholic Church exerted more influence.

The ‘family’ is no longer defined geographically, increased mobility raising complex legal issues regarding international re-location and abduction, enforcement and forum shopping. The ‘family’ is also no longer defined by marriage, other common forms of family structure include cohabitees, civil partnerships, adults who choose to have children but not live together, single men and women adopting, sperm donors and surrogacy. Jurisprudence in the European Court of Human Rights, has established that the term “family” is a question of fact to be determined on the basis of the existence of close personal ties in a given case. [K v The United Kingdom, no. 11468/85, Commission decision of 15 October 1986, Decisions and Reports 50, p 199, 207]. Family conflict can be multi-cultural and complex; race, religion, culture, language, education and heritage are increasingly part of the conflict, or context of the conflict, when families break down. Reform in the family justice arena has mainly been driven by outside pressures. Ireland now needs to move from a reactive position, to a proactive approach, particularly in addressing the access to justice issues and inequalities arising in our current system and laws.

We must now go beyond the traditional role of the court and develop a family justice system comprised of all laws, programmes and services that effectively and meaningfully contribute to the resolution of family disputes. The support services should include supervised access programmes, representation for children, parent information programmes, legal information programmes, assistance for lay litigants, access to ODR (online dispute resolution) and mediation. Most importantly, during this process of evidence based reform, prioritising the needs of the users, we need to re-define the application of the *in camera* rule in family law proceedings, to facilitate the development of a body of jurisprudence with recorded decisions and law reports. The State now recognises that there must be an opening up of the family courts both public and private. In 2013 the Child Care Law Reporting Project was established to examine and report on child care proceedings in the courts, under Section 3 of the Child Care (Amendment) Act 2007 and in accordance with the 2012 Regulations (Regulation No 467 of 2012) made under the Act. One of the key objectives is to provide information to the public on child care proceedings in the courts. The *in camera* rule has been further relaxed under the Courts and Civil Law (Miscellaneous Provisions) Act 2013, providing that bona fide representatives of the press may attend court proceedings, and allows reporting of those cases with certain restrictions set by the court, where the court deems it appropriate to protect the identity of a child or vulnerable party. Any restrictions imposed by the court must be balanced against the right of the public to see justice administered in public. While more



access to our family courts is desirable, it is the lack of information available, rather than the closed hearings that present the most immediate difficulty to users of the system.

Our family courts should be open to the public, subject to appropriate restrictions, and on the record, this will allow the court to evolve, ultimately bringing more certainty to those who must use the system.

## 1 Chapter 1 - Introduction

The veil of secrecy, that has traditionally lain over family law proceedings in Ireland, by way of the *in camera* rule<sup>1</sup>, has meant that the judiciary are not aware of each other's decision making processes or interpretation of legislation; there is no development of case law, and the public cannot see justice administered publicly. While cases are developed in the normal way, with High Court appeals (de novo) and written judgments, a serious problem is the lack of written judgments in the Circuit Court due to the volume of work, with the vast majority of cases being heard in this court. It is this, combined with the *in camera* rule, which creates the especially closed off nature of the Irish system, yet organizations and groups that deal with families in crisis, and researchers and policy-makers, need information on what happens in the Irish family courts. A striking feature of family law proceedings is the relative invisibility of children. Where children are caught in the crossfire of marriage or relationship break-down, the child's perspective is often non-existent.<sup>2</sup> Justice Harvey Brownstone stated in his book on family law proceedings, 'Tug of War'<sup>3</sup> "...when you start a court case, you are starting a war..."; in Ireland that "war" culminates in a day in court, with often unexpected, and perhaps inequitable results.

Family law is an extraordinarily under-researched subject area, in terms of comprehensive empirical research. Up until the Court & Civil Liability Act 2004<sup>4</sup> was enacted, no third party could attend '*in camera*' family hearings. The Courts Service Board, members of the judiciary, some legal practitioners, including Geoffrey Shannon, and the Law Reform Commission expressed the need to change the '*in camera*' rule, to facilitate insight into the workings of the family law courts. Put in a Constitutional context, justice must be

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<sup>1</sup> The *in camera* rule first made its appearance in the Emergency Powers Act 1939 S.7(1), and was later reinforced in S.45 of the Courts (Supplemental Provisions) Act 1961.

<sup>2</sup> Shannon, G. (2008) 'Divorce ten years on: The case for reform' Editorial, Irish Journal of Family Law 1 pg 1

<sup>3</sup> Mr. Justice Harvey Brownstone (2009) *Tug of War*, Toronto: ECW Press pg 3

<sup>4</sup> S.40 (3) Civil Liability and Courts Act 2004, "(a) the preparation by a barrister at law or a solicitor or a person falling within any other class of persons specified in regulations made by the Minister and publication of a report of proceedings..."

administered in public, with family law as with all other law, except where statute provides otherwise. The closed off nature of family law proceedings, and the lack of reporting, results in a secretive administration of justice, creating uncertainty for judges, practitioners and litigants. The Law Reform Commission report of 1996 described a system with chronic problems, the myriad problems identified still exist;

*“...that report was published in 1996. Despite no doubt good intentions and some measures being introduced, the situation has not greatly improved. One of the principal developments is that family law has become ever more extensive and complex.” Minister Alan Shatter<sup>5</sup>*

No comprehensive research has been carried out to date, that follows the decisions made by the judiciary in family law. We have no research that shows how much judicial discretion is being exercised, whether it is applied in every situation, and whether any system is employed by the judiciary. Geoffrey Shannon has often drawn attention to the failure on the part of the legislature to provide any system or formulae in terms of the calculation for maintenance, and “proper provision” on divorce.

Some empirical research was carried out in relation to judicial separation and divorce, under the broader research umbrella of the Courts Service Pilot project and subsequent ‘Family Law Matters’ reports. The object of Dr. Carol Coulter’s 2006-2007 pilot project<sup>6</sup> was to provide a general over-view of judgments, trends and statistics from the High Court, Circuit Court and District Court, carried out by a panel of researchers, to be published for the use of the judiciary, legal practitioners and the general public; the overall task being to report on cases and outcomes in a non-legal format, easily accessible to a layperson.

The statistics gathered during Coulter’s research period were compiled by Courts Service, from the rudimentary information available in the Courts service database. There were 12 simple statistic fields; the first 6 dealt with the number of applications, the number granted/refused/withdrawn, the sex of the applicants, the number of cases settled, the number of cases to full hearing, and the number that settle after the hearing commences. Statistics

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<sup>5</sup> Shatter A. T.D. (2013) ‘A New Structure for Family Courts’, Address by the Minister for Justice, Equality and Defence, *Consultative Seminar on Family Law Courts*, Blackhall Place, Dublin, 6 July 2013.

<sup>6</sup> Coulter, C. (2007) *Family Law Reporting Pilot Project* Courts Service

regarding ancillary orders were also gathered from the same database, and 6 fields were available; how many custody orders were made, how many access orders, how many orders to sell the family home, maintenance orders, property adjustment orders and where pension orders were made. A finding of Dr. Coulter's research was the need for the development of a statistics gathering system, that could gather significantly more material, which would be of value to researchers and to the public. This project addresses that need, with the creation of a comprehensive and inter-linked database, with 184 data fields and multiple options within many of those fields. It is user friendly, and is capable of gathering the fine detail of every case. The database was created with the following research goals in mind, to;

1. Capture as much information as possible about family law cases in the Irish circuit court
2. Use a flexible and intuitive database structure to do so.
3. Anonymise that information to protect privacy
4. Identify research questions and create database queries to match those
5. Produce statistics from database queries
6. Give research conclusions

This wealth of data can be mined and analysed not just from the perspective of quantitative results under a specific field, but queries can be posed such as;

*Of the cases studied, how many cases were there in the Dublin Circuit court, where greater than 50% of the assets were assigned to the wife, on judicial separation?*

Dr Coulter's research encompassed the District Court, the Circuit Court and the High Court. This project focussed only on the Circuit Court, and critically examined the workings of the family law system in the Circuit Court, which was excluded from the brief of the Courts Service pilot project. Statistics gathered by Dr Coulter, in the course of that project, came from the Courts Services database, or by manually locating files and extrapolating data. Unlike the pilot project, the primary statistics in this research came from detailed verbatim notes taken in court during 1,179 hearings, of 1,087 unique cases. These detailed notes were distilled into forms containing all the fields of the database. No distinction was drawn between cases that settled "on the steps of the court", and cases where orders were made, in terms of the gathering of statistics. The data is attached to the type of outcome, whether terms were compromised or where orders were made. This project sought to empirically identify if outcomes were comparable, and to qualitatively identify, whether judicial influence, both

direct and indirect, impacted on settlement outcomes. Judicial interviews were not undertaken in the Courts Service Pilot project. This project prioritised interviewing as many as the judges observed as possible. Out of the 13 judges observed in court during the course of this research, 6 consented to be interviewed.

## 1.1 Literature Review

### 1.1.1 *In-camera* rule

Article 34.1 of the 1937 Constitution provides for public hearings<sup>7</sup>, but specifies that cases may be heard in private in “special and limited circumstances”. *In camera* is a latin term meaning ‘in chambers’ as proceedings held in private were traditionally held in the private chambers of the judge. These “special and limited” circumstances have been interpreted by the courts to include all family law proceedings, both public and private. The Law Reform Commission describes family cases as being in a class different from other cases, that frequently involve detailed analysis and discussion of personal and private relationships, at a time when the litigants may be hurt and vulnerable.<sup>8</sup>

*...the interests of resolution in family disputes in private outweighs the public right that justice be administered in public – Murphy J.*<sup>9</sup>

There is a dearth of comprehensive empirical research in the subject area, judicial separation and divorce, in the Circuit Court, indeed, in the area of family law in general, in that court, largely due to the *in camera* rule<sup>10</sup>. As noted by Frank Martin;

*“In camera family law proceedings tend to contravene the promulgation*

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<sup>7</sup> *Justice shall be administered in courts established by law, by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.*

<sup>8</sup> Law Reform Commission, Consultation Paper on Family Courts (March 1994), p.150 para. 7.43.

<sup>9</sup> R.M. Applicant v D.M. Respondent, and a Barrister, Barristers Professional Conduct Tribunal, Barristers Professional Conduct Appeals Board and DJ [2000]

<sup>10</sup> Coulter, C. (2009) *Family law in Practice- A study of Cases in the Circuit Court* Dublin, Clarus Press Ltd. pg. xiii

*principle. Untrained and sometimes unsympathetic judges deal differently with some family cases. There is an absence of a cogent and sophisticated body of legal precedents, particularly in the judicial separation ancillary orders context”<sup>11</sup>*

Records to date, comprise of elementary statistics and reports compiled in the annual report by the Courts Service, and reported judgments from the Superior Courts.<sup>12</sup> Mrs Justice Catherine Mc Guinness, President of the Law Reform Commission, in commenting on the effect of that lacuna, stated;

*“The public view of the family courts has been coloured by rumour, hearsay, and media commentary, much of it ill-informed and at least in some cases coloured by the personal prejudices of the writer.”<sup>13</sup>*

Lack of information can fuel popular perceptions, such as a growing consensus that since most applications are brought by women, the courts are biased against men.<sup>14</sup> Minister Shatter acknowledges that from his experience as a practitioner, a father who had a “credible” case for custody as the “appropriate parent” would face an uphill battle to obtain such an order in his favour.<sup>15</sup>

In 2004 the in camera rule was relaxed for the first time under the Civil Liability and Courts Act 2004, where provision was made for third parties<sup>16</sup> to attend in camera proceedings and

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<sup>11</sup> Martin, F.(1997) *Judicial Discretion in Family Law*, 15 ILT 226

<sup>12</sup> Coulter, C. supra n.6, pg 1

<sup>13</sup> Coulter, C. (2009) *Family Law in Practice. A study of Cases in the Circuit Court*, Clarus Press Ltd. Dublin, opening forward, pg xii

<sup>14</sup> Wood, K. and O’ Shea, P. (2003) *Divorce in Ireland*, Johnswood Press Ltd. Dublin, preface

<sup>15</sup> Shatter, A. (1997) *Shatter’s Law*, Fourth Edition, Dublin, Butterworth (Ireland Ltd.), pg 656

<sup>16</sup> S.I. No. 337 of 2005 sets out the “classes of persons” that may attend at in camera proceedings; family mediators, academics engaged in research and persons engaged by the Court Service to prepare reports of proceedings.

publish reports<sup>17</sup>. The most relevant empirical study to date, enabled by the 2004 Act, is that carried out by the Courts Service in their pilot project October 2006 to October 2007, headed up by Dr. Carol Coulter. 62 days of that research was carried out in the Circuit Court<sup>18</sup>, it is unclear what percentage of the 511 cases covered in the research were Circuit Court cases, as the pilot project also covered family law proceedings in the District Court and the High Court, nor is it noted how many other researchers were attending court hearings as part of the pilot. Notably that research project did not include any interviews with members of the judiciary.

Dr. Carol Coulter believes that critical analysis of family law is a “recent discipline”, particularly in Ireland, which she states to be largely due to the fact that divorce is but ten years old.<sup>19</sup> She is critical of the published material of Geoffrey Shannon, Jim Nestor, Wood and O’ Shea, Muriel Walls and David Bergin, as being “essentially descriptive”, containing little analysis of the law itself, or commentary on how the law operates in practice.<sup>20</sup> The dearth of information from the Circuit Court includes the lack of information on the application of jurisprudence from the higher courts, being applied.<sup>21</sup> As Kevin Liston stated; “the absence of a developed jurisprudence increases the risk of incoherence in judicial

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<sup>17</sup> *Section 40 (3)(a) the preparation by a barrister at law or a solicitor or a person falling within any other class of persons specified in regulations made by the Minister and publication of proceedings to which the relevant enactment relates, or (b) the publication of the decision of the court in such proceedings, in accordance with rules of court, provided that the report or decision does not contain any information which would enable the parties to the proceedings or any child to which the proceedings relate to be identified and, accordingly, unless in the special circumstances of the matter the court, for reasons which shall be specified in the direction, otherwise directs, a person referred to in paragraph (a) may, for the purposes of preparing such a report, attend the proceedings subject to any directions the court may give in that behalf.*

<sup>18</sup> Coulter, C. supra n.6, pg 26

<sup>19</sup> Coulter, C. supra n.6, pg 7

<sup>20</sup> Coulter, C. supra n.6, pg 15

<sup>21</sup> Coulter, C., supra n.6, pg 17

decision making”.<sup>22</sup>

The absolute nature of the *in camera* rule has led to a public perception that family law cases are shrouded in secrecy, the absence of reliable information leading to a lack of confidence in our system of family law and child protection.<sup>23</sup>

### **1.1.2 Judicial Separation**

The Judicial Separation and Family Law Reform Act, 1989, provides that an application by a spouse for a decree of judicial separation, from the other spouse, may be made on one or more, of six grounds.<sup>24</sup> “Fault” can be ascribed, sections 2.(1)(a) provides for adultery as grounds for judicial separation, and 2.(1)(b) provides that the conduct of the respondent spouse, may be sufficient grounds, where that the applicant could no longer be reasonably expected to live with the respondent. Geoffrey Shannon has noted that the element of ‘fault’ which is relevant in judicial separation, has no relevance in relation to the granting of a divorce<sup>25</sup>. How ‘fault’ is interpreted by the courts, or how often it is cited as a grounds for judicial separation, or if it is a factor on divorce, has to date remained unknown.

### **1.1.3 Divorce**

Opponents to the divorce referendum in 1995, argued that legislating for divorce would mean that men would be first to make applications for decrees of divorce, with a view to impoverishing their spouses.<sup>26</sup> However, Circuit Court statistics published in the Annual Reports of the Courts Service, since 1997, indicate that the majority of applications for

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<sup>22</sup> Liston, K. (2005) *Family Law Negotiations, An Alternative Approach*, Dublin, Thomson and Round Hall, pg 334

<sup>23</sup> Shatter, A. T.D. Minister for Justice, Equality and Defence (2013) ‘A New Structure for Family Courts’, presented at the Consultative Seminar on Family Law Courts, Blackhall Place, Dublin, 6 July 2013, pg 2

<sup>24</sup> S.2(1) Judicial Separation and Family Law Reform Act, 1989

<sup>25</sup> Shannon, G. (2003) ‘*Family Law*’, Volume Editor, and Author, New York, Oxford University Press, Second edition pg 30

<sup>26</sup> Shannon, G. (2011) ‘*Family Law*’, Volume Editor, and Author, New York, Oxford University Press, Third edition pg 43



divorce are being made by women. No qualitative research is yet available to indicate the factors underpinning those applications.

On divorce the court must ensure that “proper provision”<sup>27</sup> is made for spouses and dependent children, however Jim Nestor argued that the term “proper provision” is not defined, referring to *DT v CT* [2003] where Murray J. commented;

*“The Oireachtas studiously avoided giving any prescriptive guidelines as to how the court should exercise its discretion.”*

Nestor believes that what constitutes “proper provision” will vary from trial judge to trial judge, each using his or her own judgment to apply the factors as set out in s 15 of the 1995 Act and s 20 of the 1996 Act<sup>28</sup>. Based on the Supreme Court case of *M.K. v J.P.*<sup>29</sup> Nestor affirms that it is desirable that the trial judge should set out the reasons for the relevance and weight of each factor in his or her determination.<sup>30</sup> In terms of the lack of a “clean break” in Irish law, Rosemary Horgan, now President of the District Court, argued that the lack of analysis as to how fair and reasonable provision can be achieved for dependent spouses and, or, children, creates uncertainty. She posits that practitioners must, as a precaution, warn the paying spouse that the court is obliged to consider any further application for provision, determining whether it is justified, based on needs, or not.<sup>31</sup> While Irish law does not establish a right to a “clean break”, it is however a legitimate aspiration as enunciated by Keane C.J. in *D.T. v C.T.*,

*“It seems to me, that unless the courts are precluded from so holding by the express terms of the Constitution and the relevant statutes, Irish law should be capable of accommodating those aspects of the “clean break” approach*

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<sup>27</sup> S. 20 Family Law (Divorce ) Act, 1996

<sup>28</sup> Nestor, J. (2007) ‘Introduction to Irish Family Law’, Dublin, Gill & Macmillan Ltd., pg 120

<sup>29</sup> *M.K. v J.P. (or se S.K. )* [2001] 3 I.R. 371 (SC)

<sup>30</sup> Nestor, J. supra n.28, pg 120

<sup>31</sup> Horgan, R. (2007) ‘A Decade of Divorce in Ireland’, Editorial, 1 I.J.F.L. pg 1

*which are clearly beneficial. As Denham J. observed in F. v. F. [1995] 2 I.R. 354, certainty and finality can be as important in this as in other areas of the law. Undoubtedly, in some cases finality is not possible and thus the legislation expressly provides for the variation of custody and access orders and the level of maintenance payments. I do not believe that the Oireachtas, in declining to adopt the “clean break” approach to the extent favoured in England, intended that the courts should be obliged to abandon any possibility of achieving any certainty and finality and of encouraging the avoidance of further litigation between the parties.’’<sup>32</sup>*

The landmark decision in G. v. G. [2011] IESC 40, has addressed a number of issues that have significant relevance in the Circuit Court. The appellant husband, appealed against the judgment and order of the High Court delivered by Abbott J. on the 12<sup>th</sup> December 2008. It was submitted that the learned High Court judge had failed to give any real weight or proper consideration to the parties’ prior separation agreement, which contained a “full and final” settlement clause<sup>33</sup>. Denham C.J. reiterated the view that Irish law does not establish a right to a “clean break”, however referring to D.T. v. C.T. and citing Mr. Justice Murray, she did re-emphasise that finality is a legitimate aspiration,<sup>34</sup>

*“I also agree that when making proper provision for the spouses, a court may, in the appropriate circumstances, seek to achieve certainty and finality in the continuing obligations of the divorced spouses to one another...the objective of seeking to achieve certainty and stability in the obligations between the parties is a desirable one where the circumstances of the case permit.’’<sup>35</sup>*

In delivering judgment, Denham C.J. set down a number of general principles that should be applied, where there has been a prior separation agreement, followed by a subsequent application by a party to court. The Supreme Court stated that a separation agreement is an extant legal document, and should be given significant weight, when determining proper

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<sup>32</sup> D.T. v. C.T. [2002] 3 I.R. 334 at p.364

<sup>33</sup> G. v G. [2011] IESC 40 at p 2 Para. 8

<sup>34</sup> G. v G. [2011] IESC 40 at p 12 (ii)

<sup>35</sup> D.T. v. C.T. [2002] 3 I.R. 334 at p.411

provision<sup>36</sup>. That while the circumstances of each case should be considered specifically, inherited assets will not be treated as assets obtained by both parties in a marriage.<sup>37</sup> That;

*“a party should not be compensated for their own incompetence or indiscretions to the detriment of the other party”*.<sup>38</sup>

That changed circumstances of either of the spouses, must constitute significant change, before the court is required to “consider all the circumstances carefully”.<sup>39</sup> Changed circumstances, which may also be considered as relevant factors, can include a significant change in the value of assets, such as an altered value due to “the bursting of a property bubble”<sup>40</sup>, or an “exceptional change” in the value of assets which was not foreseen<sup>41</sup>. Significantly the Supreme Court emphasised that the requirement of the courts on divorce is to make proper provision, not to seek to redistribute wealth.<sup>42</sup>

#### **1.1.4 Maintenance**

No set formula or guidelines exist to assist the court regarding the calculation of maintenance, either in legislation or in case law. Ultimately it is at the sole discretion of the court to determine an appropriate amount based on the needs of the applicant spouse and, or, the child or children.<sup>43</sup> The blanket of secrecy shrouding family law proceedings has meant that how such discretion is applied by the courts is unknown.

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<sup>36</sup> The Family Law (Divorce) Act, 1996 Section 20

<sup>37</sup> G. v. G. [2011] IESC 40 at pg 14 (xv)

<sup>38</sup> G. v. G. [2011] IESC 40 pg 14 (xvi)

<sup>39</sup> G. v. G. [2011] IESC 40 pg 13 (vi)

<sup>40</sup> G. v G. [2011] IESC 40 pg 13 (viii)

<sup>41</sup> G. v. G. [2011] IESC 40 pg 14 (xvii)

<sup>42</sup> G. v. G. [2011] IESC 40 pg 13 (vi)

<sup>43</sup> Shannon, G., supra n.25, pg 61

### 1.1.5 Children

As repeatedly highlighted over the years by Geoffrey Shannon and other commentators, children appear to be invisible in family law proceedings, that involve the break-down of marriage; he suggests that in many cases, custody and access to children of the marriage are more vigorously contested than any financial settlement,<sup>44</sup> however, the views of the children regarding same are not sought. There is a presumption at law that married parents of any children, of the marriage, are automatically joint custodians and guardians. A parent who has left the family home, fears that they will lose all control of his or her child's life, particularly if they surrender any custodial rights<sup>45</sup>, this fear is currently based on anecdotal evidence rather than any data collated from court proceedings. Jillian van Turnhout, Chief Executive of the Children's Rights Alliance, is also critical of the constitutional position pre the constitutional amendment concerning children's rights in 2012;

*“The Constitution has a skewed view of children's rights; in fact it is virtually silent on children's individual rights. It permits discrimination between children, and provides different levels of protection to children, based on the marital status of their parents”.*<sup>46</sup>

In November 2012 the Irish people went to the polls and voted in favour of the 31<sup>st</sup> amendment to the Constitution. This amendment empowers the State to intervene in exceptional cases, to stand in the place of parents, where they have failed in their duties. The previous requirement was that parents need to have failed and abandoned their parental rights before the State could intervene. The constitutional amendment paves the way for the State to enact legislation for the adoption of marital children, but will do little to change the status quo in terms of children's rights.<sup>47</sup>

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<sup>44</sup> Shannon, G, supra n.2. pg 1

<sup>45</sup> Shannon G, supra n.25, pg 228

<sup>46</sup> Van Turnhout, J. Editorial, [2010] I.J.F.L. Volume 13, pg 1

<sup>47</sup> Dr. Harding M. (2012) 'The Children's Referendum: The Constitutional Amendment will not create a truly Child Centred Legal System', Human Rights in Ireland [online], [humanrights.ie/children-and-the-law/the-childrens-referendum-the-constitutional-amendment-will-not-create-a-truly-child-centred-legal-system/](http://humanrights.ie/children-and-the-law/the-childrens-referendum-the-constitutional-amendment-will-not-create-a-truly-child-centred-legal-system/) [accessed 1<sup>st</sup> July 2013].

Dr. Carol Coulter has highlighted a number of court practices that act as a barrier to the voice of children being heard, in family law proceedings, regarding their welfare. Hearings are overcrowded, often delayed or adjourned, including urgent cases concerning the welfare of a child. The pressure on the court perhaps resulting in unsatisfactorily short hearings, and at times, of necessity, being heard by different judges.<sup>48</sup>

Aoife Daly refutes the popular belief that children do not wish to be heard in legal matters affecting their welfare.<sup>49</sup>

Where one spouse seeks to relocate with a child after separation of divorce, an application can be made under the Guardianship of Infants Act 1964, in the District Court or Circuit Court. The court has full discretionary powers, and may make an order as it sees fit. Rory Costello posits that the determining factors in the court's assessment should be, "*the primacy of the welfare of the child in the context of the reasonable needs of the primary carer*"<sup>50</sup>, the rationale adopted by the Circuit Court regarding such applications is unknown.

### **1.1.6 Reform**

The Law Reform Commission has over the years identified urgently needed reform, but little or no such reform has taken place following published recommendations. The Law Reform Commission report of 1996 described the family law courts as a system in crisis;

*"Long family law lists, delays, brief hearings, inadequate facilities and over hasty settlements were too often the order of the day".<sup>51</sup>*

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<sup>48</sup> Coulter, C. *supra* n.6, pg 59

<sup>49</sup> Daly, A. (2010) 'Limited Guidance: the Provision of Guardian ad Litem Services in Ireland', I.J.F.L. Vol., 1 pg 10

<sup>50</sup> Costello, R. 'Relocation', [2010] I.J.F.L. Vol., 1 pg 12

<sup>51</sup> The Law Reform Commission, *Consultation Paper on Family Courts*, March 1996, p ii

The same report went into more detail;

*“ ...of major concern are the impossibly crowded lists in many Circuit and District Courts, leading to a wholly unsatisfactory situation in which judges are being forced to make the impossible choice between brief and hurried hearings or intolerable delays. The situation is particularly acute outside Dublin, where in some venues a judge may face a list of as many as 70 cases in one day”.*<sup>52</sup>

Minister Alan Shatter firmly places the blame at the door of previous Governments, maintaining that the escalating volume of family litigation over the years has effectively been ignored by the State, which has shown particular disregard for the ability of the courts to cope with the additional burdens placed on them, not least of which are the physical facilities and essential support services.<sup>53</sup> He notes that the alarm bells were first sounded in 1985, in the Report of the Joint Oireachtas Committee on Marriage Breakdown, which highlighted the then difficulties being experienced by the courts with the demands made by family proceedings.<sup>54</sup>

The development of principles and formulae to underpin legislation in family law proceedings in the Circuit court has been advocated over many years by family law commentators. Geoffrey Shannon believes that the development of a clear set of principles for the determination of ancillary relief, would bring greater clarity and certainty of outcome for the parties involved, in particular he believes the formulation of principles guiding the determination of what comprises “proper provision” is required.<sup>55</sup> President of the District Court, judge Rosemary Horgan, noting the variations that exist from Circuit to Circuit, on how maintenance is fixed and secured, questions whether a philosophy should be developed;

*“...which mandates that the maintenance and standard of living of child*

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<sup>52</sup> The Law Reform Commission, supra n.51 , p 134

<sup>53</sup> Shatter, A. supra n.15, pg 134

<sup>54</sup> Shatter, A. supra n.15, pg 136

<sup>55</sup> Shannon, G. supra n. 2, pg 1

*dependents should never suffer post separation and divorce”.*<sup>56</sup>

The lack of certainty that permeates every aspect of family law proceedings in the Circuit Court, may lead to a high number of settlements on the steps of the court, but as Frank Martin comments;

*“Surely such uncertainty clashes with the very foundational principle underpinning our rule of law. Unpredictability devalues our respect for law in the long term.”*<sup>57</sup>

The concept of a unified family court jurisdiction was proposed by the Law Reform Commission in 1996, comprising of a Regional Court established at Circuit Court level, having a comprehensive family law jurisdiction.<sup>58</sup> The model is not dissimilar to the Unified family court in Ontario, and followed the concept that family law should be administered separate and apart from other areas of the law, by judges who show “aptitude” for such cases.<sup>59</sup> The Commission took the view that mediation should form an integral part of such a model, however fourteen years later there has been no meaningful implementation of any of the recommendations of this report.

Family law is different and distinct from other areas of legal practice. Practitioners and the court are aware of the emotional, psychological trauma and cost burden the parties experience, and the impact such proceedings have on the welfare of the children<sup>60</sup>. Family law differs from contentious disputes in other areas of civil law, partly due to the interpersonal nature of the conflict.<sup>61</sup> The role that mediation can play in family disputes has long

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<sup>56</sup> Horgan, R., supra n.31, pg 2

<sup>57</sup> Martin, F. supra n.11, pg 1

<sup>58</sup> The Law Reform Commission, ‘Report on the Family Courts’ ,(LRC 52- 1996) p. 25

<sup>59</sup> The Law Reform Commission, supra n.58, p. 27

<sup>60</sup> Shannon, G. supra n.26, pg 1

<sup>61</sup> Liston, K. supra n.22, pg 241

been acknowledged<sup>62</sup>, however family law proceedings in Ireland continue to be conducted within the adversarial system of litigation<sup>63</sup>. In 1986 the Family Mediation Service was set up on a pilot basis; unlike other jurisdictions the practice of mediation in Ireland has been placed in the context of the Irish value system, fundamentally intertwined with the teachings and practices of the Roman Catholic church<sup>64</sup>.

Today the Family Mediation Service, subsumed into the Legal Aid Board, is being criticized for long delays in setting appointments, significant delays between appointments, children are usually not involved in the process<sup>65</sup> and the model used often results in unenforceable agreements. Irish family mediators tend to come from human sciences and this had led to the development of a therapeutic form of family mediation, practiced frequently utilizing techniques deriving from family therapy or counseling<sup>66</sup>. A further criticism of mediation by legal practitioners, is the lack of any governing body, statutory or otherwise. Mediators therefore are of an uncertain professional status and competency, practicing in a profession that cannot reach agreement on best practice in various areas, including family mediation.<sup>67</sup> Kevin Liston believes that most mediators are not lawyers, and that seeking to resolve legal issues without an understanding of the relevant law is “very unwise”.<sup>68</sup> Others advocate re-assessing the role of mediation in family law proceedings, as parties are inevitably bargaining in the “shadow of the law.”<sup>69</sup>

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<sup>62</sup> Dr. O’ Callaghan, E. (2010), ‘The Role of mediation in Resolving Disputed Contact Cases: An Empirical View’, Irish Family Law Journal Vol., 13, Number 2 , pg 47

<sup>63</sup> Liston, K. supra n.22, pg 20

<sup>64</sup> Dr. Conneely, S.(2002) ‘Family Mediation in Ireland’, Aldershot, Ashgate Dartmouth, Aldershot, pg 6

<sup>65</sup> Dr. O’ Callaghan, E. supra n.62, pg 49

<sup>66</sup> Dr. Conneely, S. supra n.64, pg 26

<sup>67</sup> Liston, K. supra n.22, pg 69

<sup>68</sup> Liston, K. supra n.22, pg 71

<sup>69</sup> Mnookin, R. and Kornhauser, L. (1979), ‘Bargaining in the Shadow of the Law: The Case for Divorce’, 88 Yale L.J. 950



Ss 5 and 6 of the Judicial Separation and Family Law Reform Act 1989, as well as Ss 6 and 7 of the Family Law Divorce Act require solicitors to inform their clients about the possibility of engaging in mediation and to provide names and addresses of such persons or organizations that may be qualified to provide such a service, however, according to Kevin Liston a feature of family law litigation is that efforts to compromise proceedings, which is at the core of the mediation process, often only get underway at the door of the court, on the day the matter is listed for hearing.<sup>70</sup> Dr. Elaine O' Callaghan takes the view that on-site mediation would be a useful and more constructive approach, given the propensity of the significant number of cases to settle in this manner.<sup>71</sup> The State provides family mediation as an ancillary service, a free service with lengthy waiting lists, which was transferred from the Family Support Agency, FSA, to the Legal Aid Board in November 2011. An on-site mediation pilot project has been operating in the Dolphin House District Court in Dublin, since 2010, run by the FSA, one of their strategic priorities contained in the 2010 strategic plan.<sup>72</sup>

The European Commission has taken the view that settling disputes through court is costly and time consuming. The EU mediation directive<sup>73</sup>, applies when two parties involved in a cross border dispute agree to voluntarily settle their dispute using an impartial mediator. Member states are obliged to transpose the directive into national law no later than 36 months after the date of adoption, and member states must ensure that such mediated agreements can be enforced, which will have implications for family proceedings in Ireland and the competency of family mediators. Ireland transposed the directive into Irish law in May 2011, enacting The European Communities (mediation) Regulations 2011 (S.I. 209 of 2011).

The 2009 Law Reform Commission seminar paper on Alternative Dispute Resolution, recommends that “where appropriate mediation should be considered by parties to a family

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<sup>70</sup> Liston, K. *supra* n.22, pg 28

<sup>71</sup> Dr. O' Callaghan, E. *supra* n.62, pg 53

<sup>72</sup> Family Support Agency Annual Report 2010 pg 7

<sup>73</sup> Directive 2008/52/EC on mediation in civil matters was adopted on the 23<sup>rd</sup> April 2008.

dispute before litigation”<sup>74</sup>. While the Commission notes that mediation may not be appropriate in some family cases, such as domestic violence or child sexual abuse, it does advocate mediation as the first step in resolving family disputes. It would appear that;

*“Mediation has come to a point in its development where it cannot be ignored, underestimated or dismissed as a transient phenomena”.*<sup>75</sup>

The Draft General Scheme of mediation Bill 2012, which has yet to be enacted, provides that a barrister must also advise a client of the possible use of mediation. Currently where the services of a barrister are engaged, he/she is instructed by the solicitor and not directly by the client. However the explanatory note for head 5 indicates that a significant change in that system is now likely under the Legal Services Regulation Bill 2011.

How mediation can form an integral part of the family law system, and what changes need to be made to the application of the *in camera* rule, are questions that need to be addressed. Structured regular reporting of family law cases in the Circuit Court, and substantive empirical research is required to address the dearth of information currently available.

*“The absolute nature of the in camera rule has led to a situation that family law cases are perceived to be shrouded in secrecy. There is no press reporting of these proceedings because the press access to them is prohibited. Accordingly, aside from the valuable work of the Family Law Reporting project 2006 to 2008, there has been an absence of reliable information on the operation of law in this area, which is not conducive to confidence in our system of family law and child protection”*<sup>76</sup> **Minister Alan Shatter**

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<sup>74</sup> The Law Reform Commission, ‘Seminar Paper, Alternative Dispute Resolution’, (LRC SP1-2009) pg 19

<sup>75</sup> Dr Conneely, S. supra n. 65, pg 43

<sup>76</sup> Shatter, A. Supra n.5 pg 2

## *1.2 Research Aims & Objectives*

This project aims to develop a template for a data system for Family Court proceedings that will enable meaningful statistics and data to be extrapolated by researchers and court administrators. A database capable of describing demographical information such as the sex of the applicants, whether individual cases have male or female, national or international influences in relation to access, custody, maintenance, and parenting, and to describe the nature and evolution of cases, including settlements before trial, trial itself, outcomes and post-trial applications.

The research will identify patterns in relation to distribution of assets and disposal of the family home; it will examine the adversarial nature of family law proceedings, and to evaluate the potential of family mediation and the use of enforceable agreements. The project will probe the relative invisibility of children in judicial separation and divorce, and look to other jurisdictions for better solutions to encompass the child's perspective, including Wellington New Zealand, Toronto Canada, California and Michigan in the United States of America.

The principle research question of this research is to examine the decision making processes of the Judiciary in judicial separation and divorce cases in the Circuit Court. Secondly, as noted by Frank Martin<sup>77</sup>, there appears to be a marked degree of inconsistency between the eight Circuit Family Courts in terms of practice and procedures, and application of the legislation. This project will examine if this is the case. The question that this project will seek to address is what type of legal framework and practice should underpin law in this area.

## *1.3 Methodology*

### ***1.3.1 Investigative and Analytic Methods***

This research is based on a representative selection of applications to the Circuit Court in relation to judicial separation and divorce, based on a "unit of time", October 2008 - February 2012 inclusive, using Dr. Carol Coulter's research format as a starting point. The Courts Service Pilot project, 2007, being the only comparable empirically based research project

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<sup>77</sup> Martin, F. (2000), Irish Divorce Law 1997-2000: Time for Reform, I.J.F.L. 28

carried out in this subject area. The Circuit Court hears approximately 98% of all divorces and judicial separations<sup>78</sup>, the greatest volume of those cases being heard in the major cities of Dublin and Cork<sup>79</sup>. The statistical measure to be used, being the sample size compared against orders made in the Circuit Court, during the research period. Initially the number of applications in the research period was to be the comparative measure used, but investigation showed that applications can take a significant period to come to court, and cases where orders are made, are contemporaneous with the research period giving a truer like for like comparison. The aim was to observe cases in every Circuit based on the percentage of applications per Circuit per year (averaged over 3 years), where possible. This was dependent on when family law days were scheduled in seven of the eight Circuits, as Dublin held continuous family law days in Phoenix House. The courts and cases were selected on as random and as representative a basis as possible, seeking to adequately represent each circuit, whilst ensuring that as many judges as possible were observed.

The dataset contains cases observed from the eight Circuits from October 7<sup>th</sup> 2008 to February 24<sup>th</sup> 2012. The research sample consists of 1,087 unique cases, which were listed 1,179 times during the period of the research. The percentage of listed cases observed by Circuit were as follows; Cork Circuit 17%, Dublin Circuit 29%, South East Circuit 29%, Western Circuit 8%, South Western Circuit 3%, Eastern Circuit 5%, Midland Circuit 1% and Northern Circuit 8%. Half the dataset was taken from the Dublin and Cork circuits, comprising almost 46% of the sample, with a greater representation of cases in the Southeast based on the ability of the researcher to access those courts. Family law lists were often cancelled, or amended with less days than initially scheduled, or the same judge previously observed was scheduled again to hear the list. The researcher accessed as many courts as possible within the limitations of (a) the lack of predictability of family law lists, and (b) the costs involved in travelling around the country. In the Dublin Circuit Court access was given to review case files, and 40 cases were selected, the oldest of the cases, in that Circuit, that had been observed in court during the research, filed between 2003 and 2006, and an in-depth analysis of the cases was carried out from the date of application to substantive hearing and orders made.

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<sup>78</sup> Courts Service Annual Reports 2008-2011 [www.courts.ie](http://www.courts.ie)

<sup>79</sup> See 'Statistics' Appendix E for detailed analysis

Interviews were carried out with judges, court clerks, County Registrars, and others associated with the family law courts. All interviewees were given the research protocols, and anonymity was assured. The 13 judges observed have been assigned numbers randomly, and the numbers do not correspond to the sequence in which cases were heard. There were 5 female judges, however, the gender of each judge has not been assigned, in order to preserve the identity of the judges.

11 judges were also shadowed in Toronto Canada (2009), and Wellington New Zealand (2012), to enable a comparative analysis to be undertaken.

A conference was developed by the researcher to underpin the research, the Canadian-Irish Family law conference October 2010, Carton House Maynooth, supported by the Research Department of Waterford Institute of Technology. International speakers were invited by the researcher, and topics were selected relevant to the research project, and assigned to individual speakers. 12 Canadian Family law judges presented, along with 3 Canadian family law experts, two American judges, the Principal Family Court Judge of New Zealand, Judge Peter Boshier, and the Hon. Mr. Justice Henry Abbott, High Court. Master of ceremonies for the event was the Hon. Mr. Justice Liam Mc Kechnie Supreme Court, and the invited moderators were Dr. Carol Coulter and Minister Alan Shatter. The conference was attended by 25 Irish judges from the District Court, Circuit Court and High Court, including then President of the Circuit Court the Hon. Justice Matthew Deery and President of the High Court the Hon. Mr. Justice Nicholas Kearns. The researcher proposed topics for the Canadian-Irish judicial workshop on the second day of the event, selected from research questions, which was hosted by the Canadian judges, and included a training session on child representation.

An International Family Law workshop, to develop the concept of a One World Family Law Model, was held by the researcher in March 2012, funded under the Irish Research Council 'New Ideas' Scheme and launched by Canadian Ambassador Loyola Hearn. The objective of the workshop was to determine a core list of issues that require investigation inter-jurisdictionally, and to identify issues of mutual concern, for the purpose of developing an over-arching family law model. The workshop was attended by Judge Deborah Mc Nabb, Michigan U.S.A., Jane Long S.C. Family Policy and Programs branch, Ministry of the A.G. Toronto Canada, Dr Tamar Morag Associate Professor Haim Striks School Colman Israel, Oliver Connolly BL, Dr. Sinead Conneely BL and Law Lecturer W.I.T., Marianne

Gabrielsson Barnfried Stockholm Sweden, Josepha Madigan Sol., Judge James O' Donohoe Circuit Court Ireland, Mary O' Malley County Registrar Meath, Susan Ryan County Registrar Dublin, Shane Dempsey BSc MSc, David Hodson Deputy District Judge Family Division HC London, Owen Connolly Consultant Psychologist Dublin, Ann Thomas Sol., Managing Partner International Family Law Group London, Inge Clissman SC Ireland, Morag Driscoll Director Scottish Child Law Centre and Dr. Louise Crowley Law Lecturer U.C.C.

In May 2013 this researcher commenced a family mediation pilot, a public/private, self-financing, not-for-profit initiative under the CADRE research centre, Humanities Department, Waterford Institute of Technology, in collaboration with Waterford Area Partnership. To test and develop a family mediation model developed by the researcher to underpin the recommendations made as part of this research. The duration of Phase I was May – December 2013.

### ***1.3.2 Theoretical Framework***

There is a necessity for research and accurate statistical and other empirical data in this subject area, to form the basis for rational reform. The research entailed the preparation of Reports, Judgements, Trends and Statistics, a framework devised during the Courts Service Pilot Project.

- (1) Detailed notes were taken during observations in the court-room, for all cases heard on any given day. Relevant excerpts have been used in qualitative analysis. Direct quotes have been used where relevant, while preserving the anonymity of the parties, including the judiciary. Decisions or judgments were recorded. Elements include, the factors taken into account by the judge in his or her conclusions, if enunciated, and any other relevant comments. Judicial consistency, or not, being a key factor to identify. The intention is to extrapolate broad parameters on which family law issues are decided, forming the basis for suggested formulae or guiding principles.
- (2) Statistics relating to each case were be compiled, enabling trends to be identified. Details of cases from pleadings to trial or settlement, including decisions or outcomes and whether the parties had legal representation or were lay litigants. An analysis of applications was carried out; who initiated proceedings, what was the sex of the

applicant, how many cases settled before trial, how many cases went to trial and what were the subsequent orders given by the courts. The collation of this data followed the N.S.B. (National Statistics Board) “whole system” approach, where meaningful data can be used to support policy recommendations and evaluation, arising from research, that leads to “evidence –based” outcomes.

- (3) Comparative international research was carried out in the courts in Wellington New Zealand, January 2012 and Toronto Canada October 2009, which was used to underpin recommendations.

### **1.3.3 Database structure**

At the outset it was determined that a database be developed to capture key information during the research. Initially the database was ‘flat’, in that data consisted of a single table, which contained information about each case, comprising of 55 data fields. As the research progressed a decision was made to develop a richer and more elaborate database, with 184 interlinked fields, which would enable more information to be captured in digital form for analysis. The wealth of information the database holds can be used for further research in areas not directly related to this project, such as nullity applications and District Court appeals. An SQL (Structured Query Language) database was created, with separate tables. SQL is an international standard<sup>80</sup> for describing the structure of data and creating queries to access that data<sup>81</sup>. The database is the Oracle-developed MySQL with a bespoke web-based interface, to allow simplified updating and querying, of the family law data. The database is accessed via a high security, PKI encrypted, secure connection. Each case observed first received a “list” reference number, linked to the court application reference, in hardcopy format only. The database contains no information that could be used to identify any real case or litigants. The cases were then analysed to identify how many times they appeared on a “list” during the period of research, and then assigned a unique case id, commencing with C1. That case id is the identifier for each case in the database. Litigants each have their own unique id created in the database and each litigant is linked to a case. 13 judges were

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<sup>80</sup> International Standards Organisation (ISO), ISO 9075-1:2008: Information technology – Database languages – SQL – (Part 1: Framework (SQL/Framework))

<sup>81</sup> w3schools.com, SQL Tutorial, <http://www.w3schools.com/sql/default.asp> (accessed 1/07/2013)

observed, five of whom were female, and each was assigned a number from 1-13, the numbers were not issued in a chronological sequence, in order to protect their identity. The data is completely anonymised. The statistical data collated provides the basis for the development of recommendations for reform.

#### *1.4 Procedure and Jurisdiction of the Circuit Court*

The Judicial Separation and Family Law Reform Act 1989, empowers the court to make ancillary relief orders before, or at the same time, as the granting of the decree of Judicial Separation. The court may grant property adjustment orders, lump sum orders or exclusion orders. The Family Law Act, 1995 extends the power of the court on Judicial Separation, to make pension adjustment orders and financial compensation orders. The Family Law (Divorce ) Act 1996, empowers the court to dissolve a marriage contract, enabling the parties to remarry after the granting of a decree of divorce. The Act further provides for extensive ancillary relief on divorce.

The Circuit Court and High Court have concurrent jurisdiction in the area of family law. The Circuit Court has jurisdiction to hear both judicial separation and divorce, and can make related orders, including maintenance, custody and access orders, and orders under the Domestic Violence Acts.<sup>82</sup>

Proceedings are initiated by lodging a family law civil bill, a copy being served on the other party. The civil bill sets out the main aspects of the applicant's case, identifies the relevant legislation under which the claim is being made and the reliefs sought. The family law civil bill, with sworn Affidavits of Means, as required, are served by the applicant on the respondent usually by registered pre-paid post or personal service. Where the respondent resides outside the jurisdiction, but within a Member State, the Civil Bill must be served either by the use of a 'transmitting' agency in that State or documents must be served in accordance with the rules of service of that Member State. Where the respondent resides outside the European Union, leave must be sought from the court before the issuance of the civil bill. The respondent then has 10 days in which to file 'an appearance' and a further 10

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<sup>82</sup> Domestic Violence Act, 1996, as amended by the Family Law ( Miscellaneous Provisions Act) 1997, the Domestic Violence (Amendment) Act 2002.



days to file his or her defence. The defence is accompanied by the respondent's affidavit of means, if required. Where no 'appearance' is filed with the court, the applicant may file a motion with the court for judgement in default of appearance. If there is no defence filed by the respondent, the applicant may file a motion for judgement in default of defence. Where an appearance and a defence has been filed, a case progression summons will be issued, directing the parties to appear before the County Registrar. A case progression hearing of the case will be scheduled no later than 70 days after the date the defence is filed. The purpose of case progression is to prepare the case for trial. Where a separation agreement has been entered into, or separation terms are agreed on the day of the hearing, or the divorce is uncontested, the parties can ask the court to 'rule' on the matter.

Litigants may engage a private solicitor and/or counsel, or apply for legal aid, or represent themselves.

## 2 Chapter 2 Separation Agreements

### 2.1 Terms

*A separation agreement is an extant legal document, entered into with consent by both parties, and it should be given significant weight. That is so especially if the separation agreement ...provides that it was agreed between the parties that the agreement was intended to be in full and final settlement of all matters arising between the parties.*<sup>83</sup>

**Denham C.J.**

A separation agreement may be entered into by the parties to a marriage, where that marriage has broken down, who do not wish to have recourse to the courts. The agreement can be drawn up between the parties themselves, with the assistance of solicitors and /or counsel, with the assistance of a mediator, or with the assistance of mediators and solicitors. The agreement should be legally binding, and usually deals with an agreement to live apart, parenting and financial arrangements for dependent children, division of assets including the family home, division of debt, financial provision for a dependent spouse, and arrangements as to succession and inheritance.

Keane J. delivering the judgment in *P.O'D. v A.O'D* [1998] 1 ILRM 543, stated that a separation agreement is a binding legal contract, and as such is a bar to subsequent proceedings for judicial separation under the Judicial Separation and Family Law Act, 1989.

In Case C812 March 2011, the respondent wife and the applicant constructed a separation agreement between themselves. The wife hand-wrote the terms of the agreement. The applicant, had no legal advice, the respondent's partner was a practising solicitor who drew up the agreement, from the hand-written terms, at the kitchen table of the house he lived in with the respondent. The applicant believed the agreement to be in full and final settlement of all matters, and all terms of the agreement had been fully performed, including the payment of € 30,000 to the respondent for her interest in the family home. The respondent sought to over-turn the agreement on the basis of duress. The court stated "*The wife was clearly not*

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<sup>83</sup> *Y.G. v N.G.* [2011] IESC 40, 20 [unreported]

*under the thumb of the husband. I prefer the husband's evidence with regards to the drafting of the agreement. I am satisfied that the agreement should be enforced."*

Six judges out of the 13 judges observed during the period of this research agreed to be interviewed. In speaking of separation agreements before the court, Judge 2 said;

*"Mediated agreements must "stand up", a poorly worded mediated agreement that does not deal clearly with the legal issues arising, creates significant problems later on. I have seen some really bad agreements. A great number of mediated agreements that have come to my court have been prepared by non-legally trained parties and this is an issue where there are issues around financial provision for children and assets to be divided".<sup>84</sup>*

Judge 7, advocated mediation as the number one priority for family law disputes, however, the judge expressed concerns about mediated separation agreements that have come before the court;

*"Mediated agreements that come before the court show lack of consistency, often are written in unenforceable language and showed disregard for possible legal outcome".<sup>85</sup>*

Case ref; C555 March 2010. In this case the parties twice constructed a separation agreement between themselves at the instigation of the respondent wife, who hand-wrote the terms on each occasion. She suggested on the second occasion that they go together to the solicitor that they both used for other matters relating to their business ventures. The solicitor drew up a deed of separation that the husband signed, and he subsequently performed the terms therein, which included the payment of €170,000 to the wife. The respondent submitted that the separation agreement was not valid, and should form no part of the considerations of "proper provision" on divorce, as she had been put under pressure by the applicant to meet with the solicitor and agree terms for a separation agreement and she had never signed the agreement. The court held that she was the instigator of the agreement, that evidence had been submitted to support that by the solicitor who drew up the agreement, and that she had acted on the

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<sup>84</sup> Interview with Judge 2, Appendix B (i)

<sup>85</sup> Interview with Judge 7, Appendix B (i)

terms therein and benefited. The court relied on the terms of that agreement to determine “proper provision” on divorce.

### ***2.1.1 Dispute over terminology***

Poorly worded separation agreements can lead to dispute about the intent of the clause, which then falls to the court to interpret. The interpretation of a judge may not reflect the intentions of the parties at the time the agreement was constructed.

Case ref; C970 February 2012. The motion before the court was an application for maintenance, pending divorce. The parties had entered into a separation agreement in 2003, clause 18 of that agreement stated that € 165 per week child maintenance would be paid, for two dependent children, which was index linked, payments were now € 192.00 per week. Payments were always discharged in full and on time. The issue arising was a dispute over the term whereby both parties agree to contribute 50% of “*educational expenses*”. Counsel for the respondent husband submitted that the intention of the parties was to cover costs incurred during the school years, and that it had been discussed that if the children went on the third level education, they would seek grants and part-time work to cover those costs. The applicant wife sought 50% of the registration fees and accommodation costs of the dependent who had now started college. The registration fee was € 1,920, accommodation costs were € 8,000. The respondent submitted that the dependent was attending university in Dublin, when there was a university two miles from the family home where the mother and dependent children resided. The court ordered that the respondent contribute € 2,500 per year towards accommodation costs of the dependent, where those costs are vouched, weekly maintenance to continue as set out in the deed of separation.

## ***2.2 Consent Terms Made a Rule of Court***

Pressurised settlements on the steps of the court were the norm throughout this project. Unrealistically long lists were to be dealt with on any given day, the same pattern highlighted by the Law Reform Commission.<sup>86</sup> The most extreme example was Letterkenny in the Northern Circuit, with 79 cases on the list, scheduled to be dealt with in four days. 27 of

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<sup>86</sup> The Law Reform Commission supra n. 47, pg 134

those were listed as full hearings. Two of the cases for full hearing had an indicated one day requirement, 17 other cases listed for hearing had an indicative time of at least half a day.

### *Access to all relevant records*

Where a settlement on the steps has been entered into, with full access to relevant records, the court will not set aside those terms, unless it can be proven that full disclosure did not take place.

Case ref; C743 March 2011. Settlement terms agreed on the steps of the court were made a rule of the court. Three years later on divorce counsel for the applicant sought to set those terms aside on the basis that full disclosure had not occurred. Significant sums were at issue in relation to the joint enterprise the parties were engaged in at that time. The court commented *“I think you are still-born in your argument. If you had access to the records at the time, then you had access to do forensic work. You must do your own enquiries, if they are not done well, too bad.”* The court took a strict contract law view of the agreement, *“if you want to come again for another bite, or to set aside this agreement, you have to prove that you were not told something that was uberrima fides”*.

### *2.3 Terms agreed previously, as basis for divorce*

Where a separation agreement has been entered into that dealt with all assets and financial provision, in full and final settlement, it is anticipated that the agreement can be the basis for divorce, or it may be stated as the basis for divorce, in the full and final settlement clause. A well drafted separation agreement will include the date the parties began living apart or the marriage ended, so that it will be clear on divorce. A separation agreement does not act as a bar to divorce, and the court is obliged to have regard to the terms of any separation agreement, which was entered into by the parties and is still in force.<sup>87</sup> The court has an obligation<sup>88</sup> to assess “proper provision” at the time of the divorce, but must also have due regard to the terms of a separation agreement, particularly where it is of a recent date. The

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<sup>87</sup> S. 20 (3) Family Law (Divorce) Act, 1996

<sup>88</sup> Article 41.2.iii

court, therefore, has two unavoidable mandatory obligations.<sup>89</sup> The majority of the judges observed had regard to prior agreements, particularly where the parties intended full and final settlement. However, one judge took the view that all prior agreements should be re-visited, given the significant downturn in the economy commencing in 2008:

*“The present consensus is that full and final settlement means nothing. There is a sea change here...we are finished with the world of finality”.*<sup>90</sup>

### ***Change in circumstances argued***

The court can take note of a manifest or material change in circumstances, such that “proper provision” as made in the separation agreement may be deemed to be no longer sufficient.

### **Case note; C610 May 2010 [material change in circumstances not sufficient]**

#### **Facts**

The parties entered into a separation agreement in 2002. Both were legally represented at the time. Maintenance was agreed for the two dependent children at € 500 per month. The family home which was valued at € 180,000, was transferred to the wife, who paid the husband € 63,000 to buy out his interest. The respondent husband on divorce sought to rely on that agreement as being in full and final settlement. On divorce the net income of the wife was € 2,400 per month, the mortgage on the family home was € 96,000, and her debts, including loans from family members were € 56,000. She sought lump sum maintenance provision for the dependent child, and ongoing maintenance of € 500 per month, on the basis that her circumstances were about to change as her job was being reduced to a three day week. The respondent claimed that his circumstances had also changed, he had been ill and out of work as a bank manager for three years, and had borrowed € 40,000, as a preferential loan from his employer, to keep up the maintenance payments and pay the mortgage on his house, which had a mortgage of € 113,000. He had returned to his employment and his net earnings were € 2,900 per month.

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<sup>89</sup> K v K [2003] 1 IR 326

<sup>90</sup> Case ref; C162 December 2008.

## Orders

The court held that the terms agreed in the separation agreement were fair at the time, that the respondent had paid the maintenance agreed, and that the circumstances of both parties were not sufficiently changed such that the terms of the original agreement needed to be revisited. A decree of divorce was granted, s 5 (1) 1996 Act as per the terms of compromise in the separation agreement. The court discharged the maintenance for one child who was no longer dependent and noted that the respondent had agreed to continue with maintenance for the other child, and discharge 50% of the future education costs of the dependent child. The pension adjustment order was adjourned.

### ***2.3.1 Significant period of time elapsed between separation agreement and divorce***

Where a significant period of time has elapsed between the separation agreement and the hearing of divorce, the terms of that separation agreement may be taken into account, but the court must assess “proper provision” at the date of the divorce.

Case ref; C919 February 2012. On divorce, the applicant wife sought to set aside a separation agreement that the parties had entered into, that included a clause that this agreement was in full and final settlement of all issues, and would form the basis for divorce. Counsel for the wife argued that “*undue influence*” was exerted by the husband, even though she had availed of legal advice at the time. The wife submitted that she felt coerced into signing due to the controlling influence of the husband. The separation agreement was entered into in 2003, the wife applied for divorce in 2007, and the case had only finally come for hearing in 2012, due to the long delays with the court system. The court noted that such a long delay in getting this application to hearing was unacceptable. Counsel for the respondent husband said that the applicant had proposed the terms of the agreement, that she had received independent legal advice, and that the terms had been performed. The husband paid £30,000 for the equitable interest of the wife in a home that was then valued at £200,000. Counsel asked the court to note that the conduct of the wife was such that it would be unreasonable to disregard it. It was submitted that the wife had a lengthy affair and left the marriage to live with the other man and had a child. The dependent child of the marriage remained living with the father, although the mother continued to collect the children’s allowance payments for that child. Counsel for the applicant reminded the court that the grounds of divorce are not adultery. The

court responded, “*I need to weigh up adultery versus undue influence,, £30,000 at the time would not accord with any norms of that time, however the circumstantial evidence would indicate adultery and in all the circumstances I am leaving the terms of the separation agreement as they are*”. The court granted a decree of divorce. There was no order as to costs.



## 2.4 Maintenance/Pensions

### 2.4.1 Pension

Where the spouses have entered into a separation agreement, neither can later seek a pension adjustment order. Such an order can only be made by the court.<sup>91</sup> The 1995 Act, s.12 (1996 Act, s.17) can only be used to make an ancillary order after the granting of a decree of judicial separation under the 1989 Act, or a decree of divorce. Where the parties intend to divide the benefits of pension schemes, they should not execute a deed of separation. However, in some cases the court seemed unaware of this bar, or unsure how to rule.

Case ref; C453, February 2011. A lay litigant applicant wife sought a pension adjustment order, as per consent terms agreed on divorce. The parties were married in 1974 and entered into a separation agreement in 1988 which was fully complied with. The respondent was not represented and not in attendance in court. The court indicated that a pension adjustment order could not be made as the parties had entered into a separation agreement.

Case ref; C600 February 2010. Lay litigants sought a consent divorce. The parties were married in 1980 and entered into a deed of separation, the husband bought out the wife's interest in the family home on foot of that agreement. On divorce the court asked the applicant husband if he had a pension. The husband replied "*she doesn't want any part of my pension*". The court stated, "*the correct way to deal with your pension is to serve notice on the trustees and you will need a draft pension order. I can do the divorce and the office will help you with the draft order. I will adjourn the pension aspect and you will have to come back to court*".

Case ref; C655 February 2011. The applicant husband was represented by counsel, who asked that the separation agreement, made a rule of court, be discharged on divorce. The court queried "*if the separation agreement is fully complied with, why do you need it discharged*". Counsel responded that it needed to be done so a pension adjustment order could be made as part of the consent terms on divorce. The request was granted, and the decree of divorce issued.

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<sup>91</sup> S.12 1995 Act, S.17 1996 Act.

### **2.4.2 Vary maintenance**

A separation agreement can include a clause where maintenance is to be paid by one spouse to another. In only one case did a discussion arise about setting maintenance payments in line with the Consumer Price Index<sup>92</sup>. Separation agreements should contain a clause that provides for the variation of maintenance, however, the existence of maintenance terms set out in a separation agreement, does not preclude a spouse from having recourse to the court under the 1976 Act.<sup>93</sup>

#### ***Variation upwards***

Case ref; C43 October 2008. An applicant wife sought to vary child maintenance, set out in a consent separation agreement, ruled by the Court in 2002. It was agreed between the parties that the consent separation agreement would be in full and final settlement, and the terms therein would be the basis for divorce. Maintenance was agreed at € 205 per week for the three children, with 50/50 contribution from the parties for educational and medical expenses. The wife filed for divorce in 2003, and sought further financial provision. The court determined that circumstances had changed, and that while the wife was now earning more than her spouse, that the costs for the children had also increased. It was ordered that child maintenance be increased to € 1,200 per month, and the husband would continue to contribute to medical or educational costs.

Case ref; C838. In a post divorce application the wife sought to vary maintenance upwards from € 1,000 per month to € 3,500 per month, for two dependent children. The maintenance had been agreed and stated in a separation agreement. Those terms had been the basis for a consent divorce. The wife claimed that the expenses for the children had increased significantly. The husband submitted that the house he lived in had a mortgage of € 2 million, and he had a number of properties, all in negative equity. He had lost his job and currently worked as a bartender for € 20,000 net per year. It was submitted that his mother was independently wealthy, and was currently discharging the mortgage on his residence, and

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<sup>92</sup> *The Consumer Price Index measures the overall change in the prices of goods and services that people typically buy over time. Prices are collected every month for consumer goods and services, creating the "basket of goods and services", representing the spend of an average household in Ireland. The items included in the basket are determined by the HBS (Household Budget Survey), conducted every 5 years.*

<sup>93</sup> Family Law (Maintenance of Spouses and Children) Act 1976.

assisting with paying the maintenance for the children. He indicated that while the maintenance agreed in the separation agreement was € 1,000 per month, he had in fact been paying more as additional expenses had arisen for the children which he had discharged. He also entered into a joint loan for € 900,000 with his wife as agreed on divorce, which she used to purchase a house for € 1.2 million. The bank was now calling in the loan which he was unable to service. The court determined that € 1,000 per month was more than adequate, and refused the appeal to vary.

### ***2.4.3 Binding contract/Full and Final settlement***

Where a separation agreement contains a clause that it is intended by the parties to be in full and final settlement, the judges observed, in the main, did take note of such a clause. Equally, where the parties had entered into a separation agreement and it was of a recent date, the court took the view that weight should be given to the terms agreed, and regard should be had to the circumstances prevailing at the time.

#### **Case note; Ref; C555 March 2010<sup>94</sup> – [enforceability of prior agreements, reserved judgement]**

##### **Facts**

The parties were married in 1998. They entered into two joint enterprises, running a pub and a gardening business together. In 2004 the shop closed, in 2006 the pub was sold. The marriage ended in 2008. The parties went to see a solicitor together at the suggestion of the wife, and produced a hand-written agreement, written by the wife, that they wished to formalise. The solicitor drew up a deed of separation, from those hand-written consent terms. Both parties were advised by that solicitor to seek independent legal advice before entering into such an agreement, but both declined. Under that agreement, €170,000 was to be paid to the wife, in return for which, she would move out of the family home and into a second house the parties owned, which had been purchased with the proceeds from the sale of the pub. The sum of money was to discharge the balance of that mortgage, which was €30,000 and ownership of that property would then be transferred to her. The family home would be transferred to the husband. Three dependent children lived with the wife at the family home,

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<sup>94</sup> See also Chapter 2, section 2.1

which had no mortgage, one of those children was dependent. The husband at the time was living in rented accommodation and had started his own garden centre business. The husband signed the deed of separation and transferred the money into the wife's bank account. Subsequently the wife changed her mind. She didn't sign the deed of separation, and refused to leave the family home, seeking a further sum of money. She also claimed that she was not a partner in the previous joint ventures and therefore had no liability for the remaining debts of those businesses. The debts included, VAT, PAYE, Capital gains tax, a bank overdraft and audit fees - the combined liability was €160,000. Counsel for the wife submitted that she was coerced by the husband into hand-writing an agreement, and going to the solicitor to create a deed of separation, that she never had any intention of entering into this deed, and that the monies the husband transferred to her were a "gift" and not related to those discussions.

### **Orders**

On hearing the submissions the court determined that the parties had been engaged in a joint enterprise in the pub and the garden centre, joint and several liability applying regarding the debt. While it was accepted that the parties had not received independent legal advice, it was not believable that the wife had been pressurised to hand-write an agreement to separate, and subsequently attend at a solicitor's office. The court found that the partnership ended in 2008, when the marriage ended and the husband commenced a new enterprise alone. Both properties were now mortgage free, the family home being valued at € 275,000, the second house at € 190,000. The court directed that the second property be sold, and the debts of the marriage (CGT) and the partnership be paid, the balance of any proceeds to go to the husband "*in recognition of the fact that he has been paying rent and continues to pay rent*". The wife was given sole right to reside in the family home, until the youngest child was 23 or no longer in full-time education. The net proceeds to be divided between the parties 50/50. The court ordered that in default of agreement, within 14 days of being requested, the County Registrar could appoint an auctioneer. The parties were directed to heed the advice of the auctioneer regarding the selling price. € 50 per week maintenance for the dependent child was ordered, to be paid through the District court. Nil maintenance orders were made in favour of the spouse. Nominal pension adjustment orders were also made. A decree of judicial separation 2 (1)(f) under the 1989 Act was granted and an order was made under s.13 of the 1995 Act, preserving the respondent's entitlement to be considered a spouse on the applicant's pension. No order was made as to costs, and liberty was given to make a further application.

#### ***2.4.4 Separation agreement not binding***

Case ref; C639 May 2010. The parties agreed terms of compromise on the break-down of their marriage, and signed the document. Both parties had legal advice prior to signing. The husband applied for judicial separation later that year and sought to have the agreement overturned. The applicant, a lay litigant, submitted to the court that he felt pressurised to sign the agreement. He had no option but to sign the agreement as he needed to draw down funds later that day to pay a settlement on another matter. The parties had agreed that the wife would receive the family home and 15 acres, the balance of the farm, 50 acres, to the husband, and their savings at bank allocated to him. At the same time that he was negotiating the settlement with his wife, he was also negotiating a settlement with his brother. He and his brother were in partnership in the farm and had fallen out. The brother had agreed to a sum of money that would buy out his interest in the farm. The brother had set a deadline, failing the payment of the agreed monies by a certain date the brother would sell his 50% of the farm to a third party. The applicant maintained this would mean he no longer had a viable farm to operate. He stated that he had no access to the savings at the bank as solicitors for the wife had contacted them and indicated monies should not be withdrawn while discussions were ongoing. The court found that duress was in play, that the terms of compromise were not binding and could not be acted on, and adjourned to allow the respondent prepare a defence to judicial separation.

## *2.5 Conclusion*

There was no consistency with the types of separation agreements seen by the courts. The range included agreements deliberately constructed to be legally unenforceable, and legally worded documents intended to be capable of legal enforcement. The legally drafted separation agreements in front of the court during the research period were constructed by solicitors. The judiciary were very critical of separation agreements created in mediation, that contained a clause stating that the agreement was not intended to be legally binding, or agreements that were written in unenforceable language. Information given on the Courts Service website endorses the school of thought that mediated agreements should not be legally binding.

*“If agreement is reached, the mediator will draw up the terms of the agreement, which is signed by both parties. The mediated agreement is generally stated not to be legally binding unless the parties arrange for a solicitor to draw up a legal agreement based on the mediated agreement”<sup>95</sup>*

If mediators who mediated in family matters were required to have a competent knowledge of family law and the courts<sup>96</sup>, then it would be evident to those mediators that separation agreements ought to be legally binding in accordance with the view expressed by Buckley J. in *M.G. v M.G.*<sup>97</sup>, with the assistance of legal advisers, where those agreements contained any division of assets or financial provision or dealt with any matters that may have legal implications for the parties.

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<sup>95</sup> ‘Mediated Agreement’ Courts Service [online]

<http://www.courts.ie/Courts.ie/library3.nsf/pagecurrent/532616871316C0658025773100356B8A?opendocument> [accessed 1 June 2013]

<sup>96</sup> Dr. O’ Callaghan, E. (2010), *The Role of Mediation in Resolving Disputed Contact Cases: An Empirical View* I.F.J.L. 2 pg 48

<sup>97</sup> *“Where the parties (to proceedings involving the making of ancillary Orders to a Divorce), are well educated intelligent persons, who have had the benefit of competent legal advice before entering into a Separation Agreement which is of recent date, the Court should be slow to make any radical alterations to the terms of such agreement unless there have been sufficient changes in the situations of the parties.”*

## 3 Chapter 3 Judicial Separation

### 3.1 *Issues arising*

In the event that a separation agreement is not an option or cannot be concluded, then a party can issue court proceedings for judicial separation. 30% of the judicial separation applications on the lists for trial, were settled on the steps of the court.

The 1989 Act<sup>98</sup> sets out six grounds for judicial separation; adultery, behaviour such that the applicant cannot be reasonably expected to live with the respondent, desertion for a continuous period of at least one year, that the parties have lived apart for a continuous period of a year and the respondent consents to a decree being granted, that the parties have lived apart for a continuous period of at least three years, and normal marital relations have not existed for at least one year<sup>99</sup>. Proceedings observed dealt with spouses who resided apart, and spouses who continued to reside under the same roof. Conduct was argued in several cases, with varying outcomes dependent on which judge heard the case. One judge always took “conduct”, particularly adultery, into consideration when making final orders, and stated so at the outset of a case where “conduct” was argued. In the majority of cases where adulterous conduct was argued, it appeared to have little or no bearing on the final orders.

Of interest is one case where questions arose around the role of a guardian ad litem for the respondent, a vulnerable adult, and whether or not the applicant wife could veto a guardian chosen.

#### ***Guardian ad litem***

Case ref; C416 March 2010. The applicant wife in a divorce case, sought a direction from the court regarding the appointment of a Guardian ad Litem to represent her husband in the proceedings. The proceedings were issued in 2008 and a s.47 report ordered on the basis that the respondent may have sexually abused one of the children. Counsel for the respondent indicated that his client had suffered a “*full nervous breakdown*” and for several weeks was institutionalised. He has since been diagnosed with paranoid schizophrenia and bi-polar

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<sup>98</sup> Judicial Separation and Family Law Reform Act 1989

<sup>99</sup> S.2 (1) (a) – (f) Judicial Separation and Family Law Reform Act 1989

disorder. Counsel indicated that while the respondent had arrived at the court he seemed either unwilling or unable to give instruction and declined to come into the court-room. The applicant had consented to the appointment of a Guardian ad Litem but wanted a right of veto over who could be appointed. The family had nominated one brother, while the wife preferred another. The court indicated that the appointment of a Guardian ad Litem would be required in the circumstances, however the wife should not have right of veto unless there was a significant reason that had not yet been disclosed. The applicant withdrew her objection.

### *3.2 Preliminary Orders*

Given that parties in dispute, following the break-down of their marriage, must wait twelve months, before either can make an application for judicial or “judge ordered” separation, issues can arise in the intervening 12 months that must be dealt with. Issues such as, financial provision for children and/or spouse, custody and access orders, domestic violence orders, or orders for the protection of the family home and its contents. Preliminary orders can be made by the court before the full hearing of the application under s. 6 of the Family Law Act, 1995, the Domestic Violence Act 1996 and the Domestic Violence (Amendment) Act 2002, to secure a barring order or protection order, an order under s.11 of the Guardianship of Infants Act 1964 and an order under sections 5 or 9 of the Family Home Protection Act 1976. Maintenance pending suit orders can be made under s.7 (1) of the 1995 Act.

#### ***3.2.1 Maintenance pending suit***

Case ref; C48 November 2008. In this case the wife left the family home with the two children two months before this application was heard, and moved in with her parents. The wife, who was employed, sought maintenance of €300 per week for the two children<sup>100</sup> – at the time of this application no maintenance was being paid and the wife had initiated judicial separation proceedings. The husband, who was a lay litigant, and a self-employed taxi driver, had not submitted any statement of means. The judge asked him what he thought he could pay, the amount offered was € 100 per week per child. This amount was made an interim

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<sup>100</sup> Family Law ( Maintenance of Spouses and Children) Act 1976



Order under s.7 of the 1995 Act, with € 200 to be paid into the bank account of the mother every Thursday, until the judicial separation application was adjudicated upon by the court.

### ***3.2.2 Dissipation of assets – interlocutory injunction***

Injunctions were used where the applicant sought an order requiring the respondent to perform a particular act or refrain from carrying out a particular act.

Ex Parte Application; not on the court list- February 2010. The applicant husband sought an order prohibiting the respondent from further dissipating the marital assets. Evidence was submitted that the respondent had received a lump sum payment from a critical illness scheme that both parties had paid into. The respondent did not notify him that monies had been received. He stated that he was concerned that by the time the matter came on for hearing that the funds would be dissipated. An informal agreement had been entered into, that the wife, who was working, would discharge the mortgage on the family home, in which she resided, however the mortgage payments were now in arrears. The court granted the interlocutory injunction restraining the dissipation of funds, save for the school fees falling due.

### ***3.2.3 Freezing order – Mareva injunction***

Case ref; C987 February 2012. The applicant wife sought a freezing order in relation to a pension, pending judicial separation. The respondent was due to receive a lump sum payment on retirement within 4 days, in the amount of € 65,018.18. The respondent had previously signed over the family home to the wife, there were no children of the marriage and spousal maintenance had been agreed. The applicant submitted that there were now maintenance arrears. The affidavit of the respondent indicated that he spent € 1,000 per month more than he earned in the previous 12 months, without corresponding documentation of bank loans or loans from family members or friends to pay the difference. The court declined to place a freezing order over the entire amount, and ordered that € 20,000 be paid over to the solicitor for the applicant, to be held pending the trial.

## ***3.3 Counter-claim***

### ***3.3.1 Judicial separation, counter-claim nullity***

In case C29 October 2008, the counter-claim was that nullity had already been granted. A Ukrainian national resident in Ireland sought a judicial separation from her Irish husband, he counter-claimed seeking recognition of a nullity granted in the Ukraine. It was argued by counsel for the husband, that under Ukrainian law if the applicant, a Ukrainian national, was registered in a permanent address in the Ukraine and did not de-register, then she is not considered a non-resident, and the Ukrainian court has jurisdiction. Both parties were represented at the court of first instance in the Ukraine which granted a decree of nullity, the effect being that the marriage is void from the outset. The judge made an order under s.29(1)(d) of the Family Law Act 1995 Act order, that the nullity decree between the parties is hereby recognized in Irish law.

### ***3.3.2 Nullity counter-claim judicial separation***

In case C51 October 2008, the applicant wife sought a declaration that the marriage was null and void. The parties married in 2004 and had one child. The wife left the marriage with the child in 2006. Both parties had attended marriage counselling and the applicant wished to call the counsellor to give evidence that neither party gave full and free consent at the time of the marriage, and that her husband was incapable of entering marriage due to his mental state. The wife worked as a pharmaceutical researcher and the respondent, a non-national, was a full-time English language student. The court declined to hear the evidence of the marriage counselor, and dismissed the nullity application, “nullity is gone we are now dealing with judicial separation”. A decree of judicial separation was granted, under s 2 (1)(f) of the '89 Act.

### ***3.3.3 Judicial separation, counter-claim divorce/change to divorce***

Of the total number of judicial separation applications observed, a significant number had a counter-claim of divorce by the time the case came for hearing. In many instances the parties agreed to change the application to divorce, most judges did not object and directed that the paperwork for divorce be completed retrospectively and the judicial separation application be struck out. Two judges refused to hear any application other than the application formally submitted, notwithstanding the agreement of the parties to change to divorce. The length of

time it took for cases to reach a substantive hearing meant that very often, in all circuits observed, the statutory periods for divorce had elapsed.

Case ref; C108 October 2008. The application before the court was for judicial separation. The parties married in 1990, the year the respondent was granted a divorce from his first wife. The marriage ended in 2004 and the applicant wife filed for judicial separation in 2006. Two years later the matter came for hearing and while all matters were in dispute the parties agreed on one issue, and that was the decision to proceed on divorce, as the relevant periods had elapsed. The court granted a decree of divorce.

Case ref; C119 October 2008. The applicant wife sought a judicial separation in 2005. Three years later the matter came before the court. That morning the parties, now both lay litigants, reached agreement and asked the court to grant a divorce. Compromised terms were submitted and made a rule of court, a decree of divorce was granted.

### *3.4 Welfare of Children*

In all cases consideration was given to the welfare of dependent children of the family, in terms of provision. A dependent child, under the 1995 Act<sup>101</sup>, is defined as a child aged under 18 years of age, or having attained that age must be under the age of 23 years and in full-time education at an educational establishment. The starting point for that consideration was where and with whom the children resided. In the majority of judicial separation applications, dependent children resided with their mother in the family home. A starting point taken by most of the judges was that the family home should not be sold until the youngest child was no longer dependent. This created a significant financial burden for the non-resident spouse, in all cases male, to contribute or fully discharge the mortgage on the family home while also making child maintenance payments and providing for their own costs of living. The ability of a payer spouse or maintenance debtor to maintain this level of financial support post orders was not fully explored by the court in any case observed. Orders were made on the basis that primary consideration must be made for the wife and dependent children, perceived as a unit, and the calculations for the weekly maintenance payment per child never appeared to be based on an assessment of the Affidavit of Means of the payer, or on the circumstances of the

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<sup>101</sup> S. 2 Family Law Act 1995

child. No calculations were done based on the disposable income of the payer spouse, factoring in the costs of providing separate accommodation for himself, with the associated additional costs.

Case ref C188 February 2009. In a judicial separation application the court stated that it must be satisfied that “proper provision” was being made for the dependent children as provided in the 1989 Act. The court must consider a number of factors pursuant to s.16 of that Act when determining A mother, a “homemaker”, resided in the family home with the two young dependent children, two and four years, and sought orders transferring the family home into her name and maintenance for the dependents. The respondent sought the sale of the family home so he could provide for his new partner and their child. The family home had a value of € 445,000 with a mortgage of € 40,000. The court ordered that the family home be transferred to the wife for a payment of € 110,000 within three months, buying out the interest of her spouse. € 300 to be paid per child per month, no spousal maintenance was ordered.

### *3.5 Conduct (alcohol, violence, abuse, sexual misconduct....)*

Alcohol was cited in a significant number of cases as a contributing factor to the demise of the marriage. Allegations of alcohol abuse were made against men and women, but the majority of the allegations were made against men.

#### **3.5.1 Alcohol**

Case ref; NL-2910 October 2011. The parties were married in 1996 and resided in the family home. There were three dependent children, 15, 13 and 9 years old. The applicant wife, on judicial separation, argued that the conduct of her husband should be taken into account. She sought to remain in the family home with the children, with sole right to reside and maintenance of € 350 per week for the children. The value of the family home was € 600,000, with a mortgage of € 290,000 currently on interest only repayments. The respondent wished to partition a folio at the end of the garden and build a small house with € 80,000 of loans from his family. The wife alleged that the husband’s drinking was out of control, that he consumed 30/40 units of alcohol per day and was out every night. She indicated that he had spent two months in rehab, had mood swings, was aggressive, and engaged in generally difficult behaviour. On giving evidence the respondent acknowledged that he had a problem with alcohol. He indicated that his family had confronted him in 2008, which is why he went

voluntarily to rehab and hadn't had a drink for three years. The court brought the applicant wife back to the stand and asked why her evidence cited ongoing drinking problems. She submitted that at the time the marriage was breaking down he was drinking heavily, but acknowledged that he appeared to be in control of the problem for the last three years. The court stated "*alcohol may have contributed to the demise of the marriage or the respondent may have been drinking more as he was unhappy*". The court ordered the immediate sale of the family home, appointed named auctioneers, with a 50/50 division of net proceeds, with joint carriage of sale and joint custody with the mother as primary carer, € 250 per week maintenance for the children. A decree of judicial separation was granted 2 (1)(f), and the court directed that the respondent continue to reside in the house until the sale had been concluded. Counsel for the applicant sought a stay on that order, a stay was denied.

The "fault" based approach argued was often around extra-marital affairs or adultery.

### **3.5.2 Extra-marital relationship**

Case ref; C78 October 2008. Conduct was argued in a judicial separation application by the wife. It was submitted that the marriage ended as the husband began an on-line relationship with a woman in the United States. Evidence was produced to show that the husband spent €11,000 between telephone bills and two trips to America. In light of the conduct of the husband the court indicated that it was considering giving the whole of the equity in the family home to the wife. The matter was briefly adjourned while the parties remained in the court-room for discussion. Terms were agreed, the husband would receive 15% of the net proceeds on the sale of the family home.

### **Adultery**

In the following case the wife carried on an affair for six months, regularly bringing the man back to the family home for sexual relations, unbeknownst to her husband. On her own evidence the wife did not take care of the children on a day to day basis as she was working 9 a.m. to 5 p.m., and she submitted that she was entitled to go to the pub up to five nights a week to relax. The court would not consider sole custody to the father, who was accepted as the primary care-giver, and indicated that it would rule that the family home should be transferred to the wife to reside there with the children.

### **Conduct acknowledged as grounds**

Case ref; C55 November 2008. The respondent husband argued that the wife's conduct should be taken into consideration on division of assets and custody arrangements on judicial separation, he sought sole custody and sole right to reside. On evidence he submitted that he was the full-time carer for the children, preparing breakfast, bringing them to school, the paternal grand-mother collected them, and he prepared their dinner after he returned from work. On cross-examination the wife acknowledged that she had been involved in an affair for six months, unbeknownst to her husband. She met with a married man on three nights of every week, bringing him back, after the pub had closed, to the family home to a spare bedroom. She set a clock to wake him, to ensure that he was out of the house before the three children or her husband woke. The husband understood she slept in the spare room as his snoring kept her awake and was unaware that she was conducting an affair in the marital home until he was told by a neighbour. The court took the view that sole custody to the father was not an option, "we have to consider the welfare of the children, the husband is at work all day, the mother is not. On that basis I cannot give him full custody". The case was adjourned for settlement discussions. The judge erroneously understood that the wife was not working.

**"Conduct...which I believe is gross in the circumstances"**

Another judge took a startlingly different approach, stating at the outset of a case, where adulterous conduct was argued, that it would "go against" the adulterer if he didn't "come clean", the inference being that the court would go easier on a repentant adulterer. This judge clearly stated his resulting outrage where the man accused of adultery sought to defend against the allegations.

Case ref; C819 March 2011. In a judicial separation hearing the applicant wife argued that the conduct of the respondent should be taken into account. The parties were married in 1994, they had two children both dependent, and the family home was valued at € 650,000 with a mortgage of €100,000. The parties were both employed, the wife had an annual net income of € 40,000 and the husband's net income was € 75,000. The husband paid € 3,000 per month to the wife, € 1,000 for the mortgage payment and the balance being child maintenance. In her affidavit she claimed her outgoings were € 6,291 per month, in excess of € 75,000 per year. The court sought detailed evidence from both parties regarding the alleged adultery. Counsel for the husband submitted that the marriage had effectively ended, the wife had asked him to leave, and the husband had moved to the Far East and worked there three years, before he commenced a relationship with another woman. He submitted that his wife was adamant that

their relationship was over, he was devastated, such that he considered hanging himself and took a contract out of the country to re-assess his life. The wife acknowledged that she had asked him to leave, but believed that they were working on their marriage and that in time her husband would return. The court stated *“Where there is an issue of conduct it will have a knock on effect. I am astonished that the respondent has gone to great lengths to try and argue that he was not in an adulterous relationship, I believe he was. Taking conduct into account, which I believe is gross in the circumstances, I value his share of the family home at 20%. A decree of judicial separation was granted under 2 (1)(a), sole occupation of the family home to the wife to be sold when the youngest child is no longer dependent, net proceeds to be divided 80/20 in favour of the wife. Maintenance as previously ordered and nil pension adjustment orders. The court further ordered 1/3 of the costs of the applicant against the respondent, “in light of the conduct issues”.*

### **3.5.3 Conduct in the marriage**

**Case note; C253 February 2009 – [refusal to engage in marital relations]**

#### **Facts**

The parties were married in 1974 and had no children. The respondent wife alleged that the applicant had “no inclination” to have sexual relations throughout the marriage and would not discuss having a family. They attended marriage counselling and individual counselling, but the issue remained unresolved. The wife argued that the conduct of the respondent should be taken into account in dealing with the family home as provided under s.16 (2)(i) of the Family Law Act 1995. The family home was valued at € 310,000 with a mortgage of € 14,000. The respondent wife offered € 50,000 to buy out the interest of the applicant, and sought a property transfer order and immediate sole right to reside.

#### **Orders**

Having considered the submissions, the court indicated that due regard must be given to s 20 (2)(f) of the 1989 Act, what contributions each of the spouses has made, and must have regard to (a), (b), (c), (d) and (j). The court acknowledged that the parties had encountered serious difficulties in their marriage but is satisfied that the conduct of the applicant is not such that supports conduct as expressed under 16(2)(i) of the 1995 Act. Having weighed up all the factors the court determined that it was only equitable that each party should have 50% of the equity in the family home. The court made the following orders:

- (1) A decree of judicial separation 2 (1) (f)
- (2) That the family home be transferred to the respondent for the sum of € 125,000 to be paid to the applicant within 3 months.
- (3) Should the payment not be made by the respondent within 3 months, the house is to be sold, and the proceeds to be divided 50/50 between the parties.
- (4) The county registrar may sign where either party refuses to give consent
- (5) All joint bank accounts to be split equally
- (6) Neither is entitled to the other's pension
- (7) Mutual orders s.14, 18(10) succession
- (8) 5 weeks to ruling of pension adjustment order

### **Abusive behaviour**

In this case the conduct engaged in by the respondent was extreme. The wife acknowledged that she engaged in sustained “warfare” in the family home for a number of years, and included her friends in that activity. It should be noted that the court did not enquire as to the impact of this behaviour on the dependent child who was seven at the time her mother commenced her admitted nightly harassment of the husband. Evidence was given that the husband was driven to a nervous break-down and became suicidal. Further evidence was heard that he took to locking his bedroom door and staying in his room. Where the child was, or what impact this conflict was having on her, was not addressed by the court, or mentioned by either counsel.

Case ref; C948 February 2012. The applicant husband filed for judicial separation seeking orders under 2 (1) (a) and 2 (1) (b), the wife counter-claimed for divorce. The parties were married in 1985, the applicant was 25 years older than the wife. They resided together in the family home, an old farmhouse, which was valued at € 150,000. There were four children, one of whom was a dependent of 12 years of age. The husband was a farmer with a large farm, and a Catholic. The wife was Presbyterian, but converted to Catholicism on marriage. The applicant had sold a large block of land for € 1.5 million and sites for € 850,000. The applicant submitted that the atmosphere in the house was extremely hostile for over five years. Counsel for the applicant submitted that the respondent had waged a war against the applicant in his own home. On almost a nightly basis it was submitted that the wife would march through the house wearing an orange sash singing The Red Hand of Ulster, often accompanied by friends engaging in the same activity. The applicant took to locking his



bedroom door and stayed in the room. The G.P for the applicant gave evidence that the applicant is a shy timid man, who was suffering greatly following the break-down of the marriage, and had been prescribed Xanax™ and sleeping tablets “*whatever is happening in the home is causing him great distress, which has led to a severe stutter and suicidal ideation*”. On evidence, the wife defended her right to sing religious songs at home. The respondent sought € 875,000 as lump sum spousal provision, and her portion of equity in the family home. The court recommended that the parties adjourn briefly for settlement discussions and indicated that the house and € 500,000 would be a fair offer in the circumstances. The parties agreed that the family home would be transferred to the wife, lump sum spousal provision of € 400,000 and € 50 per week child maintenance for the dependent child. A decree of divorce was granted and the consent terms were ruled.

***“Conduct is not an issue when nothing significant happened”***

In Case ref; C813 March 2011, counsel for the applicant and respondent had a pre-case discussion with the court without the clients in the room. Conduct was being argued, but the court sought clarification as to the type of conduct. The parties were married in 1991 and had one child in 1992. The marriage effectively ceased on the birth of the child and the parties had no further sexual relations although they continued to reside together. The applicant husband stated in the civil bill that he had been “*tormented*” for 19 years. His wife engaged in persistent low level harassment, meanness and unkindness. He had previously sought nullity but was denied. The court stated; “*Conduct is not an issue when nothing significant happened. My own view in this case is to look at who is entitled to what of the assets based on the length of the marriage. Sometimes we are asked to perform a role that is not our function. My role is to send them on their separate ways.*” Counsel for the husband acknowledged that the conduct probably did not meet the T v T<sup>102</sup> standard of gross and obvious conduct, but his client wished to be heard. The case was adjourned for settlement discussions.

### *3.6 Reconciliation*

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<sup>102</sup> T. (D.) v T. (C.) [2002] IESC 68 SC

There was no judicial consistency in terms of seeking evidence of reconciliation<sup>103</sup>, on judicial separation. It should be noted that Judge 4 never asked if reconciliation was possible, while Judge 6 always sought to determine if reconciliation had been considered by the parties.

### 3.7 Pensions

The majority of pension adjustment orders on judicial separation were based on terms agreed between the parties. The ancillary orders were sought on consent pursuant to a decree of judicial separation.

The court is empowered to make orders to direct the trustees of a scheme not to regard the separation of the spouses, resulting from the decree, as a ground for disqualifying the other spouse from the receipt of a benefit under the scheme.<sup>104</sup> Where any questions arose around pension adjustment orders, most of the judges deferred to counsel or sought clarification from counsel.

In a case in March 2010 the court in making pension orders stated, “*Under s 13 of the 1995 Act I am preserving the respondent’s entitlement to be considered as a spouse on the applicant’s pension, there will be a minimal pension adjustment order*”. The court sought advice from counsel, “*are those two orders compatible?*” Counsel replied in the affirmative.

#### 3.7.1 Pension, an asset of the marriage

T v T<sup>105</sup> stated the principle that discrimination based on the particular role of one spouse in the marriage, for example the wife as a homemaker, is not permissible.

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<sup>103</sup> Judicial trends Appendix B (ii)

<sup>104</sup> S. 13 Family Law Act 1995

<sup>105</sup> T v T supra n.97 Para 47. “*In Irish society today, it can no longer be assumed that the husband and wife will occupy their traditional roles in which the husband has been the breadwinner and the wife the home builder and carer. The roles may on occasions even be reversed and, in many instances, both husband and wife will be in receipt of income from work. In those cases where one spouse alone is working and, in the result, a significantly greater responsibility for looking after the home has devolved on the other, it is clear that under*

Case ref; C817 March 2011. In a significant asset case, where the wife was a “homemaker” counsel for the husband argued that the wife had no claim on the pension of the husband which was valued at € 250,000. The court took the view that consideration should be given to the length of the marriage and the contributions of both parties. The court indicated that if the court were to make orders that all assets would be “*in the pot*” including the pension of the husband.

### **No children, a factor in division of marital assets**

Case ref; C253 February 2009<sup>106</sup>. In a case where there was a long marriage but no children, the court ordered 50/50 division of the family home, the wife being given an option to buy out the interest of her husband in the property. The wife had worked in different jobs over the years contributing to the mortgage and general bills when receiving income. All joint account savings were to be divided equally. Both had pensions, the husband having a greater value public sector pension. The court ordered that neither be entitled to the other’s pension, indicating the date by which pension adjustment orders should be submitted.

### **Amending terms regarding pension adjustment**

Case C439 May 2010. A pension adjustment order was being handed in post a judicial separation. Counsel for the applicant indicated that an issue had arisen regarding a supplemental super-annuation scheme in the terms of consent. While the trustees had not objected to the wording, the respondent had, and it was agreed to amend the terms. Counsel for the respondent submitted that the husband had agreed to waive his interest in the family home in order to preserve his pension with the least amount going to the spouse. The wording of the term, “*25% of the contingent benefit under the scheme to the non-member spouse, and /or death gratuity*”. It was agreed that “*and/ or death gratuity*” be deleted. The court noted that 12 months had elapsed since the terms were ruled, “*counsel are cutting it fine, as orders must be made today*”.

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*s.20(f), the court must have regard to that as a relevant factor. Moreover - and this is of particular significance in the present case - the court is obliged by virtue of subparagraph (g) to have regard to the financial consequences for either spouse of his or her having relinquished the opportunity of remunerative activity in order to look after the home or care for the family”*

<sup>106</sup> See also chapter 3, section 3.5.3

### 3.8 Conclusion

The most common ground for an application for judicial separation was that the marriage had irretrievably broken down for a period of at least one year immediately pre-dating the application.<sup>107</sup> Where conduct was argued, the outcome varied depending on which judge heard the case, however the majority of judges sought to grant a decree under s 2 (1)(f). One judge always took “conduct”, particularly adultery, into consideration when making final orders, and stated so at the outset of a case where “conduct” was argued. The parties were encouraged to “come clean” by that judge, failing which, should adultery be deemed to have occurred, it would “go badly for that person”, the clear inference being that if they confessed to their adulterous conduct, the court may be more lenient.<sup>108</sup> This approach runs contrary to *M.M. v C.M.*<sup>109</sup> The view of this judge was known, and discussions were over-heard between practitioners that openly proposed adopting a strategy to exploit the disposition of this judge. Adulterous behaviour was rarely argued, and in the majority of cases where adulterous conduct was argued, it appeared to have little or no bearing on the final orders with all judges, bar one.

The most common conduct ground argued was behaviour associated with excess alcohol consumption. The most common “pending suit” applications were for interim maintenance orders, where primary carers sought financial provision. In the overwhelming majority of judicial separation cases dependent children resided with their mother. Where they resided in the family home the majority of judges expressed the view that young children should remain in the family home with their mother, and orders made reflected that view.<sup>110</sup> Non-resident

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<sup>107</sup> S 2 (1) (f) Judicial Separation and Family Law Reform Act, 1989; *that the marriage has broken down to the extent that the court is satisfied in all the circumstances that a normal marital relationship has not existed between the spouses for a period of at least one year immediately preceding the date of the application.*

<sup>108</sup> See Judicial Trends, Appendix B, Judge 1

<sup>109</sup> In *M.M. v C.M.* [1993] High Court, unreported, O’Hanlon J. criticised both parties for their adulterous behaviour, but made orders under s 2(1)(f) on the basis that assigning “blame” for the breakdown of the marriage would be pointless.

<sup>110</sup> See Judicial Trends, Appendix B

fathers were usually ordered to continue to discharge the mortgage on the family home and there was no evidence that the payors ability to pay was fully explored. Settlements reached ‘ on the steps of the court’ reflected the same approach, which was to be expected, given that settlement discussions at the courthouse on the day a case is listed for hearing, are firmly conducted in the shadow of that particular judge’s disposition. The absolute consistency between these kind of settled outcomes and court ordered outcomes was evident. Settlements reached in the Circuit Court were usually drawn up within the litigation process, at the Courthouse directly influenced by the known disposition of the judge on the day, and not drawn up pre-litigation, or on a day where the matter was not listed to be heard, as would be common in other jurisdictions.

T v T<sup>111</sup> was the only case law referenced during judicial separation hearings. It was referenced in the context of conduct in Case C813 .<sup>112</sup> T v T set out the principle that conduct will only be relevant in the determination of proper provision if it is obvious and gross<sup>113</sup>, as was later stated in D.T. v C.T.<sup>114</sup> 19 years of “persistent meanness and unkindness” alleged by the husband as conduct that ought to be considered, did not, in the opinion of the trial judge, meet the “obvious and gross” standard, who stated “conduct is not an issue when nothing significant happened”.

Pensions were the primary ‘assets’ in the marital pot, the family home and other properties had little equity or were in negative equity. Where the court dealt with pensions in a contested case, the approach of the court was to put that asset into the marital pot for a division of assets on a 50/50 basis.

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<sup>111</sup> T v T [2002] IESC 68 SC, unreported

<sup>112</sup> See also Chapter 3, section 3.5.3

<sup>113</sup> T v T [2002] IESC 68 SC para 48.

<sup>114</sup> D.T. v C.T. [2003] 1 ILRM 321 SC

## 4 Chapter 4 Divorce

### 4.1 Statutory Requirements

The grounds for divorce are set out in s.5 (1) of the Family Law (Divorce) Act 1996, as follows;

- (a) at the date of institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,
- (b) there is no reasonable prospect of a reconciliation between the spouses, and
- (c) such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent members of the family.

Jurisdiction to grant a decree of divorce is conferred by Article 41.3.2 of the Constitution, which also places a Constitutional obligation on the court to satisfy itself that there is no reasonable prospect of reconciliation<sup>115</sup> and to ensure that “proper provision” is made for the spouses and any children or either or both of them.<sup>116</sup>

The constitution provides that a dissolution of marriage may be granted, but only where the Court satisfies itself that the “living apart”<sup>117</sup> period of four years has been complied with, that there is no reasonable prospect of reconciliation<sup>118</sup>, and that “proper provision” in all the circumstances has been made for the spouses and any children of either spouse<sup>119</sup>.

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<sup>115</sup> Article 41.3.2 (ii) Bunreacht Na hÉireann

<sup>116</sup> Article 41.3.2 (iii) Bunreacht Na hÉireann

<sup>117</sup> Art. 41.3. 2(i) *at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years*

<sup>118</sup> Art 41.3.2 (ii) *there is no reasonable prospect of a reconciliation between the spouses*

<sup>119</sup> Art 41.3.2 (iii) *such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law*

### ***Statutory requirements not complied with***

Case ref; C981 February 2012. The parties were married in 1997, and submitted that they separated in 2004. The husband, an Irish national and lay litigant, filed for divorce in 2011, and matters were to be dealt with on consent. The family home was valued at € 200,000 with a mortgage of € 29,000, the mortgage was in arrears. On evidence it transpired that the parties lived in the same house with the two dependent children seven and nine years old, until April 2011, when the applicant filed for divorce. The wife, a Russian national, represented by legal aid resided in the family home, and the husband had moved into rented accommodation. The husband was to keep a site and a small farm. When questioned by the court, the husband testified that they had last had marital relations in 2005, one year after the stated date of separation. The court refused to rule the consent, not satisfied that the statutory requirements had been complied with, nor was “proper provision” being made, and advised the applicant to get legal advice.

## ***4.2 Preliminary Orders***

Preliminary orders can be granted under S.11 of the 1996 Act<sup>120</sup>

- (a) a safety order, a barring order, an interim barring order or a protection order under the 1996 Act.
- (b) an order under section 11 of the Act of 1964
- (c) an order made under section 5 or 9 of the Family Home Protection act 1976.

Section 11 of the Guardianship of Infants Act 1964 provides for an application seeking orders relating to custody, access and maintenance. Section 5 of the Family Home Protection Act 1976 deals with conduct that may lead to the loss of the family home and empowers the court to make such orders as it considers “proper” for the protection of the family home in the interest of the applicant spouse or dependent child. Section 9 of the 1976 Act enables the court to make orders to restrain a spouse from selling, leasing, pledging, charging or otherwise disposing of household chattels, where the removal of such items from the family

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<sup>120</sup> Family Law (Divorce) Act 1996

home would be likely to make it difficult for the spouse and any dependent children to reside there without any “undue hardship”.

### **Case Note; C417 March 2010 [Order issued prohibiting dissipation of monies]**

#### **Facts**

The applicant husband was awarded € 300,000 in the High Court as the result of a sexual abuse claim. €150,000 was paid on settlement of that case in 2005 and the respondent wife was granted a preliminary order under s 35 of the Family Law Act 1995, that the monies were not to be dissipated, pending the hearing of the divorce application. The order was breached and the monies were dissipated. Counsel for the wife set out the background to the application. In November 2006 the s 35 order was granted and served on the respondent in March 2007. In 2008 a further sum of € 150,000 was paid to the respondent, when the matter came to Case Progression in 2009, the monies had been almost entirely dissipated save for € 13,000. The husband also sold a site for € 150,000 and paid € 50,000 to the respondent. The applicant, on evidence, stated that he used the first € 150,000 to pay off debts and build an extension. He indicated that his solicitor at the time told him that the s 35 order was unlawful, therefore he ignored it. The respondent was now unemployed, in receipt of social welfare payments of € 168.00 per week and mortgage interest relief of € 175.00 which was due to cease. In a separation agreement in 2002, the husband sold a site and bought out the wife’s interest in the family home for € 50,000.

#### **Orders**

The court took the view that with the award from the High Court, the respondent was in receipt of € 380,000, since 2005, which had been squandered. The court directed that the €13,000 held in the applicant’s Credit Union account be deposited with the respondent’s solicitor up until a hearing of the matter. The applicant was ordered, under s 5 1976 Act, not to sell the family home or add any new encumbrances, and to provide vouched accounts of the monies dissipated.

### *4.3 Separation Agreements and Divorce*

In a significant number of divorce applications a separation agreement had been entered into. Where the divorce was contested, the issue arose as to whether that agreement was binding or



not. In some instances an applicant sought to over-turn the agreement and re-visit all matters on divorce. In other cases, an applicant or respondent sought to vary the terms or argue a change in circumstances such that “proper provision” was no longer adequate. Where the parties entered into a separation agreement in contemplation that the terms were in full and final settlement, the court gave due weight to that agreement, particularly where the agreement contained a full and final settlement clause stating that the agreement was reached on the basis of full disclosure.

#### **4.3.1 Separation agreement binding and enforceable**

Case ref; C970 February 2012<sup>121</sup>. In an application for maintenance pending divorce, the applicant sought enforcement of a term in the separation agreement that stated that the respondent would pay 50% of the “educational costs” of the dependent children. One child was now going to college, and the stated annual costs were € 8,000, registration fee and accommodation costs. The respondent was paying weekly maintenance to the applicant for both dependent children. Counsel for the respondent argued that the intent of the parties at the time was that “educational” costs referred to second level only, and secondly the dependent child had access to a University in very close proximity to the family home, with an equivalent course, but the applicant believed a college in Dublin was better. The court took the view that “educational costs” should only relate to second level, that discussions should be had between both parents, where any dependent children sought to go to third level, particularly in relation to costs. The court ordered, under s. 12 (1) of the 1996 Act, that the respondent pay a lump sum to the applicant of € 2,500 towards the costs in the current academic year for the dependent child, and indicated that the weekly maintenance agreed in the separation agreement for both dependents should continue.

**Case ref; C812 March 2011.<sup>122</sup> [Separation agreement binding]**

#### **Facts**

The applicant husband on divorce sought to rely on a separation agreement entered into between the parties in 1983. The parties were married in 1964, the relationship ended in the

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<sup>121</sup> See also Chapter 2, section 2.1.1

<sup>122</sup> See also Chapter 2, section 2.1

1981 but the parties continued to reside in the same residence until 2004. They lived separate lives while residing together and the wife commenced a new relationship, moving in with her partner in 2004. The applicant husband submitted that he paid all costs associated with the family home, and provided for and took care of their children. In 2005 the applicant received a lump sum on redundancy of € 96,000. The respondent wrote up a separation agreement with the assistance of her partner a practising solicitor, the applicant would keep the family home in consideration for €30,000. The applicant also agreed to pay € 75 per week maintenance for their eldest child who was diagnosed as clinically mentally retarded. The applicant, respondent and her partner all signed the agreement. When giving evidence the wife maintained that she had only signed the agreement under duress and sought proper provision on divorce without reference to the prior agreement. She sought the sale of the family home worth in the region of € 60,000 and 50/50 division of net proceeds, and 50% of the € 66,000 cash at bank of the applicant. It also transpired that the child was in the care of the State in foster care at the date of the agreement and remained in that care.

### **Orders**

The court stated that there was no entitlement to child maintenance of € 75 per week, and that while the court must satisfy itself that proper provision was made on divorce, it was entitled to have regard to any prior agreements. The court found that the respondent was clearly not under the influence of the applicant at any time and was satisfied that the agreement should be enforced. Given the length of time that had elapsed since the separation agreement had been entered into and taking into account all the circumstances on divorce, the court made the following orders; A decree of divorce was granted. The wife was ordered to transfer her interest in the family home to the applicant for € 17,000 and a lump sum payment was to be made to the respondent of € 15,000, both within 3 months. No maintenance order was made. The prior freezing order on the applicant's funds at bank was discharged.

### *4.4 Consent Divorce*

A substantial number of divorce cases were on consent. Litigants in these consent cases were invariably lay litigants, and there were little or no assets. Consent divorces were dealt with at a fast pace by every judge, except judge no. 6. The shortest time in which consent orders were issued was 30 seconds by Judge 4 in the Western Circuit. Consent divorces had an

average hearing time of five minutes across seven circuits, with two minutes in the Dublin Circuit. Many issues arose with consent divorces. The lack of implementation of the statutory and constitutional requirements by all judges, improper service, no marriage certificate, language difficulties for non-nationals, and lack of clear evidence of consent where a lay litigant was not in court.

### **No evidence of consent**

Case ref; C172 December 2008. The applicant husband, a lay litigant, gave evidence on divorce that the marriage was of a very short duration. As soon as the parties returned from honeymoon in 1960 the wife left for the U.K. and gave birth to a daughter nine months later. The civil bill for divorce was issued in 2001, however he submitted that it took some time to locate the wife, who consented to the divorce. The applicant submitted that he paid his wife € 28,600 for her consent, however no evidence of this was submitted to the court. Divorce was granted.

## *4.5 Conduct (alcohol, violence, abuse, sexual misconduct...)/absence of fault*

The grounds for divorce in Ireland do not include any reference to the conduct or behaviour of the parties. The statutory grounds indicate that the question of responsibility for the breakdown of the marriage is not relevant to the granting of the decree itself, however conduct can be taken into consideration by the court when making ancillary orders under s 20 of the 1996 Act.<sup>123</sup>

### **4.5.1 Conduct argued on divorce**

In the following two cases the applicant wife argued conduct, which was considered by the court, and resulted in orders under section 14 (1)(a) and section 15 (1)(a) of the 1996 Act.<sup>124</sup>

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<sup>123</sup> S. 20 (2) (i) *the conduct of each of the spouses, if that conduct is such that in the opinion of the court it would in all the circumstances be unjust to disregard it.*

<sup>124</sup> S.15 (1) (a) *an order – (i) providing for the conferral on one spouse either for life or for such other period (whether definite or contingent) as the court may specify of the right to occupy the family home to the exclusion of the other spouse*

Case ref C31 October 2008. The applicant wife argued that the conduct of the husband, a self employed taxi driver, should be taken into account when determining his equitable interest in the family home, in a judicial separation case, with a counter-claim for divorce. The parties married in 1982. They separated in 2006 when the wife applied for and secured a safety order, and subsequently a barring order. The husband discharged the mortgage and provided voluntary maintenance for their two children until they were no longer dependent. At the time of the hearing the house was mortgage free. The wife argued that the husband was an alcoholic, was verbally abusive and that he travelled to Thailand up to three times a year for weeks at a time commencing in 2004. The court indicated that there was nothing in law that would allow a transfer of more than a 50/50 interest in the family home. A divorce was granted, sole right to reside was awarded to the wife s.15 (1) (a), with liberty to apply to seek the sale of the family home at a later date.

**Case Note; C183 February 2009. “Conduct will have to be taken into account”  
[reserved judgement]**

**Facts**

The husband and wife were married on the 4<sup>th</sup> of June in 1983. The marriage broke down in 2003 when the husband commenced an affair. The applicant wife resided in the family home, with their four children, two of whom were school-going dependents. The two non-dependent children contributed to the household. The family home was valued at € 300,000 with a mortgage of € 90,000. The husband was in € 4,200 in arrears with the mortgage repayments and in arrears of € 1,700 with maintenance for the dependent children, in breach of interim orders. The wife filed for judicial separation in 2003, seeking a barring order, which was refused. Inadequate Affidavits of Means were submitted by the husband and there were three sets of applications for discovery. The husband had a taxi business, no tax return was filed for the 14 years of the business. All of the staff were paid in cash. The husband stated that he had significant debt as the business was going bad; an overdraft of € 10,000, credit card debt of € 14,000, € 2,000 arrears on vehicle finance, bank debt with two banks of € 17,500 and €6,500, and a liability with the Revenue Commissioners, for the business which he had conducted as a sole trader. An accountant retained by the husband assessed the Revenue liability for 2008 as € 87,000 in payroll tax, and stated the tax liability situation as “*not a retrievable*

*situation*". The employee payroll was € 6,500 per month, the husband received € 3,100 per month and € 110,000 in "expenses", which included the cost of running three mobile phones. The husband was in a new relationship and had another child and claimed to be in arrears with his contribution of "rent" to his partner who owned the property. The wife worked four hours per week earning € 187.50, received € 250 per week in disability payments and received children's allowance for one child of € 40 per week. Maintenance for the dependent children was court ordered to be € 300 per week. She had a Credit Union loan of € 1,900, a car loan and a € 12,000 bill on a mobile phone from 2003, a phone she claims her husband used to call sex lines. The wife was not in a position to service the existing mortgage on the family home or discharge the arrears.

### **Orders**

On reviewing the evidence the judge stated that the respondent husband had clearly run his affairs in a shambolic manner for many years with a complete disregard for all legalities. *"The house is now in jeopardy as the Revenue may seek a charge, and I will not see this woman out on the street. I will have to be circumspect dealing with a man who has dealt with his business affairs in such a cavalier fashion, such conduct will have to be taken into account"*. The judicial separation application was struck out and divorce was granted. The house was ordered to be sold and proceeds divided 80/20 in favour of the wife s. 15 (1)(a) (ii) 1996 Act. Sole right to reside was given to the wife while the house was being sold under s.15 (1)(a) (i) 1996 Act. Maintenance as previously ordered at € 300 per week, until the two children are no longer dependent. and arrears to be discharged.

### **Case note; Ref C374 May 2009 – Conduct a factor on divorce [reserved judgement]**

#### **Facts**

The parties were married in 1981. They had three children, none dependent. The case for the applicant wife, as enunciated by counsel, was that the conduct of the respondent was such that his wife and family should now be left in peace to reside in the family home. The family home was the former home of the paternal grand-parents. The house was signed over to the respondent when he turned 18 for £200. The current agreed valuation on the house was € 535,000. No maintenance was paid to the wife and she received Lone Parents Allowance (re-

named as One Parent Family payment). He was subsequently determined to be a “liable relative” and his wages were garnished from 1998 until 2007 when the youngest was no longer a dependent. The respondent first left the family home in 1994 after an incident where the wife alleged he was violent and abusive. She subsequently made an application for a barring order for one year which was granted - subsequent applications for barring orders were refused. In 1997 the wife filed for judicial separation, consent orders were made a rule of the court. The respondent agreed to leave the family home permanently and the house was to be sold and split 50/50 when the youngest child turned 18. The respondent resided with his new partner and had a child in 1998. The respondent was arrested in 2000 and charged with eight counts of indecent assault of a minor. He was convicted and sent to jail in 2007. At the time of this hearing the respondent was on temporary release. One of his children gave evidence as to the lack of contact he had with his father after he left in 1996, “*no presents, no phone-calls, no nothing*”. Counsel for the applicant wife put it to the court that the respondent failed to provide maintenance, engaged in numerous affairs during the marriage and abdicated his parental role. Engaging in such gross and obvious misconduct that it would be contrary to justice to ignore it. The respondent sought whatever portion of equity the court saw fit in the family home to provide for himself going forward. He was now on jobseekers allowance and at 58 was unlikely to secure new employment.

### Orders

The court stated that the case was run on the basis of conduct, with evidence from the Gardaí, the Probation office, the son and the wife. The main issue of contention was the family home, which belonged to the paternal grandparents. The court made the following orders;

- (a) The house will be left to the wife, “*in the interests of justice*” s. 20 (5) Judicial Separation and Family Law Reform Act 1989<sup>125</sup>
- (b) That the title of the family home be transferred to the wife s.14 (1)(a) 1996 Act.
- (c) A decree of divorce s. 5(1) 1996 Act
- (d) Blocking orders s.18(10)
- (e) Sole right of occupation to the wife s. 15 (1)(a)(i)
- (f) County registrar to sign if consent with-held.

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<sup>125</sup> “*In this section “desertion” includes conduct on the part of one spouse that results in the other spouse, with just cause, leaving and living apart from the other spouse.*”

It should be noted that the wife in this case never left the family home, and the application being dealt with was divorce.

#### ***4.5.2 Adultery argued on divorce***

Case ref; C991 February 2012. The applicant wife argued grievous conduct on divorce, alleging that the respondent had entered into an adulterous affair which had been conducted for the last five years of the marriage. The court indicated at the start of the trial “*an adulterous affair will have an impact on this case*”, despite the ‘no-fault’ imperative on divorce. The parties married in 1984 and separated in 2004. There were three children of the marriage, one died in tragic circumstances in 1998. The applicant, on giving evidence, indicated that they were both devastated by the death of their oldest son, “*it had a bad effect on the marriage*”. She indicated that she withdrew from everyone including her other two sons, both she and her husband turned to drink. He went to the pub, she drank at home. The respondent concurred that the death of their son was effectively the death of their marriage. He said that his wife never recovered from the loss, and in his own grief he had turned to someone else for support. He submitted that this relationship was friendship only, until he realised after a few years that his marriage was over. His wife left the family home, the two sons remained with him and he commenced a romantic relationship with the woman who had been offering support. The court in stating that conduct was no longer an issue to be considered in this case, surmised that the death of the son appeared to cause the end of the marriage and that adultery may not have occurred, or been a factor. A decree of divorce was granted, an order was given that the family home be sold s.15 (1)(a) (ii) 1996 Act and € 45,000 of the net proceeds be paid to the wife. The court directed that the default mechanism would be that the husband pay the wife € 30,000 within nine months.

#### ***4.6 “Proper Provision”***

“Proper provision” is set out in section 5 (1) of the Family Law (Divorce) Act 1996, as follows;

*Such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent members of the family.*

T v T set out guidelines, or propositions, relating to proper provision including;

- (a) That the function and responsibility of the court is to determine what is “proper provision”, taking into account the circumstances of the case.<sup>126</sup>
- (b) That the appropriate date for the assessment of “proper provision” is on the date of the trial.<sup>127</sup>
- (c) That how the assets were acquired may be relevant<sup>128</sup>
- (d) That discriminating against one spouse on the basis of their role in the marriage is not permissible<sup>129</sup>
- (e) That conduct should only be taken into account in determining “proper provision” where that conduct is obvious and gross<sup>130</sup>
- (f) That there is no provision in Irish law which mandates or requires a 50/50 division of marital assets.<sup>131</sup>
- (g) That the circumstances of each individual case must be assessed to determine “proper provision.”<sup>132</sup>

Peart J. expressed the view that “proper provision” extended into the period after a spouse has died;

*It seems to me that proper provision in the context of Section 20 of the Act of 1996 includes proper provision for the period after the husband has died, in so far as circumstances then permit, and not simply during his lifetime.*<sup>133</sup>

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<sup>126</sup> T v T [2002] IESC 68 para 30

<sup>127</sup> T v T [2002] IESC 68 para 60

<sup>128</sup> T v T [2002] IESC 68 para 60

<sup>129</sup> T v T [2002] IESC 68 para 47

<sup>130</sup> T v T [2002] IESC 68 para 48 and 65

<sup>131</sup> T v T [2002] IESC 68 para 46 and 57

<sup>132</sup> T v T [2002] IESC 68 para 45

<sup>133</sup> BC v MC [2012] IEHC 602, 20 [unreported]



#### **4.6.1 Previous settlement terms**

##### ***“Was the initial settlement sufficient?”***

Case ref; C64 October 2008. The applicant wife on divorce sought “proper provision”. The parties were married in 1974, the applicant left the marriage five years later alleging the husband was an alcoholic. She met a new partner in 1981, and has lived with him since. In 1986 she took maintenance proceedings in the High Court, she accepted a settlement offer of £1,000, against the advice of her solicitor. A consent separation agreement was drafted, in full and final settlement, and made an order of the court. She claimed financial duress as the reason for accepting the 1986 award. The court held that she had left the marriage for “good reason”, and that bearing in mind the s 20 conditions, believed that provision should be made. The court stated; *“What I have to answer is, was the initial settlement sufficient? I have to take into account all the circumstances on divorce...I am not inclined to be bound by the agreement signed, on evidence I am of a mind to make provision for her”*. The court directed that a valuer inspect the husband’s lands to identify a site that could be partitioned for the wife.

#### **4.6.2 Court not satisfied “proper provision” made**

Case ref; C438 May 2010. The parties married in 1990 and separated in 1991. They entered into a separation agreement in 1992, the husband was to pay € 120,000 lump sum maintenance provision, but indicated shortly afterwards that he would be unable to do so and the agreement fell. The husband subsequently applied for judicial separation, the subject of this hearing, offering € 10,000 lump sum provision. Counsel for the husband indicated that his client lived out of the jurisdiction with his new partner and their children, and was not able to attend the hearing. Counsel for the respondent wife sought to proceed with her counter-claim of divorce, seeking an order against any future property that the applicant may acquire or inherit. The court stated, *“I cannot grant a divorce unless I satisfy myself that there is proper provision for both spouses, if we go ahead with the case in the absence of the applicant we are heading straight to the High Court”*. The case was adjourned to the next list.

Case ref; C850 May 2011. In seeking to make “proper provision” for the two spouses on divorce the court questioned the stated expenditure of the applicant wife, whose Affidavit of Means indicated a monthly spend of € 4,268.62 with a stated income of € 3,000 per month

including maintenance and children's allowance. When questioned by the court the wife replied, "*if I spent this money every month, that's what I would be spending, but obviously I cannot afford to spend this much which is why I need more maintenance or a lump sum payment*". Addressing her counsel the court indicated that it is the responsibility of the solicitor to ensure that the sworn affidavit of means reflects the actual spending. Later in the same case the court noted that the respondent's affidavit did not match his direct evidence, vouched documents had not been provided, and the court indicated that the solicitor was again at fault. The matter was adjourned as the court could not determine "proper provision".

#### ***4.6.3 Where consent terms fail to make "proper provision"***

Case ref; C865 May 2011. The parties married in 2003 and separated in 2006. There were no children of the marriage, the wife had two children from a new relationship. The family home was valued at € 225,000 with a mortgage of € 80,000. Consent terms were agreed on divorce, the respondent would receive € 11,000 being the value of his interest in the family home. The court declined to rule the terms of the agreement on the basis that "*I have to make sure that adequate provision is being made for both parties. This does not appear to be a provident arrangement given the equity in the family home*". The court asked the parties to adjourn for discussions as the matter would not be ruled unless in the region of 1/3 of the value of the equity were provided to the respondent. The parties returned, evidence was given that the wife had purchased a house in Ireland seven years before the marriage. She moved to New Zealand to lecture, renting out the house in Ireland, and married the respondent. They purchased a house together in New Zealand, the husband contributed € 2,500, the wife paid € 15,000. They sold the house to return to Ireland, netting € 24,000 from the sale of the New Zealand house which was used to pay down the mortgage on the Irish property. On separation the wife paid €5,000 to the respondent for his interest in the house contents, and € 6,000 of their joint savings. She stated that the marriage ended as the husband had engaged in multiple affairs. On the basis that € 11,000 had already been paid, the further € 11,000 was offered. The court stated that the baseline for division of assets in these circumstances had to be 20% and ordered that € 11,000 be paid now with a further € 8,000 over the next eight years, € 1,000 per year. A decree of divorce was granted.

Case ref; C982 February 2012. In a consent divorce case the parties agreed to sell the family home and divide the net proceeds on a 50/50 basis. The husband had a substantial pension, the wife had none. They agreed nil pension adjustment orders. The court refused to rule the

terms on the grounds that “proper provision” was not being made for the wife, who should have some entitlement to the pension given the length of the marriage.

Case ref; C943 February 2012. In a consent divorce case the parties had agreed that the family home would be transferred to the children. The court refused to rule the consent on the grounds that “proper provision” was not being made for either spouse.

Case ref; C1072 February 2012. The parties were married in 1968, and separated in 1998. There were four non-dependent children. As part of the consent terms agreed on divorce the family home was transferred to the eldest son. The court refused to rule the consent terms, “*I am not approving that transfer*”. Counsel for the applicant wife indicated that the transfer had already taken place. The court refused to rule the consent terms on the basis that “proper provision” had not been made.

#### *4.7 Reconciliation/ “Living apart”*

##### **4.7.1 Reconciliation**

The court is required to satisfy itself that there is no reasonable prospect of reconciliation between the spouses. Judge 4 never asked if the parties had considered reconciliation and Judge 5 very rarely put the question to represented litigants, and never put it to lay litigants. Judges 2, 9, 10, rarely put the question to litigants, Judges 3 and 11 sometimes put the question, Judges 12, and 13 usually mentioned reconciliation; Judges 1, 6, 7 and 8, always put the question.

Judge 1 in particular would often enter some discussion around reconciliation, urging the parties to consider reconciling if it was at all possible.

Case ref; C871 May 2011. The court permitted a solicitor to come off record for the respondent husband, who said he could no longer afford legal fees. The court questioned if the respondent felt he had the ability to represent himself. The respondent replied, “*I don’t know your honour, I don’t have any experience, I was looking for a reconciliation up until now*”. Counsel for the applicant wife, who was not in court, stated that the divorce application would proceed, no reconciliation was possible. The court asked counsel to check again with his client if she would consider reconciliation, and adjourned the case.

#### **4.7.2 Living apart**

When applying for a decree of divorce the statutory requirement, is that the parties have lived apart for four years during the previous five years. This issue was considered by McCracken J. in the case of *McA v McA*.<sup>134</sup> He noted that the 1996 Act did not provide any definition of “living apart” and looked to *Sanchos v Sanchos*<sup>135</sup>, where Sachs J, stated;

*“I do not think one can look solely at where the parties physically reside, or at their mental or intellectual attitude to the marriage. Both of these elements must be considered, and in conjunction with each other.”*

#### **4.7.3 Residing at intervals during past 4 years**

In this first case the applicant wife testified that she had resided on and off with the respondent during the previous four years, out of necessity.

Case ref; C330 April 2009. The parties married in 2003 and the marriage ended in 2005. The applicant wife, a non-national from Latvia, had a child from a previous relationship. The initial application was for judicial separation but the parties sought consent to strike out that application and substitute a civil bill for divorce, on consent, on the basis that they have been living apart for four years. While giving evidence it transpired that the parties had lived together for two periods since the end of the marriage in 2005. The wife testified that she needed someone to live as she had a child and they stayed in separate rooms and did not live as husband and wife. The court was satisfied that the parties had satisfied the grounds for divorce set out in s 5(1) of the 1995 Act, and granted divorce.

#### **4.7.4 Still residing in same house**

In five cases observed the parties were still living in the same house on divorce. The five cases were dealt with by three different judges. In each instance the court granted divorce, while noting the statutory requirements.

Case ref; C817 March 2011. The parties agreed consent terms, on the steps of the court, on divorce. They married in 1991 and had one child. It was agreed that the applicant wife would

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<sup>134</sup> *McA v McA* [2002] 2 ILRM 48

<sup>135</sup> *Sanchos v Sanchos* [1972] 2 All ER 246

receive € 80,000 within three months to buy out her interest in the family home. The dependent child of 18 would continue to reside with the father, and was in the final year of school. While giving statutory evidence it transpired that not only did the parties still reside in the family home, but the wife assumed she could continue to live there until she could find suitable accommodation later that year. The court stated that *“the Act specifically recognises that the parties no longer reside together”*. Counsel for the wife suggested that the wife move out after the child had finished his leaving certificate exams. The husband testified that he had been leaving the house to avoid confrontation as *“she continually gets in my space, she has waged psychological warfare against myself and my son”*. The court ordered that the wife vacate the family home within six weeks but no later than June 30<sup>th</sup>, and sought an undertaking that she would be civil and courteous during that time. An exclusion order was granted from July 1<sup>st</sup>. The husband was ordered to pay a lump sum of € 80,000 on or before June 30<sup>th</sup>. A decree of Divorce was granted s.5 (1) and 18 (10) blocking orders, no order as to costs.

#### **4.7.5 Criteria to be considered**

In a consent divorce application, Case ref; C422 February 2011, counsel for the applicant wife submitted that they had “lived apart” for the requisite four out of the previous five years. When questioned by the court, it transpired that the parties still lived in the same property. The court indicated that certain criteria must be applied to determine if the parties met the statutory requirements of living apart, including;

- (a) Were the parties still sleeping together
- (b) Were they socialising together during the last four years
- (c) Was the wife doing the husband’s laundry
- (d) Did either of the parties consider themselves married

The wife answered no to each of the criteria stated. The husband was not in court and was not represented. The court issued a decree of divorce.

#### **4.8 Ancillary Orders**

Section 20 of the Family Law (Divorce) Act 1996 sets out the factors to which the court is to have regard in deciding whether to make ancillary orders, in addition to which the court must

ensure that “proper provision” exists and will be made, for the spouse and any dependent children, taking into account the circumstances of the case.

### ***Succession Rights – the rights of two wives***

Case ref; C18 October 2008. In this case the respondent husband had not paid maintenance for two children of the marriage for a considerable period, resulting in arrears of € 11,000. He claimed to have no income and no assets, however the court took the view that he was not coming to court with clean hands. He had a new partner and child, and was living in a property (not the family home), of which he was the legal owner, however his father claimed to be the beneficial owner having discharged the mortgage on that property, and entering an agreement with his son to repay that amount to him. The court ordered that the maintenance arrears and future maintenance liability be capitalised as € 25,000, that the husband’s succession rights be excluded in relation to his wife, however her succession rights to his estate would not be excluded. Counsel for the applicant husband indicated to the judge that the respondent was shortly to marry his partner, and this order would essentially means that two wives could have a legitimate claim against the estate. The judge adjourned the case to seek clarification on succession rights.

## ***4.9 Pensions***

It most cases, the court relied on practitioners, to have carried out due diligence, both in relation to assessing the value of pensions, and in terms of the basis for orders sought. The court was guided by suggestions of counsel in contested cases, and the views of the court in making pension arrangements was rarely enunciated in court. No expert evidence in relation to pension valuations was submitted in any case observed.

### ***Pension adjustment orders for 1998 divorce***

Case ref; C23 October 2008. The parties were divorced in 1998, an application was made for mutual nominal pension adjustment orders. Counsel explained to the court that the practice when divorce first commenced in Ireland was not as “fine-tuned” as it is now, no pension adjustment orders were sought at the time.

### ***Fixed fund “is of the nature of a pension”***

Case ref; C24 October 2008. Leave was sought to make a pension adjustment order application in a case where the court had previously made a 50/50 Order on divorce, in relation to a fixed fund with Eagle Star. A policy with equally entitled parties, both parties having ceased to pay into the fund. The trustees were of the view that a pension adjustment order was required as the fixed fund is “of the nature of a pension”. The court agreed and gave liberty to apply.

#### ***Vacate a pension adjustment order***

Case ref; C25 October 2008. An application was made to vacate a pension adjustment order, made on divorce as AIB said “they couldn’t implement it” as the adjustment was not to take place until the 66<sup>th</sup> birthday, after the spouse had retired. A lump sum maintenance provision was sought in the same amount and granted.

### ***4.10 Case Law referenced***

Case law was very rarely referenced in divorce proceedings. The court and practitioners would occasionally reference *T. v T.*<sup>136</sup>, where conduct was being argued, and *G. v G.*<sup>137</sup> in terms of “proper provision”.

### ***4.11 Divorce and Nullity***

#### ***Divorce, counter-claim nullity***

In Case C30, nullity was granted, primarily on the evidence of the expert, that the husband lacked the mental capacity at the time to consent to enter into marriage.

Case ref; C30 October 2008. In this case the wife made an application for divorce, the husband counter-claimed with a nullity application. The evidence given by the husband was of a troubled childhood with violence both at home and at school. As an adult he suffered bouts of depression and eating disorders before the marriage. He met his wife and married

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<sup>136</sup> *T. v T.* [2002] IESC 68 SC

<sup>137</sup> *G v G* [2011] IESC 40

her within 8 months, during which time he was meeting with a counsellor. His wife described him as emotionally unavailable, withdrawn and constantly down, before and after marriage, but attributed that to his “being different”. A psychologist who had assessed the husband and wife gave evidence that the husband lacked the capacity to sustain any relationship, and lacked the capacity to enter into marriage. He had been treated by 10 psychologists since his early twenties. The marriage created a catastrophic event that led to increased withdrawal and repeated suicide attempts. “*The hallmark of this man’s relationship with his wife was non-engagement*”. Nullity was granted.

### ***Marriage void***

In this case the respondent husband, counter-claimed nullity on the grounds that he was still married at the time, and therefore had a lack of capacity.

### **Case note ; C809 March 2011 – [ marriage void, lack of capacity]**

#### **Facts;**

The respondent husband in a divorce case, counter-claimed nullity, on the grounds that the marriage should not be recognised, as he was not validly divorced. The respondent was first married in 1972, there was one child of the marriage, and in 1992 the parties entered into a separation agreement. On the availability of divorce, post the constitutional amendment, he sought legal advice regarding divorce, but was put off by the costs. The respondent resided in Ireland but his sister resided in the U.K. and using her address with her consent, he applied for divorce in the U.K. The wife was notified and did not object and in September 1998 a decree absolute was issued by the English court. The respondent then married a Spanish national in a ceremony in Ireland. Counsel for the first wife, a notice party to the proceedings, believed the divorce to be valid, and wanted the respondent estopped from denying the validity of the divorce. Counsel for the second wife, cited the authority of *K v K*, a case stated from the Circuit Court to the Supreme Court in 2004, submitted that estoppel cannot be used where a foreign divorce does not have jurisdiction, and where fraud has been perpetrated. It was held in the Circuit Court by his honour Judge Patrick Mc Cartan that;

*"I believe that justice between the parties can only be achieved by prohibiting or stopping the respondent from attacking the validity of his divorce and by definition the validity of his marriage to the applicant. However, given the law as stated, I accept that the concept of estoppel as a remedy, well suited to offer*



*a solution in this case, is a judge made and developed principle. I believe it is preferable for the parties to this action that prior to a final determination of the case that the Supreme Court be consulted on this issue.”<sup>138</sup>*

## Orders

*“It is clear that he misled the English courts as to domicile. Counsel’s authorities leave me in no doubt that the original marriage remains valid, consequently it follows that the subsequent marriage is void”* The court cited Justice Denham in *K v K*;

*“Consent cannot confer jurisdiction to dissolve a marriage, where that jurisdiction did not exist”<sup>139</sup>*

The court stated that the first marriage remained a valid marriage, issues of custody, access and guardianship arising in relation to the children of the applicant and respondent, *“a consequence of nullity is that [the respondent] is no longer a guardian of his children.”* The court noted that p. 256 of the Supreme court report stated that a remedy for a wrong in such circumstances, where fraud is proved, is that the ostensible spouse can seek damages where they had believed themselves to be a spouse. The counter-claim was granted and the marriage of the applicant and respondent found to be void on the grounds that the respondent was still validly married to another person.

### 4.12 Full and final settlement/Clean break

In *T v T*<sup>140</sup>, Keane C.J. disagreed with the view of Mc Guinness J in *D. (J.) v D. (D.)* [1998] FLJ 17, where she stated that the Oireachtas had made it clear that a ‘clean break’ situation is not to be sought and financial finality is virtually to be prevented. In referencing the “clean break” principle provided in English legislation, he took the view that;

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<sup>138</sup> *K v K* [2004] IESC 21 pg 1

<sup>139</sup> *K v K* [2004] IESC 21 pg 4

<sup>140</sup> *T v T* [2002] IESC 68 SC para 43

*“Irish law should be capable of accommodating those aspects of the “clean break” approach which are clearly beneficial.”<sup>141</sup>*

***“Full and final settlement means nothing”<sup>142</sup>***

Case ref; C162 December 2008. The respondent husband sought the direction of the court, post divorce, as to whether the ruled terms could be varied. Counsel for the applicant wife argued that no such variation should be considered as the terms of consent stated they were entered into, in contemplation that the consent agreement was in full and final settlement of all matters. The terms agreed included a specific value of money that would be transferred to the wife on sale of the farm. The intention of the parties was that the value of the proceeds to be assigned to the wife represented 1/3 of the then value of the farm. The farm was immediately put up for sale and the only offer received was €500,000 for 60% of the farmlands. This would satisfy the wife, but leave the husband with a non-viable small-holding and € 250,000 of debt. The judge commented, *“the present consensus is that full and final settlement means nothing...we are finished with the world of finality”*. The court gave leave to the respondent husband to issue a post-divorce matrimonial bill seeking a variation.

#### *4.13 Conclusion*

There was a significant variation in the approach of judges to the statutory and constitutional requirements on divorce. Where divorce was on consent, several judges did not seek evidence regarding reconciliation<sup>143</sup> Judge 6 always sought evidence to determine if reconciliation had been considered and if “proper provision” was being made. Judge 4 never heard evidence for consent cases regarding reconciliation and “proper provision”, frequently proceeding to orders, with some brief questions regarding the satisfaction of the parties with the terms agreed, often before applicants were even sworn in. In one case Judge 1 refused to proceed with a divorce application until counsel for the applicant wife “checked” with her again to see

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<sup>141</sup> T v T [2002] IESC 68 SC para 42

<sup>142</sup> See “Clean break” post divorce, Chapter 5

<sup>143</sup> See Judicial Trends Appendix B (ii)

if reconciliation was possible. Of the judges observed one elected not to hear any evidence on divorce from either party, where the matter was on consent. Another judge always carefully examined the paperwork, and sought evidence to satisfy the constitutional requirements.<sup>144</sup> The possibility of reconciliation was rarely put to litigants on divorce by some judges, whereas one judge always entered a discussion around that possibility. Determining whether the parties had “lived apart” for the requisite period, particularly where litigants were still residing under the same roof, was dealt with differently from judge to judge. As Mc Cracken J. noted<sup>145</sup>, the 1996 Act does not provide any definition of “living apart”, and held that parties who live under the same roof may be considered, in all the circumstances, to be “living apart”. One judge applied criteria to determine if the parties were “living apart” whilst living together, which included marital relations, socialising together, laundry being done together, and whether either of them still considered themselves to be still married.

Separation agreements formed the basis for many of the divorces before the court, particularly consent divorces. Where the agreements contained “full and final settlement” clauses the majority of the judges gave due weight to that agreement, as per the principles enunciated by the Supreme Court<sup>146</sup>, only seeking to determine what period of time<sup>147</sup> had elapsed since the separation agreement had been entered into, and whether intervening circumstances required further evaluation to satisfy the “proper provision” imperative. Where the separation agreement was of a more distant origin in time, the court sought evidence to determine if further provision needed to be made.<sup>148</sup> The Court did enunciate that those changed circumstances for either spouse, must constitute significant change, as per Denham J.<sup>149</sup> Where the court deemed that “proper provision” was made at the time a separation

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<sup>144</sup> See Chapter 14, 14.2.5 Statutory evidence on divorce

<sup>145</sup> *Mc A. v Mc A.* [2002] 2 ILRM 48

<sup>146</sup> *G. v G.* [2011] IESC 40 at p 2 para 8

<sup>147</sup> In *RG v CG* [2005] 1 IR 418 the court held that the Consent order before it which was 5 years old was open to reconsideration by the court to ensure that proper provision was made.

<sup>148</sup> *McM. v McM.*[2006] unreported HC, Abbot J.

<sup>149</sup> *G. v G.* [2011] IESC 40 pg 13 (vi)

agreement was entered into, it was upheld,<sup>150</sup> essentially creating a “clean break”, however, all judges expressed the view that the appropriate time for determining “proper provision” was on the day the matter was before their court.<sup>151</sup> This research was conducted during a period of severe contraction in the Irish economy. The collapse of the property market formed the basis, in the majority of cases, of a change in circumstances argument.

Issues that arose with separation agreements on divorce, included agreements without a full and final settlement clause, agreements that contained a clause stating the agreement was not intended to be legally binding, agreements that were badly worded and not capable of legal enforcement, and agreements where one party claimed not to have received independent legal advice before signing.

67% of divorce applications were on consent, and a substantial number of these cases involved lay litigants, where there were little or no assets. Many issues arose with these consent divorces including; improper service, no marriage certificate, language difficulties and lack of clear evidence of consent. Where there were assets, and the Court sought to determine “proper provision” the guidelines stated in *T v T*<sup>152</sup> were followed, if not enunciated, in most cases. However, guideline (f)<sup>153</sup> was not adopted, with most judges and practitioners expressing a ‘presumption’ that where there was a long marriage, assets should be divided on a 50/50 basis. One judge expressed the view that there was nothing in law that would allow a transfer of more than a 50/50 interest in a family home. The expressed view of judges had a particular impact on cases that settled at the courthouse. This was particularly evident where a case may have come briefly before the judge, who recommended that the matter “stand<sup>154</sup>” while the parties try to come to a settlement. In line with Denham C.J.’s

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<sup>150</sup> *W.A. v M.A.* [2005] 1 IR 1

<sup>151</sup> *D.T. v C.T.* [2003] 1 ILRM 321

<sup>152</sup> *T. v T.* [2002] IESC 68 para 30

<sup>153</sup> *...there is no provision in Irish law which mandates or requires a 50/50 division of marital assets.*

<sup>154</sup> Where a case remains on the family law list for that day, to enable the parties and their legal counsel to engage in negotiations with a view to agreeing settlement terms. The judge would later enquire as to the status of the case, and if not settled, would either hear the case, or adjourn it for hearing on another day. This type of high pressure settlement process, usually without the privacy of a consultation room, was extremely common throughout all eight Circuits.

view, that while Irish law does not establish a right to a clean break, finality is a legitimate aspiration<sup>155</sup>, the desire of the court to promote a settlement, or make orders that would provide a “clean break” was evident. However, judges cautioned litigants who expressly sought a “clean break” that it could not be achieved in terms of reliefs available after divorce.<sup>156</sup>

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<sup>155</sup> G. v G. [2011] IESC 40 at p 12 (ii)

<sup>156</sup> Periodical payments and lump sum orders s 13 1996 Act. Property adjustment orders s 14 1996 Act. Miscellaneous ancillary orders s 15 1996 Act. Financial compensation orders s 16 1996 Act. Orders for sale of property where previous specified orders were made s s 19 1996 Act. Pension adjustment orders s 17 (2) 1996 Act. Provision out of the estate of a deceased spouse s 18 1996 Act.

## **5 Chapter 5 Post Separation/Divorce applications**

### *5.1 Enforcement*

When a decree of judicial separation is issued, the parties remain legally married but are no longer obliged to co-habit. Should the parties continue to reside together it ought to negate the “fundamental reason” for granting the decree<sup>157</sup>, however, it should be noted that cases were observed where judicial separation was sought by parties who stated they could not afford to move apart. Ancillary relief orders can be made<sup>158</sup>, which are capable of enforcement, and the court may award sole custody on the basis that a parent was unfit.

When a decree of divorce is issued the marriage is dissolved and the parties are free to re-marry. Where there are children, both parents continue to be joint guardians, and joint custodians unless otherwise ordered. A divorced spouse is no longer entitled to be deemed a “spouse” under the Succession Act 1965. However, the granting of a decree of divorce does not deprive a spouse of a right to bring proceedings under the Domestic Violence Acts, nor does it deprive them of a right to claim a widows or widowers pension. A divorced spouse also retains the right to seek ancillary reliefs, such as periodical payments and lump sum orders<sup>159</sup>, property adjustment orders,<sup>160</sup> miscellaneous ancillary orders,<sup>161</sup> financial compensation orders,<sup>162</sup> orders for sale of property where previous specified orders were

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<sup>157</sup> Shannon, G (2011) Family Law, Volume Editor, and Author, New York: Oxford University Press, Third edition  
pg 48

<sup>158</sup> Part II 1995 Act

<sup>159</sup> s 13 1996 Act

<sup>160</sup> s 14 1996 Act

<sup>161</sup> s 15 1996 Act

<sup>162</sup> s 16 1996 Act

made,<sup>163</sup> pension adjustment orders,<sup>164</sup> provision out of the estate of a deceased spouse<sup>165</sup> and enforcement of any orders made on divorce, or terms of compromise made a rule of the court.

80% of the post separation applications to enforce terms ordered, or consent terms agreed and ruled, were made by the wife. 100% of the post divorce applications to enforce terms ordered, or consent terms agreed and ruled, were made by the wife. In all cases the significant down-turn in market conditions was submitted as the reason why orders or terms agreed, to pay monies on sale of property, or to divide net proceeds on the sale of the family home, could not be performed. Properties valued on separation or divorce, were not only not achieving offers at reserves agreed, but in some instances no offers at all had been made. Property values plummeted during the course of this research, and record numbers became unemployed<sup>166</sup> or suffered a significant decrease in income, particularly those whose income derived from the construction industry.

### ***5.1.1 Matters relating to property***

Case ref; C481 .The applicant wife re-entered a judicial separation application as the orders were not complied with. The respondent had been ordered to discharge the mortgage on the family home until the youngest child was 18, and to discharge the arrears that had accrued. The house was to be sold at that point and the net proceeds divided 50/50. Counsel for the applicant submitted that the mortgage was now in further arrears, and sought as a remedy an order to sell a second property. The “summer house” the subject of the application, was owned 50/50 between the parties and was rented out. The respondent indicated he wished to live in it when the lease ended. The applicant sought the net proceeds of that sale to discharge the mortgage arrears from the respondent’s equitable interest. The respondent, an architect, indicated that he had renegotiated terms with the lender, for interest only payments, to be reviewed every six months. Counsel for the wife submitted that an interest only agreement did not constitute “re-negotiating” the mortgage, and that the lender should not be making

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<sup>163</sup> s 19 1996 Act

<sup>164</sup> s 17 (2) 1996 Act

<sup>165</sup> s 18 1996 Act

<sup>166</sup> *The standardised unemployment rate in 2008 was 4.6%, but the end of 2012 it was 14.8%. [online]*  
[http://www.finfacts.ie/irishfinancenews/article\\_1024459.shtml](http://www.finfacts.ie/irishfinancenews/article_1024459.shtml), [accessed June 30<sup>th</sup> 2013]

arrangements with one borrower, to the exclusion of another, where they are joint owners of the property.

In refusing the application to order the sale of the “Summer house”, the court stated that the applicant was not prejudiced until such time as the mortgage arrears on the family home exceed the value of the equitable portion that belongs to the husband. The matter was adjourned for the applicant to secure a statement from the lender, the court cautioned counsel for the respondent “*The court would be unsympathetic if the actions of the respondent regarding negotiations with the bank, prejudiced the equitable interest of the wife*”.

Case ref; C842 March 2011. An application was made by the respondent wife to enforce the orders made on divorce, whereby the applicant was to pay € 180,000 as spousal lump sum provision within 3 months from a substantial windfall of € 700,000 due to be paid in relation to lands under offer. The applicant subsequently secured an order to register a charge against the family home, as the monies had not been paid. The monies had not yet been discharged and the respondent sought an order to sell the family home. The application was granted with leave to seek the assistance of the County Registrar to sign documents where consent was not forthcoming.

### **5.1.2 Maintenance**

100% of the applications to attach and commit for non-payment of maintenance ordered were by the wife. In no case observed was the application granted.

Case ref; C1007 July 2011. Two motions were before the court post judicial separation. The applicant wife sought attachment and committal for maintenance arrears subject of orders made on judicial separation relating to three dependent children, the self employed respondent sought to vary the orders. The parties had been before the court on an earlier date post judicial separation, where the respondent who worked as a sub-contractor in construction was in maintenance arrears and ordered to provide 12 months of bank statements, company accounts and tax documents. The court stated, “*there are two aspects before me today. You [respondent] are in arrears and you have an application to vary maintenance. I have ordered you to provide documents, you haven't done so, it's a nonsense. You say you have nothing in your bank account, but you have to prove it with statements, this is unsatisfactory*”. The respondent, who was visibly distressed in court, said that he had many unpaid invoices and was getting no new work, “*I have no money, no social welfare, I have nothing but two pieces of equipment and yez can have that*”. The court took the view that a committal order would



not assist as “*it would seem to be a case of blood from a stone*”. The court granted a judgement for the arrears in the amount of € 4,000, no order for attachment and committal, and adjourned the respondent’s motion to vary maintenance to early October. The court recommended that the respondent begin to discharge the arrears as otherwise committal becomes possible.

### ***Acting to thwart to effect of a Mareva injunction***

The respondent husband believed that by withdrawing all monies from his two bank accounts, in the form of bank drafts, that he had effectively put the monies out of the reach of the court and the applicant. The court took the view that a bank draft is essentially a cheque, drawn by a bank, and as such was capable of cancellation and re-issuance.

Case ref; C1073 February 2012. The applicant wife sought an attachment and committal order for maintenance arrears of € 32,000, post judicial separation, against the applicant a lay litigant. At a previous enforcement hearing the court granted a Mareva injunction<sup>167</sup>, pending the hearing of a divorce application, freezing the two bank accounts of the applicant husband. Counsel for the wife submitted that before the order could be served on the bank, the husband left the court and went straight into the bank around the corner and withdrew the monies from both accounts. The bank indicated that two bank drafts had been drawn up in the amounts of € 18,000 and € 10,000, said drafts had not been cashed and were still extant. The court asked the husband where the bank drafts were, he refused to say. The husband indicated that he wanted to keep the monies as a deposit for a house for himself and for his son, and he refused to disclose the whereabouts of the drafts or to hand them over. The court had him removed to the cells in the courthouse for contempt of court. The court instructed solicitors for the applicant wife to talk to the bank, to see if they would cancel the drafts the man held, and re-issue drafts to be held by the wife’s solicitor. The bank complied, and two new drafts were issued. The husband apologised to the court later that afternoon and was released.

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<sup>167</sup> Also known as a “freezing order”, which freezes the assets of a defendant/respondent pending the full trial. The injunction is granted where the applicant establishes that the defendant/respondent intends to dissipate assets for the purposes of avoiding his obligation to the applicant/plaintiff.

## 5.2 *Inability to perform terms*

77.78% of the applications to vary terms ordered, which could be performed, post judicial separation were made by the husband. 87.5% of the applications to vary terms ordered, which could not be performed, post divorce, were made by the husband.

### 5.2.1 *Fixed value rather than percentage*

The significant downturn in the property market highlighted the problems that could arise where a specific value was agreed or ordered to be paid to the other party, from the sale of a specified property.

Case ref; C162 December 2008<sup>168</sup>. The parties entered into consent terms on divorce in 2007. It was agreed that the farm would be sold, which was valued at € 1.8 million. The farm consisted of two separate holdings, in close proximity, of 45 acres and 60 acres. The applicant wife was to receive €500,000 of the proceeds of that sale, in full and final settlement, representing a third interest. Debts to the value of € 250,000 were attached to the farm. The farmlands were put up for sale, only one offer of € 500,000 was received for the larger portion of the farm. The respondent sought direction from the court, seeking to vary the consent terms ruled, as the offer would satisfy the wife, but leave the respondent with debts of € 250,000 and a non-viable farm of 45 acres. The matter was adjourned to allow the respondent to issue a post divorce matrimonial bill seeking variation of terms ruled.

### 5.2.2 *No offers*

Case ref; C1079 February 2012. An order to sell the unencumbered family home was made on divorce in 2008. A named auctioneer was appointed and a guide selling price agreed. The applicant wife was to receive € 200,000 from the net proceeds. No offers were received. The father of the respondent had since moved into the house, the “For Sale” sign had been taken down, and the front area of the property was strewn with car tyres and garden gnomes which the father-in-law was selling. The court ordered that the father-in-law vacate the family home immediately, that the gnomes and tyres be removed and the “For Sale” sign be erected again. The applicant wife indicated that she was now willing to vary her portion of the net proceeds downwards to € 100,000 and agreed a lower reserve. The court further directed that the guide

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<sup>168</sup> See chapter 4, section 4.12

selling price be set by the appointed auctioneer, indicating that the County Registrar was to sign in default of consent.

### 5.3 *Variation of Orders*

#### ***Variation of maintenance orders***

100% of the applications to vary maintenance orders on judicial separation, or terms ruled, were made by the husband. 90% of the applications to vary maintenance orders on divorce were made by the husband. All applications by the husband sought to vary maintenance downwards and were based on a change in circumstances. Applications for the wife post-divorce sought to vary maintenance upwards and were made on the same grounds.

#### ***Variation of access orders***

Case ref; C879 May 2011. The respondent husband sought to amend access orders made on divorce in light of the recommendations of a s 47 report<sup>169</sup>, completed after the orders were made on divorce. Supervised access was ordered on divorce and a s 47 report ordered. The report recommended that access be unsupervised. The court expressed a view that the litigant, an Algerian national, was inappropriately dressed for court and declined to amend the court orders. The court stated to counsel for the litigant, “*tell your client to come appropriately dressed the next time he is in court*”. Liberty was given to make an application at a later date.

### 5.4 *Variation of terms*

*“It is likely that a significant number of previous agreements and orders which were made during the boom years of the Celtic Tiger, may have to be*

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<sup>169</sup> S 47, Family Law Act, 1995; *Where the court believes that the welfare of a child may be at risk, it may make a section 47 order, giving such directions as the court sees fit, to procure a report in writing to address any questions affecting the welfare of that child. The purpose of this “social” report is to assist the court in making decisions regarding the welfare of that child, particularly in relation to access orders*

*reviewed or revisited having regard to the Credit Crunch*<sup>170</sup> G. Durcan S.C

### ***Respondent seeks rectification of consent terms***

Case ref; C402 A motion was before the court seeking rectification of terms of settlement. Counsel for the applicant objected to the motion on the basis that this was an attempt to revisit terms of settlement, made an Order of the court, over two years later. On judicial separation, consent terms were agreed on the day of the hearing, which were ruled, those terms included a clause which stated that all the applicant's legal fees would be deducted from the gross proceeds of the house, with the balance being divided equally between the parties. Counsel for the respondent indicated that the solicitors and barristers who represented the parties at the judicial separation hearing, and assisted with the settlement discussions were in attendance and willing to give evidence as to the intent of the parties on the day - that it was never the intention of the respondent that costs for the applicant's legal team would essentially be discharged from his equitable portion of the proceeds. The court declined to hear the motion declaring ethical concerns about solicitors and barristers who took part in an actual settlement now giving evidence about the terms they constructed. The motion was struck out.

### ***Applicant seeks to vary consent terms***

Post the ruling of consent terms on divorce, the applicant discovered that charges had been registered against the respondent's interest in the family home, fearing that further charges were imminent the applicant sought to vary the consent terms, so that any charges remaining would be discharged from the equitable portion of the husband, and not from her interest in the family home.

Case ref; C741 March 2011. A post-divorce motion was before the court seeking an order to amend a clause of the consent terms. The clause stipulated that the wife would reside in the family home until the youngest child was 18 at which time it would be sold and the net proceeds divided 50/50 between the parties. Until then the husband would discharge the mortgage and the wife would have sole right to reside. The applicant wife sought an

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<sup>170</sup> Duncan S.C., G. (2008) 'Divorce and Judicial Separation, Recent Developments in the Superior Courts'; paper presented at *The 6<sup>th</sup> Round Hall Family Law Conference*, The Westbury Hotel, Dublin, 6 December 2004

amendment, that the respondent would disclose any or all judgement mortgages registered against the respondent's interest in the family home, as of the date of the divorce, and any future such charges. The court made the order to vary the original consent agreement.

### *Application to change court appointed specialist*

On judicial separation the court appointed a named specialist to provide therapy for the dependent child and parents. Subsequently the applicant realised that the expert practiced over 100 miles from the house she resided in with the child, and sought to vary the orders to select a similar expert, easier to access.

Case ref; C825 March 2011. Counsel for the applicant sought an amendment of an order made on judicial separation. The order appointed a specific family therapist, however the applicant did not realise the distance involved at the time. The court directed that another counsellor, agreed on by the parties, be appointed for the family and amended the order accordingly.

## 5.5 “Clean-break”

As noted, Keane C.J. in *T v T*, disagreed with the view of Mc Guinness J in *D.(J.) v D. (D.)* [1998] FLJ 17, where she stated that the Oireachtas had made it clear that a ‘clean break’ situation is not to be sought and financial finality is virtually to be prevented. However, no “clean break” can be achieved in terms of reliefs available after divorce. The separated parties continue to be regarded as spouses and may apply for relief, by way of periodical payments and lump sum orders<sup>171</sup>, property adjustment orders<sup>172</sup>, miscellaneous ancillary orders<sup>173</sup>, financial compensation orders<sup>174</sup>, orders for sale of property where previous

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<sup>171</sup> S.13 1996 Act

<sup>172</sup> S.14 1996 Act

<sup>173</sup> S.15 1996 Act

<sup>174</sup> S.16 1996 Act

specified orders were made<sup>175</sup>, and pension adjustment orders<sup>176</sup>, on or at any time after the decree of divorce has been granted. Relief can even be sought after the death of a spouse, where the other spouse can apply to the court, within six months of the death of their spouse, for provision out of the estate of that spouse. The court must be satisfied that “proper provision”, in the circumstances was not made for the applicant during the lifetime of the deceased spouse<sup>177</sup>

### ***Maintenance sought post divorce***

Case ref; C922 February 2012. The applicant wife sought a child maintenance order 7 months post divorce. The parties were married in 2001 and separated in 2007, they had two dependent children. Divorce was granted in July 2011. The wife did not seek spousal or child maintenance on divorce, which was granted on consent terms. The dependents were living with the mother. The house valued at €180,000 was transferred into the applicant’s name, and she took over the mortgage. The respondent was to receive € 18,000, constituting 10% of the equity in the family home, on retirement of the wife. The applicant submitted that she had suffered a 21% reduction in her salary, which made it difficult to manage the finances and provide for the children, the respondent had been paying €700 per month in maintenance prior to the divorce. The respondent submitted that they had entered into consent terms in full and final settlement of all issues. The court indicated that the wife had a statutory right to seek relief post divorce, and a maintenance order post divorce was not dependent on agreeing maintenance on divorce. The parties asked the judge to rise to allow further discussions. The parties agreed maintenance terms which were ruled. The respondent agreed to pay € 80 per week child maintenance, which he would receive back along with the lump sum when that became payable.

## ***5.6 Pensions***

The Family Law Act, 1995 and the Family Law (Divorce) Act, 1996, oblige the court to take the value of pension benefits into account in arriving at a financial settlement. A pension

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<sup>175</sup> S.19 1996 Act

<sup>176</sup> S.17 (2) 1996 Act

<sup>177</sup> S.18 1996 Act

adjustment order can only be made on or after the granting of final decrees on judicial separation or divorce.

### *One year period elapsed*

Case ref; C782 March 2011. Counsel for the applicant wife, post judicial separation, asked the court to make a pension adjustment order to be served on the trustees of a pension scheme. It was ordered on judicial separation that retirement benefits from the pension of the respondent husband be paid to the applicant. A specified portion of the retirement benefits were to be paid to the non-member spouse. Counsel for the respondent indicated that his client was already drawing down on the pension, the one year period to serve the order having also elapsed. The court stated that no pension adjustment order could now be made, and suggested that a maintenance application be made in lieu.

## *5.7 Conclusion*

The majority of post separation and post divorce applications, enforcement and variation, related to property. The significant down-turn in market conditions was submitted as the primary reason why orders or terms agreed, could not be performed. Properties valued on separation or divorce, were not only not achieving offers at reserves agreed, but in some instances no offers at all had been made.

Maintenance arrears were also attributed to the dramatic downturn in the economy, with the self-employed or those employed in the construction industry most commonly in default. All applications made by the husbands sought to vary maintenance downwards based on a change in circumstances. Applications for attachment and committal<sup>178</sup> of the offending payors were not granted in any case observed.

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<sup>178</sup> Circuit Court Rules, Order:37 *If the person bound by any order of the Court, other than a judgment for the payment of money, fails to comply with its terms, the party entitled to the benefit of such order may serve a notice requiring the person so bound to attend the Court on a day and at an hour to be named in such notice to show cause why he should not be committed for his contempt in neglecting to obey such order.*

## 6 Chapter 6 Domestic Violence

The Domestic Violence Act 1996 sets out the objectives of the legislation in the preamble;

*(a) To protect spouses and children and other dependent persons, and persons in other domestic relationships where their safety or welfare is at risk because of the conduct of the other person in the domestic relationship.*

The Domestic Violence (Amendment Act) 2002 provides that an interim barring order may be sought *ex parte*, without notice to the other party, if the court believes that the circumstances warrant such an order.<sup>179</sup> Such an order may not exceed eight working days, unless confirmed during that period by the court.

The over-whelming majority, 94.2%, of orders previously granted or sought under the Domestic Violence Acts, submitted on evidence, or the subject of an application, were against the husband. 87.5% of barring orders were issued or sought against the husband, 100% of safety orders were issued or sought against the husband, 100% of protection orders were issued or sought against the husband, and 100% of interim barring orders were issued or sought against the husband.

While the possible grounds include physical, sexual, emotional or mental abuse, the majority of those applications cited certain behaviours that were threatening, rather than the threat of physical violence. Physical violence was alleged by the wife in 5.71% of cases. The most common grounds for these applications were; aggressive behaviour, anger, psychological abuse, intimidating behaviour, abusive language and abusive texts. In no case was an order sought in favour of a dependent child of the marriage. An order granted under the Domestic Violence Act 1996 is deemed in force as soon as the respondent has been notified. A respondent who contravenes a safety order, barring order, interim barring order or protection order, or if they interfere with the access and egress of the applicant or any dependent person, to and from the property to which the order relates, will be guilty of an offence. The

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<sup>179</sup> s 1 (3)(a) 2002 Act



respondent is liable on summary conviction to a fine not exceeding € 1,905, or at the discretion of the court may be imprisoned for a period not exceeding 12 months, or may be liable to both sanctions.<sup>180</sup>

## *6.1 Barring Order/Interim Barring Order*

A barring order, in the context of family law proceedings, is essentially an exclusion order, directing the respondent to immediately leave the family home, and prohibits the respondent from re-entering the property until the order is discharged by further order of the court, or until such time as the court specifies. The effect of such an order is that one party can occupy property to the exclusion of the other, raising issues in relation to the constitutional right to private property.<sup>181</sup> Orders of this nature are extremely problematic where the family home is located on a working farm, and the respondent needs access to areas in and near the house to carry out his/her work. To secure an interim barring order the court must be of the opinion that there is an immediate risk of significant harm to the applicant, or any dependent person, if the order is not made immediately.<sup>182</sup> An interim barring order should also only be granted where the court determines that a protection order<sup>183</sup> would not suffice.

### *6.1.1 Interim barring order*

In this case the evidence of the wife did not indicate an “immediate” risk of harm, her testimony hinged more on a battle for the right to operate the farm, and her intent appeared to be to exclude her husband from the property she resided in, the old farmhouse dwelling, which included the farm buildings, which surrounded the house.

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<sup>180</sup> S. 17 (1) (a) and 17 (1) (b), Domestic Violence Act, 1996

<sup>181</sup> Article 43 and Article 40.3 Bunreacht na hÉireann

<sup>182</sup> S. 4 (1)(a) Domestic Violence Act 1996

<sup>183</sup> *A protection order may be granted by the court where there are reasonable grounds for believing that the safety or welfare of the applicant is at risk. This order only lasts until the determination of a safety order or barring order, and prohibits the respondent from using violence or threatening to use violence against the applicant.*

Case ref; C163 December 2008. The applicant wife sought an interim barring order pending the hearing of her application for judicial separation. The wife had moved 50 yards to another house on the farm with the children, the husband continued to reside in the family home. Both parties competed to run the farm. The wife testified that she had her own vet and her own accounts for the farm. The respondent husband refuted that claim, asserting that he had always operated the farm and would continue to keep his stock on the land. The applicant wife alleged that the husband was behaving in a threatening manner, and she wanted a barring order to force him to stay out of the second property and off the farm. The court declined to issue a barring order, and sought an undertaking from the husband that he would stay out of the house the wife and children resided in, and would behave courteously to the wife on the farm.

### ***Arrest without warrant***

In only one case where domestic violence was alleged, had an Garda Síochána exercised their powers to arrest the alleged perpetrator without warrant under s 18 of the 1996 Act.

Court note; A case not on the court list came before the court for direction, 11<sup>th</sup> May 2010. The applicant wife secured an interim barring order pending the hearing of her judicial separation application. That interim order was made on the 20<sup>th</sup> of April. The wife subsequently learned that the Gardaí had applied under s 3<sup>184</sup> for a barring order against the husband, which was granted on the 23<sup>rd</sup> April, restraining certain acts, including a specific direction that the defendant husband was not to come within 20 miles of the house. Counsel for the applicant wife indicated that while the order secured by the Gardaí went further, it did not include the prohibition on text messaging contained in the interim barring order secured by the wife, requesting that the interim barring order be continued as an interlocutory injunction. The court granted the application.

### ***6.1.2 Barring Order and/or Safety Order***

Where a safety order<sup>185</sup> is sought, it cannot be granted in place of a barring order, unless both remedies are sought by the applicant.

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<sup>184</sup> S. 3 Domestic Violence Act 1996

<sup>185</sup> A safety order prohibits the respondent from using or threatening to use violence against the applicant or molesting or putting the applicant in fear. The order does not exclude the respondent from the family home

Case ref; C50 October 2008. The applicant wife sought a barring order and a safety order against her husband. Her application being by way of sworn affidavit. She had been granted a protection order, with liberty to apply for further relief under the Domestic Violence Act. Counsel for the wife submitted that the respondent frequently phoned the mobile of the applicant, forcing her to change her number twice. He had her most recent number and the court was shown seven missed calls from the phone of the respondent commencing at 2.11 a.m. the night before the hearing. A voicemail was played for the court, where the husband was heard shouting *“I thought you might be in need of a penis, I can sort that for you, you slut”*. On evidence the husband submitted that he was very embarrassed about that message, and that he was undergoing treatment for his anger. The court declined to issue either order and asked the respondent to give a sworn undertaking not to go near the house, not to make any phone-calls or texts, and to behave in a civilised way towards the wife.

It should be noted that the court also ordered access between 11 a.m. and 4 p.m. every Sunday, ordering that the wife drop off and collect the children from the husband’s rented accommodation. Those orders raise two questions, how can the respondent communicate any changes to the applicant relating to access, caused by something outside his control such as a broken down car, illness, death of a relation or some other intervening event. The second issue is, if the wife is genuinely in fear of her husband, the basis of her application, the orders made, force her to go to his location twice on a Sunday, every week, and would appear to put her at risk. On evidence he submitted that he was very angry that she had ended the relationship and needed help controlling that anger, a more prudent approach would perhaps have been to investigate the possibility of a third party involved in drop off and collection, or the selection of a public location that would reduce the likelihood of possible contact between the parties.

### **6.1.3 Barring Order**

Case ref; C1060 June 2011. The applicant wife’s motion for judgement in default of defence was before the court. The husband was not represented and did not attend at the court. The wife submitted that she had secured a barring order when the marriage broke down, which was discharged when the respondent undertook to received treatment for his anger. He moved back in to the family home and tensions grew between the parties with the applicant subsequently securing a protection order. Since then the parties had resided in the family home without speaking. From the time the marriage broke down in 1998, the wife discharged the mortgage as the respondent had lost his job. Counsel for the wife submitted that in light

of the conduct of the husband, the family home in its entirety should be transferred to the wife. The court indicated that it would be inclined to make orders to sell the family home and the net proceeds to be divided 70/30 in favour of the wife. The court declined to make any orders without first hearing from the husband, and adjourned the matter, asking the solicitor for the applicant to write to him once again.

#### **6.1.4 Discharge of a barring order**

In this case the husband, a lay litigant, attended at the court alone. He had a motion before the court to discharge a barring order. His wife was not present nor represented, yet the court decided to discharge the barring order on the basis that the wife's claims were exaggerated, and he had now moved back into the family home. No evidence was produced to show that he was residing there, nor did the court express any view on the fact that living in the family home meant he was in contravention of the order.

Case ref; C137 December 2008. The respondent husband appealed against a two year barring order granted to his wife. The husband attended as a lay litigant, the wife was not in court and was not represented. The husband claimed that "*it was all blown out of proportion. She got the HSE involved. They said I was drunk and abusive to her and the kids*", the judge asked "*where are you living now*", the husband responded that he was back in the family home. The judge asked him to swear that this was true, and lifted the barring order.

#### **Barring Order against the wife**

Case ref; C792 March 2011. The respondent wife sought to discharge a barring order pending divorce. The respondent was an Indian national and did not speak English. The court allowed a family member to attend as interpreter. The wife gave a sworn undertaking to stay out of the family home and agreed not to use violence against her husband. The barring order was discharged.

## **6.2 Protection Order**

Where an application has been made for a safety order or a barring order, or in the period between the making of such an application and the determination, a protection order may be granted by the court where there are reasonable grounds for believing that the safety or welfare of the applicant is at risk. A protection order, which only lasts until the determination

of a safety order or barring order, prohibits the respondent from using violence or threatening to use violence against the applicant. Where the respondent resides at a place other than the place where the applicant lives, then he/she shall be prohibited from watching or “besetting” the residence of the applicant. A protection order once issued can be varied by a motion from the applicant or respondent.<sup>186</sup>

### ***Watching or besetting***

What constitutes “watching or besetting” is not defined in the domestic violence legislation. In this case the husband submitted that he wanted to see his children as access was being with-held and did not believe that his actions contravened the order.

Case ref; C50 October 2008<sup>187</sup>. A protection order had been granted one month before this application for a barring order and/or a safety order. The judge in granting the protection order gave liberty to apply for a safety order or barring order if required. In February of this same year a judicial separation application by the wife had been granted. The husband lived in a rental property very close to the family home. In evidence, the wife submitted several voicemails that were played to the court, that were sexually lewd. Her mobile phone showed missed calls that were made from the husband’s number between midnight and 5 a.m. in early September, she submitted that he “haunted” the house, coming in without invitation or sitting outside in his car. The husband maintained that the incidents she spoke of occurred prior to the issuing of the protection order, and he had not made any phone-calls since then. However, he admitted calling to the house and waiting outside in his car – his explanation was that she was keeping the two young children, five years and two years old, away from him, that he couldn’t phone to arrange access as he was worried he would be accused of breaking the protection order, so he had to call to the house. His understanding was that the protection order related to the making of nuisance phone-calls only. Neither a barring order nor a safety order was granted. The judge asked the husband to give an undertaking not to go near the house, not to make any phone-calls, not to send any texts and to “behave in a civilised way” towards his wife. Access was also ordered, 11 a.m. to 4 p.m. on a Sunday with

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<sup>186</sup> S.5 Domestic Violence Act 1996

<sup>187</sup> See chapter 6, section 6.1.2

the wife dropping off and collecting the children from the husband's residence. Liberty to apply for committal was given, if the husband breached his undertaking.

### *6.3 Safety Order*

A safety order prohibits the respondent from using or threatening to use violence against the applicant or molesting or putting the applicant in fear. The order does not exclude the respondent from the family home, and where the respondent does not live with the applicant, the order prohibits him or her from "watching or besetting" the place where the applicant lives.

#### *Safety order refused*

In this it appeared that the wife applied for a safety order as her husband had reported her assault to the police, and used her application as a pre-emptive strike.

Case ref; C743 March 2011<sup>188</sup>. The applicant wife pending divorce secured a safety order under the 1996 Act. The respondent husband appealed against that order, on divorce. The parties separated three years previously, entering into a deed of separation, but continued to reside together in the family home, which also operated as a Bed & Breakfast. On evidence the wife alleged that the husband shouted abuse at her and threatened to throw her down the stairs and "break her head", she felt threatened and continued to feel so. On cross examination the wife acknowledged that she had kicked in the door of the husband's bedroom which was locked, as he had his "mistress in there" and wanted her out. On evidence he maintained he restrained her and moved her outside his bedroom door, she seemed intent on attacking the other woman. The bedroom door was quite a distance away from the stairs, and he did not harm her in any way. He phoned the Gardaí immediately and he photographed his injuries. The court took the view that the wife was clearly the aggressor, and the appeal against the Safety order was allowed.

### *6.4 Breach of Orders*

#### *Safety order breached*

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<sup>188</sup> See also Chapter 2, section 2.2

Case ref; C1063 October 2011. The respondent sought the discharge of a safety order. Sole custody of the two children aged 7 and 13 was granted to the applicant wife on divorce. A five year Safety order was also granted, which stipulated that the respondent was to stay away from Dublin 15. The applicant and respondent were both non-nationals from Slovakia. The wife alleged that he was violent, and had attacked her in front of the two children in a shopping centre during access, which led to her application for the order. The respondent subsequently made two motions for safety orders to the court, both were denied. The respondent was convicted of a breach of the safety order, and a Garda gave evidence as to the circumstances of that breach and arrest. The respondent attended a family court hearing, and when leaving the building started to follow his wife. The Garda, who had been giving evidence at the hearing, walked after him and told him to walk in the other direction. The Garda stated that the respondent told him that anyone who stops him from seeing his children is risking their safety. Giving evidence the respondent stated that he was being refused access to his children, that his wife ignores his texts and calls, that he had been “*thrown into a situation where I have lost my home, my children, my marriage, my car and my job*”. The court asked that the parties attend with Prof. Sheehan, a free pilot project, to assist with parenting arrangements and adjourned the case for review at a later date. The application was denied.

### ***Barring order breached***

In this case the wife, on evidence, acknowledged that she had been allowing the husband to come into the house to collect and drop off the children, despite having secured a three year barring order against him.

Case ref; C80 December 2008. The respondent husband, a lay litigant, on judicial separation, asked the court if he could continue to have access to his family home after orders were made, and said “*I think it is important for the children to know that their father is still welcome in the house*”. He submitted that he usually called into the house and visited for a while when collecting or dropping off the children. The court asked the wife if this was true. The wife, on evidence, acknowledged that she had encouraged the respondent to come into the house, rather than have conflict at the door, or outside the house, as it was better for the kids. The court chastised both parties, as a three year barring order was in place, stating to the husband “*there is no need for you to be going into the house at all, you have been excluded*”

*from the property and entering the house contravenes that order, with or without the consent of your wife”.*

## 6.5 Conclusion

*We now know about the serious emotional impact of domestic violence on children. At the same time our understanding of domestic violence has become more sophisticated. While all violence must be taken seriously, not all violence looks the same, or is extreme in nature. We are now talking about differentiated approaches to domestic violence and new models for evaluating level of risk.*<sup>189</sup>

### **The Honourable Madam Justice Waldman G.**

The majority of applications under the Domestic Violence Acts cited behaviours that were threatening, physical violence rarely being alleged to have occurred<sup>190</sup>, physical violence was alleged in almost 6% of these cases, and no sexual violence was alleged to have occurred. The “threatening” behaviour included aggressive or angry behaviour, psychological abuse, intimidating behaviour, abusive language and abusive texts. The behaviour complained of, most commonly occurred in relation to parenting arrangements, communications, and collection or drop offs. An Australian research project, evaluating three major Australian studies, found that three quarters of parents who did not sort out their parenting arrangements reported that they experienced “family violence”, emotional abuse and violence after separating.<sup>191</sup>

In the cases observed there was a clear link between disputed parenting arrangements and incidents of threatening behaviour. Fathers who were the subject of applications or orders under the Domestic Violence Acts, where their behaviour was stated as “threatening”, uniformly submitted to the court that access was being with-held by the mother and they

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<sup>189</sup> The Honourable Madam Justice Waldman, G. (2010) ‘Ireland – Family Justice Reform’, presented at the Canadian-Irish Family Law Conference, Maynooth, 9 October, pg 16

<sup>190</sup> Physical violence was alleged by the wife in only 5.71% of domestic violence allegations.

<sup>191</sup> Australian Institute of Family Studies (2009) ‘Evaluation of the 2006 family law reforms’, Australian Government, December pg 14.



wanted to see their child/children. Where barring orders had been made against fathers, they spoke of the injustice of being deprived of the right to reside with their children, in the property that they co-owned. It was also evident that lay litigants were not aware of the effects of a protection order or barring order. Fathers believed that they could return to ‘the family home’ to collect or drop off their children without seeking the consent of the mother, and some mothers indicated that they “invited in” the barred spouse as it created less conflict. In the cases where the barred spouse had been “invited in” to the house there was no understanding that they should have sought the discharge of the barring order by the court.

Orders under the 1996 Act can be enforced by the Gardaí<sup>192</sup>. In cases where prior orders had been made under the 1996 Act, where the Gardaí were contacted by the spouse who secured the order, no arrests were made. Evidence given would suggest that the approach of the Gardaí, in circumstances where no physical violence or threat of physical violence is imminent, is to contact the spouse against whom the order is made and advise them to stay away from the family home or the residence of the other spouse.

Ontario has an integrated domestic violence court since 2011, where families can have their family cases (excluding divorce, family property and child protection) and domestic violence criminal charges heard before a single judge. It is based on courts operating in various states in the United States including New York State<sup>193</sup>, Vermont and Idaho. While each case is dealt with separately, a single judge hears both the criminal and family case, on the same day and in the same court-room. The facility is specially resourced to address the unique issues of domestic violence. Domestic violence is a complex, multi-dimensional problem that requires a multi-disciplinary approach<sup>194</sup>, that differentiates between types of domestic

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<sup>192</sup> The gardaí have powers of arrest under the Domestic Violence Act 1996, the Criminal Damage Act 1991, the Non-Fatal Offences Against the Person 1997, the Dublin Police Act 1842 and the Criminal Law (Rape) Amendment Act 1990.

<sup>193</sup> The ‘Integrated Domestic Violence Court’ was launched in 2001 in New York State. IDV courts are premised on the “one family- one judge” concept, serving families by allowing a single judge to hear multiple case types which relate to one family where the underlying issue is domestic violence.

<sup>194</sup> Dr. Kearns, N., Coen, L. and Dr. Canavan, J. (2008) ‘Domestic Violence in Ireland: an overview of national strategic policy and relevant international literature on prevention and intervention initiatives in service provision’, Child and Family Research Centre NUIG, pg 67

violence. A domestic violence model is required to carry out evaluations, with a view to distinguishing the incidents that are non-physical and inter-linked with high conflict parents. That model including the provision of appropriate training and/or counselling, to promote better long-term shared parenting arrangements post separation. Domestic violence guidelines and specific judicial training is required<sup>195</sup> to assist the courts in dealing effectively and sensitively with allegations of domestic violence.

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<sup>195</sup> Kennedy, C. [2004] 'Domestic Violence: How We Answer Their Cries for Help' C.O.L.R. 8 pg 10

## 7 Chapter 7 Maintenance

### 7.1 *Basis of assessment/ Affidavit of Means/“Homemaker”/Spousal, Child*

The Family Law (Maintenance of Spouses and Children) Act 1976 is the principle statute governing the grant of maintenance orders, for dependent children and/or dependent spouses. Dependent children include adopted children, where either spouse is *in loco parentis*<sup>196</sup>, where the child is under the age of 18, or under the age of 23 if in full-time education.<sup>197</sup> Maintenance orders can also be ordered as ancillary relief subsequent to a judicial separation and a divorce. Section 5 of the 1976 Act provides that the court can exercise discretion to determine if a spouse has failed to provide adequate maintenance, “as is proper in the circumstances”, and may then make an order that it believes is “proper”.<sup>198</sup>

The basis of assessment to be employed by the court is set out in s 5 (4) of the 1976 Act, to include an assessment of income, earning capacity, property and other financial resources of the spouses and any dependent children, and any obligations they may have towards each other or to other dependent children. Conduct may also be taken into consideration, if it is such that in all the circumstances it would be “repugnant to justice” to ignore it. Five governing principles enunciated by Finlay C.J. should also be given due consideration. The court ought to have regard to the fact that two households post separation lowers the living standards of the both parties; The court must determine the minimum “reasonable requirements” of the dependent spouse and children; it must ascertain the income and/or

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<sup>196</sup> where the other spouse, being aware that he is not the parent of the child, has treated the child as a member of the family

<sup>197</sup> Part 1 s 3 1976 Act

<sup>198</sup> *Where it appears to the court, on application to it by a spouse, that the other spouse has failed to provide such maintenance for the applicant spouse and any dependent children as is proper in the circumstances, the court may make an order that the other spouse make to the applicant spouse periodical payments, for the support of the applicant spouse and of each of the dependent children of the family, for such period during the lifetime of the applicant spouse, of such amount and at such times, as the court may consider proper.*

earning capacity of the dependent spouse and the net income of the respondent. Crucially, the court ought to ascertain the respondent's minimum requirement for living.<sup>199</sup>

Where child maintenance orders were made, they were always made against the male litigant. In no case was maintenance ordered against the liable wife, where the children resided with the father. 100% of the applications for maintenance pending suit were made by the wife. Where spousal maintenance was ordered, the wife was the beneficiary in 100% of cases. It should be noted that no application came before the court, by a husband, for child maintenance of a child residing with him, or spousal maintenance where the husband had the role of "homemaker".

### **7.1.1 Affidavits of Means**

It was notable that sworn affidavits of means were rarely correctly completed, even where the litigants had legal representation. The core issue was that litigants did not appear to understand the fundamental basis on which such an affidavit is based, i.e. that the weekly expenditure stated is an accurate account of monies actually spent in the period of time stated. Expenditure was usually over-stated on the basis that such expenditure was envisaged as 'likely' rather than actual. This invariably meant that stated expenditure would often exceed stated income, without any explanation as to what other source of funds were available to account for the differential.

#### ***"This is what I would be spending, if I had it to spend"***

Case ref; C850 May 2011<sup>200</sup>. In seeking to make "proper provision" for the two spouses on divorce the court questioned the stated expenditure of the applicant wife, whose Affidavit of Means indicated a monthly spend of € 4,268.62 with a stated income of € 3,000 per month including maintenance and children's allowance. When questioned by the court the wife replied "*If I spent this money every month, that's what I would be spending, but obviously I cannot afford to spend this much which is why I need more maintenance or a lump sum payment*". Addressing her counsel the court indicated that it is the responsibility of the solicitor to ensure that the sworn affidavit of means reflects the actual spending. Later in the

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<sup>199</sup> R.H. v N.H. [1986] ILRM 352

<sup>200</sup> See also Chapter 4, section 4.6.2

same case the court noted that the respondent's affidavit did not match his direct evidence, vouched documents had not been provided, and the court indicated that the solicitor was again at fault. The matter was adjourned as the court indicated it could not determine "proper provision".

### ***Spending 100% more than stated income***

Case ref; C1006 July 2011. The parties were married in 1998. There were two children of the marriage aged eight and five. The wife worked at a senior level in the banking sector, the husband was a "homemaker", but contributed to the monthly costs of the family from a large redundancy lump sum. The wife submitted in her affidavit that her monthly outgoings were € 12,000, with a net income of € 5,589. The court questioned where the shortfall had come from to pay the difference. She stated that she had declared all the monthly outgoings of the family, as they still resided together, but neglected to factor in that the husband paid € 2,300 of those monthly costs and a further € 3,000 was paid in rent on the two investment properties that she had included in her affidavit as a mortgage liability that she alone discharged. The court noted her occupation, and gave the view that it was incomprehensible that a person with her experience of accounts could not balance two columns, expenditure and income.

### ***No Affidavit of Means provided***

Case ref; C48 October 2008<sup>201</sup>. In a maintenance pending suit application the wife sought maintenance for two dependent children. The husband, a self employed taxi driver and lay litigant was paying no maintenance. The wife had left the family home with the children as accrued mortgage arrears of € 29,000 had resulted in repossession proceedings. The judge indicated to the respondent that he was entitled to legal aid and explained that he must file a statement of means so the court could assess what maintenance he could pay. The husband offered € 150 per week, and the matter was adjourned to enable the husband to file an Affidavit of Means.

### ***7.1.2 Subsistence level***

There were a significant number of cases where the only income of the husband was State benefits, and yet child maintenance was ordered. Judge 5 always ordered a father to pay maintenance without any regard to the father's ability to subsist on the balance. The average

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<sup>201</sup> See also chapter 3, section 3.2.1

State benefit received by the non-resident parent, of cases observed, was € 200 per week - out of which the husband had to pay for accommodation, food, utilities, and other basic living costs. The I.S.I. guidelines 2013 for reasonable living standards, determined the basic amount of money a single person requires to live on as € 237.65 per week<sup>202</sup>. The I.S.I. calculations did not include any costs related to exercising access with any dependent children.

### ***Below subsistence level***

Case ref; C140 December 2008. The respondent husband, a Nigerian national, sought to vary the maintenance order made on Judicial Separation as he no longer had work. He received € 197 in State benefits of which he paid € 90 for rent. The original order was for € 150 per week for his two children. The wife, also a Nigerian national, received € 254 per week One Parents Allowance, and the monthly children's allowance. The court varied the order and ordered that the husband pay € 60 per week, which the husband indicated he would not be able to pay. The Order was made.

### ***At subsistence level***

#### **Case ref; C463 May 2010. [Social welfare recipients at subsistence level]**

#### **Facts**

The parties married in 1996, the marriage ended in 2005 and there were 3 dependent children. The respondent wife and children, 15, 14 and 6 years old, resided in the family home. The site on which the family home was built was inherited by the husband and he had discharged the mortgage until he lost his job in June 2009. The mortgage arrears were in the amount of € 2,700. The respondent, a lay litigant, submitted he was having great difficulty paying child maintenance of € 30 per week per child as he was on State benefits of € 196 per week. He asked the court to factor in the fact that he had a new partner and children to provide for. He sought orders to sell the family home and divide the net proceeds as the court saw fit. The court sought clarification as to whether these children were his children or children of his partner. One child was his. The respondent earned € 600 net per week and had savings of € 10,000, she sought child maintenance of € 45 per week per child.

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<sup>202</sup> Insolvency Service Guidelines for Reasonable Living Expenses, Personal Insolvency Ireland [online] <http://insolvencyarrangement.com/insolvency-service-guidelines-for-reasonable-living-expenses/> [accessed July 1<sup>st</sup> 2013].

## Orders

Having reviewed the submissions made the court indicated that its primary concern was to ensure that the dependent children of the marriage were provided for, and to ensure that they continued to reside in the family home. In relation to the applicant's ability to pay maintenance the court stated "*I've made up my mind, Social welfare recipients are at subsistence level in this country, we have got to get realistic about the ability to pay child maintenance*". A decree of judicial separation was granted. Maintenance to continue at € 30 per child per week, to be paid through the District court. The court recommended that the wife discharge the mortgage arrears from savings, and discharge the mortgage going forward. No orders were made in relation to the family home, and liberty was given to make a further application.

### *Maintenance debtor cites inability to pay*

Case ref; C49 December 2008. Post a judicial separation the husband sought to vary the maintenance ordered downwards. He was ordered to pay € 50 per week for each of his five children and € 200 per week to his wife. He cited an inability to pay, with the mortgage on the family home € 4,000 in arrears, maintenance € 7,600 in arrears and € 3,200 in arrears in his rent. The judge struck out the application on the basis that there was no change in circumstances.

### **7.1.3 Spousal and child maintenance**

Article 41.2.1 of the Constitution protects a domestic role for women in the home, stating;

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

The Circuit Court did generally recognise the contributions of the wife, in accordance with Article 41.2.1., where there were children and a long-term marriage.

***Spousal maintenance for “homemaker”***

Case ref; C31<sup>203</sup>. The parties were married in 1982, there were two children of the marriage, both independent at the date of this hearing. It was submitted by counsel for the applicant wife that a number of protection orders were issued over the years, and in 2006 a barring order was issued. The wife was a ‘homemaker’ and did not work outside the home. She suffered from a disability from 1981, and was in receipt of State disability benefits in the amount of € 203.00 per week. The husband, an alcoholic, engaged in disruptive and aggressive behaviour, including urinating in bed when he was drinking, and marital relations ceased. The respondent left the family home in 2006 and voluntarily paid maintenance for the then dependent child. The family home was valued at €300,000 and was re-mortgaged by the husband to buy a taxi and carry out home improvements. The mortgage balance was € 12,500. Counsel for the husband indicated that his client would be willing to buy out the interest of the wife in the family home, which he believed to be worth € 100,000, subject to loan approval. A sole right to reside was granted to the wife, with a 50/50 apportionment of equity, with liberty to apply for an order to sell the house, when the market improved, and ordered spousal maintenance of € 150.00 per week.

***Application for child maintenance***

Case ref; C922 February 2012<sup>204</sup>. The applicant wife did not seek spousal or child maintenance on divorce, which was granted on consent terms in 2011. Two of the children were dependents and living with the mother. The house was transferred into the applicant’s name and she took over the mortgage. The respondent was to receive € 18,000, constituting 10% of the equity in the family home, on retirement of the wife. The applicant submitted that she had suffered a reduction in her salary, which made it difficult to manage the finances and provide for the children, the respondent had been paying €700 per month in maintenance prior to the divorce. The respondent had not submitted an affidavit of means and the parties asked the judge to rise to allow further discussions. The parties agreed maintenance terms which were ruled. The respondent agreed to pay € 80 per week child maintenance, which he would receive back along with the lump sum when that became payable.

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<sup>203</sup> See also chapter 4, section 4.5.1

<sup>204</sup> See also Chapter 5, section 5.5



## *7.2 Relationships with Third Parties/ additional children*

When the maintenance debtor, always the husband, asked the court to take account of the fact that they had a new partner and a dependent child or children from that relationship to take care of, it was not evident in any case observed that such a consideration was given. The only basis of assessment enunciated by the court, was the need of the primary carer of dependent children of the marriage.

### *New partner and dependent children of that relationship*

Case ref C853 May 2011. The parties entered into a deed of separation in 1999, however the family home was not dealt with. On divorce, the applicant husband sought an order to sell the family home as soon as the youngest child of the marriage was no longer a dependent. Under the terms of the separation agreement, the husband undertook to discharge maintenance and pay 50% of the mortgage on the family home. Counsel for the husband submitted that his client had acquired certain equity rights in the property after 11 years of paying a mortgage contribution, post the separation agreement and paying 100% of the mortgage during the marriage. In 2003 the applicant moved in with his partner in her house and they had a child together. He submitted that he paid rent to his partner and was not named on the mortgage or the deeds of the property. His net income was € 500 per week, out of which € 127 per week was paid to his wife for child maintenance and mortgage contribution and € 180 per week on loan repayments and a car lease. The court urged the parties to enter settlement discussions, indicating that if orders were made, child maintenance for the dependent child would be increased and no order to sell would be given until that dependent was 18, at which point the house would be sold with a 70/30 division of net proceeds on the basis that the wife was the primary carer. Terms were compromised, the wife to pay € 9,500 to the husband for his interest in the family home within 6 months. A decree of divorce was granted, transfer of the family home to the wife subject to the discharge of the sum agreed, maintenance as per the separation agreement.

### 7.3 *Variation and discharge*

In many cases, the payer father took the view that they should be allowed pay maintenance directly to a child. It was often submitted that the mother spent the money on things that were not related to the upkeep of the dependent child or children.

#### ***Maintenance paid directly to dependent***

Case ref; C191 October 2011. In a post judicial separation application, the applicant wife sought direction from the court. Both parties were lay litigants. Maintenance had been ordered at € 75 per week for the dependent child of 18 who resided with the mother. The father elected to pay the weekly maintenance directly into the bank account of the dependent. The applicant submitted that this had caused great difficulty between herself and her daughter, who refused to pass on any of the money towards her keep in the house. The father took the view that the first major problems started between the mother and her daughter when *“unfounded allegations were made against me of sexual abuse against my daughter 6 years ago, my daughter hasn’t forgiven her for it”*. The court stipulated that the maintenance money be paid directly to the mother, it was not for the dependent child to spend as pocket money, it was intended to provide for her upkeep.

#### ***Variation upwards***

Case ref; C43 October 2008<sup>205</sup>. The husband and wife separated in 1999, and in 2002 a judicial separation was granted on consent terms. The family home was transferred to the wife and a lump sum payment was made for the wife, to discharge the mortgage on the family home. Maintenance for the three dependent children was set at € 205 per week. This agreement was to be in full and final settlement. The husband made an application for divorce in 2003, which was now being heard. At the time of this divorce application the husband earned € 66,000 gross and had bought another house with a mortgage of € 695 per month. The wife earned € 70,000 gross. The husband had paid the maintenance agreed since 2002, and also provided additional funds directly to the three children, including buying and insuring a car for the eldest boy. The wife sought an increase in maintenance and a contribution towards the educational and health costs which she submitted averaged at € 227 per week. The court ordered that maintenance be increased to € 1,200 per month, additionally

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<sup>205</sup> See also chapter 2, section 2.4.2

the father was to pay 50% of all vouched educational costs until the children were no longer dependents, on the basis that “it is more costly to maintain children as they get older”.

### ***Variation downwards***

Case ref; C681 July 2010. The parties were married in 1990, and separated in 2003. The wife left the family home and brought maintenance proceedings in the District Court, the husband was ordered to pay € 300.00 per week for the 3 dependent children. Subsequently the husband sought and secured a downwards variation of that order in the District Court and maintenance was set at € 200 per week. The wife filed for judicial separation, with a counter-claim for divorce by the husband. The husband sought to vary maintenance downwards again, pending the hearing. The court asked why the maintenance matter was not back in the District Court. Counsel for the respondent husband indicated that jurisdiction now vested in the Circuit Court. On evidence the applicant wife worked 9 hours a week in a cleaning job for undeclared cash, claimed Lone Parents allowance<sup>206</sup> and rent allowance although she was co-habiting, had credit card debt of € 5,500 and according to her affidavit was spending € 2,000 per month more than her stated income and had no savings or cash at bank. The respondent had a fishing boat and license, and submitted that his income had fallen significantly from 2008. He resided in the family home and had bought out the interest of the wife for €95,000 which had been paid. His income was € 2,000 a month gross from the business and € 600 a month for rent on part of the house. The mortgage was € 965 per month, he was repaying a loan of € 40,000 to repair the hull of his boat, and paying his portion of the license. The court ordered maintenance be reduced to € 100 per week for the three children, and ordered 50/50 to back to school costs and Christmas costs be paid by both parties.

### ***Variation application not granted***

Case ref; C838.<sup>207</sup> In a post divorce application the wife sought to vary maintenance upwards from € 1,000 per month to € 3,500 per month, for two dependent children. The wife had since re-married but claimed that the expenses for the children had increased significantly. The husband submitted that he had lost approximately €18 million in the property bust. The house he lived in had a mortgage of € 2 million, and he had a number of properties all in negative

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<sup>206</sup> Now known as One-Parent Family Payment, a means tested payment for men and women under 66 who are bringing up children without the support of a partner.

<sup>207</sup> See also Chapter 2 section 2.4.2

equity. He had lost his job and currently worked as a bartender for € 20,000 net per year. It was submitted that his mother was independently wealthy, and was currently discharging the mortgage on his residence, and assisting with paying the maintenance for the children. He indicated that while the maintenance agreed on separation was € 1,000 per month, he had in fact been paying more as additional expenses had arisen for the children which he had discharged. He also entered into a joint loan for € 900,000 with his wife as agreed on divorce, which she used to purchase a house for € 1.2 million. The bank was now calling in the loan which he was unable to service. The court determined that € 1,000 per month was more than adequate, and refused the appeal to vary.

### *Seeking to discharge maintenance orders*

In this case the court incorrectly made a maintenance order for the son of a lay litigant, who was no longer a “dependent”.

Case ref; C169 December 2008. The applicant father, a lay litigant, sought a discharge from a maintenance obligation ordered on judicial separation for both dependent children. On evidence he stated that the daughter had turned 21, left college and taken up full-time employment, and the son, who was still in full-time education, was now 23. The respondent wife wanted the maintenance for the son to continue and to be paid to her. On evidence, the applicant stated that the son was in college in America, and if ordered to continue paying maintenance that he should send the money directly to the son and not the respondent. The court ordered that the father continue to pay maintenance to the mother until the son completed his college education, the maintenance obligation for the daughter was discharged.

### *7.4 Lump sum payments*

Case ref; C15 December 2008. The applicant wife sought enforcement of an Order for lump sum spousal maintenance provision of € 45,000 made on judicial separation. The parties continued to reside together in the family home. The respondent husband claimed that his two brothers, in partnership with him in the farm operation, would not cooperate to release the necessary funds. The court gave leave to the applicant to join the two other co-tenants as notice parties and adjourned the matter.

## 7.5 *Interlinking of Access and Maintenance*

One of the most frequent areas of dispute were arrangements regarding children. Financial provision and parenting arrangements were often inter-linked. Where access was with-held by the primary carer mother, the payer father commonly felt entitled to decrease or cease maintenance. Or the primary carer would believe themselves justified in with-holding access, when maintenance payments were not made. Both parties used the weapons at their disposal to exert control over the situation, to the detriment of the right of the children to spend time with both parents. The rights of the children were a non-existent factor in this battle of wills.

### ***Case note C463 May 2010*<sup>208</sup>. [Access with-held when maintenance not paid]**

#### **Facts**

The parties were married in 1996, the marriage ended in 2005. There were three dependent children 6, 14, and 15. Maintenance orders were made in 2005. The respondent wife and children resided in the family home, the applicant lived in rented accommodation. During judicial separation proceedings evidence was heard that the respondent linked access to maintenance payments. When the applicant was late with a payment, the respondent with-held access. When he lost his job in 2009 and was in financial difficulty, she frustrated access, with repeated cancellations and then with-held access. The applicant had sought and secured downwards variations from the court. The respondent was employed with a net income of € 600 per week, plus children's allowance. The applicant was unemployed and on social welfare of € 196.00 per week.

#### **Orders**

The court directed that arrangements for access be reduced to writing to include that the parties would communicate by text to make arrangements, with collection and drop-off at a neutral venue. The court stated; "*access orders are to be adhered to, and it is not within the gift of the mother to with-hold access until maintenance was paid. What's more important than access to your children?*" The court ordered that the current access orders be followed which stipulated that the children should be with the applicant each Wednesday after school and overnight, and every second weekend Friday 6 p.m. to Sunday 6 p.m. The court noted

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<sup>208</sup> See also chapter 7, section 7.1.2

that at the time of the judicial separation hearing the applicant had not seen the youngest child for a year, *“this is unacceptable, and is an unnecessary hardship on the child.”*

### ***Maintenance not paid when access with-held***

Case ref; C1041 October 2011. The respondent husband, a lay litigant, submitted to the court that the applicant was blocking access to the two children. He submitted that she forced him out of the family home, which left him nowhere to live. He had to reside in a hostel for a period until the Council provided a bedsit. The applicant submitted that the respondent was in arrears with maintenance. He submitted that *“if she won’t let me see my kids, then I’m not going to pay maintenance”*.

## ***7.6 Enforcement/ International enforcement***

### ***7.6.1 International enforcement issues***

EU Council Regulation No. 4/2009 of the 18<sup>th</sup> of December 2008, was transposed into Irish law in 2011<sup>209</sup>. The intention is that a maintenance creditor in a Member State with a court order, including any administrative decisions such as child maintenance, will have that order automatically recognised and easily enforced in another Member State, without further formalities or procedural steps.

*“The recognition and enforcement of maintenance orders presents many challenges, which are exacerbated in times of financial difficulty, when maintenance debtors, rightfully or wrongly claim that they are unable to meet their obligations and, in some instances abscond. The maintenance creditor, who in most cases will be the wife and, or, mother, then faces the arduous task of seeking to enforce an Irish maintenance order in another jurisdiction.”*<sup>210</sup>

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<sup>209</sup> S.I. No. 274 of 2011- European Communities (Maintenance) Regulations 2011

<sup>210</sup> The Honourable Mr Justice Abbott H. (2010) of the High Court, address to the Canadian-Irish Family Law Conference, October 8<sup>th</sup> Maynooth, Dublin

### ***Unable to enforce maintenance in England***

Case ref; C84 October 2008. The applicant wife, a lay, litigant sought a consent divorce. The parties were married in England in 1995. It was submitted that they separated nine times due to the drinking habits of the respondent, finally ending the marriage in 2002. There were two dependent children of the marriage, 9 and 12 years. The respondent was not in court and not represented. A letter of consent to the divorce was on file. The court questioned why the applicant was not seeking maintenance, she replied, "I've given up chasing him for maintenance. I have done over the years, he was even arrested for non-payment, but it didn't make any difference. All I know now is that he lives in England, but I don't know where. His sister keeps in touch with him but won't give me his address".

### ***Foreign maintenance order to be enforced in Ireland***

Case ref; C621 May 2010. Final orders granted on divorce in 2008 included maintenance for two dependent children. The applicant wife and respondent resided and were domiciled in Jersey, proceedings were initiated there, however the wife returned to Ireland and initiated maintenance proceedings, which she later withdrew. The divorce was granted in Jersey. Counsel for the applicant indicated that Jersey was not covered under Brussels II and sought mirror orders to give effect to what was agreed between the parties on divorce. The ancillary orders granted in Jersey covered detailed arrangements for schools, children's health, communication, travel, consent for the mother to move the children to Ireland and maintenance. The court stated "*I will make those orders*".

## ***7.7 Secured payments/Attachment of Earnings Order***

When making maintenance orders, the court can direct that payments are paid through the District Court, which ensures that there is a record of payments made, and when requested by the maintenance creditor the Clerk may take reasonable steps to recover monies, where there is a default. The Family Law Act<sup>211</sup> provides that the court may make periodical payment orders spouse to spouse, or parent to parent, for any dependent child of the family, in any proceedings taken under the Act. This same provision can be used as a method of enforcement where the court can secure the payments against the payor. An attachment of

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<sup>211</sup> S 41 (a), (b)

earnings order is automatically made under s.10 of the 1976 Act, as amended by the Family Law Act 1995, where the payor is an employee, unless the payor convinces the court that he/she would make the payments without such an order. This order directs the payor's employer to deduct a specified amount from his/her salary. The Enforcement of Court Orders Act 1940 s 8, as amended by the 1995 Act s. 22, also enables a maintenance creditor or District Court Clerk, where the maintenance is paid through that court, to seek enforcement.

### ***Seek an attachment of earnings order***

Case ref; C194 February 2009. The applicant wife sought enforcement of a maintenance order, post a judicial separation. There were three dependent children, and the husband was ordered to pay € 75 per week and 50/50 of health and education costs. The wife, a lay litigant, submitted *"We have three young kids, the order is for € 75 per week. The payments are sporadic, and there are two years arrears in terms of back to school expenses, he has made no contribution and doesn't even come for access. He has seen the children three times in two years and his family say he has gone abroad."* The court indicated that the wife should determine where the respondent lives, and apply for an order to attach his earnings.

### ***Attachment of earnings order granted***

Case ref; Ex Parte application, not on list. July 2011. A motion was brought by the applicant wife, for an attachment of earnings order. The respondent had initiated divorce proceedings in 2004, but hadn't proceeded with that application. There was one dependent child, residing with the mother. Maintenance orders had been made five months previously, in the amount of € 40 per week, of which only one week had been paid. Evidence was submitted that the respondent who was employed by the army had net earnings of € 402 per week. The court ordered that €100 per week was to be paid until the arrears had been discharged, reverting to € 40 per week thereafter, to be paid from source. The attachment of earnings order was granted.

## ***7.8 Conclusion***

Child maintenance and spousal maintenance in the Circuit Court is based on a highly discretionary, individualised assessment of evidence and submissions made by counsel, informed, in part, by the Affidavits of Means submitted by the parties. The basis of assessment should include the basic criteria set down in s 5 (4) of the 1976 Act, and the five



governing principles as enunciated by Finlay C.J.<sup>212</sup>, however no overt reference was made to either set of criteria. In theory the Affidavit of the primary carer/applicant spouse should clearly indicate the needs of the child/children and/or spouse, and the Affidavit of the non-resident parent/respondent should indicate his or her ability to pay. However, un-reliable Affidavits and inconsistent child and spousal maintenance orders were a hallmark of maintenance applications in the Circuit Court. During this project there was no evidence of any formulaic approach by the court, rather a rule of thumb pattern for each judge emerged, that appeared to be dependent on what the court thought was appropriate, often without seeking sufficient evidence clearly setting out the needs of the child/children or spouse, or the ability of the payor to pay. Affidavits submitted frequently indicated that the outgoings of that party significantly exceeded their income, with no explanation as to where the funds came from to support this imbalance. Evidence submitted indicated that a common approach to completing an Affidavit of Means was to base it on a ‘wish list’ of what the party believed they would be spending. The fundamental function of an Affidavit of Means is to clearly set out the financial circumstances of the parties, as they are in reality, based on a period of time before the filing of the application, usually a two year period. It is intended to be a factual snapshot of the expenditure, income, assets and debts of each party, on which the court should rely to assess what maintenance may be required and for whom, and the ability of the payor to pay. This is particularly important on divorce where the court is obliged to make “proper provision” for any dependent children and/or spouse. There was a clear disconnect between the intended purpose of such affidavits and the practical application.

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. The national insolvency guidelines for 2013 state the subsistence level, i.e. the basic amount a single person requires to live on, as € 237.65 per week.<sup>213</sup> The court, in the main, prioritised the legal, moral and constitutional<sup>214</sup> obligation on the payor parent to financially provide for their child/children, making orders

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<sup>212</sup> R.H. v N.H. [1986] ILRM 352

<sup>213</sup> See 7.1.2 Chapter 7

<sup>214</sup> Art. 42 ...duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children

that effectively brought many payor fathers below subsistence level, and took no account of their financial ability to exercise “access” in terms of any transport costs and providing for the child/children during those periods. This musical game of chairs, in cases of financial hardship, borrowing from Peter to pay Paul, makes little sense where Peter and Paul are both the same entity, the Irish State. More importantly, where the State has previously determined the subsistence rate that an adult requires in order to live (subsist) each week, is it equitable that the court then makes a determination that said party can survive on less? In relation to dependent children from other relationships, there was no indication that the court gave consideration to their needs. Instead of seeking to balance the needs of the applicant spouse and/or children, with the resources of the respondent spouse, the over-riding basis of evaluation, was the need of the primary carer of dependent children of the marriage.

100% of child maintenance orders were made against men, the non-resident parent. Many payors mis-understood the purpose of child maintenance, which is to provide financial support to the primary carer, who in turn provides a place to live, sustenance and other supports to the child/children. The 1976 Act provides that where a liable spouse has failed to provide adequate maintenance, the court may make such orders as it considers “proper”.<sup>215</sup> This was enunciated as seeking to ensure that the financial needs of the primary carer were met. Many primary carers felt entitled to inter-link child maintenance and access, and unilaterally with-held access where maintenance payments were not made. There was no understanding shown that orders of the court could not be unilaterally varied, neither access orders nor maintenance orders. Attachment of earnings orders<sup>216</sup> were the most effective means of securing court ordered maintenance where the payor was in default and in employment.

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<sup>215</sup> S.5 Family Law ( Maintenance of Spouses and Children) Act, 1976

<sup>216</sup> *An attachment of earnings order shall be an order directed to a person who (at the time of the making of the order or at any time thereafter) has the maintenance debtor in his employment and shall operate as a direction to that person to make, at such times as may be specified in the order, periodical deductions of such amounts (specified in the order) as may be appropriate, having regard to the normal deduction rate and the protected earnings rate, from the maintenance debtor's earnings and to pay the amounts deducted, at such times as the Court may order* Part III s. 10 (2)

In 1997 Canada introduced mandatory child support guidelines following a path already taken by several other jurisdictions, including the United States England and Australia. A seven year project directed by two law professors resulted in the Spousal Support Advisory Guidelines (SSAG), which were introduced in 2008.<sup>217</sup> The spousal guidelines are informal advisory guidelines intended to reflect current practice under existing legislation. Conversely, the child support guidelines, are not in fact discretionary guidelines, they are mandatory rules that quantify precise support amounts. Generating the child support value in any given case requires a computer based calculation that works with the net income figure of the payor, and factors in other dependent children, special expenses, undue hardship circumstances and specified exceptions. Special expenses include child care fees, health expenses and “extraordinary” education expenses. ‘Hardship’ includes unusually high debts, unusually high access expenses and other maintenance obligations. Where the payor is in receipt of net income below \$8,000 no support is payable. Transposed into Euro the guidelines stipulate that a payor earning € 28,500 with one child would generally pay € 267 per month, € 427 for two children and € 549 for three children. A payor earning €43,300 would pay € 427 for one child, € 690 for two children and € 900 for three children.<sup>218</sup>

A shift from absolute discretion to some rules based solutions, with some degree of flexibility on a case by case basis, would ensure more certainty, predictability and more efficient dispute resolution. Clear rules would promote settlement, as the certainty of outcome would obviate the need to litigate in some circumstances, reducing both the financial and emotional costs associated with resolving the end of a marriage. Child maintenance guidelines could determine maintenance as a percentage of the payor’s income, or better yet we could adopt a scheme that takes the incomes of both parents into account. The calculation could be done when the Affidavit of Means is submitted, and any inconsistencies or inadequacies in the Affidavit could be addressed. Revised calculations can be ascertained if an updated Affidavit of Means is required. Small incremental changes could be possible in the development of

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<sup>217</sup> Professor Rogerson, C. (2010) ‘Child and Spousal Support in Canada: The Guidelines Approach’, presented at the Canadian-Irish Family Law Conference, Maynooth, 9 October, pg 2

<sup>218</sup> Professor Rogerson, C. (2010) ‘Child and Spousal Support in Canada: The Guidelines Approach’, presented at the Canadian-Irish Family Law Conference, Maynooth, 9 October, pg 13

formulae for child and spousal maintenance if mediators, solicitors and barristers, with their years of experience dealing with support issues, collaborated to develop guidelines to indicate appropriate support outcomes.

## 8 Chapter 8 Children

### 8.1 *Custody and Access disputes on Judicial Separation and Divorce/ who is primary carer*

Prior to the adoption of the Constitution in 1937, common law upheld the rights of fathers to determine the education of children in cases of dispute, a view endorsed by Lord O' Hagan L.C. in 1871;

“The authority of a father to guide and govern the education of his child is a very sacred thing, bestowed by the Almighty, and to be sustained to the uttermost by human law.”<sup>219</sup>

Hogan J., in 2013, takes the view that Article 42.1 envisages that both parents would be the joint decision-makers in respect of their children.

*Article 41 and Article 42 of the Constitution presuppose a marriage of equals with both parents having an equal claim in respect of the upbringing of their children*

**Hogan J.**<sup>220</sup>

Custody is the day-to-day care of a child. It is described by the Department of Justice, Equality and Law Reform as “essentially relat(ing) to the physical day-to-day care and control of a child or children”.<sup>221</sup> The parent with whom the child or children reside is commonly termed ‘the primary carer’, and is de facto the primary custodian. Married parents are automatically joint custodians and guardians of the dependent children of the marriage, and both should therefore be involved in the care of the children. However, joint custody does not appear to operate in settlements agreed at court, or in orders made. While the agreement or orders may commence with “joint custody”, it was usually followed by “with primary residence to the mother/father”. “Joint custody” in the Circuit Court appeared to be merely an acknowledgement that both parents have obligations to provide for their children,

<sup>219</sup> In re Meades [1871] L.R. 5 Eq. 98,103

<sup>220</sup> B.B. v A.A. [2013] IEHC 394, para 12

<sup>221</sup> <http://www.justice.ie/en/JELR/Pages/Custody>

it did not mean shared parenting in relation to the day-to-day care of children. This view is supported by the Department of Justice, Equality and Law Reform, which states that when married people separate “custody vests in the parent with whom the child primarily resides.” Furthermore the Department states, “the parent deprived of custody as a result of marital break-down still remains a guardian and is entitled to be consulted on all matters affecting the child’s welfare”. It was observed that leaving the family home results in a surrendering of custodial rights.

Access is the right of visitation with a child, both a parent’s right to spend time with their child, and a child’s right to enjoy the company of both parents. The Department defines ‘Access’ as relating to the contact between a child and the parent with whom the child does not ordinarily reside. ‘Access’ can include physical contact, telephone communication, skype, email and letter. In every case listed for hearing, whether settled on the day or not, the heat of the battle centred around the parenting arrangements for children.

*“The prognosis for the children is very poor if the current level of animosity between the parents remains. The two younger children are exhibiting high anxiety, one has hair loss and has lost all her friends, the other 10 year old child is showing temper tantrums and is having difficulties in school”.*

Case ref; C622 July 2010 Extract from s.47 report

All primary carers, the overwhelming majority of whom were women, stated, consciously or unconsciously, that the children belonged to them. This belief that children were a form of chattel, was evidenced by the frequent use of the words “my children”. Several of the judges would ask women or men to desist from referring to children as “theirs”, to no avail. The more heated the conflict between the parties, the more assertive the primary carer became in stating a conviction that they alone were in a position to know the needs of their children, and equally to know what they did not want. The driving force behind the submissions of parents in relation to parenting arrangements, appeared to be the desire to gain the upper hand and to “win”. In no case did any parent acknowledge, or even appear to have any awareness of, the harm their own behaviour/actions may be having on the child or children. With-holding, or frustration of access orders or arrangements, was common, with the justification enunciated as “my child/children doesn’t want to go and I can’t force him/her”, or “my child is afraid of their father/mother”, or “he doesn’t care about the child/children as he doesn’t pay maintenance, so why should he see him/her/them”.

Advocating that parenting agreements should be undertaken by experts Judge 1<sup>222</sup> said “*parenting agreements should be put together by experts, every case is different and a lot of court time can be wasted trying to work out individual arrangements.*” The judge also expressed frustration at the frequency of unilateral decision making by parents, particularly mothers who withhold access, believing it to be “within their gift”, as no appropriate remedies are available. Judge 2<sup>223</sup> expressed a keen awareness of the harm that can be done to young children, where high animosity exists between the parents. “*Children can become alienated from one parent, 4 to 5 years down the line*”. Judge 4<sup>224</sup> believes that there are serious issues that need to be dealt with in family law particularly regarding the welfare of children. Judge 7<sup>225</sup> in commenting on the stressful dynamics of family law hearings said, “*I can manage short bursts, but if I had to do a long stint, I would go mad*”.

Most of the judges interviewed indicated an intense dislike for the emotional context of family law cases, and found disputes over the arrangements for children to be extremely difficult, and sometimes distasteful.

100% of the access pending suit applications were made by the husband. 100% of the access motions brought post-separation and post divorce were brought by the husband, where the wife was in non-compliance with the orders made or terms agreed and ruled.

### ***8.1.1 Applications for sole custody to the mother***

In the cases observed, sole custody was awarded where one parent had absented themselves completely from the lives of their child or children, or where allegations were made regarding the safety and welfare of the child or children.

#### ***Statements that children were in fear, without evidence***

Case ref; C2 October 2008. In 2004, the wife left the family home with the children, two daughters now aged 14 and 10. She unilaterally ceased court ordered access, and sought sole

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<sup>222</sup> Judicial Interviews Appendix B (i)

<sup>223</sup> Judicial Interviews Appendix B (i)

<sup>224</sup> Judicial Interviews Appendix B (i)

<sup>225</sup> Judicial Interviews Appendix B (i)

custody, during proceedings for divorce. On evidence the wife stated that the children were afraid of the father and that she had to make decisions in the best interests of the children, which she believed was no access and sole custody. The court took the view that no evidence had been given to support the claims of the wife, stating “*you cannot front up here seeking sole custody without a professional report.*” The court ordered that access should resume immediately as the father had a right to see his children, and affirmed joint custody.

### ***Sole custody where husband absented himself from lives of children***

Case ref; C84 October 2008<sup>226</sup>. The applicant wife was a lay litigant with two dependent children seeking divorce. She produced a letter of consent from the husband, which had no return address or date, although she believed him to be residing in England. The judge queried why she hadn’t sought maintenance or sole custody in her application. The applicant wife responded, “*I’ve given up, I have done it all over the years to get him to pay, he was even arrested...so I’ve given up*”. The judge granted a decree of divorce and sole custody to the wife, with liberty to apply for maintenance.

### ***Chronic abuse noted in s 47 report***

Case ref; C651 February 2011. The applicant wife in divorce proceedings brought a sole custody application pending suit. A s 47 report had been ordered by the court during an access application by the respondent. Access was suspended on the basis that the eldest child may have been sexually abused. There was evidence of chronic penetrative abuse. The recommendation of that report was sole custody to the mother. The respondent, a Nigerian national, was the subject of a deportation order and his legal aid solicitor was unable to contact him to get instruction. The court ordered sole custody to the mother.

The preparation of s 47 reports under the Family Law Act 1995 and/or section 42 of the Family Law (Divorce) Act 1996, clearly presented practitioners with difficulties. Where the court directed that such a report was required, it was for the practitioners themselves to organise, and the parties to finance. The significant associated costs, and length of time such reports took to complete, created a serious impediment to the progress of a case and meant that parenting arrangements remained in a prolonged state of conflict.

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<sup>226</sup> See chapter 7, section 7.6.1



### ***8.1.2 Applications for sole custody to the father***

#### ***Sole custody awarded post Hague***

In this case interim sole custody was awarded to the father, following the abduction of the children by the mother to France. On judicial separation the court took the prior circumstances into consideration and determined that an order for sole custody should be made to the father.

Case ref; C814 March 2011<sup>227</sup>. The mother had taken the two children to France without the consent of the husband. He made an application under the Hague Convention to have the children returned and interim sole custody was awarded to him. The application before the court was judicial separation. Counsel for the respondent husband indicated that the applicant had a history of not turning up in court for access enforcement motions, following which she left the country with the children. Solicitor for the respondent had contacted her by phone and she had indicated she would not be attending court as she had applied for legal aid and they hadn't appointed a solicitor yet. The court responded "*if the case is on the list it proceeds, if the legal aid board have chosen not to be here, then she should be here to represent herself*". The respondent sought a discharge of a maintenance order as the children were living with him. The court asked if the respondent was happy with joint custody, he replied "*I would prefer to have sole custody*". The court determined that in light of the previous actions of the mother an order for sole custody would be made in favour of the father. A decree of judicial separation under s 2 (1) (f) was granted. The maintenance order was set aside and a declaration of no arrears was made. The court confirmed the access order of February 2011. The court granted a s.10 order, awarding sole right to reside for life in the family home to the respondent. Liberty was given to re-enter the matter to address legal and beneficial entitlement in the family home.

#### ***Mother absented herself from the lives of the children***

Case ref; C796 March 2011. An applicant father sought and was granted sole custody of two dependent children on divorce. The mother resided in Poland, and the father testified that she

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<sup>227</sup> See also Chapter 4, section 4.7.4

saw the children “every two years”. The court indicated that he could seek maintenance at any stage while the children were dependents.

### **8.1.3 Custody**

Custody was defined by Denham J. in *W.O’R v E.H.*<sup>228</sup> as being the right of a parent to exercise physical care and control, in respect of the upbringing of his or her child, on a day to day basis. The best interests of the child ought to be the paramount consideration of the court when making such orders.

*Any court...in exercising its jurisdiction to consider an application to vary a custody of access order, at all times having the elfare of the child as it sparamount consideration must be careful to ensure that fair procedures are followed...*<sup>229</sup>

**White J.**

Section 12<sup>230</sup> of the Guardianship of Infants Act 1964, enables a court to vary or discharge any previous custody or access orders in respect of a child. Custody and access decisions are therefore never final and conclusive, but are open to variation.

*Custody and access orders are never final orders until a minor reaches the age of of majority at 18, and has the mental capacity to make decisions.*<sup>231</sup>

**White J.**

Married parents are automatically joint custodians and guardians, however whichever parent resides with the children is de facto the primary carer. Where a father or mother left the family home, or the wife left the family home with the children, the non-resident parent effectively lost control of their child or children’s lives. The custody orders made in these cases, usually affirmed joint custody, but access orders made by the court, reinforced the de facto sole custody role of the parent with whom the child or children resided. The access

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<sup>228</sup> *W. O’R v E.H.* [1996] 2 IR 248

<sup>229</sup> *L.T. v J.T.* [2012] IEHC 588, 22 [unreported]

<sup>230</sup> Part II, Guardianship of Infants Act, 1964, S. 12 *The court may vary or discharge any order previously made by the court under this Part.*

<sup>231</sup> *L.T. v J.T.* [2012] IEHC 588, 18 [unreported]

orders severely limited the role of one parent, prohibiting the non-resident parent from participating in the day to day care of the child or children. The orders may have been joint custody in name, but the effect was sole custody. Moreover, the legal status of “joint custody” did not appear to be recognised by schools, who engaged with the primary carer as if they were the legal sole custodian of the child or children.

### ***“Joint Custody”***

Case Ref; 0066/2008 Cork Circuit Court 2008. On divorce a father was awarded joint custody of the youngest child, however “access” was ordered as weekly on a Saturday between 12.30 and 3 p.m.

The court made an order for joint custody, yet the access orders made ensured that the father lost the ability to have a say in the day to day care of the child. The effect of this order was sole custody.

### ***Joint custody affirmed***

Case ref; C526 March 2010. An interim sole custody application was brought by the husband, who alleged that the wife was engaging in “wild parties” and drinking excessive alcohol. The parties had one child, the mother had a child from a previous relationship. He brought two witnesses who were neighbours, on each side of the house, to attest to the parties happening next door every weekend. It was alleged that the parties would continue until 6 a.m. with anti-social behaviour and possible drug taking. One witness gave evidence that the Gardaí had been up to the house on eight or nine occasions. On evidence the mother said that she did hold parties some weekends at the house, but her son was never there, he would spend the night with the maternal grandmother. She alleged that her husband was following her, threatening her friends and accused the maternal grandmother of harassing him. The father stated he had taken the child, who was five at the time, to the Garda station to be interviewed by a specialist child interviewer, to determine if the child was in the house when the parties were occurring. The court was critical of the father’s decision to go to the Gardaí and questioned how a child specialist interviewer was arranged, *“it appears to me that this situation is getting worse and worse, the childhood of this young child is being robbed, by the friction between the parents, I have no doubt that you [the father] are involving your child in this...it is about time that both parents put the children first, you are playing with these children’s lives”*. Joint custody was affirmed and sole custody denied.

### ***Sole and joint custody***

Case ref; C28 October 2008. In an application for judicial separation the wife sought sole custody of the eldest child of the marriage who suffered from cerebral palsy and remained a dependent. There were two other dependent children 14, and 16. It was argued that the eldest child was afraid of his father, who agreed that he had issues with alcohol following brain surgery. On one occasion, the father arrived to visit his son and the guards were contacted who notified “Social Services”, the HSE. The court ordered sole custody of the eldest child to the wife, with joint custody affirmed for the other two children.

#### ***8.1.4 Access***

The word “access” was intensely disliked by non-resident parents, denoting a parent who was granted access to his or her children, akin to a visitor role, rather than a co-parent. The majority of non-resident parents were men, who questioned why restricted parenting time with their child or children was deemed in the interests of the children. When enunciated, it appeared that access orders made, had more to do with keeping parents apart who were in conflict, than addressing the needs of the child or children. No judge asked to speak directly to any child, to solicit their views about parenting arrangements, and where one judge was asked by a parent to speak to their child the judge declined saying that she was not trained to speak directly with children.

#### ***Withdrawal of access***

Case ref; C14 October 2008 An application was made by a father, for Attachment and Committal, where the mother had unilaterally withdrawn access to two children, 10 years and 6 years old. Access was court ordered on judicial separation. The mother filed a motion for attachment and committal for non payment of maintenance. The judge noted that correspondence from the mother to the father indicated that she believed it was within her gift to withdraw access.

#### ***Exercising Access***

Case ref; C20 October 2008 On divorce, the applicant wife claimed that she wanted the husband to have more access with the three dependent children, all over the age of 14. Counsel for the husband alleged that the wife repeatedly denied access to the father who worked abroad for six months of the year.

### ***50/50 parenting arrangements***

“Shared parenting” was often enunciated to indicate a perceived right to equal parenting time, or 50/50 division of time with the child or children. Several parents painstakingly calculated each hour they “had” the child or children, and forcefully pursued a rights based approach to secure an absolute equal share of the child or children’s time, or at the very least a more “equitable” share. The notion that children were chattel to be “divided” was reinforced by this approach. The parent who can establish themselves to have the main care and charge of their child, who resides with them, can secure entitlement to One Parent Family Payment, calculated per child, where their gross earnings do not exceed a stipulated limit. It must be shown that the child or children spend the greater amount of time weekly with the claimant. A successful claimant may also be entitled to Family Income Supplement and other State support. The potential combined State benefits created a significant financial incentive to secure the greater timeshare of the child/children. The judges observed did not entertain the notion of 50/50 parenting as proposed by many non-resident parents, the only case where this was clearly stated, was where terms had been compromised and ruled. In this case, how the 50/50 arrangements would actually work, were not stated, the child was dealt with in the same way as the other “assets” of the marriage, everything split down the middle.

Case ref; C37 October 2008. 50/50 parenting arrangements were agreed in consent terms on divorce, where the mother worked as an air hostess and the father was unemployed. They specifically agreed that the seven year old child would spend half the time with his father and half the time with his mother. No maintenance would be paid.

### ***8.1.5 Abuse allegations and breach of orders***

#### ***Sexual Abuse allegations and s 47 reports***

Case ref; C66 October 2008. The parties separated in 2005, allegations of sexual abuse were made by the mother against the father, access ceased while the matter was investigated. On reviewing access on divorce the judge commented “...what I wasn’t happy with was there was no evidence, in a serious allegation of child sexual abuse”. Access was recommenced with one child, the eldest, after the investigation. The judge indicated that he would vary access, increasing the time the father spent with the eldest child. However, the father asked the court to leave access as it was, as he would not meet with the child alone after the allegations, and it was difficult to make additional arrangements to have another extended family member present.

Case ref; C781 March 2011. The respondent father had sought access pending the hearing of divorce proceedings. The applicant wife alleged that the father was abusive and violent towards the two children, eight and six years respectively. A s 47 report was ordered by the court and access was suspended. The psychologist strongly recommended that access should be put in place as soon as possible, that the conflict between the parents was the issue, rather than any behaviour by one parent that threatened the welfare of the children. The court commented *“Parental spats affect the children. Children are aware of all the issues around the split, there should be as much access as possible to defuse the polarisation of the children towards the mother. When a child expresses such a desire, it is clear that the child is influenced by the mother, children express the discord of the parties.”*

### ***Abuse allegations***

Case ref; C545 March 2010. The applicant husband made an application for access post the break-down of the marriage in 2009. The relationship ended while the wife was pregnant with the second child. The children were four years and two years old. The applicant claimed that the respondent frequently frustrated access arrangements made, and sought to deny overnights with the children. The respondent indicated he was a 50/50 parent before the applicant left the family home with the children and doesn't want to an “access” parent. The respondent stated that she was concerned about the mental state of the father and feared for the safety of her children. She produced a recording on her iphone, taken when speaking with the four year old child at bedtime. The child in response to a question from the mother, which was inaudible said *“Daddy said, I will be taking you and your mother to God”*. The mother alleged that she was in fear for the welfare of the children after the child said this, however she continued to drop the children off for access. The court questioned why the mother allowed access to continue for another three weeks until the court hearing, if she genuinely believed that the father was a risk to the child. The court took the view that either the father was a risk and the mother knowingly put her children in harm's way, or the mother was making a vexatious complaint. The court ordered a s 47 assessment.

### ***Attachment and Committal***

All of the judges interviewed acknowledged that persistent breaches of court ordered access was a chronic problem, but did not believe that attachment and committal was an appropriate

sanction where the primary carer was the mother. Judge 1<sup>232</sup> asked, “*how can I order the mother of the children to be locked up, when she is the carer of the children, does it mean that the children would go into care?*” This judge did not consider the father to be an appropriate primary carer, even where that father was a joint custodian.

Case ref; C206 July 2011<sup>233</sup>. A motion was before the court relating to access orders made on judicial separation in 2010. The respondent husband had previously sought enforcement of the access orders, but the applicant wife continued to frustrate access. The husband sought an attachment and committal order as the wife had refused overnights as ordered, had restricted the ordered weekend access, and finally sent an email unilaterally ceasing access. On evidence, the applicant spoke in terms of the children as “*my children*”, the court repeatedly interjected with “*our children*”. The children were 11, 9 and 5 years old. The husband became distressed on giving evidence, producing copies of emails and transcripts of text messages sent to him by the wife regarding access, where he claimed she was abusive and controlling. The court in addressing the wife said “*It is not your choice to refuse access. You must both be very proud of yourselves, with the children as the rope in your personal tug of war*”. The court ordered that access resume as previously ordered, that both parents attend a parenting course, and the matter was adjourned to November.

## 8.2 *Child Representation/ Welfare of the Child/ Wishes of the Child*

In no case observed did a judge ask to hear direct testimony from any child. Where parents indicated that the court would have a better understanding of their child’s view if they listened to them, the court declined to hear that child. Those judges who had children, often stated that they understood the needs of children as they had their own, but the individual needs of any particular child, and their particular circumstances, were not assessed.

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<sup>232</sup> Judicial Interviews Appendix B (i)

<sup>233</sup> See also chapter 7, section 7.7

***Telephone access***

Rather than focus on the needs of the child, and the positive benefits of regular contact with a parent who lived a distance away, the court's priority was the conflict between the parents. Telephone contact was deemed to fuel that parental conflict, therefore there should be none.

Case ref; C81 October 2008. On divorce, the applicant father, who was a joint custodian, with weekend access, sought telephone contact with his five year old son, who lived 100 miles away. The judge refused to make an order for telephone access on the basis that "*as long as I am at the bar, telephone access has been likely to be the cause of enormous friction*".

***Battle over special occasions***

Many applications to vary access dealt with special events in the lives of the children, which was not unexpected, as court access orders usually only dealt with some form of indefinite bi-weekly arrangements, and occasionally holiday arrangements. Communion and Confirmation became battlegrounds, with parents vying over where the child would spend the night before, who would buy the child's clothes, who could attend at the church, who could take photographs afterwards and who took the child for the celebration lunch. The court was asked to deal with the minutiae of these events, based around the expressed rights of the parents, not the best interests of the child.

Case ref; C361 April 2009. An interim access order was sought by the mother, pending the hearing of the father's judicial separation application. All four dependent children resided with the father. A psychologist's report was ordered to determine the best interests of the children, which recommended increased access for the mother. The mother sought to spend the night before with the child who was making her Holy Communion and bring her to the church. Access was scheduled to commence at 11 a.m. on the Saturday, the ceremony scheduled to commence at 10 a.m. The father's view was that he had made all the necessary arrangements and that the daughter did not want her mother in the church. Both parents had booked hair appointments for the child, and each had purchased a communion dress. Each parent testified that the child had told them she wanted to wear the dress they had purchased and spend the day with them. The court responded, "*The thing about children who are compromised is that they tell each parent what they want to hear*". The court noted that nothing in the psychologists report indicated that any of the children had any difficulty with spending time with both parents. The court ordered that the child remain with the father on



the Friday night, that the mother attend at the church and that access with all four children take place from 4 p.m. to 8 p.m. that day.

### **8.2.1 High conflict**

Judge 7 expressed concern about the ability of the court to hear the voice of the child, particularly in high conflict cases, *“Desperate cases, where the parents are diametrically opposed, and have no money, means that no assessment of the needs of the children can be carried out”*.<sup>234</sup> A similar view was expressed by another judge in this case;

Case ref; C843 May 2011. In a case with a long history of disputed access and custody with allegations of physical abuse and sexual abuse of children by each parent the court commented, *“This is a very serious situation that has developed in respect of the children. If ever a case required the voice of the children to be heard then this is the case, a section 47 report would be too intrusive, and while a Guardian ad Litem is more appropriate, it is not available to me. This case is crying out for the voice of the child to be heard”*.

#### **‘High conflict’ parents**

‘High conflict family court cases are characterised by U.S. lawyer, therapist and mediator William Eddy as one or two parents who;

1. Lack emotional boundaries
2. Lack self restraint
3. Are used to all-or-nothing thinking
4. Are pre-occupied with blaming others
5. Take no responsibility for their own behaviour, and
6. Are constantly seeking validation for themselves through the legal process.<sup>235</sup>

Eddy maintains that ‘high conflict’ parents essentially have a personality disposition, an “unstable sense of self”, that makes them extremely defensive in family law proceedings and unable to create objective distance. “Splitting” can occur in those with borderline and

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<sup>234</sup> Judicial Interviews Appendix B (i)

<sup>235</sup> Eddy, B. (2009), Old Ways, New Ways: How “New Ways for Families” is Different, High Conflict Institute [online] <http://www.highconflictinstitute.com/articles/new-ways-for-families-articles/78-hci-articles/published-articles/115-old-ways-new-ways-how-qnew-ways-for-familiesq-is-different> [accessed 9 June 2010] pg 1

narcissistic personality traits, where people are “split” into “all good” or “all bad”, the other parent often becoming “all bad”. He believes that litigation reinforces these traits, and daily life with such parents can influence the behaviour of children which may alienate them from the “all bad” parent.<sup>236</sup> Toronto, Canada, has a high conflict working group to develop strategies to deal with families who present as “high conflict” or where parental alienation is an issue.<sup>237</sup>

**Case ref; C1085 June 2011. “The two of them scare me”.**

**Facts**

An ongoing dispute regarding access arrangements was heard on judicial separation. The parties married in 1999, the marriage ended in 2009 when the husband left the family home. There was one child of the marriage, a boy now 11. In an application for access by the respondent father, the court ordered a s 47 report. While the report was being undertaken the court ordered supervised access with two named parties, collection and drop off to take place at the local Garda station. The named parties were rarely available, access arrangements fell apart. At a subsequent hearing to review the s 47 report, the expert recommended that the father attend anger management counselling. At the judicial separation hearing the same expert gave evidence. He indicated that the HSE were involved with the family. When asked by the court if the father was “*obsessed with the child, and suffered from unexplained aggression*”, as the mother alleged. The expert replied, “*no, the frustration, anger and aggression being displayed by the father is as a direct result of the perceived injustices and broken access. Alcohol does play a factor here for both parents.*” The expert assessed the child and said that he found the child had a high average range of intelligence, and, “*did not have any mental health issues, but rather was suffering from the impact of the parents marriage break-down. Parental alienation is occurring, where the father is actively*

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<sup>236</sup> Eddy, B. (2009), Old Ways, New Ways: How “New Ways for Families” is Different, High Conflict Institute [online] <http://www.highconflictinstitute.com/articles/new-ways-for-families-articles/78-hci-articles/published-articles/115-old-ways-new-ways-how-qnew-ways-for-familiesq-is-different> [accessed 9 June 2010] pg 2

<sup>237</sup> The Honourable Madam Justice Waldman, G. (2010) ‘Ireland – Family Justice Reform’, presented at the Canadian-Irish Family Law Conference, Maynooth, 9 October, pg 16

*undermining the position of the mother. This is a very serious syndrome, where a child will make a choice to please one parent to the disadvantage of another.”* The expert concluded, *“the child sees both of his parents as dysfunctional, saying, “ the two of them scare me”.*

## **Orders**

After hearing the evidence submitted the court stated *“sometimes you have to consider would a child be better off in care, than in the middle of this kind of acrimony”*. The court ordered that the recommendations of the expert be followed;

- a. That there be joint custody with the mother as primary carer
- b. That access continue, with minimal contact between the parents. Access arrangements should work around the school, with collections and drop-offs at the school with an undertaking from the non-scheduled parent not to attend at those times.
- c. That a parenting plan be constructed with the help of a professional and rigidly imposed
- d. That the parents both attend parenting classes

### *8.3 The Tender Years Principle- Supreme Court- Justice Mc Guinness*

In discussing O’ Dalaigh CJ’s “tender years principle”<sup>238</sup>, Mc Guinness J stated in D.F.O’S v C.A.<sup>239</sup>,

*“I do not entirely accept the old “tender years” principle: modern views and practices of parenting show the virtues of shared parenting and the older principles too often meant the automatic granting of custody to the mother virtually to the exclusion of the father”.*

It is a finding of this research that where court orders were made relating to access and parenting, that the outcome of those orders, was that the ‘tender years’ principle was almost uniformly applied. The types of access orders made, ensure that primary carers, mothers in

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<sup>238</sup> B. v B. [1975] IR 54

<sup>239</sup> D.F.O’S v C.A. 20 April 1999, High Court [unreported]

the majority of cases, become the pre-dominant parent, with very limited time allocated to the non-resident parent. Four of the 13 judges observed, refused to consider the sale of the family home until the youngest child was no longer dependent, on the basis that the children and their mother must have a place to live. Judge 1<sup>240</sup> stated, “*I believe that children should be left with their mother at least until they are 12 or 13 and I do not think it appropriate to order the sale of the family where dependent children reside there with the mother.*” Orders for sole right to reside in the family home, to the mother, where the children resided with her, were usually made. The standard presumption operating in almost all courts, was that the status quo of children with the mother in the family home, should be preserved. Where a husband sought the sale of the family home, the response of the court indicated that the request was unreasonable. No alternatives were entertained, such as the possibility that the children could live with the father, or live with both parents, or live in rented accommodation post the division of marital assets. A very traditional view of property ownership was evidenced by the actions of the court, reflecting the Irish predisposition to acquire and own a home. The impact of the recession has led to a decrease in overall home ownership in Ireland, from a peak of 79% in the 2006 Census to 69.7% in 2011<sup>241</sup>, but home ownership in Ireland is still significantly higher than most other Member States such as Germany where 53.4% of the population live in owner-occupied homes<sup>242</sup>. The courts started with the presumption that the family home must be protected for the ‘family, however, the courts’ interpreted ‘the family’ to be the mother and dependent children, and orders were made in line with that presumption.

#### *8.4 Use of Expert Reports*

Where the court believes that the welfare of a child may be at risk, it may make a section 47 order<sup>243</sup>, giving such directions as the court sees fit, to procure a report in writing to address any questions affecting the welfare of that child. The purpose of this “social” report is to

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<sup>240</sup> Judicial Interviews Appendix B(i) pg 4

<sup>241</sup> Census 2011 Results, ‘Profile 4 The Roof over our Heads – Housing in Ireland’, 30 August 2012 [online] <http://www.cso.ie/en/newsandevents/pressreleases/2012pressreleases/pressreleasencensus2011profile4therofoverourheads/> [ accessed May 10 2013]

<sup>242</sup> European Commission, ‘Housing Statistics’ 13 March 2013, [online] [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Housing\\_statistics](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Housing_statistics) [ accessed 10 April 2013]

<sup>243</sup> S.47, Family Law Act ,1995

assist the court in making decisions regarding the welfare of that child, particularly in relation to access orders. One of these experts was interviewed by the researcher<sup>244</sup>. He had previously worked for the Probation Service. His training to investigate the welfare of the child or children comprised of a certificate in social work. The work was assigned to him through Barnardos and other agencies including the HSE and the Courts Service. He charged € 1,980 for such a report, although he was aware that other experts charged in the region of € 5,000, he noted, *“up until January 31<sup>st</sup> 2011 there was State funding for these reports and I did a lot of them, but that funding has been withdrawn”*. The guidelines for the process were issued to him by the HSE or Barnardos, and his understanding of the essential points, were two interviews with each parent, one to two interviews with the child, and conduct the investigation bearing in mind the best interests of the child. He acknowledged that since he had received his certificate many years before, he had not undertaken any CPD, as there was *“no official path for CPD”*. He believed that a lot of former staff of the Probation Service now worked as experts in child welfare matters.

18 Section 47 reports were reviewed in court, and four were ordered by the court. It was clear that there were no guidelines available to the court or the practitioners, as to what a s 47 should entail or indeed the required qualifications of the ‘expert’ who would carry out such an investigation. There was no consistency in the format or content of the 10 s 47 reports read on case files, nor did there appear to be any consistency in evidence given by the experts who undertook to write these reports. Interviews may or may not take place with both parents. Critically, interviews sometimes did not take place with the parent against whom the allegation was made. The experts who gave evidence in court varied from young female social workers in their twenties, to psychotherapists to psychologists to family therapists, to former probation officers. Hearsay played a substantial part in the reports and was often written down as factual information, and submitted as evidence, rather than qualified by information indicating the source of the information. The young social workers in particular often displayed a clear bias against husbands that they perceived as lying, although on examination by the court, it was hearsay submitted by the wife that was being refuted by the husband.

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<sup>244</sup> General Interviews Appendix B (iii)

Only judge 7<sup>245</sup> took the view that s 47 reports should always be questioned, and the opinion of the expert should be rigorously examined. He expressed concern about the increase in allegations against fathers and stated, “*I am concerned that allegations of sexual abuse are at times being used as a very effective weapon, but a court is obliged to ensure that the HSE or the Gardaí investigate all such complaints*”. All other judges stated in court that they must be guided or abide by the recommendations of the expert. Six of the judges, in court, indicated that they did not have time, or they did not see the necessity, to read the full report. 12 of the judges expressed the view, in court, that they had no specific training in this area, and must defer to the experts in the field.

Uniformly the court took the view that s 47 reports were not to be viewed in their entirety by either litigant, however practitioners were generally given consent to read, but not copy the report for their client. Lay litigants who sought to read a s 47 report were refused. Judge 2<sup>246</sup> allowed parents to read the recommendations, but never the report, on the basis that it contained the views of their children.

There was a significant variance in the style and substance of s 47 reports; some experts focussed on questions of attachment, a child centred approach, while others looked at inter-familial relationships. The language was non-legal, and used unfamiliar terminology, which was interpreted into legal outcomes. Some reports were poorly written with grammatical and spelling mistakes. The statements by the experts in the report were usually accepted by the court as factual or of persuasive value; however the party against whom the allegations were made did not have sight of the report, and could neither defend against it nor have any knowledge of the basis for the courts decisions. Where a lay litigant was involved this created a significant access to justice issue.

S 47 reports were given significant weight by the court in all cases.

#### **8.4.1 Section 47 reports**

Where s 47 reports were ordered by the court, they were on foot of allegations made by the primary carer that (1) the parent had sexually abused a child/children, or (2) that the

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<sup>245</sup> Judicial Interviews Appendix B (i)

<sup>246</sup> Judicial Interviews Appendix B (i)

child/children did not want to go on access as they were afraid of the other parent, who was bullying/abusive/aggressive. In one case, a s 47 report resulted in sole custody to the mother, all other reports recommended that access continue, albeit severely restricted in most cases.

***Access denied for 3 years***

Case ref; C74 October 2008. An access matter was before the court to review a report carried out by a psychologist, as the mother unilaterally ceased court ordered access. The father sought to enforce the access ordered on separation. The mother maintained that the eight year old child was refusing to engage in access, that the child became extremely distressed when asked to go. The expert report recommended that access should resume and set out guidelines as to how that should occur. The husband was not in court. His solicitor told the court that his client may have given up, as access had been denied for three years. The judge struck out the application.

***Interim order of sole custody and s 47 ordered***

Case ref; C110. The applicant wife sought a barring order and sole custody pending the hearing of her divorce application. The parties were married in 1998, the marriage ended after two years and the wife alleged, on separation, that when the child was 12 months old, the husband hit the child and caused injury. She was granted a barring order and a s 47 report was ordered. The expert recommended supervised access for the father. The father spent time with the child for a couple of years but stopped coming when the wife sought an extension to the barring order. The father alleges that the wife frustrated access and then unilaterally ceased access, and denies assaulting the child at any stage. The court made an interim order of sole custody to the wife and ordered a new s 47 report, on the basis that the father denied assaulting the child three years prior.

***Post a section 47 report, access to continue***

Case ref; C559 July 2010. A s 47 report was ordered by the court, where the mother alleged that the children were afraid of the father and refused to engage in access. The father had filed for an interim access order pending judicial separation. The judge instructed the parties to comply with the recommendations of the psychologist who wrote the report;

- (g) That both parents take parenting classes
- (h) That the children join Rainbows

- (i) That assistance be secured for the child who is having sleeping problems and bed-wetting
- (j) That access is to continue

The court further directed that neither party remove the children from the country.

***Access to resume post a s 47 report***

Case ref; C642 February 2011. In an acrimonious significant asset divorce where the parties were in dispute on all issues, the respondent wife had unilaterally with-held access to the dependent child aged 13. The father made an application for access pending divorce and the mother alleged that the child was in fear of the father and refused to go with him, showing great distress, including disrupted sleep and loss of appetite when access was scheduled. A s 47 report was ordered. At the trial for divorce the court ordered that the recommendations of the report be followed;

- (k) That access be restored immediately, and regular weekly arrangements be made
- (l) That both parties acknowledge the impact the separation is having
- (m) That Sunday access should be at least once a month
- (n) That all information from the school be provided to the father

On hearing that access arrangements had not been agreed yet, the court stated, “ *I really think that the legal profession should be adroit enough to organise access with a 13 year old child...there should be no excuses preventing a child seeing her father*”.

***“Access with both parents is best for the children”***

Case ref; C781 March 2011<sup>247</sup>. During the review of a s 47 report, where access was with-held by the mother, counsel for the mother argued that while the expert psychologist recommended that there should be access, he also recommended that the children should not be forced. Counsel proposed that the children be brought to play therapy first, after which dialogue could commence on access arrangements. The court commented “*I don’t always regard myself as bound by psychologists, I have come across some strange cases, but I do know that access with both parents is best for the children*”.

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<sup>247</sup> See also chapter 8, section 8.1.5



**Case ref; C843 May 2011<sup>248</sup> - [Long-term “high conflict” and multiple assessments]**

This exceptional case indicated what can happen where access arrangements remain at a highly acrimonious level over a very long period of time. It bore all the elements of other high conflict cases, unilateral withdrawal of access, allegations of abuse, counter-allegations of abuse, involvement of an Garda Síochána, s 20<sup>249</sup> assessment, s 47 assessments of the children, depression, anger, multiple judges (six judges dealt with this case up to this hearing), conflicting views of ‘experts’ and the HSE, and the lack of appropriate remedy for the primary carer who refuses to comply with court ordered access. What is notable about this case is the time-lines, each time an assessment was ordered, access ceased and several months elapsed while a report was underway. Indications to the courts in other cases, was that s 20 or s 47 reports would take between six and eight months to be completed. In the life of a young child this is a long time, and is likely to impact significantly on the relationship between the non-resident parent and child.

**Facts**

The Parties married in 1994, they had two children a boy in 1996 and a girl in 1999. The marriage ended in 1999 and the children resided with the mother. In 2000 the father sought access orders pending a judicial separation. The court ordered a s 20 report<sup>250</sup> on the basis that the wife sought a supervised access order. In 2001 a decree of judicial separation was issued. Orders were made for joint custody and unsupervised access. In 2003 a decree of divorce was granted, the father submitted that access was being frustrated by the mother. Access orders on judicial separation were re-affirmed. Access problems continued with the mother allegedly frustrating or with-holding access. In 2008 the son went to live with the father. The mother sought access orders which were granted, the son refused to go. The mother notified the Gardaí, who spoke to the son in an effort to make him attend access, the son refused. The son made an allegation to the Gardaí that his mother physically abused him

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<sup>248</sup> See also chapter 8, section 8.2.1

<sup>249</sup> S. 20 Child Care Act, 1991, where the court may order an investigation of a child’s circumstances if it appears to the court that a care order or a supervision order may be appropriate.

<sup>250</sup> S. 20 Child Care Act, 1991

which is why he refused to see her. The court ordered a s 47 report be carried out, both children were assessed.

The father sought enforcement of access orders to see his daughter, as the mother had unilaterally ceased all access following the allegations made by the son. The court ordered that access re-commence, and ordered that no access orders were to be made in relation to the son. The mother made an allegation that the father had sexually abused his daughter. A second s 47 report was ordered. Access was ceased while an investigation took place. That investigation was deemed to be “inconclusive”. The wife unilaterally moved the daughter to a new school. The new school refused to communicate with the father. He went to the school to show the court orders of joint custody, and the access orders which included collection from school twice a week. The school called the Gardaí who asked him to leave. The school continued to refuse to communicate with the father.

The father attended the final HSE conference in relation to the second s 47 report accompanied by his counsellor, a psychotherapist. As the parties were leaving the building the wife indicated to the husband and the counsellor that she had made another allegation. The father sought to enforce access, the court ordered a s 47 report. The father’s motion for committal of the mother for breach of court ordered access came before another Judge, who had dealt with the case at an earlier stage. The court ordered that the s 47 be struck out as the children had been over-assessed and access should resume. The father returned to court in 2010 sought to enforce access with his daughter, during a substantive hearing the court ordered the appointment of a Guardian ad Litem for the daughter on the basis of the wife’s second sexual abuse allegation. The husband, now a lay litigant, subsequently wrote directly to the Judge stating that;

- a. That the court had no jurisdiction to appoint a Guardian Ad Litem, as s.28 of the Guardianship of Infants Act 1964 has not yet been brought into force
- b. That the judge failed to hear evidence
- c. That the judge ordered the father to pay € 500 for the appointment of the Guardian, when it had been submitted that he had no savings and was living on State benefits.
- d. Alleged that the judge displayed bias, and indicated a judicial review would be sought
- e. Requested that the judge *recuse* himself from the case

Three motions came before the same judge at this hearing, a 2008 motion by the wife for sole custody of the daughter and access for the son, and a 2010 motion from the father for sole custody of the son and enforcement of access with the daughter, and a motion to attach and commit for breach of court ordered access. The court acknowledged that the s 28 had been ordered in error. Counsel for the wife accepted the blame as he had suggested the order. The court indicated that the allegations made by the father were very serious and instructed that this hearing be recorded by the DAR court system. The court indicated that having reflected on the allegations made by the father, that it could continue to deal with this matter, as matters should first and foremost be decided on the welfare of the child, *“I am aware of the lengthy history of this case, and the long-term on-going serious difficulties with access and custody”*. The court heard lengthy evidence from the father, who stated *“for 11 years I have been putting up with this, 11 years of torment. I have been accused of being a paedophile. No court has assisted my children or myself, my children and myself have been abused by the system...I have a fear of Social Workers and their reports, in the s 20 report it said that I had been in a mental institution, this was untrue...they believe that I am just a bitter ex-husband with an axe to grind...”*. The husband stated that despite many assessments carried out, that no findings had been made that his behaviour was inappropriate with either of his children. The psychotherapist gave evidence about the aftermath of the HSE conference and the comment of the wife about a new allegation. He formed the view that the wife *“was engaging in tit for tat, at the expense of the children”*. He stated that in his professional opinion the children had been over-assessed, the son had been brought to two psychologists and the daughter had been brought to four. The court responded, *“ the view of the court is that a s 47 is a means of having the voice of the child heard mediated through the expert, who is trained to interview children”*. The court reviewed the history of the access orders from 2000. Counsel for the wife proposed that the daughter be assessed by [named psychologist], before any access orders were re-confirmed or new orders made. The father indicated that he would agree to another assessment so long as access resumed immediately.

## **Orders**

The court ordered that the access orders made in 2010 resume, and adjourned the case pending the report of the psychologist.

This is an extreme example of a case where the views of the children were not directly ascertained by the court at any time over a 13 year period, but rather through multiple

'experts' directed to carry out s 47 assessments. This case highlights what is wrong with the current family court approach, which is wholly unsuited to deal with the needs of children. In this case the 'system' utterly failed the children, and contributed to prolonged conflict. This short marriage of 5 years produced two children. The primary carer, refused access post separation, the matter went to court, supervised access was ordered. In 2001 the parties were granted a decree of judicial separation, joint custody and access orders were made. In 2001 a decree of divorce was granted. The son alleged that the mother was physically abusive and went to live with the father, by court order, and the allegation was investigated. The mother subsequently unilaterally withdrew access to the daughter, the court re-affirmed the access orders with no sanction. The mother responded with an allegation of sexual abuse against the father, access with the daughter was suspended while the allegation was investigated. When that investigation completed with an "inconclusive" finding, the mother made a second sexual abuse allegation and unilaterally moved the daughter into another school. Despite the parents having an order of joint custody the school refused to communicate with the father.

Access was once again suspended, and again the investigation was "inconclusive". Access was ordered to re-commence and once again was unilaterally with-held by the mother who applied for sole custody of the daughter which was refused. Over a 13 year period, and multiple judges, the court did not address the repeated breach of court access orders by the mother, refusing the attachment and committal sanction sought, choosing instead to re-affirm orders made. Evidence was given by the 'experts' that the mother's second allegation of sexual abuse was vexatious, and the court did not seek to address this serious issue, which severed access again with a child. The history of this case showed that each judge dealt only with the legal aspects before them on the day. Multiple judges, and multiple experts meant that no holistic view was taken in the best interests of the children. There was no joined-up thinking approach to lessen the impact of the parental conflict on the children. The result of this approach was that the children were subjected to multiple assessments by experts, it facilitated intensified conflict between the parents, the whole childhood of the children was consumed by the conflict, and the children were denied large blocks of time with one parent. It would appear that where a primary carer deliberately chooses to frustrate the orders of the court, seeking to with-hold children from the other parent, that the 'system' as it currently operates is not only ineffective in addressing this issue, it actually facilitates the strategy of that parent, thereby contributing to the adverse impact on children. This case proceeded to the High Court in 2013, but cannot be cited as it will identify the judge in this case.

### *8.5 Third party relationships and children of that union.*

In cases where there were new partners and children from that new relationship, the court did not assess the provision needed for those dependent children. The priority in terms of maintenance provision, was the circumstances of the dependent children of the marriage, and the obligation of the liable parent to financially provide for that child or children. In cases where a litigant argued that breach of access damaged the relationship between the siblings and half-siblings, the nurturing of relationships between half-siblings was not a consideration for the court.

#### ***Child of the marriage, child from new relationship***

Case ref; C987 February 2012<sup>251</sup>. In an application to freeze a lump sum being paid on retirement, the respondent indicated that he had a new partner and they had a child together. He submitted that he needed access to those funds to continue paying maintenance for the child of the marriage and the new child of the relationship. The court ordered that 1/3 of the lump sum be paid over to the solicitor for the wife, pending the hearing of her judicial separation application.

#### ***Four children of the marriage, one child from new relationship***

Case ref; C919 February 2012<sup>252</sup>. The applicant wife sought to over-turn a separation agreement in a divorce application. She submitted that at the time the respondent coerced her into signing the agreement. She sought to set it aside on the grounds of undue influence and asked the court to take into account the fact that she was in a new relationship and had a new dependent child to provide for. It was alleged by the respondent that she left the family home after she started an adulterous affair, leaving behind her four children to start a new family. The court determined that the adultery must be taken into account and granted a divorce on the terms agreed in the separation agreement.

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<sup>251</sup> See also Chapter 3, section 3.2.3

<sup>252</sup> See also Chapter 2, section 2.3.1

## 8.6 *In loco parentis*

Under the 1995 Act<sup>253</sup> and the 1996 Act a parent is deemed to be *in loco parentis* where the dependent child was adopted, or where a parent is aware that he or she is not the parent of the child, but has treated the child as a member of the family.<sup>254</sup> Only two cases were observed where *in loco parentis* was argued regarding the liability of that parent to make financial provision for the dependent child.

### ***Did not know child may not be his***

Case ref; C18 October 2008<sup>255</sup>. During divorce proceedings a wife sought a lump sum provision from the sale of the family home to provide for the three children of the marriage. The wife and children were living in rented accommodation, maintenance ordered by the District Court for the children was in arrears of € 11,000. The parties had separated in 1994, only one of the children was now a dependent, a portion of the arrears related to this child, and the mother was in receipt of One Parent Family payment for this child. During evidence from the husband, it was indicated that he had questioned whether this child was his, in his defence to the proceedings, and he had responded to the Department of Social Protection that he was not a “liable relative”. Counsel for the mother argued that the father was *in loco parentis*, as he accepted the child as a child of the marriage, and therefore must provide for the dependent child. The court took the view that if the father knew that the child was not his, and yet consented to be his father, then *in loco parentis* could be argued, however the father indicated that he was unaware that the child might not be his until 2005, when his wife alleged that the child was the result of an affair. The wife had refused to cooperate with DNA testing. The mother, when questioned by the judge, acknowledged that the child was not her husband’s.

### ***Not in loco parentis to a child from a previous relationship***

Case ref; C859 May 2011. On judicial separation the applicant wife sought sole right to reside with her son, who had been diagnosed with severe mental disability. The parties married in 1980, and there were no children of the marriage, the parties separated in 2005.

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<sup>253</sup> S.2 (1) Part I, Family Law Act, 1995

<sup>254</sup> S. 2 (1) Part I, Family Law (Divorce) Act , 1996

<sup>255</sup> See chapter 4, section 4.8

The wife had a child from a prior relationship. The family home was unencumbered and the respondent lived in rented accommodation. Counsel for the wife argued that the respondent had accepted the child and had acted *in loco parentis* to that child. The wife had a carer's allowance, the son lived with the maternal grandmother during the week and lived with his mother at weekends. The applicant also sought maintenance for the dependent child. The court indicated that the respondent would not appear legally obliged to provide for the son. The case adjourned briefly for settlement discussions. Terms agreed were subsequently ruled. Sole right to reside to the wife and her son, the property to remain in joint ownership.

### *8.7 Interaction with Schools*

Schools were often caught in the cross-fire of the war between "high conflict" parents. The primary carer frequently made uni-lateral decisions about where a child or children would go to school, or sought to restrict information from the school from the other parent. The courts uniformly took the view that married parents were joint custodians and joint guardians, and joint decision making must be made, regarding the education of their children. Schools were reluctant to become directly involved in the dispute between the parents, even where parents indicated that they had asked a teacher or principal to attend at court to give evidence. Even more problematic was the refusal on the part of schools to communicate with a joint custodian parent.

#### ***School Principal caught in the cross-fire between parents***

In this case the principal did attend court, highlighting the difficulties facing schools.

Case C537 February 2011. A Spanish mother, with very little English and no legal representation was in court to seek access to her two young children. When the marriage broke down, the children resided with the mother. The father sought access, which he submitted was frustrated or denied by the applicant. The applicant took the children to Spain, and they and the mother returned on foot of Hague Convention proceedings. The father was subsequently awarded interim sole custody, with limited supervised access. The applicant sought to vary the access order to have unsupervised access and overnights with the children who were four and seven. The school principal came to give evidence to support at the behest of the applicant. On evidence the Principal, who had worked as a teacher for 36 years and a Principal for four, said that the school was in a very difficult position. *"In the beginning the*

*mother had custody of the children and took them to and from school. The mother was friendly and engaging with staff, even though her English was bad, and her children were relaxed and happy in her company, and always excited to see her*". She noted a distinct change in the children when interim sole custody was awarded to the father, *"the children behave unusually silent when they are with the father, they never run to him when he comes to collect them, and generally in school they are not engaging as they were before"*. As a principal she indicated that she had a duty of care to the children and was concerned about their changed behaviour, when she enquired how they were, she received a letter from the respondent warning her not to talk to his children. She indicated that she later received a letter from the respondent's solicitor saying the school was in breach of a court order as the mother was allowed to see the children in the corridor at school. The Principal submitted that the school had not been given a copy of, or made aware of, any court order, and the school was unaware that the mother was to have no unsupervised contact.

#### ***Unilateral registration of a child in school by mother, a "pre-emptive strike"***

In an Ex parte July 2011 application (not on the list), the applicant mother, sought short service in a custody application. The mother submitted that, under a voluntary agreement, that the child resided with the father, who now claimed that he was a sole custodian under the terms agreed. The court indicated that married parents had joint custody of any child of the marriage and that any change of custody was a matter for the court. When asked why she sought a declaration of joint custody, the applicant replied that she had enrolled the child in a school near where she resided and the child should live with her during the week, in order to attend at the school. The court responded, *"I am not disposed to grant the relief sought, your client enrolled the infant as a pre-emptive strike, without the consent of the father. I have no idea when or how the father got effective sole custody, but he cannot be expected to travel from Wicklow to Dublin every day"*. The application was refused.

#### ***Uni-lateral change of school, by father***

Case ref; C810 March 2011. In a post-judicial separation application, the respondent mother sought direction from the court. The father was the primary carer of the children. Access was ordered on Judicial Separation. Access was withheld by the father. When the mother sought enforcement of the access orders, the father claimed that the child did not want to see the mother and was refusing to go. A s 47 report was ordered. The finding of the expert was that the child did not wish to see the mother. The recommendations included that the mother



undergo a psychological evaluation and the child attend therapy, after which access could be re-considered. Subsequently the father unilaterally moved the child to another school, in a different county. The court took the view that the parents, by virtue of being married, were joint custodians and joint guardians and neither should make unilateral decisions regarding the education of their child. The court ordered that the child be returned forthwith to the original school. The teachers in both schools were to be informed of the court order.

## 8.8 *Grandparents*

When reference was made to grandparents in the court, it was primarily in the context of assisting with access arrangements or acting as care providers for young children during the day. Where access orders or parenting arrangements were made involving an active role by a grandparent, that grandparent was not in the court-room, and the court did not seek to determine if they were willing to be named in a court order and bound by the terms therein. The Australian Institute reported in 2009 that maternal grandparents whose grandchild lived mostly with the mother were the most likely to report close or very close relationships with their grandchild, with regular weekly visits or time with the child, while paternal grandparents whose child lived mostly with the mother were the least likely to enjoy such a relationship.<sup>256</sup>

### ***Grandparent to facilitate access***

Case ref; C170 December 2008. The applicant father sought enforcement of access, as ordered on judicial separation. He testified that the mother had unilaterally with-held access with the child, unless he agreed to the mother remaining with the child during access. The mother submitted that her child was distressed in the company of the father and “needed her there”. The father suggested that his mother could assist with access to ensure that the child was not distressed. The court ordered that access resume immediately, and recommended that the paternal grandmother attend at the hand-over and assist with the first half hour.

### ***Grandparents unable to facilitate access***

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<sup>256</sup> Australian Institute of Family Studies (2009) ‘Evaluation of the 2006 family law reforms’, Australian Government, December, pg 25

Case ref; C1062 October 2011. In a motion to vary access orders, post judicial separation, the applicant father, a lay litigant, indicated that the orders could no longer be carried out. The six year old child resided with the mother, seeing the father every Wednesday from 4 p.m. until 8 p.m. and every Saturday from 10 a.m. to 6 p.m. It was specified that one of the paternal grandparents would collect the child from the mother and return her. The applicant father submitted that the grand-parents were no longer willing to be tied to these weekly arrangements but were willing to help out when they could. The court varied the order, stating that the father would collect the child whenever his parents were not available, notifying the mother by text as soon as possible before the collection or drop off.

### ***Grandparents' rights***

Only once did the court advocate the right of grandparents to spend time with their grandchildren

Case ref; C463 May 2010<sup>257</sup>. Orders on judicial separation in relation to access orders included a direction that access arrangements should foster a relationship between the dependent children and the extended families. Arrangements should be made that a minimum of a half hour per week be spent with aunts, uncles and grandparents, with more time at Christmas and Easter.

## ***8.9 Conclusion***

When access orders were made, no judge had any form of parenting template to hand to assist in those orders, and the bare minimum of arrangements were enunciated. A standard access arrangement for the non-resident parent, primarily fathers, that permeated across all courts as a default position, was the policy of ordering access every second weekend, for a period of hours during the day, and once or twice mid-week for a couple of hours. This arrangement did not appear to be informed by any social studies or child centred research, but seemed to be derived from the only experts that the court dealt with directly, those experts who created section 47 reports<sup>258</sup>. Section 47<sup>259</sup> reports are ordered where allegations are made pertaining

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<sup>257</sup> See also pages 74 and 80

<sup>258</sup> Section 47 of the Family Law Act 1995 makes provision for the High Court and Circuit Court to procure a report on any question affecting the welfare of a party to the proceedings, including children. In accordance

to the welfare of children, usually in high conflict cases, such reports are not intended to present the views of a child to the court in matters concerning them. The resulting investigation which may take many months to complete, interrupts existing access arrangements, such that a transition period is required to return to normal access arrangements. The access arrangements post a s 47 are the bare minimum required to re-establish relations between the non-resident parent or children, but appeared to be adopted as a general standard for all access orders.

*In many cases the dispute is not about the psychological or the psychiatric health of the child but a protracted custody dispute between the parents*<sup>260</sup>

**White J.**

It should be noted that where courts dealt with access cases, with more than one dependent child, they were dealt with as a collective, i.e. when access arrangements were ordered, all the children were ordered to go together to spend time with the non-resident parent. Neither their age differential, nor their own extra-curricular activities were taken into consideration. The oldest child, the subject of access orders made, was 15. Most of the judges observed took the view that children aged 13 or older should not be the subject of court access orders, if the children did not wish to spend time with the non-resident parent. However, the views of the child in such circumstances were never directly sought, the court was only informed by the view of the primary carer.

Common patterns of behaviour emerged during the course of this research, particularly in cases where there was clearly strong animosity between parents. When evidence was submitted by independent experts as to the distress being experienced by children in the middle of this conflict, not only did neither parent take any responsibility for their actions, they used the negative impact on the child as proof that the other parent was harming the

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with Section 47 (4) fees and expenses incurred in the preparation of a report shall be paid by the parties to the proceedings in such portions as the court may determine.

<sup>259</sup> See sub-headi

ng 8.4

<sup>260</sup> Mr. Justice White, M. (2013) 'Current Challenges in the Family Law Courts', Consultative Seminar on Family Law Courts, Incorporated Law Society, Blackhall Place, Dublin, 6 July 2013 pgs 5-6

child. In contested cases where there were children, it was the battle for ownership of the children that was most fiercely fought. Primary carers, the majority of whom were women, sought to severely restrict or exclude the other parent from the lives of the children, on the basis that frequent contact with the non-resident parent distressed them, and in turn distressed the children. Where fathers were the primary carers they acted in a similar way in ‘high conflict’ cases. Parents used the family court ‘system’ to wage this battle, as it was clear that the court generally did not sanction a parent who with-held or frustrated access – the default position of the court appeared to be the belief that an ‘expert’ report was required.

The aim of the 2006 reforms implemented by the Australian Government, was to bring about “generational change in family law” and a “cultural shift” in the management of parental separation, away from litigation and towards co-operative parenting. Those reforms, underpinned by extensive empirical research into the users of the family law system, acknowledged that many of the disputes over children following the break-down of relationships or marriage are driven by relationship problems rather than legal ones.<sup>261</sup>

The ‘rights’ that were promoted, were almost exclusively the ‘rights’ of the parents. The phrase “in the best interests of the child” was used by both parents to support whatever their view of parenting post separation should be - no court sought to ascertain if any child wished to express a view, and no court sought to hear the voice of any child directly.

*We are engaged in decision-making that has serious consequences for children, who are among the most vulnerable members of our community and we generally do this in their absence and often without any representation for children at all.*<sup>262</sup>

**The Hon. Madam Justice Waldman, G.**

It was noted that where primary carers unilaterally with-held access on a frequent basis and breached court orders, the only remedy sought was an attachment and committal order. All of the judges interviewed acknowledged that persistent breaches of court ordered access was a chronic problem, but did not believe that attachment and committal was an appropriate

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<sup>261</sup> Australian Institute of Family Studies (2009) ‘Evaluation of the 2006 family law reforms’, Australian Government, December, pg 1

<sup>262</sup> The Honourable Madam Justice Waldman, G. (2010) ‘Ireland – Family Justice Reform’, presented at the Canadian-Irish Family Law Conference, Maynooth, 9 October pg 4

sanction where the primary carer was the mother, and therefore no sanction was imposed. No enquiry was made by the court as to the availability and ability of the father to assume the role of the primary carer.

*Our Court, and I suspect courts overseas, has been criticised for lacking teeth when it comes to enforcing orders. I think that unless we do so, we risk our credibility being eroded.*<sup>263</sup>

**The Hon. Justice Boshier, P.**

I would argue that a more powerful deterrent, and an appropriate sanction in such circumstances, would be a reversal of the primary carer role. If a parent cannot put the interests of their child ahead of themselves, and is willing to repeatedly breach court orders, are they really fit to be the custodial parent?

There was no evidence that parents were directed to any supports that would assist them to make better decisions for their children and to understand how best to co-parent living apart. Many parents clearly lack the necessary skills to parent post-separation. Decisions made by a judge, restricted by time and the ability to view the family holistically, may fix a patch on the dispute that day, but can only lead to repeat applications when that solution becomes undone.

### ***The voice of the child***

A finding of this research is that no judge sought to ascertain if any child wished to express a view, and no court sought to hear the voice of any child directly. On several occasions counsel asked the court if a child could speak with a judge, in all instances this request was refused. Of the six judges interviewed, five stated that they believed appropriate judicial training was required to enable judges to meet with children in chambers.<sup>264</sup>

In a 2013 High Court case a lay litigant father sought a variation of access orders made in 2012 in the Circuit Court on divorce, which stipulated that access be supervised. The court noted that this was a long running dispute and enunciated the importance of hearing the updated views of the children. Rather than hearing the views of the children directly, the

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<sup>263</sup> The Hon. Justice Boshier, P. (2012) 'Family Justice: Aligning Fairness, Efficiency and Dignity' presented at the Four Jurisdictions Family Law Conference, Liverpool, 4 February pg 25

<sup>264</sup> See Appendix B, Judicial Interviews

court elected to seek the views of an expert, which for various reasons did not come to pass. The court then determined that the children's views had been communicated to it in a reliable way by counsel for the respondent mother, and stated;

*The court holds that the children do not presently wish to avail of unsupervised access with their father.*<sup>265</sup>

**Sheehan J.**

In the adversarial courtroom model that we operate in Ireland, it is the role of counsel to be an advocate for their client, and to represent that client's perspective and/or views to the court. Counsel do not take instruction from children, nor do solicitors meet with children to hear their views and convey same to counsel. The views expressed by Counsel on behalf of their client to the court cannot be said to reflect the views of the children, and therefore may not be relied on by the court as meeting the requirements of the UN Convention on the Rights of the Child, 1989.

In another case appealed to the High Court in 2013, Hogan J. took the view that his request to interview a child directly in disputed parenting arrangements, was within the power of the parents to refuse, disregarding the right of each child to have their views heard in matters that concern them.

*"Given that in this respect both parents expressed this wish, this is a view which must be respected by the judicial branch unless it was a case coming within Article 42.5 which would entitle me to interfere with that parental decision."*<sup>266</sup>

In 1992 Ireland entered into the UN Convention on the Rights of the Child, 1989, and on the recommendation of the UN Committee on the Rights of the Child, undertook to enshrine children's rights under the Irish Constitution. The proposed amendment to the Constitution was passed by a margin of 58%, and that decision was upheld by Mc Dermott J. in a subsequent High Court challenge in October 2013. The Thirty-first Amendment of the Constitution (Children) Act 2012 in itself does not give constitutional status to the voice of the child, rather it indicates a commitment to enact appropriate legislation to incorporate Article 12 UNCRC into Irish law. Children as a vulnerable group in society do not have the

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<sup>265</sup> J.E. v D.E. [2013] IEHC 379, 27, unreported

<sup>266</sup> Hogan J. B.B. v A.A. [2013] IEHC 394, 26

same ability as adults to exercise their constitutional rights, and while Article 42A specifically recognises children as rights holders in their own right, legislation will be required to ensure that these rights are recognised in court proceedings that may impact on a child. Article 42A.1<sup>267</sup> is a general recognition and affirmation of children's rights, although the 'rights' that shall apply to all children are not set out in the amendment, and "natural and imprescriptable rights" are not defined, thereby leaving this article open to interpretation by the courts. Articles 42A.2<sup>268</sup> allows the State to step in where it believes that parents, married or unmarried, have failed in their duty towards their child, such that the safety and welfare of the child is at risk, to include adoption without parental consent in the best interests of the child. 42A.3<sup>269</sup> deals with voluntary adoption, and 42A.4<sup>270</sup> deals with specific issues of child protection and care.

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<sup>267</sup> Art. 42A.1 Bunreacht na hEireann, *The State recognises and affirms the natural and imprescriptable rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights*

<sup>268</sup> Art.42A.2.1 Bunreacht na hEireann, *In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.*

Art.42A.2.2 *Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.*

<sup>269</sup> Art. 42A.3 Bunreacht na hEireann, *Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.*

<sup>270</sup> Art. 42A.4.1 Bunreacht na hEireann, *Provision shall be made by law that in the resolution of all proceedings – (i) brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child being prejudicially affected, or (ii) concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.*

Art.42A.4.2, *Provision shall be made by law for scuring, as far as practicable, that in all proceedings referred to in subsection 1 of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.*

Article 12(1)<sup>271</sup> of the UNCRC recognises that participating States have an obligation to assure all children that they have the right to express themselves freely in all matters concerning them, once they are capable of forming such a view, and Article 12(2)<sup>272</sup> recognises the right of a child to be heard directly and indirectly, through a representative or an appropriate body, in all judicial and administrative proceedings. In practice this project shows that rather than the automatic right provided in the UN Convention, whether the voice of the child will be heard in family law proceedings in the Circuit Court, is entirely at the discretion of the judiciary. No mechanism currently exists for the views of a child to be heard by the court, where that child wishes for their views to be considered, and in no case observed did a judge ask to meet with a child in any matter that affected them. Day-to-day care arrangements for children were devised by the practitioners or by the court, without any apparent reference to social research. Joint custody, while affirmed in most cases, was not joint custody in reality, mothers invariably being the primary custodian of children. Dr Anne Egan posits that this perceived unfairness to men is more attributable to practicalities than to the courts system<sup>273</sup>, however, there was no evidence of any informed decision making, based on the care arrangements pre the break-down of the marriage, that supported joint custody as a reality, where it best met the needs of the children.

A pilot study conducted in Israel, Child Participation in the Family Courts 2006 -2009, was designed to apply the recommendations of the Israeli CRC legislative Committee, appointed to implement the principles of the UNCRC. Findings indicated that the advantages for a child, where they have a right to participate in family court proceedings, and their voice is heard in a structured way, included; providing children with a sense of recognition, reinforcing positive relationships between parents and their children, providing emotional

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<sup>271</sup> Article 12(1), Convention on the Rights of the Child, (1989) *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

<sup>272</sup> Article 12(2) , Convention on the Rights of the Child, (1989) *For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

<sup>273</sup> Dr. Egan, A. *Are Fathers Discriminated Against in Irish Family Law? An Empirical Study* I.J.F.L. 2 pg 46



support for children and helping to ensure that legal decisions made were best suited to each individual child.<sup>274</sup>

Article 42A.4.1 sets out that the best interests of the child shall be the paramount consideration in all legal proceedings concerning a child, including custody and access in family law proceedings. Article 42A.4.2 directs that the views of the child shall be ascertained, so long as the child is capable of forming his or her own views, the weight to be given to such views, having regard to the age and maturity of the child. The legislation that will give force to the constitutional amendment, which provides rights to all children “capable of forming views”, will need to address who will be responsible for assessing, on a case by case basis, whether a child is capable of forming a view, what kind of training should that assessor have, and what is the nature of the report and/or findings of the assessor. In July 2013 Gerard Durcan BL noted that courts dealing with public law cases under the Child Care Act 1991 were likely to have the benefit of the views of social workers and a guardian ad litem for the child, however, in private law cases concerning children, the court may have no access to expert evidence, a problem that needs to be addressed when Article 42A is given effect in Irish law.<sup>275</sup>

In Kent County Michigan, U.S.A., the office of the Friend of the Court provides staff with advanced degrees in social work, who specialise in custody and parenting time investigations. The child is interviewed and a report with recommendations is submitted to the court, which references legislative provisions. While the report is available to parents and their representatives, any preference expressed by the child shall not be disclosed.<sup>276</sup> Further questions to be addressed include; should the views of a child be ascertained by way of an *in camera* interview with the judge, as is the case in other jurisdictions? What appropriate

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<sup>274</sup> Dr. Morag, T., Rivkin, D. And Sorek Y. (2012) ‘Child Participation in the Family Courts – Lessons from the Israeli Pilot Project’, *Int J Law Policy Family* (2012) 26 (1): pg 25

<sup>275</sup> Durcan, G. (2013) ‘Reimagining the Family Court System’, presented at the Consultative Seminar on Family Law Courts, Blackhall Place, Dublin, 6 July 2013, pg 12

<sup>276</sup> Judge Mc Nabb, D. (2010) ‘Out of the Mouth of Babes: The Evolution of a Child’s Right to be Heard in Michigan Family Court’, presented at the Canadian-Irish Family Law Conference, Maynooth, Ireland, 8 October pgs 4-5

training is required? What process should a judge follow in interviewing a child? Are all judges suited to carrying out interviews with children?

*If judges are to “talk” to children, engage in contact with children involved in Family Law litigation, there are issues about process and judicial education that should be addressed.*<sup>277</sup> **The Hon, Justice R. James Williams, Supreme Court of Nova Scotia (Family Division), Canada**

In the Israeli pilot project judges reported that in 54% of cases in which they met the child, that the interview shed new light on the case and contributed to the decision-making process.<sup>278</sup>

A finding of this project is that not all judges are suited to hearing family law proceedings, which mirrors the findings of the New Zealand Royal Commission report of 1978, which recommended that the central features of a Family Court should include specialist judges, legally trained “ and qualified by personality, experience, and interest”<sup>279</sup>

*A child custody determination is much more difficult and subtle than an arithmetical computation of factors. It is one of the most demanding undertakings of a trial judge, one in which he must not only listen to what is said to him and observe all that happens before him, but a task requiring him to discern and feel the climate and chemistry of the relationships between child and parents. This is an inquiry in which the court hopes to hear not only the words but the music of the various relationships*<sup>280</sup>

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<sup>277</sup> The Honourable Justice Williams, J. Supreme Court Nova Scotia and O’ Shea, R (2010) ‘Family Law: Common Threads and Unique Opportunities’, presented at the Canadian-Irish Family Law Conference, Maynooth, 9 October, pg 13

<sup>278</sup> Dr. Morag, T., Rivkin, D. And Sorek Y. (2012 ) ‘Child Participation in the Family Courts – Lessons from the Israeli Pilot Project’, Int J Law Policy Family (2012) 26 (1): pg 15

<sup>279</sup> The Hon. Justice Boshier, P. (2012) ‘Family Justice: Aligning Fairness, Efficiency and Dignity’ presented at the Four Jurisdictions Family Law Conference, Liverpool, 4 February, pg 3

<sup>280</sup> Dempsey v Dempsey, 96 Mich App 276, 289; 296 NW2d 813 (1980)

The capacity of a child to form a view should not be delimited by age, as this may restrict the views of younger children being heard. The Children (Scotland) Act 1995 states that a child twelve years of age or more shall be presumed to be of sufficient age and maturity to express a view<sup>281</sup>. However, a hearing or a sheriff, must give him or her an opportunity to express their wishes taking account of the age and maturity of the child, which has been interpreted by Scottish practitioners as meaning “any age if the solicitor feels that the child has capacity”.<sup>282</sup> The age of the children who participated in the Israeli pilot project, and met with a personal social worker (PSW) or Judge, ranged from three years to 18 years of age.<sup>283</sup>

The constitutional amendment is a clear commitment by the State to enact legislation to ensure that the best interests of the child are of paramount consideration. However, the State elected not to explicitly introduce the ‘best interest’ principle into the Constitution requiring instead that the Oireachtas enact legislation to implement the provision.

*...the general statement of rights contained in ...Article 42A.1 does not meet the level of protection required by Ireland’s international human rights obligations.*<sup>284</sup>

It remains to be seen if legislation proposed supports this principle, and addresses the invisibility of children in matters that directly affect them. The view of the Ombudsman for Children is that compliance with the UNCRC principles can still be brought about in law, and recommends that such legislation should require “administrative authorities to have due

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<sup>281</sup> Section 16 (c) The Children (Scotland) Act 1995

<sup>282</sup> Driscoll, M. (2012) ‘The Scottish Experience’, presented at the IRC funded International Family Law Workshop, Waterford Institute of Technology, 30 March

<sup>283</sup> Dr. Morag, T., Rivkin, D. And Sorek Y. (2012) ‘Child Participation in the Family Courts – Lessons from the Israeli Pilot Project’, Int J Law Policy Family (2012) 26 (1): pg 12

<sup>284</sup> Irish Human Rights Commission (2012) ‘Observations on the Proposed Thirty-first Amendment of the Constitution (Children) Bill 2012, [online]  
[http://www.ihrc.ie/download/pdf/ihrc\\_observations\\_on\\_31st\\_amendment\\_of\\_constitution\\_children\\_bill\\_oct\\_ober\\_2012.pdf](http://www.ihrc.ie/download/pdf/ihrc_observations_on_31st_amendment_of_constitution_children_bill_oct_ober_2012.pdf) [accessed 10 December 2012] Pg 6

regard to the State's human rights obligations when carrying out their functions".<sup>285</sup> It is of particular concern that Art.42A.4.2 states that "as far as is practicable" the views of a child shall be ascertained in any proceeding, which limits the extent of the obligation of the State, and despite the views to the contrary expressed by some academics<sup>286</sup>, could allow a resource argument to justify the non-implementation, in practice, of the UNCRC principles.

*Enabling children to be properly represented within a fiscally acceptable context can be a real challenge.*<sup>287</sup> **Boshier J. New Zealand**

The real effects for children, of any legislation that implements the Thirty-first amendment, will be in how they understand and experience their rights in practice. The practical application of a child's right to participate must ensure that children are aware that they have a right to express an opinion in matters that affect them, and are free to express their views, or not to do so, as they so wish.

## 9 Chapter 9 Distribution of Assets

### 9.1 Family Home

Ireland has no mandatory requirements that set out how the division of assets should be approached on judicial separation or divorce. As previously discussed the Supreme Court case of *T. v T.*<sup>288</sup> represents the most coherent judicial approach to setting out principles applicable to property division when a marriage breaks down, particularly in valuing the contributions of either party.

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<sup>285</sup> Ombudsman for Children (2012), 'Report to the Oireachtas on the Thirty-First Amendment of the Constitution (Children) Bill, October, 6.4 pg 18

<sup>286</sup> *A recent piece by Philip Boucher Hayes on RTE Radio 1's Drivetime confirmed that opinion among academics and retired judges was unanimous in dismissing that particular concern*, Dr. O' Mahoney, C. (2012) 'Legal Analysis of the Children's Referendum: Article 42A.1', [online] <http://humanrights.ie/children-and-the-law/legal-analysis-of-the-childrens-referendum-article-42a-1/> [accessed 15 August 2013]

<sup>287</sup> The Hon. Justice Boshier, P. (2012) 'Family Justice: Aligning Fairness, Efficiency and Dignity' presented at the Four Jurisdictions Family Law Conference, Liverpool, 4 February, pg 22

<sup>288</sup> *T.v T.* [2002] SC unreported

The second most contentious ‘chattel’ was the family home. The first being children. The two forms of ‘chattel’ were often inter-twined with the primary carer, not only seeking to reside in the family home, but usually seeking a greater portion of the equity on the basis of being the primary carer. Whosoever had ‘possession’ of the children, would invariably gain possession of the family home.

### **9.1.1 Value**

***“...you couldn’t give away a house anywhere”***

The impact of the recession commenced at the start of the research period, and the court was no longer able to rely on valuations or the possibility of selling the family home. Where cases were observed again at a later date, the key issue was the inability to perform terms of settlement or orders, as no offers were made on the family home in the region of the agreed reserves and in many instances, no offers were made at all.

Case ref; C12 October 2008. Judge; *“...you couldn’t give away a house anywhere”*, in response to an application by the husband to re-open a separation agreement, which was made an order of the Court. The parties had agreed to sell the family home, in which the wife and children resided. The reserve figure was stated in the separation agreement. Offers received were below the agreed reserve and the wife refused to sell. The Judge ordered that the family home be put up for sale without a set reserve.

### **9.1.2 Equity**

The general view of litigants was that marital assets should be divided on a 50/50 basis, however, while there was no consensus among the judges as to what presumptions existed, the view of the court tended to favour the same approach if it was a long marriage.

***“I always regard marriage as a joint venture”*** 50/50 division

Case ref; C1038 October 2011. In a judicial separation counter claim divorce case, the applicant wife maintained that the respondent should have no equity in the family home. The parties were married in 1981, their four children were no longer dependent. The wife was in receipt of monthly spousal maintenance of € 700 and the respondent continued to discharge the mortgage. The wife ran a child minding business from the family home and took in foster children. The court adjourned the matter to allow settlement discussions to take place stating *“I always regard marriage as a joint venture, particularly in relation to property, 50/50 is the equity the husband is entitled to”*.

***“There is nothing in law to allow me to transfer more than 50/50 interest in the family home”***

Case ref; C31 October 2008<sup>289</sup>. In this case, a judicial separation application, with a counter claim for divorce, the wife’s counsel argued that she was entitled, to a greater portion of the equity in the family home. The value of the house was stated as €300,000 with a mortgage balance of € 12,500; the husband continued to discharge the mortgage. The marriage was 24 years in duration. The wife was on disability from a year before the marriage, and continued to be on disability. There were two children of the marriage, neither a dependent. Neither of the parties had pensions. In refusing the argument for a greater equitable apportionment to the wife, the judge stated “there is nothing in law to allow me to transfer more than 50/50 interest in the family home”. A sole right to reside was granted to the wife, with a 50/50 apportionment of equity, with liberty to apply for an order to sell the house when the market improved.

***“In all the circumstances 50/50 is reasonable”***

Case ref; C475 June 2010. On divorce, the parties were in agreement that the family home should be sold. The house was unencumbered, it was short marriage of three years duration and there were no children. The house was valued at € 400,000. The applicant wife submitted that she was entitled to a 50/50 division of net proceeds. Each party had an apartment prior to marriage and on sale each realised comparable amounts of net proceeds, £150,000 sterling and £200,000 which they combined to purchase the family home. While the husband contributed the greater amount, the wife submitted that she discharged the mortgage on his apartment for two years while they lived there together. The respondent submitted that after the applicant left the family home he carried out extensive works, that he valued at € 24,000 for materials and € 10,000 for his own labour. The court held that it was satisfied that the wife’s contribution to the family home was greater than the husbands, indicating that the husbands claims were greatly exaggerated and unvouched, *in all the circumstances a 50/50 split is reasonable*”. A decree of divorce was issued, an order to sell the family home, division of net proceeds 50/50, joint auctioneers, joint carriage of sale, personal items of the wife to be collected. Nil pension orders were made, and no order was made as to costs.

***“There is nothing in law that says an automatic entitlement to equity exists”***

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<sup>289</sup> See also chapter 4, section 4.5.1, and chapter 7, section 7.1.3

Case ref; C862 June 2011. The parties were married in 2004, the marriage ended a year later in 2005. The husband acquired the site from his mother before the marriage, he took out a mortgage in his own name, prior to the marriage, when dating his future wife, and from that point discharged the mortgage in full. The parties resided together between 2003 and 2005, all utility bills were discharged by the applicant. The value of the house was € 600,000, the mortgage €90,000. The wife claimed 40% equitable interest. Counsel for the husband maintained that the respondent sought equitable ownership in the property by virtue of residing there as a spouse, there were no children and she made no contribution to the mortgage or bills, *“there is nothing in law that says an automatic entitlement to equity exists”*. The court responded, *“That is simplistic logic, it is a matter of law that some interest may exist”*. The court stated that the criteria it must consider are;

- a. The length of the marriage
- b. The youth of the parties concerned
- c. The contributions made

The court determined that the wife had a legitimate expectation that the house was for their marriage, *“they were young and in love, both were involved in decisions around the construction of the house, they were building for their future”*. The court ordered that monies to the value of 20% of the equity in the house be paid to the wife. Counsel for the applicant indicated that his client had no means to discharge that order, asking how the court envisaged that money would be paid. The court declined to make orders as to how that order would be discharged, directing that it should occur within 9 months, no order was made to sell the house. A decree of divorce was issued and blocking orders were made under s. 18(10). Counsel for the applicant sought a stay. A stay was granted in the event of an appeal, subject to 50% of the monies ordered being paid.

### ***Difficulty caused by stated values, rather than percentages***

At the start of the research period, it was common for the court or for the parties to agree settlement terms, that stated a monetary value that would be paid to a spouse on sale of the family home. The dramatic fall in the property market, meant that a disproportionate portion of the net equity would go to a spouse.

Case ref; C303 April 2009. On judicial separation the respondent wife sought a fixed stated value as her portion of equity in the family home. The parties were married in 1996, had 3

children, all dependent. The family home was valued at € 900,000, with a mortgage of € 350,000. The wife sought € 340,000 as the value of her equity in the family home. The applicant submitted that the value of the house was falling and was now approximately worth € 750,000. The court took the view that a set figure is unreasonable, variation orders frequently coming before the court where set values were agreed and indicated that 55% of the proceeds would be appropriate. The matter was adjourned for a further hearing.

### ***Short marriage and equity***

Where there was a short marriage, three years or less, and no children, the court usually did not allocate any equity to a non-contributing party.

Case ref; C33 October 2008. During a consent divorce application, the court questioned why the parties had agreed that the husband had no equitable interest in the family home. The parties were married for 3 years, the wife borrowed money from her parents for the deposit to purchase the house and discharged the mortgage and loan without assistance from her husband. The court agreed that the husband had acquired no equitable interest and the consent terms were fair.

Case ref; C51 October 2008<sup>290</sup>. In a nullity application, counter-claim judicial separation, the respondent husband, a Spanish national, was a lay litigant. The marriage of two years duration ended when the wife left the family home with their child. The husband, a full-time student, sought an equitable interest in the family home, on the basis that “Irish law says that the house belongs to both of us”. On evidence the wife testified that she purchased the family home before she met her husband, borrowing € 30,000 from her father and taking out a mortgage in the amount of € 158,000, which she discharged. The court granted a Judicial Separation, joint custody and no percentage of the house to the husband.

### ***Transfer of interest, to protect the family home***

In this case the court took the view that an unencumbered property should not be transferred on judicial separation.

Case ref; C582 The applicant wife in a judicial separation sought a property adjustment order to transfer the family home into her sole name on the basis that the husband had accrued debt

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<sup>290</sup> See also chapter 3, section 3.3.2



and was now gambling, accruing further debt. The family home was mortgage free and valued at €350,000. The parties married in 1994 and had three dependent children under the age of 15, the marriage ended in 2007. The wife was a ‘homemaker’, her income being € 282.30 per week Lone Parent’s Allowance and € 123.46 Children’s allowance. The husband resided in England and had ceased paying maintenance in 2008. The respondent was not in court, but had written to the applicant’s solicitor saying he could not afford to travel for the hearing, or pay legal fees, and was no longer represented. The court stated, *“I don’t think a property adjustment order of an unencumbered house is appropriate at this stage. I am conscious that the needs of both parties are to be dealt with on divorce, it would be premature to make such an order”*. The court granted a decree of judicial separation 2 (1) (f), Custody to the wife, access to the father. € 100 per week child maintenance was ordered to be paid through the District Court. The court granted sole right of residence to the wife in the family home.

### **9.1.3 Third party interest**

#### ***Equity of paternal mother in family home not noted.***

Case ref; C60 October 2008. As part of a consent agreement for separation the parties jointly sought re-mortgage approval, stating that they were the owners of the property, which was approved by the mortgagor. The applicant wife was to “step out” with the husband buying out her interest in the property. The consent agreement was made an Order of the court. The wife sought a family home declaration from the court as the respondent’s mother subsequently claimed an interest in the family home, and the wife disputed that interest. Having determined that the respondent’s mother did indeed have an equitable interest in the property, the matter was adjourned to allow the respondent to inform the mortgagor that a third party had equitable rights in the property. The court indicated that if the husband and his mother were unable to secure a loan, to enable the husband to buy out the wife’s interest, then the separation terms would have to be re-opened.

#### ***Well charging order against family home***

Case ref; C485 March 2010. A third party sought a well charging order against the family home for a debt incurred by the husband, and an order to sell. The defendant husband was in default on a loan for his business, a retail shop, which had been personally guaranteed. The

business closed in 2007 and enforcement proceedings commenced, the defendant put in no appearance. A committal summons was subsequently issued in early 2008 for non-payment of the court order for payment of debt. The lender sought and secured a conversion of that debt into a judgement mortgage against the defendant's sole asset, the family home. The wife subsequently applied for a judicial separation, the case had yet to come before the court. Counsel for the lender was unable to set out the legal basis for his case, and was criticised by the court. The well charging order was granted on the basis that the debt was converted to a charge against the family home before the judicial separation application was filed. The court refused the order to sell the family home.

***Claim that property belonging to “in-laws” was family home***

Case ref; C816 March 2011. The applicant wife sought a declaration that the house the parties lived in was the “family home” and sought her equitable portion of same as proper provision on judicial separation, or sought an order that her in-laws would buy out her equitable interest. The parties married in 1994 and had four children. Both parties engaged in heavy drinking after one child died, and got into debt. The paternal grand-parents called a family meeting and agreed that the respondent was likely to inherit their house when they died and agreed that the parties and their children would come and live with them. The parties sold the house they lived in and used the net proceeds of € 75,000 to construct an extension on the in-laws property and carry out some general improvements. The marriage ended and the wife moved out with the children, it was alleged she had commenced an affair before the marriage ended, and moved in with that party. Granting a judicial separation under s.2 (1)(a), the court held that the property was not a “family home”. Taking conduct into account, the court ordered that the husband pay the wife € 12,000 as her equitable interest. That equity to be realized on the sale of the property, transfer to the son, or on death.

**9.1.4 Exclusion orders**

Exclusion orders were commonly made in the cases observed on judicial separation, where there was a family home, and the wife and/or any dependents resided there. Section 10 (1)(a)(i) of the 1995 Act provides that the court, on application to it, may make an order granting sole right to reside in the family home, for a specified period, or for life, to one spouse, to the exclusion of the other spouse.

### ***Exclusion from family home***

Case ref; C273 March 2009. On evidence in a judicial separation case, it transpired that the applicant and wife still resided together in the family home. They married in 1972 and had 4 children, none of whom were dependent. When queried by the court, evidence was given that they had lived separate lives for several years. The applicant wife stated that her husband did not want to leave the family home, however she sought sole right to reside. Both parties were on disability allowance and resided as co-tenants in a council house. The court, granting a judicial separation, ordered that the tenancy be transferred to the applicant under s. 9 of the 1995 Act, and an exclusion order was issued against the respondent under section 10 1(a)(i) of that Act.

### ***Exclusion order on divorce***

Case ref; C31 October 2008<sup>291</sup>. The applicant wife on judicial separation, with a counter-claim for divorce, alleged that the husband was verbally abusive and an alcoholic. There were two dependent children, who resided in the family home. The husband sought the sale of the family home valued at € 300,000 with a mortgage of € 12,500. The court granted an exclusion order, granting the wife sole right to reside in the family home until further notice.

## ***9.2 Additional property***

The aftermath of the property boom evidenced in court with middle income families presenting with investment portfolios of property, which had been purchase on 100% mortgages with “interest only” deals. Most of these properties were in negative equity.

### ***Investment properties***

Case ref; C62 October 2008. In a maintenance pending suit application, it was submitted that the parties owned 15 properties, excluding the family home, and were now living apart. The children lived with the mother, who was seeking maintenance, the father, a mortgage broker, managed the properties through a company set up for that purpose. The judge queried “if the husband has 15 properties, why is the State taking care of his children?” The father explained that eight of the properties were in negative equity, two were at break-even and five had a small profit, and he had recently lost his job. He believed that bankruptcy may be the only

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<sup>291</sup> See also chapter 4, section 4.5.1, chapter 7, section 7.1.3 and chapter 9, section 9.1.2

option. The judge suggested that he hand the properties back and ordered maintenance of €150 per child per week, with costs against the respondent for the maintenance application.

### 9.3 Use of Auctioneers

Valuing the family home and any other properties became hugely problematic during the period of this project. Research commenced in October 2008, when it first became evident that Ireland was in the grip of a very serious financial crisis. In speaking of the role of auctioneers, and their ability to give meaningful valuations to assist the court in determining the division of assets, Judge 3 had this to say;

*“We are entering the world of Rumsfeld, the unknown and the great unknowns, that is where we are at with valuing the family home”.*

Case ref; C55 October 2008<sup>292</sup>. In a divorce application where the parties were in agreement on the valuation of the family home, the Judge expressed concerns about the valuation being realistic and commented *“Could we invent a scheme where if the valuer gives a price, and the property doesn't get that, then the valuer pays the difference”.*

#### ***What are valuations based on?***

**Case note;** C536 May 2010. [ **Disparity between valuations by two auctioneers**]

**Facts;** The parties were married in 1982 and separated in 2007. They had one dependent child. The applicant paid a voluntary maintenance contribution of € 75 per week. Their assets comprised of a family home, unencumbered, and 44 acres with a single farm payment attached. The applicant had self-built the family home and had acquired 44 acres from his father's estate. Two auctioneers gave evidence as to the valuations of both properties. The first auctioneer carried out a valuation in February 2010 for the respondent. He suggested that if the house was sold with three acres it was an attractive proposition, potentially achieving in the region of € 350,000, and that the farm be sold separately, creating two distinct folios. He believed that the combined price that might be achieved would be in excess € 500,000. Counsel for the applicant sought the basis for this valuation by asking the auctioneer to give comparative prices for similar properties in the region that he had sold in the last 6 months, or

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<sup>292</sup>See also chapter 3, section 3.5.2

similar properties that he was aware of that had sold. The auctioneer admitted that he had sold none, and hadn't carried out a comparative analysis. His valuation was based on his knowledge of the market. Counsel put it to him that his valuation was not realistic as he had not relied on any recent sales, and the market was now significantly different, so his own past experience was largely irrelevant. The second auctioneer indicated that the family home property was dated, he had a similar property on his books with 4 acres with an asking price of € 250,000 with no offers, he recommended that the house be "pitched" at € 200,000 with a reserve of € 150,000. He declined to value the 44 acres as "the land will get what it will get, the market is extremely uncertain". The husband worked in construction as a sub-contractor and had enjoyed annual income of € 60,000, but was uncertain of getting more work, the wife was a part-time accountant and earned € 1,222 net per month. At the time of this application the parties had €139,000 in a joint account, which was the balance remaining from € 150,000 awarded to the husband as a result of a s 117 challenge against his father's estate. It was alleged that the wife had dissipated those monies, without consent, and a balance of € 40,000 remained. The wife sought the family home and farm to be transferred into her name, so that everything could "*be left for the children*". Counsel for the applicant asked the court to note that the wife had secured a barring order against one of those children.

### **Orders**

Having considered the evidence the court made the following orders; A decree of judicial separation under s. 2 (1)(f). The 44 acres of farmland were ordered to be sold, the parties directed to agree on a reserve. The court directed that the single farm payment remain in joint ownership until the end of the year, and be transferred to the wife until the lands are sold. The Net proceeds of lands were to be divided 50/50. The family home was to be transferred to the wife. €75 maintenance per week was ordered for the dependent child. The applicant was ordered to pay the life insurance and health policy and € 100 per week spousal maintenance until the farmlands are sold. Counsel for both parties sought a stay on the orders. A stay was refused by the court, which directed that the net proceeds of sale were to be held by both solicitors pending an appeal.

## *9.4 Family Business*

### *Disputed "ownership" of a family business*

The courts were often asked to determine who should get what in relation to a “family business”, which included formal partnerships, de facto partnerships and limited companies.

Case ref; C642 February 2011<sup>293</sup>. In her defence the respondent wife claimed an equal share in the “family business” a limited company that she and her husband had started together. The application for divorce was filed in 2009, at the time the parties were both actively involved in the business as “working” directors, however the brother of the respondent commenced working in the company to protect his sister’s interest. The applicant and respondent were the only directors of the company and owned the shares equally between them. On evidence, the applicant submitted that the business was “toast”, the directors were owed € 204,000, turnover for 2009 was €1.2 million with a small net profit, but in 2010 the business made a loss after costs. He submitted that the poor performance of the company was due to the effects of the recession. Counsel for the wife submitted that the demise of the company was due to the actions of the applicant who registered as a sole trader in 2010, and commenced to trade in a competing business 30 miles away from the “family business”, using machinery and equipment belonging to the company. The court adjourned the matter and directed the applicant to furnish financial records of his new business.

### ***Corporate veil cannot be pierced***

Case ref; C496 July 2010. The parties were married in 1982 and separated in 2004. A Family business was at issue, a company trading in the entertainment industry, which had a 9.5% holding in another company, which held the physical assets of the business. The applicant wife sought a 50% division of all assets including the family home and the “family business”, she sought 50% of the land and assets of the business or an equivalent cash value. Counsel for the respondent submitted that the wife had no hand, act, or part in the business for the previous 15 years, that the business was indeed a “family business”, that of the family of the respondent who had inherited the business from his father, and that should the court determine that any equity were to be apportioned to the wife, this could only be done by way of a transfer of certain shares owned by the husband in the two companies. Furthermore, he submitted that the corporate veil could not be pierced to force the sale of the assets of a limited company, on the divorce of one of its shareholders. The company accounts submitted to the court showed that the company was experiencing trading difficulties, it had been struck

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<sup>293</sup> See also chapter 8, section 8.4.1

off by the companies Registration Office, and had a current value of approximately € 80,000. The court ordered that the family home be sold with joint carriage of sale, the net proceeds to be held on joint deposit. Liberty was given to apply when this had been carried out. The court stated “*I am not granting a divorce as “proper provision” has not yet been made.*”

## 9.5 Farm

### ***Part-time farmer, land leased from father***

Case ref; C95 October 2008. The parties were married in 2000 and had one child. The marriage ended in 2007. The applicant wife sought full ownership of the family home, located on a farm, with the second house on the property to go to the husband. The respondent submitted that he leased the farm from his father and his income comprised of jobseekers allowance, single payment premia and income from car sales and repairs. Judicial separation was granted and it was ordered that the husband retain the family home, to ensure access to the farm, that the smaller house go to the wife, that a lump sum provision of € 50,000 be made by the husband to the wife, and child maintenance was set at € 130 per week.

### ***Enforcement of agreement to divide valuable land***

Case ref; C102 October 2008. The parties were married in 1978 and entered into an agreement between themselves in 2007 with the assistance of their solicitors. The applicant wife sought to enforce that agreement or have orders made to reflect that agreement. The agreement was that the husband would remain in the family home and the farm valued at €3.5 million would be partitioned and divided between them. The husband also agreed to pay € 100 per week maintenance for the two dependent children, no maintenance was paid. The wife stated she was completely dependent on State benefits in the amount of € 245.80 p.w. The husband had lost his job and his only income was jobseekers benefit. The court ordered that the terms of settlement be made a rule of the Court, maintenance to be paid through the District Court with liberty to seek a motion to commit.

### **Case note; C691 February 2011 – [Dispute regarding best price for land]**

#### **Facts**

The applicant wife sought direction from the court post judicial separation. Orders were made that 55 acres of the farmlands be sold and the net proceeds would be paid to the applicant wife. The entire farm comprised of 280 acres in six divisions, divided by three major roads and a minor road. One of these blocks comprised of 55 acres, and was ordered to be sold. Furthermore it was acknowledged that the respondent's mother was the co-owner of the entire farm, and had agreed to co-operate with the sale. € 50,000 from the net proceeds were to be paid to the bank, who had a charge on that folio, the balance of the net proceeds to be divided 50/50 between the applicant wife and her mother-in-law. At issue, was the price being achieved for the land. The respondent had an offer of € 4,000 per acre he wished to accept from a neighbouring farmer, the applicant submitted that this was not a best price. An auctioneer specialising in the sale of farmland gave evidence. He submitted that the lands were excellent and suitable for farming, and based on comparable sales in the area believed that the lands should be valued at € 7,000 per acre. His recommendation was that the lands would achieve best price at auction.

### **Orders**

The court disagreed with the recommendation of the expert, stating that putting these lands up for auction was risky. It was ordered that the lands be re-advertised in a national paper and on-line, and in default of an offer within 3 months, the lands must be sold to the neighbouring farming at € 4,000 per acre.

### *9.6 Value of homemaker*

The Constitution protects the role for women in the home Article 41.2.1., "*in particular the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.* Furthermore, in Article 41.2.2., the State defends the right of the mother not to seek work outside the home, "*The State shall...ensure that mothers are not obliged by economic necessity to engage in labour to the neglect of duties in the home*". The court uniformly gave due consideration to the role of 'homemaker', where the mother did not work outside the home and cared for the children. However, where that role was carried out by the father, no such consideration was given.

### ***Mother as 'Homemaker'***



Case ref; C817 March 2011<sup>294</sup>. In a significant asset case where there were shares to the value of € 450,000, an unencumbered family home valued at € 475,000 and savings of € 90,000, submissions were made to the court about how the division of assets should be approached. The applicant wife worked part-time earning € 16,000 net per year, but had spent several years at home looking after the children as a “stay at home Mum”. The husband had a net basic salary of € 86,000 with bonuses. Counsel for the applicant sought a 50/50 division of all assets and lump sum spousal provision, Counsel for the applicant argued that the wife had not contributed equally to the acquisition of those assets. The parties had been married for 20 years and the three dependent children resided with the mother. The court set out the criteria it would use to evaluate contributions;

*“My approach is that I would consider the length of the marriage, whether there were children, how those children were cared for. While the wife should be brought to a place where she can provide for herself, her role as a “homemaker” must be acknowledged, not by way of lump sum, but by ongoing maintenance, but not indefinitely. I would think three more years would suffice if 50% division of assets takes place.”*

The case was adjourned briefly and the settlement terms were ruled. The parties agreed that maintenance of € 500 per month would be paid for each child, and € 300 per month spousal maintenance. The respondent was to be responsible for 2/3 expenses for the children, which were to be vouched. The family home was to be transferred to the wife. The applicant would keep all the shares, and 50% of the husband’s pension would be assigned to the wife, from date of inception.

### ***Father as ‘Homemaker’***

Case ref; C1006 July 2011<sup>295</sup>. The parties were married in 1998. There were two children of the marriage, aged eight and five. The wife worked at a senior level in the banking sector. The husband had a well paying job, earning € 700,000 net over a ten year period. He was made redundant in 2008, when he was 49, and was unable to secure new employment. The parties owned three properties including the family home. The three properties ranged in

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<sup>294</sup> See also Chapter 3, section 3.7.1

<sup>295</sup> See also pg 74

value between €550,000 and € 850,000, the two investment properties were in negative equity. The husband had € 255,000 left in savings from his redundancy lump sum of €550,000, the wife had € 133,000 in savings. The income of the wife was € 5,589 net per month. The husband contributed € 2,300 a month from his savings and the wife contributed € 1,550, to top up the joint account. The wife claimed the monthly costs to run the household were € 7,888, including the mortgage. On cross examination it transpired that the additional expense, although stated in the wife's affidavit of means, had not yet been incurred. The wife had 4 pensions, the combined value to date being € 367,000. The husband's pension was valued at € 415,116.

The respondent discharged the housekeeper and nanny and became a full-time house husband. In detailing the work of a 'homemaker', he testified that he would get up at 6.30 a.m., get the children up and dressed, prepared breakfast and made their lunches and brought them to school. He would then tidy the house, do laundry, ironing and some gardening, and do early preparations for dinner. He would collect the children from school, bringing whichever child had extra-curricular activities to and from that event. He would oversee homework, put the dinner on the table, get each child to bed and clean up after dinner. From Monday to Friday he estimated that he had free time of approximately  $\frac{3}{4}$  of an hour per day. The applicant wife would leave the house each morning before 7 a.m., never eating breakfast and most days came home around 8 p.m. Her job often took her away for days at a time. Counsel for the respondent submitted that while his client was actively seeking some form of work there was little likelihood of securing employment at his age.

Counsel for the respondent wife argued that there is a presumption that a wife should receive 50% of the marital assets, however in this instance the wife contributed significantly more financially to the family home whereby her claim is closer to 70%. Counsel submitted that the wife did not anticipate that the respondent wouldn't return to the workforce and believed that he chooses not to seek employment "*indulgently wishing to spend 24/7 with the children*". The applicant wife sought sole right to reside in the family home with the children, and an equitable ownership of 70% to be realised when the youngest child was no longer a dependent. She also sought € 125,000 of the respondent's savings as lump sum maintenance provision for the children, who would live with her, and the husband to take over the mortgages on the two investment properties, subject to the consent of the lenders or undertake to discharge the mortgages as they fall due, to be dealt with on divorce.

## Orders

The court reviewed the circumstances of the parties, *“the de facto position that I am concerned with is that one party has effectively no income, the other party has a good income and a secure position. This creates a problem as no matter how I look at the figures, serious lifestyle adaptations will have to take place here. The prospect of both parties continuing to live under the same roof for the foreseeable future is no prospect at all”*. The court granted a decree of judicial separation under s.3 of the 1989 Act. The court ordered the sale of the family home, under s.9 of the Family Law Act 1995, and the sale of one of the investment properties. The combined sale proceeds to be used to discharge both mortgages, and the net proceeds to be divided 50/50 between the parties. One auctioneer was to be appointed and *“an element of common sense”* was to be employed on setting the guide and reserve price. The applicant was ordered to redeem € 100,000 from a prize bond fund, € 75,000 of which was to be set aside to provide maintenance for the children. The applicant and respondent were each ordered to pay € 25,000 into an educational fund for the children. The collection of paintings, and the contents of the wine cellar, were to be sold, and divided 50/50. No order made as to jewellery or down-sizing vehicles. There were no orders regarding pensions. The parties were directed to agree parenting arrangements based on availability of the parents. Mutual orders s.14 and s. 15 of the Family Law Act 1995 were made, and liberty was given to make further application to the court. A decree of judicial separation was granted, and there was no order as to costs.

## 9.7 Conclusion

The majority of the cases coming before the court involved limited financial means and significant debt. The starting point for all judges was that the marital assets, of a long marriage, should be divided on a 50/50 basis. The Circuit Court deemed the role of ‘homemaker’ and ‘breadwinner’ to be equal contributors to the marital assets, where the ‘homemaker’ was the mother. ‘Homemakers’ were deemed to be women who were or had been full-time carers for their children, not working outside the family home. Their contributions were regarded as equally valuable to the family, in line with Abbot J.’s view in

N. V N.<sup>296</sup> However, reflecting the Constitutional protection for the role of women in the home<sup>297</sup>, the court did appear to discriminate where the ‘homemaker’ was male, and did not appear to value the contribution of a father who chose to stay at home to care for the children on a full-time basis. In one case the argument made to the court suggested that the ‘breadwinner’ who was the mother, should also be considered the ‘homemaker’, with greater entitlements to marital assets. In terms of division of any marital assets each case turned on its own facts, however, a consistent trend was noted where the mother was the primary carer and resided in the family home, the court generally would not consider the sale of the family home until the children were no longer dependents, even where that property was mortgage free. This approach runs contrary to the views stated by McGuinness J. in O’L. v O’L. where he indicated that “common sense” dictate that the family home be sold so as to provide accommodation for the wife and “something of a deposit” for the husband towards the purchase of his own home<sup>298</sup>. A right to reside in the family home for one spouse can be made under s 10 of the 1995 Act and s 15 of the 1996 Act, for a period of time, providing for the sale of the family home subject to certain conditions, such as when the children have all reached the age of 18 or are no longer dependents. The over-riding consideration of the court, which was consistently followed in agreements negotiated at the courthouse, was the need to provide for dependent children.

A family home is defined in the Family Home Protection Act, 1976 s 2(1) as;

*Primarily a dwelling in which a married couple ordinarily reside. The expression comprises, in addition, a dwelling in which a spouse whose protection is in issue ordinarily resides, or if that spouse has left the other spouse, ordinarily resided before so leaving.*

The 1995 Act and the 1996 Act adopted this definition with some modifications.<sup>299</sup>

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<sup>296</sup> N. V N. [2003] HC [unreported]

<sup>297</sup> Article 41.2.1

<sup>298</sup> O’L. v O’L. [1996] 2 Fam LJ 63

<sup>299</sup> s 54 (1) amends s 2 of the 1976 Act.

Property adjustment orders can be made on judicial separation or divorce under s 9 of the 1995 Act and s 14 of the 1996 Act. Property adjustment orders include not just the family home, but any property of the marriage, moveable and immovable. Such orders could be made in relation to any asset such as holiday homes, investment properties, shares, stocks, valuable art and antiques and cars. The single greatest difficulty facing the court where the family home, investment properties or land was to be sold, was the issue of valuation. Valuations submitted by ‘experts’ were of no real assistance to the court where no comparative data was available. There was no consistency between professional valuers who gave evidence, and litigants appeared to have unrealistic expectations of the Irish property market.

## 10 Chapter 10 Discovery and Evidence

### 10.1 Voluntary Discovery/ Rules of the Circuit Court

Discovery is a pre-trial process which is used to prepare either side for the hearing of the matter. Statutory obligations are imposed on both spouses to provide “*such particulars of his or her property and income, as may be reasonably be required for the purpose of the proceedings*”.<sup>300</sup> These particulars are detailed in a sworn affidavit of means, which is accompanied by copies of all bank statements, bills, visa cards etc. Where a litigant feels that the information provided in the affidavit of means is not sufficient, then they may pursue the issue of discovery and seek relief from the court if required.

The issue of discovery has been addressed in family law proceedings in a number of High Court cases. A nullity case<sup>301</sup> which permitted limited discovery in relation to medical treatment received to the years prior to the marriage, was appealed to the Supreme Court where O’ Flaherty J. stated;

*...while family law matters have to be treated with special care and decorum, nonetheless the rules of court apply in family law matters as they do elsewhere. The law is not in doubt...all documents relevant to matters in issue have to be disclosed.*

The principles enunciated by O’ Flaherty J. were subsequently accepted and applied by O’ Neill J. in *F.P. v S.P.*<sup>302</sup>, where he referenced the judgment of O’ Flaherty J.

*I have no doubt that the Circuit Court judge imposed the restriction he did in order to restrict to the minimum the intrusion into the privacy of the respondent, but in imposing that restriction he may well have impermissibly cut down on the range of discovery to which the applicant was legitimately entitled...applying the principle thus stated to the case would seem to me to*

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<sup>300</sup> S. 38(7) of the Family Law Act, 1995, and s. 38(6) of the Family Law (Divorce Act, 1996

<sup>301</sup> *M.O’R v C.L.* [1998] IESC 41

<sup>302</sup> *F. P. v S.P.* [2002] HC 17 December [unreported]

*lead to a conclusion that the applicant/respondent was entitled to discovery of the material...*<sup>303</sup>

In cases observed, 12.5% of all motions pending judicial separation, and 43% of all motions pending divorce, were seeking discovery orders on the basis that full disclosure had not been made. The court uniformly approached such motions, requiring an up-to-date letter, setting out the specific documents sought that had not been provided.

#### ***Failure to comply with discovery order***

Case ref; C192 February 2009. The applicant husband in a divorce case filed in 2006, sought voluntary discovery of a document known to be in the possession of the wife. She failed to produce the document and a motion for discovery came before the court in October 2008. The court granted an order for discovery. The matter came before the court four months later, as an application for direction, as the wife had still failed to provide the document. It was submitted that the wife had that morning produced the requested document. Counsel for the applicant sought costs, costs were reserved.

#### ***7 categories of documents outstanding***

Case ref; C201 February 2009. Counsel for the applicant submitted a notice of motion for discovery in July 2008, that motion was adjourned four times and came before the court in February 2009. Counsel for the applicant submitted that there were seven categories of documents required from a five year period and proceeded to list the various documents requested set out in a letter from the applicant's solicitor. The judge stated that the standard period is three years prior to the institution of proceedings, not five, and where discovery is outstanding that an up-to-date letter is required setting out what documents were requested and what remains outstanding.

#### ***“No fishing”***

Case ref; C159 December 2008. The applicant wife filed a motion for discovery against her husband for failure to disclose his total earnings, she alleged that he had taken four holidays in 2008, and did not believe that he had inherited money from his grandmother. The respondent husband stated that he had been a PAYE worker all of his working life, and questioned why she was seeking discovery. He testified that he had always worked at the

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<sup>303</sup> F. P. v S.P. [2002] HC 17 December [unreported] 29-30

same job, he was involved in no other business and had no other source of income. The Judge responded “*no fishing, discovery in a case like this is just a trawl*” and refused the application for discovery.

### ***Discovery order granted***

Case ref; C515 March 2010. Direction was sought from the court in relation to discovery and the matter was listed for a day’s hearing. At issue was the position of the respondent husband’s solicitor, that the discovery being sought was unreasonable and unusual. The applicant wife was seeking access to the company records of the respondent’s company of which he was the majority share-holder and Managing Director. She was seeking copies of all VAT returns, copies of all invoices issued, bank statements and loan applications to AIB bank. The court made an order that these documents be made available for inspection within 3 weeks and permission to copy the documents on the premises. The respondent to provide copying facilities, the applicant to provide the photocopy paper. The matter took 20 minutes.

## ***10.2 Use of Accountants***

Accountants gave evidence in court in five cases observed, however accountants were frequently used during the discovery and case preparation process, to forensically examine accounts provided for business activities.

### ***“Accountants not ready”***

Case ref; C473 May 2010 The respondent wife sought a further adjournment in a judicial separation application on the basis that her accountants were not yet ready, reports had not been finalised. The case had been filed in 2007, and counsel for the applicant said that this was the fourth adjournment sought by the respondent, on the other occasions ill-health was pleaded. Counsel asked the court to note that the parties still reside together in a physically partitioned situation, both were suffering from stress, discovery had been ongoing since 2007. The respondent ran the accounts for their joint enterprise and had to date not complied with discovery sought. The respondent’s counsel then indicated he had just been instructed that he and the solicitor were being taken off record. The court adjourned the case to the next list.



***“Accountant determines Revenue liability”***

Case ref; C920 February 2012. The parties were married in 1986, there were no children of the marriage. In a judicial separation application the applicant wife submitted that the separation agreement they entered into in 2003, when the marriage ended was never performed. The respondent was to purchase a house for the wife, in return for which the wife would sign over the other properties which were in her sole name, but were acquired by the respondent. Neither party carried out their part of the agreement, and the court determined that the agreement was void for non-performance. An accountant gave evidence for the husband that the current liability to the Revenue Commissioners was € 170,000 for the enterprise that both parties appear to have run together. They were involved in three joint enterprises a pub with Revenue debts of € 100,000, now closed, a grocery shop with unknown debts, now closed and a bookmakers. The lease for the pub and the license for the bookmakers venture were both in the wife’s name. The accountant submitted that on-line gambling had a devastating impact on the “bookie” business, net profits for the previous year were € 40,000. The court indicated that the accountant be appointed a joint forensic accountant for the parties, to seek to establish the liability of the parties for joint business debts, and to determine the liquidity of the bookies. A decree of judicial separation was granted, property adjustment orders in abeyance pending the forensic accountants report.

***10.3 Evidence; Hearsay/ Facebook, Bebo/ Texts/ Recordings (Twitter)***

The most common form of evidence that litigants sought to submit were text messages and voicemails left on mobile phones. This evidence was usually submitted to prove that the conduct of a litigant should be taken into consideration. Email communications and Facebook posts were the second most common. All evidence submitted from electronic sources, including social media, was accepted without question. The court showed little awareness of the potential to tamper with this form of electronic communication. Proof as to the authenticity of electronic communications was not sought in any case.

Hearsay was common in hearings observed. Some judges allowed a litigant to submit hearsay, other judges quickly admonished a litigant and asked them to refrain from telling the court what someone else said.

Evidence that was acquired without the consent of the other party was usually admitted, such as private email communications, even where questions arose as to how such evidence was required – a view supported by White J. in *P. v Q.*<sup>304</sup>

*A court should always be reluctant to admit evidence or approve discovery, which is tainted with illegality, but that is not to say that on all occasions where illegality is suspected or found, that the evidence so obtained is not admissible. This is particularly so when dealing with the welfare of a child.*

### ***Email evidence***

Case ref; C108. Applicant wife sought discovery, on divorce, in relation to the company that her husband said he worked for occasionally under contract as a consultant overseas. The court directed that he disclose all relevant documents in relation to that work. The documents he provided, which were emails and attachments from the company, purported to show that in a three year period he earned nothing from that company, and was given no travel allowance. The wife submitted that she used his email address and password to print out 99 emails and attachments, only one of which was in common with the documents disclosed by her husband. The documents she provided showed that he had received 65,000 miles of air travel expenses covering contracts in five countries during that three year period. Counsel for the husband claimed privilege over these documents, the court determined there was no issue of privilege as the husband had given his wife access to his email account earlier in the marriage.

### ***Social media evidence***

In this case the court showed no understanding of how Facebook and Bebo work. The evidence submitted did not indicate that the father was in breach of court orders, indeed the evidence showed that the father was not in any way involved in the appearance of photographs on his son's Facebook page.

Case ref; C843 May 2011<sup>305</sup>. Print outs of Facebook pages and Bebo pages were submitted as evidence that an order of the court was being breached. The order stipulated that the father who was the primary carer of his teenage son would ensure that the son had no contact with

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<sup>304</sup> *P. v Q.* [2012] IEHC 593, [unreported]

<sup>305</sup> See also pg 98

the maternal grand-father who was a convicted paedophile. The “evidence” submitted showed a photograph that had been “shared” by cousins, the grand-father was included in the group photo, a family wedding event. It was submitted that this was evidence of direct contact between the maternal grand-father and the son. The grand-father did not have any social media page and had not posted the photograph. The court admonished the father for “allowing” the contact.

### ***Facebook posts refute evidence given by mother***

Case ref; C641 May 2011. In a re-location application, the applicant mother who had already moved to America, submitted on the stand that she was in a full-time pensionable job for the previous 12 months, and was engaged to be married. She indicated that she had returned to Ireland with the child for the hearing of her re-location application as the respondent was “threatening” her with the Hague Convention. She testified that the maternal grandmother and grandfather also resided in the U.S., and cared for the child while she was at work. Counsel for the respondent indicated the respondent sought an order prohibiting the removal of the child from the State. Counsel submitted Facebook evidence on his laptop, where Facebook pages had been saved from the Facebook account of the applicant. On it there were posts that she had lost her permanent job and was working two part-time jobs in bars. Further posts and photographs were produced that indicated excessive alcohol consumption was a regular part of the weekly lifestyle of the applicant. Her “status” indicated single, “interested in men or women” and a post declared the end of her engagement some months previously, with information about several “one night stands” posted since that time. The re-location application was refused.

## ***10.4 Conclusion***

Circuit Court practice directions require solicitors to provide a certificate of readiness to confirm that financial information has been up-dated and exchanged, requests for discovery have been attended to, valuations have been carried out, and if necessary, accountants have met and agreed reports. The sanctions for failure to furnish or vouch an Affidavit of Means are set out in the rules, the most commonly used sanction being the the making of an Order for Discovery. The sanction for failure to comply with this order is Attachment and Committal, however, in no case was this sanction implemented, and while the imposing of

costs was also a possibility, costs were rarely awarded in any case. Inferences were drawn by the judges where Affidavits were inadequately completed and/or vouched, particularly where the litigant in question was self-representing.

It is a finding of this research that Affidavits of Means were frequently inadequate or contained serious inconsistencies, which rendered their function moot. The majority of discovery orders sought were on the basis that full discovery had not been made.

The common use of social media, text, tweets, email and voicemail communications as evidence, proved a valuable source of information for the court, but raised questions about the ability of the court to authenticate these sources of evidence. All such sources of evidence were accepted without question and were often persuasive in terms of the findings of the court.

*The rapid evolution of communication technology has the potential to empower people and can greatly promote freedom of speech. Balancing the reputational rights of the individual with the free expression of thoughts and ideas assumes even greater importance in this context.<sup>306</sup>*

Social media and electronically stored evidence must be subject to the same basic evidentiary rules, and their probative value must outweigh their prejudicial effect. I would suggest that rules or guidelines be adopted that ensure that such evidence is properly authenticated. This form of evidence is open to falsification or fabrication, and should be used with caution.

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<sup>306</sup> Harding, T. (2013) The Challenges of Regulating Social Media, The Bar Review 1, pg 3

## **11 Chapter 11 Litigants**

### *11.1 Conduct in court/ animosity, anger, frustration, emotive.....*

Where litigants were represented, they sat in the court-room several rows behind their counsel and solicitor. The solicitor sat with his or her back to the judge, and counsel sat facing the solicitor and the judge. During a trial, litigants often became distressed, or agitated, or angry, as they heard testimony being given by the other spouse. To communicate with counsel, a set procedure adopted by practitioners had to be followed. The litigant would attempt to catch the attention of the solicitor, the solicitor would go to the litigant and take instruction *sotto voce*. The solicitor in turn would seek to brief counsel, often while counsel was on their feet. The court was often irritated by this process, especially where the instruction process was disruptive to the trial. Judge 1, visibly changed his approach to the case if a male litigant became agitated; that conduct in the court-room impacted on the disposition of the judge, and ultimately the outcome of the case. In a case where conduct was being argued, and the judge sought intimate sexual details of what the wife allegedly witnessed, where her spouse and another woman were “*caught in flagrante*”, the husband became visibly outraged and tried to speak with his solicitor. The court told him to stay in his seat, and to stop interrupting the proceedings. Mis-interpreting the man’s distress, the court said, “*you seem to be finding this amusing, I am speaking about your conduct, show some respect to counsel for your wife while he is on his feet*”.

Behaviour patterns were apparent along gender lines. Female litigants, when distressed usually cried. If they sat in the court-room, women commonly sat still, and lowered their heads into their hands. Female litigants cried most frequently when on the stand. Displays of anger by women were seen in only two cases observed, that anger being directed towards the opposing counsel. Male litigants, when distressed generally had great difficulty sitting still, either in the court-room or on the stand. Male litigants, who became very agitated, often sweated profusely and became red in the face. When on the stand many men became combative with the opposing counsel, particularly if that counsel was male. Two men cried during evidence. One man, where he was the applicant for a consent divorce, and the second man cried when the court indicated that it did not believe his testimony that he had been assaulted on several occasions by his wife.

### ***Antipathy towards opposing counsel on cross examination***

Case ref; C460 February 2010. On divorce, in January 2009, a child maintenance order and a lump sum provision order were made to the respondent wife. The husband agreed to sell some property to satisfy the lump sum agreed. Subsequently, the husband's company became insolvent with debts of € 3 million, he no longer had an income and ceased maintenance. The husband had re-married, had two young children, and was in ill health. Counsel for the applicant stated he and his new family were being supported by his elderly parents, and his new wife had found work. It was not disputed that the husband had assets in terms of land, however, the debts of the company were personally guaranteed and charges were secured against the property before it could be sold. The respondent was representing herself, she stated she had no income, two small children, no maintenance from the applicant and was "living off charity". She became distressed, and began to argue strenuously with the applicant's counsel. She clearly did not understand the law, and saw counsel as being personally involved in the case.

#### ***11.1.1 Isaac Wunder Order***

Judge 7 advocated the use of an Isaac Wunder<sup>307</sup> order in certain circumstances;

*"...there were two categories of lay litigants, those who were forced to self represent due to economic circumstances, and the jihadists who become obsessed with the court process, coming frequently to court through multiple applications, who have become embittered about what they perceive as injustices or wrongs wrought against them, often believing there is some form of conspiracy"*<sup>308</sup>

Case ref; C1063 October 2011<sup>309</sup>. The parties were married in 1998, the marriage ended in 2010, and difficulties arose with access to the two children. The applicant mother secured a safety order against the respondent on judicial separation. The respondent subsequently filed two motions for safety orders against the wife, a motion to enforce access, and a motion to

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<sup>307</sup> Named after the plaintiff in *Wunder v Irish Hospitals Trust*, Supreme Court unreported, Walsh Haugh and O'Keefe JJ., 24 January 1967

<sup>308</sup> Judge 7 Judicial Interviews Appendix B (i)

<sup>309</sup> See also chapter 6, section 6.4

attach and commit the mother. On the hearing of the fourth motion, the court issued an Isaac Wunder order.<sup>310</sup>

The effect of an Isaac Wunder order is to restrain a litigant from making any further applications without the leave of the court. This order did not originate in a family law case, it was a libel suit between the plaintiff Wunder and the Irish Hospitals Trust in 1967. The defendant sought to have all further proceedings stayed on the grounds that they were *inter alia* frivolous, vexatious and an abuse of power. One of the fundamental rights of a citizen is the right of access to the courts, a personal right under Article 40.3 of the Constitution. Given the access to justice issues that currently exist in the Circuit Courts, in family law proceedings, the use of an Isaac Wunder order would seem to be a wholly inappropriate order, and may constitute a breach of Article 6 of the European Convention on Human Rights.<sup>311</sup> As stated in *Tolstoy Miloslavsky v the United Kingdom*, by the European Court of Human Rights;

*“The Court reiterates that the right of access secured by Article 6(1) may be subject to limitation in the form of regulation by the State. In this respect the State enjoys a certain margin of appreciation. However, the Court must be satisfied, firstly, that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the essence of the right is impaired. Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”*<sup>312</sup>

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<sup>310</sup> Wunder v Irish Hospitals Trust, Supreme Court, unreported, Walsh, Haugh and O’ Keefe JJ. 24<sup>th</sup> January 1967

<sup>311</sup> Article 6(1) provides: *“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society...”*

<sup>312</sup> [1995] 20 E.H.R.R. 442 at 475

The Isaac Wunder order, in all the circumstances, may also conflict with the proportionality test as enunciated in *Heaney v Ireland*<sup>313</sup>, that the means chosen to pursue a legitimate objective must impair the right as little as possible.

### *11.2 Who is fighting and why*

Prolonged battles over property and children were hallmarks of the cases observed. Lengthy battles over property that over-lapped into the recession commencing in 2008, meant that there was very little to fight over. Prolonged battles over children however, seemed capable of greater duration, with little or no regard for the impact on children.

#### ***Dispute over auctioneers***

Case ref; C1209 The applicant wife sought the direction of the court, post divorce. Orders had been made for the appointment of a named auctioneer and the parties were to be guided on the selling price by that auctioneer. Subsequently the wife was not happy with the auctioneer appointed, and the husband refused to co-operate with access to the property. Those auctioneers declined to act for the parties and no new auctioneer could be agreed. The respondent believed that the wife had a personal relationship with an auctioneer she proposed, the applicant believed that the auctioneer he wished to appoint wouldn't look after her interests. The order to sell the house was made in early 2010, the value had significantly decreased, very little equity remained in the property. Counsel for the respondent asked the court to take note that this was the 62<sup>nd</sup> time his client had appeared in court related to Judicial Separation and divorce proceedings. The court ordered that the respondent vacate the family home within two weeks and appointed the auctioneers of his choice. Counsel for the respondent sought a stay on that order pending appeal, the court responded "*if I give you a stay are you going to prosecute expeditiously? I have made my order you can seek your stay elsewhere.*"

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<sup>313</sup> [1994] 3 I.R. 593



### *11.3 Non-nationals/ language barrier/ religious, cultural conflict*

A significant number of litigant were non-nationals, language difficulty was the greatest impediment to engaging in the process, particularly where the party was a lay litigant.

#### ***Spanish respondent***

Case ref; C51 October 2008<sup>314</sup>. In this case the husband was a Spanish national, a full-time student studying English. The wife, a South African national, had applied for nullity, his application was a counter-claim of judicial separation. The Legal Aid Board made an application to come off record for the husband, who wished to represent himself. This was granted. The wife gave evidence, and was cross-examined by the husband. The husband also gave evidence. The husband had significant language difficulties, his English was very poor and it was evident that he did not understand the questions put to him by counsel or by the judge. Orders were made concerning division of property, passports and access. The husband did not appear to understand the discussions between the judge and counsel for the wife, nor did he appear to understand the orders.

#### ***Chinese applicant***

Case ref; C384 May 2009. In an application for divorce the applicant wife, a Chinese national, was represented by legal aid. The respondent, also Chinese, did not attend and was not represented. When called to the stand to give evidence it was clear that the applicant could not understand, or speak English. It could not be determined if she was Christian, so she was asked to repeat a general oath, which she was unable to do. The applicant was unable to answer any questions put to her by the court, and read some pre-prepared sentences to submit the basic evidence. It was unclear if her legal aid team spoke Chinese, as no effort was made to communicate with her in her own language.

#### ***Indian respondent***

Case ref C792 March 2011<sup>315</sup>. The respondent wife was an Indian national who spoke no English. She sought the discharge of a barring order against her. The court allowed a member of her family to attend as an interpreter. When the court posed a question, a lengthy

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<sup>314</sup> See also chapter 3, section 3.3.2, and chapter 9, section 9.1.2

<sup>315</sup> See also Chapter 6, section 6.1.4

discussion ensued between the respondent and her interpreter. The court cautioned that the role of interpreter was to directly interpret what was said, not to engage in a discussion.

### ***Polish applicant***

Ex Parte application February 2012. A Polish national presented in court seeking “declaration of parentage”. She was a lay litigant, spoke no English and brought a friend with her to act as interpreter. The applicant submitted, through her interpreter, that she had married her husband in Poland in 1998. She submitted that she left Poland 18 months before the child was born. She sought a declaration of parentage in order to pursue the father for maintenance in Poland. The court responded, “ *you have produced no marriage certificate, no DNA evidence, no explanation as to how this baby could be the husband’s if you left Poland 18 months before the baby was born, you have not explored all avenues.* The application was refused.

### **11.3.1 Lay litigants**

*“The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve... unrepresented litigants – or self-represented litigants as they are sometimes called – impose a burden on courts and work their own special forms of injustice. Trials and motions in court are conducted on the adversary system, under which each party presents its case and the judge acts as impartial decider. An unrepresented litigant may not know how to present his or her case. Putting the facts and the law before the court may be an insurmountable hurdle. The trial judge may try to assist, but this raises the possibility that the judge may be seen as “helping”, or partial to, one of the parties. The proceedings adjourn or stretch out, adding to the public cost of running the court. In some courts, more than 44 per cent of cases involve a self-represented litigant”<sup>316</sup>*

**The Right Honourable Beverly McLachlin P.C. Chief Justice of Canada**

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<sup>316</sup> Right Honourable Beverly Mc Lachlin P.C. Chief Justice of Canada, (2007), ‘The Challenges We Face’, presented at the Empire Club of Canada, 8 March [online]  
[http://www.0avocat.ca/portal/en/ArticleView.php?article\\_id=26](http://www.0avocat.ca/portal/en/ArticleView.php?article_id=26) [accessed June 10 2011]

It is internationally accepted that litigants should be able to avail of legal advice, whether that be provided in the form of free legal aid or legal aid resources; wider access to justice is a problem faced by citizens in many countries and is highlighted in the European Commission Green Paper, April 2002<sup>317</sup>, on alternative dispute resolution in civil and commercial law. The Green paper outlines three grounds for the increasing problem of access to justice in Member States; (1) the volume of disputes before courts is increasing, (2) proceedings are becoming more lengthy, and (3) the costs involved in such proceedings are increasing, grounds which were mirrored in the 1996 LRC Report<sup>318</sup> on Family Courts. While self-representing is a reasonably new development in Ireland, my research shows that a significant percentage of applicants or respondents are without legal representation in Circuit family proceedings. We are following patterns already firmly established in other jurisdictions, by 2010, in the Ontario Court of Justice, up to 70% of litigants are self-represented.<sup>319</sup> In California over 70% of the family law cases have at least one party unrepresented, referred to as *Pro se* representation, acting “on one’s own behalf”<sup>320</sup>.

In every court lay litigants were observed to be disorientated and confused from the moment of the first ‘call-over’ on any given day. Practitioners familiar with the routines and procedures of the court would suddenly move in a group to the court when ‘call-over’ commenced, with some lay litigants and family and friends trailing in their wake. The list would be called out by the Court Registrar, usually quite quickly and unamplified, and lay litigants often missed their case being called. This could result in the case being struck off, adjourned or let ‘stand’ until the second ‘call-over’ later in the day. There was no set pattern

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<sup>317</sup> Commission of the European Communities [2002], Green Paper, *on alternative dispute resolution in civil and commercial law*. Brussels, 19 April, COM 196 final

<sup>318</sup> The Law Reform Commission, (1996) ‘Report on the Family Courts’, LRC 52-1996

<sup>319</sup> Long S.C., J. (2010) ‘The Family Court in Ontario’, presented at the Canadian- Irish Family Law Conference 2010, Carton House Maynooth, Ireland, 9 October.

<sup>320</sup> Hough, B. (2010) ‘Self-represented Litigants in Family Law: The Response of California’s Courts’. California Law Review [online] <http://www.californialawreview.org/articles/self-represented-litigants-in-family-law-the-response-of-california-s-courts> [accessed 15 May 2011]

in how the court approached a list<sup>321</sup>, which meant that lay litigants had no awareness of when their case would be called. Lay litigants were essentially uninformed participants in the process.

Only two of the judges observed assisted lay litigants to understand the process. Where there was one lay litigant, it was common for the court to address only the counsel for the represented party, often engaging in very brief legal discussions that appeared to be indecipherable to the lay litigant. Following this kind of brief discussion, orders were often quickly made and the matter concluded before the lay litigant realised what was happening. The most frequent sentence uttered by a lay litigant was, “*I don’t understand*”. The majority of judges observed were intolerant if not intensely irritated by lay litigants<sup>322</sup>. The presence of a lay litigant created additional time pressure on a court.

When questioned by the court as to why a litigant was not legally represented, the most common response was the inability to afford legal representation. When the court asked if the litigant had explored legal aid, the common response was ineligibility or significant delay of several months before legal aid could be awarded. Where there were dependent children and access issues, litigants indicated that they were forced to self-represent in order to avoid losing contact with their child or children.

### ***Incorrect paperwork***

Case ref; C245 February 2009. The applicant husband, a lay litigant, sought to vary maintenance downwards post a judicial separation on the basis that he had lost his job. Maintenance had gone into arrears and the wife sought enforcement at an earlier date. The husband paid the arrears on that day and the Judge advised him to file a motion to vary maintenance downwards. The husband filed a motion, however the judge was not satisfied with the paperwork. The husband was instructed to issue a motion in the correct way and serve on the wife’s solicitor. The motion was struck out.

### ***“Get a divorce”***

Case ref; C258 February 2009. The applicant wife, a lay litigant, had filed a motion for judgement in default of defence, on divorce. The respondent did not attend the court and was

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<sup>321</sup> See Judicial Trends Appendix B (ii)

<sup>322</sup> Judicial Interviews Appendix B (i)

not represented. On evidence the wife submitted that the husband now consented to divorce and she wished to change her application and “get a divorce”. The court indicated that the motion was the only application before the court, that the respondent must be properly served, and he must be allowed a further 10 days to lodge a defence. The motion was struck out.

In a Waterford case Judge 2 asked “is the respondent present”, the respondent husband answered “I don’t understand the question”. In another case, the husband did not turn up in court for divorce proceedings, electing to write to the wife’s solicitor saying that they should proceed without him, as he couldn’t afford to pay for legal representation. Where a wife sought a property adjustment order and her counsel outlined the reasons why, the judge asked the husband for his view, he replied “I don’t really understand what she is saying...what is a deed of waiver?” The problem is perhaps succinctly summed up in this exchange in Case ref; C499 February 2010, where the husband was evidently distressed and the judge asked, “...*are you happy to represent yourself*”, he replied “*I have no choice in the matter*”.

#### ***Failure to serve pension trustees***

Case ref; C569 February 2010 The divorced parties attended at the court as lay litigants. The husband asked the court why they had been asked to attend the court, by letter. The court noted that a pension adjustment order was due to be made, the parties were asked if the trustees of the pension had been notified. The husband responded “*I don’t think so your honour*”. The court asked the parties to be aware that they were running out of time as the divorce had been granted in April 2009.

#### ***D.I.Y. service***

Case ref; C701 March 2010. The parties on divorce were lay litigants, who had agreed terms with the assistance of a DIY service. They had a separation agreement from 2008 and sought a divorce on the same terms. The applicant husband had a pension and the parties agreed to make no claim on each other’s pensions. The court asked where the pension adjustment paperwork was, that it required to be an order before the court. The applicant responded, “*the person dealing with my paperwork gave me something to send off, but I don’t know what it was*”. The court directed that a pension adjustment order be provided to the court.

***Civil annulment versus divorce***

Case ref; C898 March 2011. The parties were both lay litigants and sought a consent divorce. They married in 2005 and separated a year later. On evidence the applicant wife stated they had received a church annulment on the grounds of “*lack of discretionary judgement*” on the part of the respondent. The court questioned why they had not sought a civil annulment as there would appear to be grounds. The wife replied that they didn’t know how to do that, they “*just wanted closure*”. A decree of divorce was granted.

***Consent, but not consent***

Case ref; C1013 July 2011. The applicant and respondent were lay litigants and were both present in court. The application was for a consent divorce. On giving evidence the applicant wife indicated that unless her husband paid her € 17,000 as agreed she didn’t want to go ahead with the divorce. The respondent husband submitted that he was unable to pay the mortgage, his credit card was in arrears and he had no money. The court advised the parties to try and reach an agreement, as this was no longer a consent divorce. The matter was adjourned.

***Mc Kenzie friend***

The Civil Liability and Courts Act 2004 provided that a ‘Mc Kenzie’ friend could attend a family law hearing.<sup>323</sup> The courts have indicated that the Mc Kenzie friend should be objective and of real assistance to the party.<sup>324</sup>

Case ref; C317 April 2009. A respondent wife, in a divorce application, sought leave of the court to have her son attend the hearing with her as a *Mc Kenzie friend*<sup>325</sup>. The judge allowed the son to attend, so long as he did not speak to the court and did not give advice to his mother, his role being to offer support. The motion before the court was an interlocutory

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<sup>323</sup> s 40(5) *Nothing contained in a relevant enactment shall operate to prohibit a party to proceedings to which the enactment relates from being accompanied, in such proceedings, in court by another person subject to the approval of the court and any directions it may give in that behalf.*

<sup>324</sup> *K v K* [2010] IEHC 416

<sup>325</sup> *Mc Kenzie v Mc Kenzie* [1970] 2 WLR 472, *a McKenzie friend is a person who accompanies a litigant in person (lay litigant) to a court hearing for the purpose of assisting him or her in such matters as taking notes, helping to organise documents and quietly making suggestions.*

application by the respondent seeking direction from the court that all five witnesses would give their evidence by affidavit, on the basis that as a lay litigant she was not capable of cross-examination and needed time to review submissions to prepare questions. A judicial separation was granted in 2005, and a divorce civil bill came before the court for ruling, on consent, in 2008. Consent terms were signed. However, the respondent withdrew her consent as she alleged full disclosure of earnings by the applicant had not taken place. The son spoke continuously to the mother, putting documents in front of her to read. The court asked the son to desist, as it appeared that the *Mc Kenzie friend* was either telling the respondent what to say, or actually advising her. The court declined the application on the basis that witnesses should attend in order for the court to assess their credibility, *“I rule that this trial continue in the normal manner, and that all witnesses give evidence orally”*. The respondent expressed her dissatisfaction and read an extract from re; Haughey regarding fair procedures. The respondent sought to appeal this decision and be granted a stay on proceedings. The court denied a stay.

Case ref; C382 May 2009. The respondent husband, a lay litigant, in a divorce case, asked the court, *“Would it be possible for me to be told what is required of me?”* Counsel for the wife stated that the husband had produced an Affidavit in 2005, discovery was subsequently ordered, which had not yet been complied with. The husband responded that he did not object to divorce, he just didn’t understand what his wife wanted of him. The court ordered the respondent to produce 4 years vouching for an up-to-date affidavit, to include at least two years of bank statements, three years of income tax returns and a list of any properties owned. The case was adjourned to the next available date on the calendar.

#### *11.4 Non-national lay litigants*

##### ***No English***

Case ref; C804 March 2011. A lay litigant Albanian national residing in Ireland sought a divorce on consent. The respondent was not present, was not represented and had not provided a letter of consent. The applicant had a very poor grasp of English and was unable to repeat the oath after the court registrar. He was unable to understand the questions the court put to him about consent, repeatedly saying “Albanian, Albanian”. The court granted a

decree of divorce and section 18 (10) orders. The applicant looked confused and offered his passport as identification, the usher indicated he should leave.

### ***Seeking divorce, no respondent present***

Case ref; C796 March 2011<sup>326</sup>. A lay litigant Polish national sought a consent divorce. His wife did not attend, nor was she represented. The applicant indicated that the three children resided with him and he sought an order of sole custody of the two dependent children. He indicated that the wife saw the children every two years and did not contribute financially to their care. The court granted a decree of divorce, section 18(10) blocking orders and advised the applicant that he may seek maintenance at any stage in the future.

### ***Cultural/religious issues***

Case ref; C805 March 2011. The applicant husband, with poor English skills, sought a consent divorce. He was offered the Bible to be sworn in, but asked to swear on the Koran. A copy could not be found, and he gave a general oath. His wife did not attend, was not represented, and did not submit written consent. When the court queried how the respondent was made aware of the proceedings, the applicant responded, *"I told her"*. When asked by the court how he knew she consented to divorce, the applicant responded, *"I told her"*. A decree of divorce was granted s 5(1) and section 18 (10) orders.

### ***Paperwork in a language other than English***

Case ref; C803 March 2011. The applicant wife, a lay litigant and non-national, sought a consent divorce. The respondent was not present, was not represented and had given written consent. The parties were married in Switzerland and the wife submitted a marriage certificate in French. The court indicated that the document did not look like a marriage certificate, nor could the court read French, *"strictly speaking I should have evidence from counsel to the effect that this is a valid marriage certificate, however you are representing yourself"*. The court granted a decree of Divorce and s 18 (10) orders.

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<sup>326</sup> See also chapter 8, section 8.1.2



### *11.5 Conclusion*

It is a finding of this research that litigants, who attend at court, are generally treated as peripheral to their case, by the custom and practice of the family law courts. Litigants must usually operate two steps (solicitor, barrister) removed from any discussion relating to their case and are seated at a distance from the legal players and proceedings within the courtroom. Judges very rarely spoke directly to litigants where they had representation, unless that litigant was on the stand giving evidence. The formality and age-old traditions operated by the officers of the court, and the court itself, clearly created an uncomfortable and often incomprehensible forum for litigants. The discontinuance of the wearing of ceremonial gowns and wigs by the court, has done little to create a less formal and more user friendly environment. One judge however, did make a concerted effort to de-formalise proceedings and always sought to put litigants at their ease.

Murial Walls, Solicitor and Chair of the Legal Aid Board, in 2013, spoke of what our current family court system must feel like for users;

*Unremittingly, crushingly awful; The system is chaotic/dysfunctional: Like a form of torture; There is no coherence/consistency; Utter terror when a Civil Bill was served; Nightmares about giving evidence and being cross-examined.*<sup>327</sup>

I support her view that we must look at our family law system from the perspective of the users of the service, rather than from the perspective of those who deliver it.

Ireland, like virtually all common law jurisdictions is seeing significant increases in self-represented family law litigants.

*...the public court system is increasingly dominated by self-represented litigants. These litigants either commence their litigation in this manner or are forced to represent themselves after exhausting their funds mid-way through*

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<sup>327</sup> Walls, M. (2013) ' Meaningful change in our Family Courts- Meeting the needs of the people who use them', presented at the Consultative Seminar on Family Law Courts, Blackhall Place, Dublin, 6 July 2013, pg 3

*the process...In some Toronto area courts, over 70 percent are reported to be self-represented.*<sup>328</sup>

**Warren K, C.J.**

The judiciary have a particular duty of care to ensure that self-represented litigants are not disenfranchised during the process as a result of being unable to secure representation.<sup>329</sup> Difficult economic times have created a “soup” of reasons for more self-representation<sup>330</sup>, the most commonly cited as financial necessity, and long waiting lists to see if Legal Aid was a possibility. A study by the Department of Justice Canada (2009) found that in almost 75% of cases that at least one party did not have legal representation.<sup>331</sup> Research lead by Professor Rachel Birnbaum, in 2012, also indicates that there has been a significant increase in self-represented litigants (lay litigants) over the past few years.

*... litigants’ motivations for not having a lawyer are often complex, including the rise of “do it yourself” social attitudes and a perception of some self-represented litigants that having a lawyer will not result in a significantly better outcome.*<sup>332</sup>

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<sup>328</sup> Chief Justice Warren, K. (2011) Remarks delivered at the 5th Annual Family Law Summit, Toronto, Ontario, 17 June [unpublished].

<sup>329</sup> The Canadian Judicial Council in 2006 adopted a Statement of Principles on self-represented litigants and accused persons. While only advisory in nature, this statement and appellate case law in Canada makes clear that judges have a duty to assist and accommodate self-represented litigants, though this must be delicately balanced with a the need to maintain impartiality and avoid “becoming an advocate” for an unrepresented party.

<sup>330</sup> The Honourable Justice Williams, J. Supreme Court Nova Scotia and O’ Shea, R (2010) ‘Family Law: Common Threads and Unique Opportunities’, presented at the Canadian-Irish Family Law Conference, Maynooth, 9 October, pg 9

<sup>331</sup> Department of Justice Canada, (2009) ‘The Unified Family Court Summative Evaluation: Final Report’, Evaluative Division, Office of Strategic Planning and Performance, March, pg 32

<sup>332</sup> Birnbaum, R., Bala, N., and Bertrand L (2012) ‘The Rise of Self-Representation in Canada’s Family Courts: The complex picture revealed in surveys of Judges, lawyers and litigants’, La Revue Du Barreau Canadien, Vol. 91, pg 71

An interesting research finding by Birnbaum, was that judges, academics and practitioners rated lack of finances and ineligibility for legal aid as the primary reason for family litigants being self-represented, however self represented litigants rated lack of financial resources as a less significant factor; other factors included if the other side had representation, the belief that having a lawyer would increase the delay, cost or conflict, wanting to engage with or confront an ex-partner directly, having already had an incompetent lawyer, not understanding and/or agreeing with advice from counsel, the belief that the outcome will not be worse without representation- those with higher incomes were significantly more likely to have legal representation than those in lower income groups.<sup>333</sup> In Alberta, Canada 89% of lawyers indicated that lay litigants have “unrealistically high expectations” for the outcome of their cases, and reported that lay litigants are much less likely to settle. 91% of lawyers in Ontario indicated that a lay litigant on the other side contributed to increased costs for their clients, particularly the desire of lay litigants to be “in front of the judge” which increased costs.<sup>334</sup>

A recurring theme in research carried out in Canada<sup>335</sup> and in New Zealand<sup>336</sup>, is the perception that the family court system is biased against men, particularly that ex parte (without notice) applications were granted too quickly. Judge Boshier, Principal Family Court judge, did acknowledge that women obtained sole day-to-day care following a defended hearing in many more cases than men, and indicated that further research would be required to determine why this is so.<sup>337</sup>

It is a finding of this research that the poorest outcomes were for men who were lay litigants or self-representing, followed by non-national lay litigants. 22% of all litigants were lay litigants.

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<sup>333</sup> Birnbaum, R (2012) supra n.328, pgs 77-78

<sup>334</sup> Birnbaum,R. (2012) supra n. 328 pgs 79-80

<sup>335</sup> Birnbaum, R.(2012) supra n. 328 og 84

<sup>336</sup> Boshier, P. Principal Family Court Judge (2012) ‘Family Justice: Aligning Fairness, Efficiency and Dignity’, presented at the Four Jurisdictions Family Law Conference, Liverpool, 4 February pg 7

<sup>337</sup> Boshier, P. (2012) supra n. 332 pg 25

It is possible to provide legal information without giving legal advice, although this will require appropriate training for front line staff. Well-developed Family Law Information Centres, along the lines of the FLICs available in the Unified Family Court model in Ontario<sup>338</sup>, could provide an important resource to address the dearth of accurate information available for lay litigants. A clear ‘Memorandum for trial’ as provided by the Superior Court of Justice in Ontario Canada, could set out what is required of a litigant, in terms of what documentation must be filed with the court and what to expect of the legal process, particularly in relation to the *in camera* rule, evidence, discovery, witnesses, hearsay and cross-examination. Birnbaum believes that a ‘tipping point’ has been reached where the expectations of those going through separation or divorce has changed. Litigants now have an expectation and understanding that having a solicitor is one option, but self-representing is also an option, especially for those with limited means.<sup>339</sup>

That “tipping point” in Ireland has been fuelled by the severe economic circumstances prevailing in the country post the Celtic Tiger era. Litigants who once followed the legally represented route without question, now realistically assess their ability to afford such services, and are seeking other options including self representation.

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<sup>338</sup> Department of Justice Canada, (2009) ‘The Unified Family Court Summative Evaluation: Final Report’, Evaluative Division, Office of Strategic Planning and Performance, March, pgs 5-6

<sup>339</sup> Birnbaum, R. (2012) *supra* n. 328 pg 92

## **12 Chapter 12 Practice and Procedure**

### *12.1 Case progression*

The Case Progression rules<sup>340</sup> came into effect 4 months after this project commenced. This meant that any case filed before the commencement date, did not come to the court through case progression. The rules were introduced to ensure that a case was prepared, in a fair, cost efficient, way, likely to keep the costs down. The anticipated outcome was that cases who have gone through case progression would be heard more quickly and trials would be shorter<sup>341</sup>.

In February 2009, at a Case Progression motion list; it was noted that the format mirrored the formal family law hearings and was held in one of the court-rooms. The County Registrar sat in the normal seat occupied by a judge and a court clerk attended. There was a 'call-over' where the eleven cases listed were called out, in front of a room of solicitors, some litigants and two barristers. Two cases were struck out. Two cases had completed discovery and were moved to the list for hearing. A further motion for discovery resulted in an adjournment in a case filed in 2000. A solicitor and a lay litigant in two different cases sought authorisation to serve proceedings outside the jurisdiction. In the final case service was substituted by way of pre-paid post.<sup>342</sup>

Comparing the cases that were filed before the case progression rules and the cases that had moved through case progression, no discernible difference was noted in the readiness of a case to progress, and there was no quantifiable time difference, as to the length of a trial. The same issues arose that delayed the hearing of a case, resulting in adjournments, either by consent or ordered by the judge.

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<sup>340</sup> S.I. No. 358 of 2008

<sup>341</sup> Courts Service, 'Case Progression' [www.courts.iw](http://www.courts.iw) [online]  
<http://www.courts.ie/Courts.ie/library3.nsf/pagecurrent/ACEE75B152D8884E80257731003054E5?opendocument> [accessed 16 April 2012]

<sup>342</sup> See Appendix B for interviews with two County Registrars

## *12.2 Circuit Court Rules*

“Proper service” must be carried out when proceedings have been initiated, by way of a family law Civil Bill and an Affidavit of Means, as required. The applicant must “serve” the documents on the respondent by registered prepaid post, by personal service or as set out by the court, where standard service does not suffice. Evidence of that “proper service” must be submitted, a stamped certificate or stamped receipt from the Post Office and a sworn declaration of service. Judge 6 always checked if “proper service” had been properly executed and did not proceed if the paperwork was not in order.<sup>343</sup>

*“Private entities are offering D.I.Y services on separation or divorce and are charging € 800 and upwards for an incomplete service. Service is often not in order, proof of service must be in accordance with the legislation. The paperwork is often shoddy and dubious letters of consent are proffered”.*  
Judge 6.<sup>344</sup>

### ***“Affidavit of service is not sufficient”***

Case ref C804 March 2011<sup>345</sup>. An Albanian national sought a consent divorce. He presented as a lay litigant. His wife was not in court, was not represented, nor had she submitted a letter of consent. The court noted *“your affidavit of service is not sufficient, nor has it been properly executed”*. The court granted a decree of divorce and section 18 (10) orders.

### ***Service by fax or email***

Case ref; Not on the list. July 2011. An ex parte application was made for an order allowing substitution of service as the respondent had a history of avoiding service. Maintenance arrears of € 52,000 were now due to the applicant wife, a dependent spouse, and a disabled daughter. The applicant sought to serve the respondent with an attachment and committal notice of motion. The court granted the application, allowing service by fax or email.

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<sup>343</sup> Judicial Trends Appendix B (ii)

<sup>344</sup> Judicial Interviews, Appendix B (i)

<sup>345</sup> See also chapter 11, section 11.4

### ***Separate proceedings***

Frequently cases came before the court where the length of time between filing and substantive hearing meant that statutory periods had elapsed to allow an application for divorce. Practitioners and lay litigants asked the court to amend the proceedings from judicial separation to divorce, with requisite civil bills to follow. Some judges granted such a request, other judges declined, and proceeded on the basis of the application before the court.

Case ref; C721 March 2011. In a case where the respondent counter-claimed divorce on the day of hearing, the court questioned the inconsistency of the terms being offered for ruling which dealt with judicial separation. Counsel for the wife asked the court to make the orders and the divorce civil bill would be filed and an amended agreement. The court responded *“There are some judges that don’t do this, but I don’t see the point of issuing separate proceedings”*. The court granted a divorce under section 5 (1).

Case ref; C1010 July 2011. The parties had entered into consent terms, and asked the court to grant a divorce although the original application was for a judicial separation. Terms of settlement were handed in and ruled, a decree of divorce was granted, and counsel for the applicant wife undertook to submit the divorce application paperwork at a later date.

## ***12.3 Conduct of Practitioners/ solicitor off record/dynamics of the courtroom***

### ***12.3.1 Counsel in dispute with the court***

#### ***Counsel and court in dispute over outcome of previous hearing***

Case ref; C156 December 2008. Counsel for the applicant sought direction from the court. The case, a judicial separation, was heard a month earlier. Oral terms were agreed but not signed, where the parties agreed to partition land. However it was not possible to complete the partition without one portion becoming land-locked. Counsel for the applicant understood that a judicial separation had not been issued and that the matter should now come back before the court. The judge took the view that he had issued a judicial separation on the day on the oral terms of consent, and would only consider an application for a right of way. Counsel for the applicant sought a stay and an extension of time to lodge an appeal, which was granted.

***Counsel advises the court on evidence required***

Case ref; C721 March 2011<sup>346</sup>. In a consent divorce case ready for ruling, the court commenced making the orders. Counsel for the applicant interrupted and indicated that evidence need to be heard. The court responded “*I don’t require evidence*”, Counsel replied “*Yes you do*”, and insisted that evidence be heard as per the Constitutional requirements.

***12.3.2 Application to come off record***

As the research progressed, applications from solicitors to come off record became more frequent. The primary reason cited was the inability of the client to pay legal fees.

***Client more suited to legal aid***

Case ref; C269 March 2009. The respondent’s solicitor made an application to come off record on the basis that his client’s means were more suited to legal aid. The court refused to hear the application as the respondent had not been served by the solicitor.

***Unable to get instruction***

Case ref; C319. A motion for discovery was before the court against the respondent wife on divorce. Neither the applicant nor the respondent were in attendance. The respondent was not represented. Counsel for the applicant stated that the applicant had removed his files from the office of the solicitor. The solicitor had since repeatedly tried to contact the client to no avail, and now sought to come off record. The court directed that the respondent be served, and the applicant be made aware that her husband no longer had representation.

***Appeared to be new solicitor on record***

Case ref; C385 May 2009. A motion to come off record was brought by the respondent’s solicitor in attachment and committal proceedings for non-payment of maintenance. The solicitor submitted that his client was a Chinese national, he has been unable to contact his client, or take instruction and he would appear to have new solicitors on record as another application had been filed. The court declined to make the order, instructing the solicitor to serve his client by ordinary post and directing him to write to the solicitors coming on record.

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<sup>346</sup> See also section 12.2



***Client refused to discharge fees***

Case ref; C473 June 2010. A divorce application filed in 2007 was before the court. Both parties remained in the family home, and had partitioned off respective areas. The motion before the court was submitted by the solicitor for the respondent who wished to come off record. The case was also listed for hearing. The applicant wife said she was distressed that her solicitor wished to withdraw and didn't understand why. She had already paid € 30,000 in legal fees and € 6,000 to accountants. The applicant solicitor set out his position. The matter had been listed for trial on 6 occasions, each time he was instructed by the respondent to seek an adjournment and further discovery "*we have engaged in voluminous discovery*". The respondent had refused to pay further fees accrued of € 10,000 indicating that legal fees could be discharged when she received the lump sum and property she sought from the applicant, when the matter was concluded. The court granted the motion and directed that the file be handed over in 14 days. The solicitor asked the court to order that an undertaking be given by the new solicitors to pay the arrears in legal fees. The court declined that request on the basis that a recent decision of the High Court found that solicitors are not entitled to hold onto files until the fees are discharged.

***12.3.3 Conduct of practitioners***

Barristers, in the main, had an evident relationship of trust with the court. The court, by its conduct, relied heavily on that relationship, taking for granted that due diligence had been done, in preparing the case, and in submitting the basis for orders sought and relevant legislation. Judge 9, in speaking of that relationship said;

*"I would be very much against people representing themselves, you get people involved who don't have proper training. Trust is also a huge issue, when a practitioner or officer of the court says something you can take it that it is so, counsel have a high duty to the court".<sup>347</sup>*

Throughout the course of this research it was noted that in each Circuit, a core group of barristers practiced family law exclusively. They handled a significant amount of the case-load, often with multiple cases, on any list, on any given day. Several judges adopted a pro-

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<sup>347</sup> Judicial Interviews, Appendix B (i)

active settlement approach, remaining in chambers to encourage settlement discussions, however, the number of barristers that dealt with several cases on any given day impeded the possibility of meaningful settlement discussions with all clients and their solicitors.

Given the adversarial nature of courtroom proceedings, counsel, both male and female, sometimes engaged in aggressive combative behaviour.

#### ***Counsel display animosity towards each other***

Case ref; C603 February 2010; the applicant wife sought and secured a safety order alleging that the behaviour of the respondent husband was threatening, specifically the way he chose to exercise dogs in proximity to the family home. She stated that she had a great fear of dogs which was known to the husband. The respondent sought a discharge of that safety order as it impacted on his ability to run his business. The wife spent 15 minutes giving evidence about the threatening behaviour of the husband, the respondent spent an equal amount of time disparaging the testimony of the wife. The husband was clearly distressed when speaking about the Gardaí being called to the farm. During the case counsel for both parties frequently displayed animosity towards each other, opposing counsel breaking into direct arguments with each other, while testimony was being heard.

#### ***Animosity between solicitors***

Case ref; C229 April 2009. The court questioned why a “mini-hearing” was being conducted ahead of a fixed date for hearing, incurring costs for both clients unnecessarily. The parties were each represented by a solicitor and a barrister. The issues raised related to discovery, with considerable disagreement between the two legal teams as to what had or hadn’t been provided. The judge commented “*I suspect if we could get the applicant and respondent into the same room they could sort this out themselves*”. Speaking to the two solicitors the judge stated “*I think you are both a disgrace actually. I think the pair of you are doing micro management of this case, you are not talking to each other. What we have here is a complete lack of trust between the lawyers which is a pity as it is very expensive for your clients*”. The court indicated that matters would remain status quo until the trial of the action.

#### ***12.3.4 Counsel and lay litigants***

There were a significant number of lay litigants involved in cases during the period research was carried out. Lay litigants who faced counsel on the opposing side, did not abide by the

unwritten rules, had no relationship of trust with the court, usually had no understanding of the law or legal language, and often took the submissions of counsel as a personal attack or affront. This created significant problems for all parties concerned, the court, the practitioners and the lay litigants themselves. Lay litigants often mimicked the role of counsel, perhaps observed from previous court appearances, and expected to inter-act directly with opposing counsel on a peer to peer basis.

***“I’m not negotiating with a lay litigant”***

Case ref; C80 December 2008<sup>348</sup>. In a judicial separation where maintenance and access were in dispute, the respondent was a lay litigant. The court asked the parties to “*go away and settle this among yourselves*”. The lay litigant turned to the Counsel for the applicant wife and asked where they should meet to have discussions, counsel responded “*I’m not negotiating with a lay litigant*”, and left the court-room.

**12.3.5 Counsel and solicitors**

It was noted that preparatory work for a case would be carried out by the solicitor. Documentation required for court were sometimes numerous, but usually occupied no more than one large box. The solicitor prepared copies of all filings, correspondence, and Affidavits of Means with vouching documents for both parties, with any ancillary discovery material. In the court-room, the solicitor acted as an assistant for counsel, locating relevant material as required, from the wealth of documentation available. The overwhelming majority of solicitors showed good familiarity with all the material. The approach of counsel was to elicit testimony from their client, or to ask specific questions on cross examination, relating to post-noted sections of a master copy provided by the solicitor. The court demeanour of counsel was authoritative and adversarial. While counsel generally showed good familiarity with the law, they were often not as familiar with the details of the case as the solicitor. Children’s names and dates of birth were often incorrectly stated, and events preceding the hearing may not have been stated correctly. There was a notable disconnect between the solicitors detailed knowledge of the case, and the more superficial grasp of some counsel. For low asset cases, the presence of both solicitor and counsel seemed unnecessary, and where solicitors acted alone, they brought a greater depth of understanding to the court.

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<sup>348</sup> See chapter 6, section 6.4

The demeanour of those solicitors who acted for their clients, without counsel, was confident but generally not adversarial.

### **12.3.6 Case load**

The case-load that barristers undertook meant that settlement discussions were difficult to progress, and occasionally counsel were “double- jobbing” at another court entirely.

#### ***Double-jobbing, Circuit Court and High Court***

Court note; February 2009 Dublin; a barrister due to represent two different cases listed for full hearing that day was found to be attending at the High Court, without notifying the registrar. Neither case could run.

Court note; October 2008 Cork; a case was due to run. The devil for counsel for the applicant told the court that Mr [x] was in another court and was delayed. The court stated “*this court will not wait while Mr [x] double jobs in another court, we will proceed without him.*”

#### ***Court-room comments***

Court note; Waterford February 2010, at the start of the first case on the list, one barrister sought direction from the court, questioning the presence of a researcher in the room and asked if parties could object. The court asked the researcher to explain the authority which allowed the research to be carried out, and cite the relevant legislation. The researcher remained in the court, with the consent of the litigants, and the case proceeded.

Settlement discussions, between one litigant and their legal team, often took place in the courtroom. The case usually had a partial hearing in front of the judge, who indicated he/she would “rise” to allow the parties to consult with their counsel. One litigant and their team would stay in the courtroom the other “side” would leave. Counsel were heard outlining the particular ruling trends of the judge on that day, suggesting strategies that could work, bearing in mind the disposition of that judge. Where a particular judge had indicated a view that counsel did not support, it was often proposed that the client seek to adjourn the matter, as it was highly unlikely that the same judge would hear the case again and a very different outcome could be expected. Where a mother had strongly expressed a view that the child/children should not spend time with the father, but had given no clear reasons as to why that view was held, counsel on five occasions were overheard to probe that concern with

leading questions during discussions, that encouraged that mother to indicate to the judge that abuse may be at issue. This happened twice in Limerick, twice in Galway and once in Bray.

Court note; While waiting for the judge to return to the court-room for a call-over at 4 p.m., counsel for the applicant in C342 commented to a colleague, *“I hate 4 o’clock, you can see everyone is brain dead. It’s a bad time to settle as it will come back to haunt you”*.

## *12.4 Role of Court Registrars, training, and recording of Orders/ training/ back office*

### **12.4.1 Court clerks**

Court Clerks, or Registrars of court sittings, had an extremely difficult job. The heavily burdened lists meant that large amounts of corresponding case files needed to be located and brought to court. Where the files were not stored in the same building as the hearing, the logistics of moving those files appeared to be quite onerous. The role of the court clerk involved ensuring that the requisite file was ready for the judge as each case came before the court and swearing in witnesses. Where a judge had no particular pattern in how they dealt with the list, this process became more difficult. Just before “call-over” commenced the court clerk would distribute printed copies of the list for the day. Practitioners would often seek to add cases to the list at this stage. The job of calling out or identifying the next case was usually the responsibility of the court clerk, appropriate amplification was available in only one court attended. The greatest difficulty arose at the end of a hearing, whether brief or long, when the court enunciated decisions. It was noticeable that court clerks were unable to fully record that decision, due to (1) the speed at which the decision or order was enunciated, (2) the quiet speaking tone that the decision or order may have been enunciated in, and (3) the type of legal short-hand language used to enunciate decisions or orders.

### ***Lack of or no real training***

Family law is a complicated area of law, with multiple possibilities in terms of ancillary orders. To record decisions of the court, some understanding of family law would be required. As the research progressed it was evident that lack of training, and lack of available trainers was a significant issue.

Court note; March 2010; In discussions with a court clerk, “in training” who was attending at court alone, two issues arose. The clerk was attending alone during a period she was due to be trained as no trainer was available, and secondly the clerk had not attended any family law sittings to date and had no knowledge of family law.

Court note May 2011; In a court on the Midland Circuit, two court registrars were in attendance. They indicated they were both in training, however they didn’t have a trainer. Neither had any experience of family court or any knowledge of family law. They were having great difficulty writing up the orders of the court and did not feel that they could ask the judge to repeat the orders or explain.

### ***The courts orders commonly determined by consensus***

Within a few days of commencing this research, it was noted that court clerks were not writing down in full the decisions or orders of the court. When each court clerk was questioned about this, the response was uniform. Firstly, the court clerks indicated that it was often impossible to hear the judge clearly, and secondly the language used and the legal abbreviations made it extremely difficult to understand what the decisions/orders were. It was noted that the majority of the judges enunciated the effect of orders, but did not reference the relevant legislation and provision therein. All but one of the court clerks observed and spoken with, felt that they could not ask the court to repeat what they said or to clarify. Having looked at 40 case files, the standard procedure for the court is to handwrite a very brief note, approximately 30 words or less, on the file cover itself, very rarely were actual orders clearly written. It would appear that to deal with these difficulties, a system has developed, whereby the decisions and orders of the court are regularly determined by consensus. The process outlined was as follows;

1. Counsel for the applicant would submit to the Circuit Court office the orders as he/she understood them to be.
2. Whatever notes had been made by the court clerk would be compared with this submission, and any brief notes made by the judge on the cover of the file folder, and the decisions/orders were then typed out and sent to counsel for the respondent.
3. Where counsel for the respondent did not concur, and it was understood this was not a rare occurrence, the court clerk would then ask both counsel to consult.

4. When the decisions/orders had been agreed between counsel, counsel for the applicant would submit the written orders again, indicating that agreement had been reached by consensus.

In comparing the notes taken during cases observed and the orders eventually recorded on file, variations were noted, orders or decisions were omitted, or additional orders were added.

### ***Writing down orders, extremely difficult***

Court note; March 2010. A court Registrar with 30 years experience indicated in an interview that there is a significant problem where a judge gives a reserved judgement, without a written statement, for the Registrar to write down all possible orders. He acknowledged that writing down the orders correctly was very difficult, given that some judges didn't enunciate the actual orders, or refer to legislation. Finding the relevant legislation to match the enunciations of a judge was often impossible, and counsel were asked to assist with their recollection of the orders/decisions on the day.

It was noted that the DAR (Digital Audio Recording system) was turned on in the Dublin family courts in May 2011 to record family law proceedings, and two court clerks were observed playing back these recordings, to more accurately record decisions and orders. The DAR also appeared to record all family law proceedings in the Waterford Courthouse, however, the court clerks who were questioned did not know how to operate or use the system.

### ***Court clerks reluctant to address the court***

Case ref; C466 March 2010. Direction was sought from the court by counsel for the applicant, who sought to amend the divorce Civil Bill issued in 2007 to include particulars of conduct on the part of the respondent, "*I will be guided by your Lordship as to whether the matter can proceed*". Counsel for the respondent indicated that the case now to be pleaded was "*a horse of a very different colour*", and it was not the defence prepared. The court stated "*There is no reason why this case can't go on today, go out and take instruction, come in and run the case*". When the parties left, the Court Registrar pointed out to the judge that orders to amend were not made. The court replied "*I made those*". The registrar replied "*I must have missed it*". The case was subsequently not heard.

### ***12.4.2 Back office***

At the start of the research period, the data being gathered in the Dublin Family Court Offices was minimal, reflecting the basic fields under-pinning the statistics collated for the Courts Service Pilot project 2006-2007. Cases were stored, hardcopy, in cardboard folders, and stacked on metal shelving. The office was very busy with a heavy workload of orders/decisions to be recorded, including the associated notifications that needed to be drafted and sent out. The public counter was also extremely busy, the majority of those who presented at the counter appeared to be lay litigants seeking legal information about family law, or were seeking assistance identifying the correct form to fill out. While very busy, the office was well managed, and effective systems were in place to deal with the high volume of cases. Other offices around the country appeared to be under-staffed, and had great difficulty keeping pace with the demands of the case load.

### ***12.4.3 When a case is appealed***

In an interview with judge 6 on the 26th of February 2009, it transpired that the court received no notification of when a case had been appealed, or the outcome of that appeal.

## *12.5 Analysis of lists/ cases heard, length of sessions/ cases adjourned/ struck off*

Lists were over-burdened on all but two days, of the days court was attended. The expectation that any court can deal with the volume of cases listed to be dealt with, was unreasonable, and adjournments were commonplace. 24.8% of all applications were adjourned.<sup>349</sup> Dublin operated 3 courts on most days, yet the average list to be completed for each court had 16 cases listed on any day, broken down into cases for ruling, cases for mention, adjourned motions, motions, and hearings. There were usually 2 full hearings listed per day. The longest Dublin list had 31 cases listed, of which 9 sought adjournment without any reason given, 4 cases were “no show”, i.e. no litigants attended at “call-over”, 4 had lay litigants involved, and the indicated time required by counsel for the two hearings were 2

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<sup>349</sup> See Statistics Appendix E



hours and half a day respectively. Motions were observed to effectively be brief hearings, and at times were not so brief.

*“The lists are over-loaded, the quantity of work for us is too great on any given day. The system has unreasonable expectations listing multiple cases for hearing and motions on the same day. The system would never function without barristers, the court is so inundated with work”.* Judge 4<sup>350</sup>

The Cork Circuit had an average of 12 cases listed to be dealt with per day. The single greatest list scheduled to be dealt with in one day, in this Circuit, was where 44 cases were on the list, and 5 additional cases were added at “call-over”.

The most extreme example of a lengthy list which could not be dealt with was in the Northern Circuit in Letterkenny. 79 cases were on the list. 27 of those were listed as full hearings. Two of the cases for full hearing had an indicated one day requirement, 17 other cases listed for hearing had an indicative time of at least half a day. So the indicative requirement was a minimum of 10 days, just for cases listed for hearing. The rest of the 52 cases, were listed as “for mention”, and many of those were motions. Allowing an average of five minutes for this type of case, the required time to process these was at least a full day. So on the face of it, this list required court time of 11 days. The allocated time was four days initially. On arrival the court indicated that a function was taking place on that Friday, so three days would now be the allocated court time. Several times it was submitted to the court during call-over that priority should be given to a case, as the parties had attended for hearing on multiple occasions but had not yet had any kind of hearing.

### ***Counsel on Northern Circuit indicate significant delays in “getting on”***

Case C919 was a divorce application submitted in 2007<sup>351</sup>, which managed to secure priority. However, there were older cases where counsel indicated the cases had been listed for hearing several times, to no avail. Seven of the cases listed for hearing pre-dated 2005, two of those cases were filed in 1998.

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<sup>350</sup> Judicial Interviews, Appendix B (i)

<sup>351</sup> See also Chapter 2, section 2.3.1 and Chapter 8 section 8.5

Waterford Circuit Court had the second most extreme over-burdening of a list where 76 cases were listed to be dealt with in a four day period.

### ***Third time listed for hearing, yet adjourned again***

Case ref; C466 March 2010<sup>352</sup>. A 2008 divorce case was listed for a full day's hearing. It was the third time the case had been listed for hearing. Speaking to counsel for the parties the court stated "*unfortunately the time of the court is not here today, I cannot sit beyond 5 p.m. I will recommend that the case gets priority on the next list and be noted as a day case. If it can't be fitted into the next list, it will go back again.*" The case was adjourned.

### **12.5.1 List system**

A huge variety of case identifying systems were used from Circuit to Circuit and even within a Circuit. There were several cases given the same case identifier, and incorrect inputting of case ids resulted in further variation. Cases on the Dublin Circuit had consistent ids (identification numbers) and no duplication or errors.

Cork Circuit; One type of case id comprised of number and year, eg 00606/2002. Another id commenced with a letter eg M00408/2007.

Dublin Circuit; Case ids comprised of a number and a year, eg 00458/2002

South Eastern Circuit; Comprised of a variety of letters and numbers, such as FL23/98, F24/02, 614/03, No. 1366/2004, J432/06 110, No. J536/09, No. 27/2009 FM19, and 00005/11 and 015/2010 60b.

Western Circuit; Comprised of a number and year, 00076/2006

South Western Circuit; Comprised of a variety of letters and numbers, F45/09, E56/09, C1/10, 1567F/10

Eastern Circuit; Comprised of a variety of letters and numbers; FLD00073/2004, FLJS00093/2009, F110-05, 2006/00171, FL00049/2007, 3/09F/L, 84/2010F/LD, FLME00066/2011[ this Circuit had a duplication of file id]

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<sup>352</sup> See also section 12.4.1

Midland Circuit; Comprised of a variety of letters and numbers; 76M/02-D, 28M/08

Northern Circuit; Comprised of a letter, a number and a date, FL37/1998 [ this circuit had a supplication of case id]

### *12.6 Length of time from application to final substantive hearing*

Over-burdened lists and short hearings were found in all Circuits. Consent divorce cases were given on average two minutes for evidence to be heard in the Dublin Circuit, with 5.3 minutes being the average length of time for consent divorces across all 8 Circuits<sup>353</sup>. The shortest consent divorce observed took 30 seconds.<sup>354</sup> The pressure of the waiting list promoted inadequately short hearings and intense pressure to settle and get some kind of closure on the day.

*“Even though family law cases often constitute a high percentage of cases on civil calendars, they often receive insufficient allocation in the scheduling of court sittings on circuit, resulting in long delays.”*<sup>355</sup>

Attorney General, Máire R. Whelan SC 2013

A significant number of cases before the courts in the eight Circuits were dated from 2007 or earlier.

In Dublin 29.65% of all cases observed were from 2007 or earlier;

In the Cork Circuit 58.65% were from 2007 or earlier

In the South Eastern Circuit 23.79% of cases were from 2007 or earlier

In the Western Circuit 9.43% of cases were from 2007 or earlier

In the South Western Circuit 8.82% of cases were from 2007 or earlier

In the Eastern Circuit 24.56% of cases were from 2007 or earlier

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<sup>353</sup> See Statistics Appendix E

<sup>354</sup> See Statistics Appendix E

<sup>355</sup> Whelan, M. Attorney General (2013) ‘Preliminary Considerations on the establishment of a Civil Court of Appeal and a new Family Court structure’, presented at the Law Society of Ireland, Blackhall Place, Dublin 2 March 2013. Pg 11

In the Midland Circuit 22.22% of cases were from 2007 or earlier

In the Northern Circuit 18.98% of cases were from 2007 or earlier

Taking into account the length of the research period, almost 1/3 of judicial separations or divorce applications in Cork or Dublin took more than four years to substantive hearing. The oldest” live” cases observed by Circuit were, Dublin [1999], Cork [1997], South Eastern [1998], Western [2000], South Western [2004], Eastern [2004], Midland [2002] and Northern [1999].<sup>356</sup>

### ***Delay***

Case ref; C440 May 2010. Proceedings were issued by the husband in 2006, the parties had been married 29 years. The only asset of the parties was the family home. At the time the application was made by the husband the family home was valued at € 220,000. Counsel for the applicant husband indicated that the respondent had delayed matters considerably, and he sought an interim order to sell the property, net proceeds to be divided 50/50. Counsel asked the court to note that the interim application had been on the list numerous times, but has not gone on. The value of the family home is now € 130,000. Counsel for the wife argued that the house should not be sold as the wife could not re-house herself with 50% of net proceeds. The husband had a modest pension, disability payments of € 205 per week and a fuel allowance. On hearing submissions the court held that the wife had contributed significantly to the purchase price of the house and had discharged the mortgage since 1999. The court ordered that the wife buy out the interest of the husband for € 10,000, failing which the house would be sold and € 10,000 paid to the applicant.

### ***12.7 Application of In Camera rule***

The *in camera* rule was applied as follows;

- (a) Generally, only the litigants and their legal counsel were permitted to attend in the courtroom.

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<sup>356</sup> For more detailed analysis see Statistics, Appendix E.

- (b) All court ordered reports were for the eyes of the court only, unless otherwise stated by the court
- (c) All proceedings were private and confidential, parties were consistently reminded that they may not discuss anything that occurred or was said in the courtroom with anyone other than their legal team.
- (d) Where notification of trustees or other matters arose that required the lifting of the *in camera* rule consent of the court had to be sought.
- (e) In the exceptional cases where transcripts of court hearings existed they were to be held in the Circuit Court office, with supervised access as per the instructions of the court
- (f) Digital recordings of the proceedings were deemed to be for the use of the court only.
- (g) Persons with Ministerial consent under section 40(3) of the Civil Liabilities and Courts Act 2004 were permitted to observe proceedings.

### ***12.7.1 Breaches of the in camera rule***

#### ***Details of cases discussed at open “call-over”***

Court note; October 2010 Dublin; During call-over two barristers discussed in detail, with the judge, an adjournment being sought as the husband lived in the Philippines. The parties were identified and details of the case were discussed, while members of the public and practitioners not involved in the case, were in the court-room.

Court note; February 2010 Waterford; During the call-over of a four day list, where 76 cases were due to be dealt with, two barristers discussed a case in detail with the judge, and issues arising as to why it couldn't go on that afternoon. The parties in the case were identified by name. Arrears of maintenance, a freezing order on the husband's monies at bank, and an exclusion order from the family home were all discussed. The court-room was full with solicitors, barristers and litigants from other cases and members of the public attending with litigants.

### ***12.7.2 Exceptions to the in camera rule approved by the court***

In several cases the court approved specific persons to attend in the courtroom, such as family members or friends acting as interpreters, signing interpreters for deaf litigants, a

stenographer, Mc Kenzie friends, a detective in a domestic violence case, Guardian ad Litem, court appointed experts, court approved experts, witnesses, and barristers and/or devils who wished to observe cases.

#### ***Wheelchair assistant permitted to remain in court***

Court note; Case ref; C118 November 2008. In a judicial separation application the applicant wife was in a wheelchair. Her friend who had wheeled her into the court-room remained for the duration of the contested hearing. When the judge made the Orders, after the hearing concluded, he noticed the friend and told her she should not have been in the room.

### ***12.7.3 De facto breaches of the in camera rule***

#### ***Digital Audio Recordings of case proceedings in Waterford and Dublin***

Court note; It was noted that the digital audio recording system, DAR, was actively recording family law hearings in a Waterford court in February 2010. On enquiry it transpired that the staff did not know how to turn off the system.

#### ***Presence of Gardaí in the courtroom***

Court note; It was noted in all cases in 2008, in one circuit, that a Garda would regularly come into the court-room during the hearing of a case. He would remain for a few minutes, walk across the room and exit through another door. When questioned, he stated that his presence was required to ensure “there was no trouble”.

Case ref; C634 May 2010. The respondent in a maintenance pending suit application was a senior member of An Garda Síochána. Counsel for the respondent noted that a member of an Garda Síochána had been sitting in the court-room throughout all cases that day, and requested that this guard be asked to leave. The court agreed that it would be inappropriate for the guard to remain.

Court note; In Wexford, Portlaoise and Bray, multiple Gardaí sat in the court-room for *in camera* family law hearings. They indicated they were appointed by their sergeants to attend at the court, although their function was unclear.

Court note; A guard, who was given instruction by his sergeant to attend in the court-room for family law hearings at Portlaoise, asked the Judge if he could leave the court as he knew the woman professionally in the next case and did not feel he should be in the room. The court indicated that it had not assigned the task to him, nor could it free him from that assignment, and suggested that he contact his sergeant.

### ***'In camera' applied to documents***

Court note; In February 2009 a lay litigant father was the applicant in an appeal from the District Court relating to guardianship. The court accepted paperwork from the High Court which acknowledged the applicant's right to hire a stenographer to take a transcript of the hearing. The court sought to limit sight of any transcripts "*the transcripts of these records are not to be disclosed to any third party*". The applicant father produced further paperwork from the High Court which he stated indicated that parties mentioned in any such transcripts, had the right to review the parts relating to them, in order to respond if called as a witness. On reviewing the documents submitted the court stated "*the transcript of this hearing is for your purposes only. Those persons assisting you are not at liberty to see these transcripts*". The court determined that the transcript should be treated in the same category as a s.20 report, and ordered that it would be kept by the Circuit court offices, where it could be viewed by the applicant under supervision. Three employees of the HSE also attended the full hearing, although they were not called to give evidence.

## ***12.8 Settlement on the Steps***

Pressurised settlements on the steps of the court were the norm throughout this project. Unrealistically long lists were to be dealt with on any given day, the same pattern highlighted by the Law Reform Commission.<sup>357</sup> The most extreme example was Letterkenny in the Northern Circuit, with 79 cases on the list, scheduled to be dealt with in 4 days. 27 of those were listed as full hearings. Two of the cases for full hearing had an indicated one day requirement, 17 other cases listed for hearing had an indicative time of at least half a day.

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<sup>357</sup> The Law Reform Commission supra n. 47, pg 134

The ritual followed, without fail, on all family law days observed, commenced with “call-over”, where all cases listed were called out in order. Responses came from solicitors, counsel or lay litigants as to the status of the case. Many cases would get adjourned during this process, frequently without any reasons being proffered or the court questioning why. One judge actively encouraged adjournments to reduce the list<sup>358</sup>. A significant number of cases usually remained at the end of the first “call-over”. The procedure that followed depended on the individual judge. Some judges dealt with the list chronologically in the order the cases were listed, others dealt with short matters first. This set pattern could be changed when the court was petitioned by counsel for priority, particularly where settlement talks were not likely to “bear fruit” and the day was progressing. Where friendly relations existed between particular counsel and the court, priority would often be given, the reverse was also the case. Lay litigants had no knowledge of this process, or the individual procedural preferences of the judges. No court spoke directly to lay litigants at “call-over” generally recommending to the room at large that they enter into settlement discussions while other matters were heard.

As the day progressed ‘settlement talks’ were conducted in almost all cases, particularly those listed for hearing. These ‘talks’ followed set patterns. Where the litigants were represented, counsel negotiated with counsel, counsel discussed matters with the solicitor, the solicitor briefed the client and sought instruction and then briefed counsel. Counsel and the client rarely engaged in any form of direct discussion. Counsel for the most part remained in the room reserved for barristers. Very often counsel were involved in more than one case, which meant several cases at a time could be under discussion between different counsel, who may also spend time in the court-room for a matter being heard, or seeking direction from the court. No court-house attended during the research period had sufficient consultation meeting rooms to deal with all these discussions, so the majority of ‘settlement talks’ took place in crowded corridors or foyer areas of courthouses, unless the weather was clement, in which case discussions literally took place on the steps of the court.

Some agreements were entered into when the court recommended the parties should take time for more settlement discussions, often indicating how the court might rule if the matter proceeded to orders. This additional pressure added to the hothouse atmosphere of pressurised settlements. The terms of settlement agreements entered into, differed little from

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<sup>358</sup> Judge 4, Judicial Trends Appendix B (ii)



cases where orders were made, primarily due to the influence of the court, either directly or indirectly through practitioners who indicated the ruling patterns of any particular judge. Where the court rose to allow further settlement discussions, one 'side' would leave the court-room with their legal representation and the other 'side' remained. A common phrase over-heard during these type of settlement discussions in the court-room was, "*if you don't agree to this, this judge is likely to order it anyway, or might make an order less favourable*". It was the only time counsel were observed speaking directly to clients.

Counsel and solicitors looked comfortable and at ease with this process. Litigants appeared distressed or confused, particularly where the parties and their representation asked the judge for direction, or were called in by the judge to give an update on the progress of the talks. These court sessions could be extremely brief. Counsel and team would sweep into the court-room, engaging in a fast dialogue with the court. There could be brief references to 'white smoke' and the moment was sometimes over before the litigants even took a seat. These brief legal discussions appeared to be indecipherable to most litigants, who left the courtroom in a state of confusion in the wake of their solicitor and counsel. The process was even more stressful for a lay litigant where the other party was represented. Without fail, all such discussions were directed by the court to counsel in the room, even where that counsel only represented one party.

These pressurised agreements would then be reduced to hand-written agreements, often amended, or incomplete at the time of ruling. No facilities were available at any courthouse to type up, print and photocopy these agreements, which meant that litigants left without a copy of the terms entered into. Legal representatives did not appear to bring laptops or portable printers. These hand-written agreements, signed by the parties, would be offered to the court to be made a rule of court, with an undertaking to type up the terms at a later date and submit that document to the file. Given the pressurised nature of these settlements, detailed access arrangements and long-term parenting arrangements were usually not included in the agreement.

### *12.9 Review of Court buildings/facilities*

70% of the courthouses attended were buildings dating from the mid 1800s. These older buildings were designed to intimidate, and to be an uncomfortable experience for litigants.

Two of the courthouses had no public toilets, no meetings rooms, had visible patches of mould and disrepair, and were unheated. No courthouse had refreshments available in the building, and no courthouse had any facilities for children. There was a scarcity of meeting rooms even in the two newer courts, that were purpose built for use in the 21<sup>st</sup> Century. Common seating areas, when counted, could at best accommodate 40 people and at worst none. In Dublin, with average lists of 16 cases per court, with three courts running simultaneously; this meant that up to 200 people could be in the common area on any given day, a space approximately 40' x 40' with a short corridor. In Cork, with average lists of 12 cases per day, approximately 50 people were competing for seating space, in a courthouse where other courts were running simultaneously. Solicitors attending with their clients had no rooms to go to, to take files or prepare for the hearing. Counsel usually had a single room for all barristers, invariably small and over-crowded. There was no access to computers or photocopying facilities for counsel to draft agreements. Some counsel prevailed on court staff in certain courts to photocopy hand-written terms or other documents. In the courtrooms, microphones rarely worked properly or were rarely used properly. Acoustics were poor and it was often difficult to hear proceedings.

All of the courthouses attended were unsuitable for family law proceedings. The intimidatory design of the buildings, and the lack of basic comfort, added to the stress of litigants attending. Over-loaded lists meant that litigants and their solicitors spent many hours in these uncomfortable conditions, and often did not have their case heard.

### *12.10 Conclusion*

No discernable difference, in terms of readiness, was noted between cases that went through Case Progression and those that didn't.

*Case progression in its present form in the Circuit Court is a system of case management to get cases ready for trial rather than to advance resolution.*<sup>359</sup>

**White J.**

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<sup>359</sup> Mr. Justice Michael White (2013) 'Current Challenges in the Family Law Courts', Consultative Seminar on Family Law Courts, Incorporated Law Society, Blackhall Place, Dublin, 6 July 2013 pg 8

It was observed that frequent applications were made by solicitors to come off record, where the litigant could no longer afford to pay fees, hadn't paid fees, or wouldn't give instruction. There was a clear relationship of trust and familiarity between the judiciary and legal practitioners. This close relationship was problematic when a lay litigant was a party to the proceedings, as the court almost exclusively conversed with legal counsel for the represented party.

Court clerks were seen to be under pressure, and were often not sufficiently trained, which led to the practice of 'orders determined by consensus' between counsel in the days after a case, where inadequate notes were available of the orders enunciated by the court. The large volume of cases on family law lists on any given day, and the practice of storing all data on a case 'hardcopy' in a file, meant that the logistics of ensuring that all files required were present was quite onerous. Lists were over-burdened on all but two days of this research period, such that there was no reasonable possibility of all listed cases being dealt with. Letterkenny in the Northern Circuit was the worst example of an impossible list of 79 cases, where four days were allocated, but a minimum of 11 days would have been required. The list reference system, or case id, itself has no consistency from court to court and circuit to circuit, and the facilities in 70% of the buildings were wholly inadequate in terms of basic facilities such as toilets, heating, seats, consultation rooms and refreshments. In no court was there access for legal representatives to computers or photocopying facilities, all terms compromised on the day were hand-written.

Over-burdened lists, multiple adjournments and short hearings were found on all eight Circuits. The pressure of the list promoted inadequately short hearings and intense pressure to settle. A significant number of cases were filed in 2007 or earlier, over 58% of cases observed in Cork dated from 2007 or earlier. Almost 1/3 of judicial separations or divorce applications in Cork and Dublin took more than four years to substantive hearing, meaning that a significant number of divorce cases took eight years or more to be concluded. In Letterkenny it was noted that more than one divorce case on the list was 11 years or older. Long delays, brief hearings and an increasing number of cases were also key findings in a PhD thesis by Dr. Elaine O' Callaghan, of the Department of Law, University College Cork in 2009. The purpose of that study was to examine the child's right to contact with his or her parents following separation and divorce. She noted delays of 3 ½ to 4 months to get an

access case before the court,<sup>360</sup> and further delays of 2-3 months where social reports examining the child's living arrangements were required.<sup>361</sup>

### **In camera**

As noted by Judge Rosemary Horgan, the concluding report on the Project to the Board of Court Services supported Dr. Coulter's recommendations, that restrictions on reporting family law cases should be reduced to the greatest extent possible, while ensuring that the identities of the parties are not disclosed.<sup>362</sup> Furthermore, in the same media address in 2013, Judge Horgan noted the growing demand to "open up" family law and child care proceedings, both nationally and internationally, from all professionals engaged in family justice matters. One of those professionals, Gerard Durcan SC, emphasized that the hearing of family law cases in private leads to a lack of openness and transparency, which must be addressed.<sup>363</sup> Hogan J., interpreted the provisions of the 2004 Act<sup>364</sup>, in *D.X. v Her Honour Judge Oliver Buttimer v M.Y.*<sup>365</sup>, such that s 40(8) of the Act of 2004 permitted the presence of third parties during *in camera* family law proceedings, where the interests of those third parties might otherwise be affected<sup>366</sup>, although the provision was designed to deal primarily with the release of documents.

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<sup>360</sup> O' Callaghan, E. (2011) 'Children and Contact in the Private Family Law Setting: Resolving disputes in practice', Briefing document, Department of Children and Youth Affairs, Dublin pg 1

<sup>361</sup> O' Callaghan, E. *Supra* n.18 pg 2

<sup>362</sup> Judge Rosemary Horgan, (2013) Media Address; The Child Care Law Reporting Project, April 4th, 2013 <http://www.childlawproject.ie/media/>

<sup>363</sup> Durcan, G. (2013) 'Reimagining the Family Court System', presented at the Consultative Seminar on Family Law Courts, Blackhall Place, Dublin, 6 July 2013, pg 11

<sup>364</sup> Civil Liability and Courts Act 2004

<sup>365</sup> [ 2012] IEHC 175

<sup>366</sup> (8) *A court hearing proceedings under a relevant enactment shall, on its own motion or on the application of one of the parties to the proceedings, have discretion to order disclosure of documents, information or evidence connected with or arising in the course of the proceedings to third parties if such disclosure is required to protect the legitimate interests of a party or other person affected by the proceedings*

The Courts and Civil Law (Miscellaneous Provisions) Act 2013, provides that bona fide representatives of the Press<sup>367</sup> may attend court proceedings, which are usually held *in camera*, and allows reporting of those cases with certain restrictions set by the court, “in order to preserve the anonymity of a party to the proceedings or any child to whom the proceedings relate.”<sup>368</sup> When determining what restrictions, if any, may be required, the court shall weigh the requirement to be seen to administer justice in public, with the best interests of a child, and any other party, in such proceedings.<sup>369</sup> This measure, an initiative of Minister Alan Shatter, aims to protect the privacy of any parties in respect of family law proceedings, while ensuring that the courts are “opened up” to the Press<sup>370</sup>, enabling them to disseminate information about the workings of family law courts.

The “opening up” of our family law courts is long overdue. The current application of the *in camera* rule by the judiciary, observed during this research, restricted court attendance to the parties involved in the proceedings and their legal representatives, and generally no recorded record was available of the proceedings, either written or digital. Practitioners with frequent experience in the family courts were better able to advise their clients, and other practitioners, of potential outcomes, but only where they were aware of the disposition of a particular judge. However, the *in camera* restrictions were disregarded on several occasions to allow the presence of Gardaí in the room, with no involvement in the cases before the court. Other ‘breaches’ of the stated application of the *in camera* rule, included discussions of cases, identifying the parties, by the courts and practitioners at call-over<sup>371</sup>; digital recordings were

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<sup>367</sup> s 40 of the Civil Liability and Courts Act 2004, as amended by s 5, (3A)(a), Part II, of the Courts and Civil Law (Miscellaneous Provisions) Act 2013, *nothing contained in a relevant enactment shall operate to prohibit bona fide representatives of the Press from attending proceedings to which the relevant enactment relates.*

<sup>368</sup> s 5, (3A) (b) (i), Part II, Courts and Civil Law (Miscellaneous Provisions) Act 2013

<sup>369</sup> s 5, (3A) (c), Part II, Courts and Civil Law (Miscellaneous Provisions) Act 2013

<sup>370</sup> Shatter, A. T.D. Minister for Justice, Equality and Defence (2013) ‘A New Structure for Family Courts’, presented at the Consultative Seminar on Family Law Courts, Blackhall Place, Dublin, 6 July 2013, pg 2

<sup>371</sup> “Call over” is where the family law list is called out to determine status on each case, and from which the judge decides the running order of the cases listed. There was a “call-over” at the start of each family law day, anyone could attend the court, including parties to cases, legal representatives and members of the public. A

made on the DAR system in cases in Dublin (by design) and Waterford (by accident); a stenographer was allowed to record the hearing at the request of a lay litigant, a wheelchair assistant was allowed to remain in the court-room for the duration of a case and interpreters, who were invariably family friends or relatives, were allowed to remain in the courtroom,

The concerns expressed by practitioners<sup>372</sup> about the changes to the *in camera* rule, have not been borne out in other jurisdictions. In New Zealand the Care of Children Act 2004 radically changed the public perception of the court.

*In fact, the media hardly came into court at all and they are rarely seen these days. Once we removed the secrecy and answered the complaint that access to the court was restricted, the sting of criticism abated... I just want to make the point that we seem to have defused volatility by permitting media access, which in fact almost never occurs.*<sup>373</sup>

**Judge Boshier, P.**

Indeed the experience of one journalist, who has attended childcare proceedings in the District Court<sup>374</sup> in Dublin, is that access to the court has, “lifted the murkiness from the proceedings, revealing the relatively mundane muddle of court business”.<sup>375</sup>

In Canada, the fundamental principle of openness of Canadian Court systems, means that not only are family law proceedings open to the public, but the public can also view any documents filed in a court case and any orders made, unless access is specifically restricted

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“call-over” could be done after lunch or at other times during the day where a judge may wish to indicate to practitioners that their cases would not “get on”, i.e. would not be heard that day.

<sup>372</sup> O’ Hanlon, B. SC (2013) presentation speech at the Consultative Seminar on Family Law Courts, Blackhall Place, Dublin, 6 July 2013, pg 3

<sup>373</sup> The Hon. Justice Boshier, P. (2012) ‘Family Justice: Aligning Fairness, Efficiency and Dignity’ presented at the Four Jurisdictions Family Law Conference, Liverpool, 4 February

<sup>374</sup> Child Care Amendment Act 2007

<sup>375</sup> Buckley, H. (2013) ‘Law Reporting project casts a light on the messy reality of family law cases’, The Irish Times [online] <http://www.irishtimes.com/news/crime-and-law/courts/law-reporting-project-casts-a-light-on-the-messy-reality-of-family-law-cases-1.1584774> [accessed 6 November]

by statutory provision, common law rule or court order. The balance of privacy and the “openness” principle is a constant source of debate in the Canadian media, however, published judicial opinion continues to stress the importance of the open court system.

The 2013 Act<sup>376</sup> begins to address the opacity of our family law courts, however, I suggest that to truly address the dearth of information currently available, we need regular published case reports from the Circuit Court, and I propose that all family court appeals should be based on transcripts, which would reduce delay, and avoid the unnecessary duplication of costs.

Comparisons can be drawn between Ireland and New Zealand, where our family law courts, like the New Zealand family justice ‘system’, do not operate as a coherent managed system. There is a general perception that cases are expensive and take a long time and lawyers or solicitors generally take an adversarial approach, which inflames rather than reduces conflict.<sup>377</sup> A U.S. empirical study out by Schneider and Mills in 2006 found that the proportion of family lawyers rated as adversarial was higher than that of any other practice group. This was despite the fact that the nature of family law proceedings, particularly where there are children, means that there must be a continuing long-term relationship.<sup>378</sup> There was evidence that solicitors and barristers may have been instructed to inflict as much damage as possible by the client, the often highly emotional context, and popular culture, perhaps sending the signal that the adversarial route is the way to go.

*In Ireland the traditional barrister/solicitor model appears to require litigants who seek counsel to pay for two legal professionals.*<sup>379</sup>      **The Hon. Justice Williams, J.**

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<sup>376</sup> Courts and Civil Law (Miscellaneous Provisions) Act 2013

<sup>377</sup> The Hon. Justice Boshier, P. (2012) ‘Family Justice: Aligning Fairness, Efficiency and Dignity’ presented at the Four Jurisdictions Family Law Conference, Liverpool, 4 February, pg 23

<sup>378</sup> Schneider, A.K. and Mills, N. (2006) ‘What Family Lawyers are Really Doing when They Negotiate’, Family Court Review, Vol. 44 No. 4, October pg 618

<sup>379</sup> The Honourable Justice Williams, J. Supreme Court Nova Scotia and O’ Shea, R (2010) ‘Family Law: Common Threads and Unique Opportunities’, presented at the Canadian-Irish Family Law Conference, Maynooth, 9 October, pg 10

It is my view that there would appear to be no justification or necessity for this spilt system of dual legal representation in family law cases where there is little or no legal complexity. Solicitors or barristers who wish to practice in the family courts ought to be able to represent their client alone, however seismic change would be required as barristers may not currently take direct instruction and represent a client. Most solicitors who represented their clients without counsel did so competently and were well briefed with the details of the case, which assisted the court. Family law solicitors showed good knowledge of the law, and were practical in its application. I would suggest that with the current representation system that should a solicitor deem it necessary to engage counsel in a family law case in the Circuit Court, that solicitor should explain to the client why his/her services are not adequate, and what legal complexities require the more specialised service of an additional legal representative. The Legal Services Regulation Bill 2012, which may not be enacted in its current form, provides for the establishment of an independent Legal Services Regulatory Authority which proposes a radical shift away from self governance by the legal professionals. A very significant change, if effected, for a very old profession. Section 73 provides that a barrister may not be prevented, other than in a contentious matter, from receiving direct instruction from a person who is not a solicitor. I believe that to provide a cost effective service to the user, we need to go further, and provide measures that move away from the separate systems of legal representation, that operate in tandem, as has been done in other common law jurisdictions, allowing the user to select the man or woman they wish to represent them.



## 13 Chapter 13 Inter-jurisdictional issues

*It is evident that family law matters in Ireland now straddle many boundaries, particularly between EU member states and inter-jurisdictional issues require the intervention and cooperation of different Member States*<sup>380</sup>

**The Hon. Justice Henry Abbott**

### 13.1 Recognition of a foreign marriage/divorce/nullity

*“The whole area is something of a minefield, with different rules applying depending on the date of the institution of the foreign divorce proceedings and the domicile and residence of the parties. Where a foreign divorce is not recognized in Ireland, this has potentially devastating consequences as it invalidates any second marriage entered into by either one of the parties.”*<sup>381</sup>

**The Hon. Mr. Justice Henry Abbott**

#### ***Foreign divorce not recognised***

Case ref; C92 October 2008. The applicant wife sought recognition of a foreign divorce, or a decree of divorce (by consent). The applicant wife, who was a French national, met and married an Irish man, in France in 1986. Both were then residing in France. The husband had resided in the U.K. for ten years prior to relocating to France. After marrying they both moved to Ireland in 1986. The marriage ended in 1989, and the husband applied and secured a divorce in England, however, both parties at the time were domiciled in Ireland. The wife wished to remarry, but the validity of the English divorce had been questioned. The court held that the parties were still married. The English divorce was invalidated on the basis that neither of the parties had domicile in England at the time of the application for that divorce.

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<sup>380</sup> The Honourable Mr. Justice Henry Abbott, High Court (2010), address to the Canadian-Irish Family Law Conference, Maynooth, October 8th, 2010

<sup>381</sup> The Honourable Mr. Justice Henry Abbott, High Court (2010) address to the Canadian-Irish Family Law Conference, Maynooth, October 8th, 2010

A decree of divorce was granted.

***Foreign divorce recognised***

Case ref; C337 April 2009. The applicant was a Ukrainian national who married a Ukrainian man, in the Ukraine, in 2004. At the time the applicant was resident in Ireland, and had been living there since 2002. She regularly visited the Ukraine, where her daughter lived with her parents. The parties moved to Ireland, both received work permits. The marriage was short-lived, ending in 2006, when the husband returned to the Ukraine in July of that year. Shortly afterwards, the applicant lost her job in Ireland and returned to the Ukraine for three months, still seeking another job in Ireland. She applied for a divorce in the Ukraine, it was uncontested and was granted. Counsel for the applicant indicated that while both parties were resident in Ireland prior to the divorce application, the issue is domicile. Under Ukrainian law the applicant must be domiciled in the Ukraine at the time of the divorce application, to no longer be domiciled a party must de-register. The court indicated that it was satisfied that at the time of the divorce the applicant was effectively domiciled in the Ukraine, the divorce was recognized.

***Unable to rule on status of foreign divorce***

Case ref; C493 February 2010. The parties were two Moldovian citizens, married in Ireland in 2002, and represented by legal aid. The marriage broke down in 2006. Both parties continued to reside in Ireland, but stated their domicile of origin remained unchanged. The wife obtained a divorce in Moldova in 2007. Counsel for the applicant husband sought a declaration recognizing the validity of the Moldovian divorce under s 29 (1)(d)<sup>382</sup> and s 5 (1)<sup>383</sup>. Counsel asked the court to note that Moldova is not a member of the EU, nor is there any Irish case law on the matter. The court adjourned the case, directing counsel to seek further information.

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<sup>382</sup> Family Law Act 1995, Part IV Declarations as to Marital Status, s. 29 (1)(d) *a declaration that the validity of a divorce, annulment or legal separation obtained under the civil law of any other country or jurisdiction in respect of the marriage is entitled to recognition in the State.*

<sup>383</sup> Domicile and Recognition of Foreign Divorces Act 1986. S. 5 (1) *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 a country where either spouse is domiciled.*

***Recognition of foreign nullity decree***

Case ref C29 October 2008<sup>384</sup>. A Ukrainian national resident in Ireland sought a judicial separation from her Irish husband, he counter-claimed seeking recognition of a nullity granted in the Ukraine. It was argued by counsel for the husband that under Ukrainian law if the applicant, a Ukrainian national, was registered in a permanent address in the Ukraine and did not de-register, then she is not considered a non-resident, and the Ukrainian court has jurisdiction. Both parties were represented at the court of first instance in the Ukraine which granted a decree of nullity, the effect being that the marriage is void from the outset. Counsel for the wife argued that the wife did not recognize the Ukrainian nullity, she entered Ireland as a spouse, and there is no authority in Ireland on the matter. The judge made an order under s 29(1)(d) of the Family Law Act 1995 Act order, that the nullity decree between the parties is hereby recognized in Irish law.

***Recognition of foreign marriage***

Case ref; C171 December 2008. The applicant, an Irish national, sought recognition of her marriage to a Pakistani national, which took place in Pakistan. Evidence was given that the 2008 ceremony took place, as required, in the local police station with both parties present. The husband then sought a visa to Ireland, and was refused on the grounds that the marriage was not recognized in this jurisdiction. A notice of appeal was lodged and the applicant and her husband sought a s 29 declaration that the marriage is valid. An attested copy of the marriage certificate was produced with ancillary documentation, all written in Urdu. The judge adjourned the matter asking for the documents to be translated.

***Proxy marriage in Egypt recognised***

Case ref; C377 May 2009. The applicant and respondent, both Egyptians, sought the recognition of their marriage, by way of a declaration, for immigration purposes. The applicant came to Ireland six years previously to seek work, and had been working as a chef for four years. He lived in rented accommodation. The marriage certificate stated that the applicant was domiciled in Egypt at the time of the marriage in 2008, however he was residing in Ireland, and the marriage ceremony was conducted in his absence, with his father standing in as proxy. Counsel for the Attorney General indicated that the State is not

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<sup>384</sup> See chapter 3, section 3.3.1

consenting or objecting, the burden being on the applicant to prove that the marriage should be recognized. The only matter at issue was domicile as the State recognized valid marriages conducted in the Egypt. Evidence from the applicant was delayed as a Koran was sought for him to be sworn. On evidence, the applicant stated that he decided some time ago to reside in Ireland, he had abandoned his domicile of origin choosing Ireland. The court determined that domicile was not an issue and made the declaration under section 29(1)(a) of the Family Law Act 1995.

***Proxy marriage in the Republic of Sudan recognised***

Case ref; C669. February 2010. Counsel for the applicant husband sought an order to notify the Attorney General, in a case where recognition of a proxy marriage was being sought. The marriage occurred in the Republic of Sudan, with a party standing in for the husband, and the husband wished to bring his wife to Ireland. Counsel stated that there is no superior court law on the matter, and it needed to be dealt with urgently, as there were financial and immigration issues for the wife should the State continue to refuse to acknowledge the marriage. The application was granted.

***Invalid marriage to citizen of the U.S.A.***

Case ref; C145 December 2008. The respondent husband, in a divorce application, sought a declaration from the court that his marriage to a U.S. citizen in Ireland was not valid, on the basis that the woman was still legally married to another party, at the time of that marriage. On evidence it was submitted that the woman had been married twice in the U.S. The first husband had died, and she had initiated divorce proceedings against the second husband. The solicitor who investigated the former marriage in the U.S. gave evidence that while divorce proceedings had been initiated, they had not been concluded by the respondent. The court declared that the marriage in 1987 to the applicant was null and void.

### ***13.2 Child Relocation***

In this case, the parties were unmarried, however this case is useful as the criteria for relocation were considered by the court.

## Facts

Case ref; C641 May 2011<sup>385</sup>. In a re-location application, the applicant mother who had already moved to America, indicated that she had returned to Ireland with the child, who was 4 years old, for the hearing of her re-location application, as the respondent was “threatening” her with Hague. Prior to the abduction of the child, the mother had unilaterally ceased court ordered access to the child, and had initiated a re-location application. The father filed a motion to enforce access. The mother alleged that the father had abused the child, and a s 47 assessment was ordered. Shortly afterwards, the mother took the child to America.

On evidence the mother submitted that she had close family near where she lived in America, including her mother, she submitted that she was in a full-time pensionable job for the previous 12 months, and was engaged to be married. The court indicated that it must consider the needs of the mother, but the best interests of the child must be to the fore, “*is re-location in the child’s best interests?*” The court stated that it must give consideration to the following;

- (a) The age of the child
- (b) Whether the mother has a permanent job in the U.S.A. and has “*put down roots*”
- (c) The bond between the father and son, and whether the geographical distance would deprive the child of his father’s company
- (d) The conduct of the mother
- (e) The recommendations of the s 47 report

The expert who carried out the s 47 investigation gave evidence that the father and son were demonstrably affectionate with each other, and the father showed a great desire to be actively involved in his son’s life. He stated that the child had the right to the society of both of his parents, and a significant geographical distance at the age of 4 would fracture the bond the father and son currently enjoyed. He was critical of the mother, who when interviewed “*made it clear that she controls access, making the father sign a document every time he enjoys access, and sees it within her gift to allow time with the father.*” He further indicated that the mother is not capable of putting the interests of the child first, and that she showed “

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<sup>385</sup> See also chapter 10, section 10.3

*not an ounce of flexibility in relation to access, which I thought was unwise, given that the previous judge had indicated that there be flexibility during such visits.”* The expert concluded that there was no evidence that the father had abused the child in any way, and recommended that the child would do best residing in Ireland, to form regular emotional contacts with both parents and extended family. Facebook evidence was submitted that the mother had perjured herself, that she had lost her pensionable job, and was no longer engaged. The re-location application was refused.

### *13.3 Child Abduction*

In this case sole custody was awarded to the father, on judicial separation, as the mother had abducted the children to France a year and a half prior to this application.

Case ref; C814 March 2011<sup>386</sup>. Post the break-down of the marriage, the mother unilaterally with-held court ordered access. There were two dependent children. The father sought to enforce access, but the mother had a history of non-appearance in court. The mother then left the country, taking the children without consent to France. The father initiated abduction proceedings under the Hague Convention<sup>387</sup>. The objects of the Convention are to secure the prompt return of the wrongfully abducted child or children, held in a contracting State<sup>388</sup>, and to ensure that the legal custodial rights and access rights of the Contracting State are respected in other Contracting States.<sup>389</sup> The mother returned with the children, and interim sole custody was awarded to the father.

On judicial separation, the respondent indicted that she would not attend, and was seeking legal aid. The court proceeded to hear the application. Orders were made to discharge a previous maintenance order against the father, as the children were living with him. A decree of judicial separation 2 (1) (f) was granted and sole custody of both children was awarded to

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<sup>386</sup> See also Chapter 4, section 4.7.2 and Chapter 8 section 8.1.2

<sup>387</sup> Convention on the Civil Aspects of International Child Abduction 25 October 1980

<sup>388</sup> Article 1 (a), Convention on the Civil Aspects of International Child Abduction 25 October 1980

<sup>389</sup> Article 1 (b), Convention on the Civil Aspects of International Child Abduction 25 October 1980

the father. The access order of February 2011 was confirmed and an exclusion order under s 10 giving sole right to reside for life in the family home to the respondent, was issued.

### *13.4 Non resident/ inability to attend*

Family law lists are published on the Courts Service website, but can be amended or cancelled at short notice. As lists are generally over-burdened, litigants may wait all day without the case “getting on” and be obliged to return at another date. Where the litigant resided outside the jurisdiction, considerable costs were incurred, both in terms of accommodation and travel, and legal fees. 2% of all litigants resided outside Ireland in one of the Member States and 1% resided outside of Ireland in the rest of the world.

#### *U.K. based professional footballer unable to attend*

Case ref; C286 March, Dublin, 2008. The respondent husband was unable to attend and sought an adjournment of two weeks and a fixed date for the hearing for matters arising post judicial separation. The respondent alleged that the applicant wife had unilaterally ceased court ordered access. Counsel for the respondent indicated that his client was a professional footballer residing in the U.K., and had great difficulty with availability. The matter had been adjourned twice and the respondent had travelled to Ireland on both occasions. The court indicated that no dates were available in the current term and the matter would be transferred to another judge.

#### *Travelled from Scotland but Irish resident wife did not attend*

Case ref; C292 April 2009. The father, a lay litigant, sought a preliminary access order, pending a judicial separation hearing. The father resided in Scotland and alleged that the wife was refusing access to his child. The wife did not attend, nor was she represented. The lay litigant stated that he had been directed to issue the motion by registered post which he did, but the wife did not collect the registered letter, and it was returned. The court gave permission to serve by ordinary post and adjourned the case.

#### *Divorce granted, service outside the jurisdiction*

Case ref; C300 April 2009. The applicant wife, a lay litigant, sought a divorce. She and her husband were South African nationals, the respondent now residing there. The parties married in South Africa in 2000 and moved to Ireland. They separated in 2004 and the respondent left Ireland in 2006. There are two dependent children of the marriage six years and eight years respectively, and no assets. There has been no contact between the parties for four years. The respondent did not attend, was not represented, and no written consent was produced. The applicant secured, at an earlier date, an *Ex Parte* order for service outside the jurisdiction. Divorce was granted, no maintenance or access orders.

***Resident in the Canaries cannot afford to attend court or pay for legal representation***

Case ref; C1034 October 2011. The applicant wife sought a consent divorce. The respondent was a lay litigant, not in attendance at the court. The applicant wife testified that the respondent lived in the Canaries and “*knew about the proceedings*”, counsel for the wife indicated that the respondent had been served and had responded that he would take no part in the proceedings, as he could not afford legal representation or the costs to travel to Ireland. The parties were married in 1983, the family home had been transferred into the wife’s sole name on foot of a Judicial Separation in 2006. There were no dependent children. The wife had part-time employment, the husband’s financial circumstances were unknown. A decree of divorce was granted and section 18 (10) orders.

*13.5 Lis pen dens, first to issue*

In his address at the Canadian-Irish Family Law Conference in October 2010, the Honourable Justice Henry Abbott spoke of the “mass internationalisation of the world economies”, and the resultant impact on social trends.

*“Families now move seamlessly around the world and the family law of this country and the world in general must continue on its never-ending journey, clinging to the coat-tails of the speed of life”.*

Uniform guidelines, principles, and indeed rules regarding family law matters are necessary, to address the ease with which families and individuals can cross borders in modern times;



Brussels II bis provides a set of uniform rules for the automatic recognition of divorces granted in the courts of other Member States, and codified the law of *forum non conveniens* in relation to family matters. Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, provides a simple and standardised legal basis for the reciprocal recognition and enforcement of such judgments, including maintenance orders, between Member States; Council Regulation No. 4/2009 deals with jurisdiction, applicable law, recognition, decisions, and cooperation in matters relating to maintenance obligations. Regulation (EC) 2201/2003 concerns jurisdiction, and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility.

In the European Union, the race to be the first to issue proceedings, and seize the forum, created by Brussels II, discourages the resolution of family disputes through alternative non-court means. When a forum has been “seized” in a Member State by one spouse, it can create real financial hardship, and very different outcomes for the other spouse. Dr. Louise Crowley identifies forum shopping in family law, as provided under Brussels II, as the most significant impediment to any harmonised approach to family law in Europe.<sup>390</sup> Features that can impact on outcomes include marital agreements, non-marital assets, maintenance (needs) and disclosure. Real financial hardship can be the outcome for economically weaker parties, who don’t have the resources to follow the case internationally to the forum selected by the wealthier party<sup>391</sup> One of the biggest challenges facing Irish family law courts is applicable law in international family law matters. National laws across the Member States are often confusing, uncertain and contradictory. The EU Council passed a regulation in 2010, adopted initially by 14 Member States, setting out the applicable laws to be applied on divorce and legal separation,<sup>392</sup> to implement enhanced cooperation. Ireland opted out.

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<sup>390</sup> Dr.Crowley, L. (2012) ‘Access to Justice and Forum Shopping – placing reform in context’, presented at the International Family Law Workshop, Waterford Institute of Technology, March 30th 2012

<sup>391</sup> Hodson, D. (2012) ‘Forum Shopping, First to Issue, Applicable law- and a Future Global Family Law Solution’ presented at the International Family Law Workshop, Waterford Institute of Technology, March 30th 2012

<sup>392</sup> Council Regulation (EU) No. 1259/2010 of 20 December 2010. In force on 30 December 2010 and applied from 21 June 2012.

### ***Mutual recognition of orders in Latvia pose difficulty***

Case ref; C1030 October 2011. The applicant wife had secured a freezing order against the respondent, relating to funds of € 50,000 held in a bank in Latvia. Both parties were Latvian nationals, and resided in Ireland. Counsel for the wife submitted evidence, posted on the respondent's Facebook page, that indicated he intended to buy an apartment in Belarus. There were mutual recognition issues in Latvia with the freezing order, and the wife feared that assets would be dissipated prior to the trial of her judicial separation application. The respondent also indicated on Facebook that he was getting a divorce in Latvia. The court responded, "*then we will serve him and bring him in*", allowing service by registered and ordinary post, and permission to notify the bank in Latvia.

### ***Divorce proceedings initiated in Slovakia***

Case ref; C1063 October 2011<sup>393</sup>. In a post-judicial separation hearing, the respondent father sought the restoration of joint custody and a resumption of access which had been curtailed by the applicant. The applicant, who had secured a five year safety order against her husband indicated that the children were afraid of him. Both parties were from Slovakia. During evidence it transpired that the mother had initiated divorce proceedings in Slovakia and sought orders from that court relating to custody and access. The court indicated that it would hold jurisdiction in relation to custody and access and orders in Ireland pre-dated the application in Slovakia and the children were resident here.

## ***13.6 Conclusion***

Many cases presenting in the Circuit Court, which hears the majority of separation and divorce applications, are dealing with at least one non-national parent, and, or, children that have moved within the EU and elsewhere during their lives to date. Cases were seen to be adjourned where one party was unable to travel to Ireland for the hearing, having already travelled at an earlier date and not had a hearing on a scheduled day, due to extensive lists. The costs to attend are significant, including travel, accommodation and legal costs- there would appear to be no availability and, or, awareness of legal aid to date for the party who must make such journeys. There are questions of validity of orders made in other

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<sup>393</sup> See also chapter 6, section 6.4 and chapter 11, section 11.1.1

jurisdictions, validity of marriage, validity of by-proxy marriage, how and when a court should take account of religious beliefs, questions of residency, inter-jurisdictional maintenance and division of assets, and child abduction by a parent or family member. In January 2009, a joint Conference of the European Commission and the Hague Conference on Private International Law was held in Brussels to discuss direct judicial communication on family law matters and the development of judicial networks, in recognition of the problems being experienced with parental child abduction as the mobility of parents increases.<sup>394</sup>

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<sup>394</sup> The Honourable Madam Justice Robyn Moglove Diamond, Queen's Bench (Family Division) Manitoba Canada, (2010) 'Canadian Judicial Initiatives Respecting the Handling of Inter-Jurisdictional Cases of Child Abduction: An Update, presented at the Canadian-Irish Family Law Conference, Maynooth, October 8th, 2010

## **14 Chapter 14          Judicial Consistency**

### *14.1 How many judges might hear a case*

Multiple judges heard the cases before the courts. Where a case was observed for a second time, and before a different judge, there was a markedly different approach to the case. It was rare for a judge to take *seisin*<sup>395</sup> of a case, as the system of judicial rotation could mean a significant delay before the matter could come back before that particular judge. Lack of familiarity with a case, and varying judicial styles, meant that there was no consistent approach to a case, or evidence of a case managed approach, or certainty of outcome.

An in-depth analysis was carried out of 40 cases in the Dublin Circuit court that were observed during the period of research in the courts. These cases were filed between 1999 and 2006, and were selected as the oldest of the Dublin cases, with a substantive hearing and final orders made in all but 4 cases. The findings were;

- (a) The average number of judges per case was five
- (b) Two cases were heard by 10 judges, one of those cases was in court on 13 occasions, the other 16 times.
- (c) 45% of the cases were heard by six judges or more
- (d) 25% of these contested cases, with multiple judges and multiple hearings, entered into terms of compromise which were made a rule of court.
- (e) Two of the cases were struck out after multiple hearings
- (f) Two of the cases were ongoing

### *14.2 Variation from Circuit to Circuit/ Judge to Judge*

#### **14.2.1 Working hours of the judge and approach to the list<sup>396</sup>**

The working day of the court was usually scheduled to commence at 10 a.m. in the South Eastern Circuit, the Dublin Circuit, and the Eastern Circuit; however the judges observed on these Circuits usually ‘sat’ and started proceedings between 10.30 a.m. and 10.45 a.m.,

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<sup>395</sup> To take possession or ownership of, in family law proceedings meant as one judge taking control of the case.

<sup>396</sup> See Judicial Trends, Appendix B (ii)

except for one judge in Dublin who always commenced at 10. a.m. The South Western Circuit and the Northern Circuit had no start time, the balance of the Circuits had a 10.30 a.m. start time. The court sat in all Circuits generally between 10.30 a.m. and 10.45 a.m.

The average time for “call-over” in all courts was 20 minutes, so for courts that commenced at 10.45, less than an hour and a half of the morning remained to hear cases before lunch. Lunch for most courts commenced between 12.30 and 1 p.m. and the court recommenced at 2 p.m. The Dublin Circuit judges observed usually rose on or before 4 p.m. The average time the court sat on the Dublin and Cork Circuits was 4 ½ hours per day. Judges on the South Eastern Circuit usually “sat” by 10.45, lunch was generally between 1 p.m. and 2 p.m., and the court would often sit late until 6 p.m., or on occasion later. The average working day in court for a judge on the South Eastern Circuit was 6 1/2 hours. The average working day in the Northern Circuit was 6 hours, and the average working day for the family court in all other Circuits was 5 hours.

There was no set pattern in terms of how any judge approached the list, nor any discernible patterns from Circuit to Circuit. Two of the judges dealt with short matters in the morning after ‘call over’ and proceeded with the list as they saw fit on the day. One judge dealt with short matters first, and then chronologically progressed through the list. Five judges started the cases, as listed chronologically, taking any short matters after lunch and then the balance of the list. Four judges had no clear patterns. Judge 3 was particularly irritated by counsel seeking to mention a matter at the end of ‘call over’, taking the view that it was an attempt to “*jump the list*”.<sup>397</sup>

#### **14.2.2 Role of the court Usher**

Each judge had a court usher or crier assigned to them personally, who attended court with them. Eight of the ushers were actively involved in assisting with the list, going out into the hallways seeking litigants. Four of the ushers were actively involved in assisting with the list when they were in the courthouse, but spent approximately 50% of their time undertaking tasks assigned by the judge that took them away from the court. One usher did not assist with the lists in any way.

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<sup>397</sup> Judicial Trends, Appendix B (ii)

### **14.2.3 Adjournments**

There were a significant number of adjournments from the list on any given day. Most judges did not seek to determine why the matter was being adjourned. Judge 9 always queried why cases were being adjourned, and Judge 4 actively encouraged cases to adjourn to “ease the list”.

### **14.2.4 Proper service**

While most of the judges would check if service had been properly executed, one judge always sought to ascertain if service had been properly carried out, and if not, refused to proceed with the case.

#### ***‘You must provide proof of service’***

Case ref; C189 February 2009 An applicant wife, represented by legal aid, sought a consent divorce. The respondent was not present, or represented, however written consent was provided. The judge queried why sole custody had been granted on judicial separation and why there was no access. The wife submitted that the respondent had ignored all proceedings and had never requested access. The judge adjourned the case on the basis that the service documents were not in order, *“the respondent must be served by registered letter and you must provide proof of service”*.

#### ***Solicitor could not produce satisfactory evidence of service***

Case ref; C225 February 2009. The applicant wife was seeking a judgment in default of appearance on divorce. She was represented by a legal aid solicitor and barrister, the respondent did not attend, nor was he represented. On checking the paperwork, the judge noted that the document purporting to be a receipt from the post office proving service by registered post was an unstamped copy, and the affidavit of service of notice of motion was also a copy. The court let the case stand until the original documents were produced. An hour later the legal aid solicitor brought the file, the judge did not accept any of the documents produced as all were copies. The case was adjourned for three weeks for proper service to be completed.

### **14.2.5 Statutory evidence on divorce**

#### ***Reconciliation and Proper provision***

Eight of the 13 judges usually sought evidence to determine “proper provision”, and sometimes sought to establish if the parties had ruled out reconciliation<sup>398</sup>. Judge 5 did not hear evidence on divorce, where the case was on consent and it was a long marriage. Judge 2 rarely sought evidence on “proper provision” in consent cases, relying on counsel to have carried out due diligence. Judge 4 never sought evidence in any consent judicial separation or divorce cases, as can be seen from the following cases.

***“Different judges run their courts in different ways”***

Court note; March 2011. At call-over, a barrister queried the procedure this judge wished to follow in terms of evidence as “*different judges run their courts in different ways, and have different requirements*”. The court responded, “*if the matter is by consent then I don’t need evidence...I don’t require the parties to be called to give evidence*”.

***“So you don’t need the applicant to give evidence?”***

Case ref; C1075 March 2011. In a divorce case, the applicant wife’s motion was for judgment in default of defence, she was represented, the respondent did not attend and was a lay litigant. Counsel for the wife submitted a letter of consent from the husband to the divorce. A judicial separation was granted in 2008 and all assets were dealt with. The court granted a divorce and section 18(10) orders. The wife was not sworn in. Counsel for the wife put a query to the court, “*so you don’t need the applicant to give evidence?*” The court responded, “*No, I take a pragmatic view.*”

***“Your honour, do you not want any formal evidence?”***

Case ref; C787 March 2011. In a contested divorce, the applicant wife sought an order to transfer the family home, valued at € 120,000 to her, and 44 acres to the respondent. Counsel for the wife submitted that the husband, a lay litigant and not in court, had paid no maintenance since he left the family home five years ago. The applicant sought orders in default of appearance. The court made the orders requested. Counsel put a query to the court, “*Your honour, do you not want any formal evidence?*” The court responded, “*No*”. The matter took four minutes.

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<sup>398</sup> Statistics Appendix E

### *14.3 Matters of Judicial Style*

#### **14.3.1 Settlement approach**

Six of the judges observed strongly encouraged settlement discussions. 50% of the judges gave an indication of how they might rule if the parties did not settle. Judge 11, as seen in the following cases, promoted settlement solutions over court ordered outcomes, stating that the parties themselves were best placed to know what would work for them;

#### ***“Voluntary agreement is a better way to proceed”***

Case ref; C185 February 2009. In divorce proceedings, the parties agreed terms of settlement at the court before the case was heard. After making the Orders, the judge commented, *“Counsel cannot come to agreement without their clients. I want to congratulate the parties on settling their differences in such a comprehensive and clear manner. I can only get a snapshot of the marriage, voluntary agreement is a better way to proceed”*.

#### ***The judge indicated he might be inclined to make less generous offer – parties settled***

Case ref; C53 October 2008. A detailed offer was made by the respondent husband on divorce, which included assigning the mortgage-free family home to the wife, spousal maintenance of € 317 per week, maintenance for the 22 year old dependent child of € 200 per week, 50/50 division of the cash value of a life policy, and € 11,000 lump sum provision. The wife sought more spousal maintenance and an extension to the family home to be paid by the respondent or an additional € 30,000. The judge indicated that he believed that the offer made was more than fair and that he might be inclined to make less generous orders. He adjourned for 10 minutes to allow the applicant consider the offer. The offer was accepted with a minor amendment, that spousal maintenance increase to € 500 per week after the dependent child turned 23.

#### **14.3.2 Aptitude for family law**

Four of the 13 judges showed “aptitude” for family law. In 1978 the Royal Commission of New Zealand noted what the central features of a Family Court should be, including;



*“It should have specialist judges who are legally trained and qualified by personality, experience, and interest to decide matters and preside over all activities of a Family Court”.*<sup>399</sup>

This recommendation was adopted by New Zealand, and noted by The Attorney General, Máire Whelan SC, in her address at the Law Society of Ireland 2013.

*“Judges in the New Zealand Family Court are specifically chosen because of their aptitude for family law work and judges are not appointed to the Family Court in Australia unless they are, by reason of training, experience and personality, suitable to deal with matters of family law.”*<sup>400</sup>

Judge 3 always engaged in a friendly manner with litigants, particularly when they were distressed. Litigants showed appreciation for this approach, and it served to defuse some of the tension between the parties. Judge 9 also engaged in a friendly manner with litigants, speaking directly to them, asking questions and allowing plenty of time for “story telling”. Judges 11 and 3 always wished the litigants well and congratulated them where settlement terms had been agreed.

Eight of the 13 judges indicated that they did not support the concept of a designated family court with designated family judges. One judge thought it was a good idea, but not for him. Three judges said they would be interested, but would not like to specifically be a family law judge 100% of the time. One judge said if he had the choice he would never ever hear family law cases.

### **14.3.3 Best interests of the Child**

Seven out of the 13 judges clearly sought to prioritise the best interests of the child in the way they conducted a case. Of these, Judge 4 strongly advocated the right of children to be with

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<sup>399</sup> Hon Justice Beattie and others, (1978), ‘Report of the Royal Commission on the Courts’, New Zealand pg 469

<sup>400</sup> Whelan, M. Attorney General, (2013) ‘Preliminary Considerations on the establishment of a Civil Court of Appeal and a new Family Court structure’, presented at the Law Society of Ireland, Blackhall Place, Dublin 2 March 2013.

both parents, and was critical of mothers who with-held or frustrated access. Judge 1 admonished parents who were in conflict over access arrangements, and was particularly critical of mothers who withheld access. Judge 13 expressed frustration with the inability of the current system to “hear” the voice of the child, and Judge 7 spent time hearing evidence to determine the best access arrangements for the child or children.

#### *14.4 Attitude of Judges Towards a Particular Type of Litigant*

Five of the 13 judges were female. The gender of the judge did not generally appear to be a factor in the view of the court or decisions made, however, male judges tended to be far more critical of male litigants.

##### **14.4.1 Lay litigants**

Five of the 13 judges observed, were openly hostile to lay litigants, male or female. Judge 1 was openly hostile to male lay litigants only. Another judge appeared ill at ease and at times irritated by lay litigants, and four judges were very supportive to lay litigants. Judge 3 assisted lay litigants to understand the process and what was expected of them.

##### **14.4.2 Type of litigant**

Judge 5 openly stated the view that taxi-drivers always under-declare their income. Judge 4 was very intolerant of lay litigants with a poor grasp of English. Judge 1 was very intolerant of male litigants who dressed badly, chewed gum, had their mobile phones ringing, or appeared agitated and anxious, whether represented or not. Judge 1 also had a particular dislike for male litigants who were accused of engaging in extra-marital affairs, particularly if the husband denied the accusations, however he did not show a similar dislike for female litigants who were also accused of engaging in adultery. Most of the judges generally had a poor view of male litigants who were unable to pay maintenance, as ordered, due to straitened economic circumstances; there was a disconnect between the financial reality of the circumstances of male litigants, and the view of the court that fathers should always financially provide for their children. The enunciated over-riding imperative was the moral obligation on a male to provide for his children and, or, spouse. No judge stated a similar view, that mothers should financially provide for their children, where the children resided with the father.

## *14.5 What is the nature of the orders made and are they consistent*

### **14.5.1 Maintenance**

The courts determinations as to maintenance payments did not use any set criteria or formulae. Maintenance was primarily determined through a process of negotiation, facilitated by the court, but without due reference to a litigant's disposable income based on the submitted Affidavit of Means. Generally, the starting point was the amount per week requested by the party seeking maintenance. Judge 5 prioritised the payment of maintenance for children ahead of any other financial obligations, and would always order maintenance regardless of ability of the husband to pay. Each judge had a different 'baseline' of what they perceived to be a weekly maintenance payment per child, Judge 5 would not accept less than € 25 per child per week, frequently making weekly maintenance orders where the payer husband was in receipt of State benefits below subsistence level. While it would appear reasonable to calculate a lump sum equivalent to maintenance payments over the period of time a child or children are dependent, this was not observed in any of the cases. Instead an ad hoc process ensued involving what appeared to be arbitrary percentage re-distribution of equity.

### **14.5.2 Division of assets**

While the majority of judges spoke about a 50/50 division of assets where there was a long marriage, only three judges of the 13 clearly worked from that presumption. Two of those judges employed specific criteria such as the length of the marriage and contributions of the parties. The balance of 10 judges did not appear to start with any presumptions and approached division of assets on a case by case basis.

Nine of the 13 judges indicated in interviews and in court that they would not be in favour of ordering the sale of the family home where there were dependent children residing with the mother, and would grant exclusion orders, granting sole right to reside to the mother. Orders to sell the home, in these circumstances, were usually made where neither party could discharge the mortgage or where the children were close to the point of non-dependency. Three judges would not consider ordering the sale of the family home under any circumstances, where dependent children resided there with the mother.

## *14.6 Enunciation of Orders*

As discussed in Chapter 12.4.1 the greatest difficulty arose at the end of a hearing, whether brief or long, when the court enunciated decisions. It was evident that court clerks were unable to fully record that decision, due to (1) the speed at which the decision or order was enunciated, (2) the quiet speaking tone that the decision or order may have been enunciated in, and (3) the type of legal short-hand language used to enunciate decisions or orders.

## *14.7 How many reserved judgments*

Reserved judgements were extremely rare. During this research period only three reserved judgements were given, all of which are detailed in this thesis.

## *14.8 Judicial interviews*

Six judges out of the 13 judges observed during the period of this research agreed to be interviewed. The protocol for the interviews being that the summaries published or material referenced would be anonymised, and the researcher would not disclose the identities of the judges at any time.<sup>401</sup>

### **14.8.1 Reform suggestions**

Judge 9 questioned the strict implementation of the *in camera* rule, and advocated a partial “lifting” of the *in camera* rule.

*“While the ‘in camera’ rule is necessary to protect the parties and their children from the public eye, the lack of any record is a significant downside. Would people really attend family law proceedings if the ‘in camera’ rule was lifted, no-one comes in for civil cases and very few people attend most criminal trials, apart from the high profile cases”.*

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<sup>401</sup> Judicial Interviews, Appendix B (i)

Judge 1 recommended that parenting arrangements be developed by experts in conjunction with the parents away from the court-room environment.

*“Parenting agreements should be put together by experts, every case is different and a lot of court time can be wasted trying to work out individual arrangements.”*

Judges 1 and 2 advocate “*doing away*” with judicial separation, and suggest shortening the time to divorce.

Four of the six judges interviewed, recommended giving more powers to County Registrars to handle consent matters.

Five of the six judges interviewed recommended that appropriate training, to hear the voice of the child, and mechanisms other than a s 47 should be considered to ensure that childrens’ views are heard.

## *14.9 Costs*

### ***Costs awarded where respondent “did not come with clean hands”***

Case ref; C18 October 2008<sup>402</sup>. The judge indicated that he did not believe the testimony of the respondent, and the respondent’s father, in relation to the agreement they maintained had been made between them, where the father discharged the mortgage on a property listed in the son’s name, which the son undertook to repay him. “*This is a cock and bull story...you have not come here today with clean hands*”. The judge awarded costs against the respondent for the two hearings.

### ***Costs awarded against respondent husband***

Case ref; C14 October 2008<sup>403</sup>. A motion to commit was made by the applicant wife, as no maintenance had been paid following the granting of an interim order pending the hearing of

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<sup>402</sup> See chapter 4, section 4.8 and chapter 8, section 8.6

<sup>403</sup> See chapter 8, section 8.1.4

her judicial separation application. The court struck out the motion to commit, making an order for costs of € 2,000 against the respondent husband, to be paid with the arrears of € 2,000 in maintenance.

### ***Costs should be awarded***

Case ref; C237 February 2009. The applicant wife in a contested divorce sought costs against the respondent. Counsel for the respondent stated that his client was willing to go to mediation and the applicant refused, given that the open offer to the applicant made at the outset is equivalent to the Orders now given, costs have arisen for both parties unnecessarily. The judge responded that costs would normally be awarded against the respondent, but being mindful of his indebtedness no such order will be made.

### ***Legal aid refused costs***

Case ref; C323 April 2009. In a consent divorce the respondent was represented by a solicitor and barrister from legal aid. Counsel sought costs, “*As legal aid I am obliged to ask for costs*”, the court replied, “*As usual I am refusing*”.

### ***A portion of the costs awarded against the “adulterous” respondent***

Case ref; C819 March 2011<sup>404</sup>. The court ordered 1/3 of the costs of the applicant wife against the respondent “*in light of the conduct issues*”, where it was alleged that the marriage ended as the respondent committed adultery.

## ***14.10 Training for Family law***

The majority of judges, in interviews, and in court, expressed the view that judicial training, specific to family law matters was needed, particularly to hear the voice of the child directly in chambers.

*“The lack of judicial training in family law is an issue, particularly training to deal with children. Some form of training is required to assist judges deal with children directly when required, and to understand the dynamics of parental*

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<sup>404</sup> See also Chapter 3, section 3.5.2

*conflict”.*

Judge 2<sup>405</sup>

The Attorney General, in 2013, also noted the issue of specialist training for judges hearing family law cases;

*“One issue that is repeatedly raised in respect of judges presiding over family law cases is that they do not receive specialist training as to the optimum methods of dealing with vulnerable parties, in particular children.”*<sup>406</sup>

### ***Hearing the views of the child***

Case ref; C1043 October 2011. In a post-judicial separation application the applicant father, a lay litigant, sought enforcement of access orders. In the previous hearing the court had issued a direction *“if either party breaks these orders, I will make a committal order”*. Subsequently the mother had called the Guards when the father was late bringing the 10 year old child back, following which the father refused to give the passport to the mother to take the child on holidays, which was included in the court orders. A s 47 report had been ordered at an earlier stage in the conflict between the parents and the recommendations included that the child be brought to counselling and the parents take a parenting class. It was also recommended that access take place. The parents could not agree on which counsellor the child should attend, and neither would give consent to the other to bring the child to the counsellor of their choice. The father alleged that the mother had frustrated or with-held access for the last three years, stating, *“several judges have handled this case, she has interfered and used the courts to vary access with judges who are unfamiliar with the case”*. The applicant asked if the daughter could address the court directly. The court responded, *“No, I am not trained to speak to children, although I have considered seeing children before”*. The court ordered that the child be brought to the psychologist who carried out the s 47, to prepare an “update” for the court.

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<sup>405</sup> Judicial Interviews, Appendix B (i)

<sup>406</sup> Whelan, M., Attorney General,(2013) ‘Preliminary Considerations on the establishment of a Civil Court of Appeal and a new Family Court structure’, presented at the Law Society of Ireland, Blackhall Place, Dublin 2 March 2013. Pg 9

### *14.11 Conclusion*

*One of the most common criticisms of our current system, both from the practitioners and litigants point of view is the lack of consistency in decision making even in cases which seem to be broadly similar*<sup>407</sup>

It is a finding of this research that the wide discretionary powers applied by the judiciary, on separation and divorce, resulted in a considerable variation of approach and outcome. Rather than finding consistent decision making patterns, it was difficult to identify consistency of approach. The outcome was wholly dependent on the individual judge, and practitioners relied on information or knowledge of each individual judge's disposition in order to argue their case. Practitioners become familiar with the decision making trends of individual judges, and could be heard instructing their clients as to how to appeal to the known view of a judge on certain matters. This creates a lack of predictability generally, and makes it more difficult to achieve settlements.<sup>408</sup>

It is a finding of this research that there is no specific judicial training in family law or related disciplines. The Canadian family courts have judges who are specialist family law judges. These specialist judges participate in judicial education programmes, which include substantive law, context education and skills development. Training programmes include evaluating domestic violence allegations and partner violence through role play strategy, brain development and understanding the needs of children, delivered by psychiatrists. Training for family law judges in Ireland must be interdisciplinary to assist judges to understand the complexity of family disputes, and to adopt a best practice approach based on the research and wisdom of relevant professionals, to evaluate evidence, and make the best decisions for litigants and their children.

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<sup>407</sup> Walls, M. (2013) 'Meaningful change in our Family Courts- Meeting the needs of the people who use them', presented at the Consultative Seminar on Family Law Courts, Blackhall Place, Dublin, 6 July 2013, pg 5

<sup>408</sup> Durcan, G. (2013) 'Reimagining the Family Court System', presented at the Consultative Seminar on Family Law Courts, Blackhall Place, Dublin, 6 July 2013, pg 11



## **15 Chapter 15            Legal Aid**

### *15.1 Delay in processing cases/ impact*

There are 33 full-time Legal Aid law centres in Ireland. It is an independent publicly funded organisation established in 1979, and placed on statutory footing in 1995.<sup>409</sup> They are responsible for the provision of legal aid for civil law matters where a person is unable to fund the cost of legal representation from their own resources. The mission statement of the Board as set out in its Corporate Plan 2012-2014 is; “to provide a professional, efficient, cost-effective and accessible legal aid and mediation service in accordance with the terms of our statutory mandate”.

To secure legal aid it must first be proved that the case has “merit”, and that the applicant meets the financial eligibility requirements. The “merits test” includes an assessment of the prospect of success in the case, if other available methods have been explored, and the cost to the Board measured against the potential benefit to the applicant. To meet the financial eligibility requirements an applicant’s annual disposable income must be less than € 18,000. The disposable income is calculated based on gross income less certain stated allowances. Capital resources such as property (excluding an applicant’s home) are also factored in, and an applicant will not be eligible if the value of those assets exceeds € 100,000. Debt such as bank loans, or credit union loans may be off-set against stated assets. Legal Aid is not free, contributions must be made. The minimum contribution is € 130. Where an applicant’s disposable income exceeds € 11,500, the contribution is € 50 plus  $\frac{1}{4}$  of the difference between disposable income and €11,500. Each application filed with the court requires a separate contribution. Those who are resident outside of Ireland and have court proceedings or a legal dispute in Ireland can apply for legal aid through the appropriate authority in the country in which they are resident, who will contact the Legal Aid Board in Ireland.

In 2008 at the start of this research the Legal Aid Board released a Press Release titled ‘ Legal Aid Board annual report highlights increasing demand’. It was acknowledged that the increased demand put “further pressure” on waiting times for initial appointments, and the

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<sup>409</sup> Civil Legal Aid Act 1995

demand was attributed primarily to the economic downturn.<sup>410</sup> In December 2012 near the end of this research project, the Legal Aid Board released a press release with a very similar heading, ‘ Legal Aid Board reports significant increase in demand for legal services’, the two main factors driving this “significant” increase were identified as;

*Firstly, and most significantly, the continued economic downturn has meant that a greater number of persons are now satisfying the means test which allows them to avail of the legal services provided by the Board. Secondly, evidence points to a greater need for certain legal services during times of economic distress, particularly in areas such as family law, debt and employment.*<sup>411</sup>

Dr. Moling Ryan, the Board’s Chief Executive noted that the increase in demand put considerable pressure on the Board’s capacity to deliver a timely service at some of its law centres.

Litigants spoke in court of long delays waiting for legal aid. Stated timelines differed from Circuit to Circuit. The average length of time in Dublin was stated as 8 months, however Wexford had delays of up to 12 months and Waterford had delays of up to 10 months.

***Respondent not making due haste to acquire legal aid.***

Case ref; C264 March 2009. A motion was before the court seeking direction. Counsel for the applicant alleged that the respondent was not making due haste in applying for legal aid. 16 months has now elapsed since the last direction from the court. The respondent, attending as a lay litigant, indicated that he had now submitted the required documents to the legal aid board and had been given an appointment in April. The respondent was unclear if a legal aid solicitor had been appointed and was not in receipt of any letter confirming same. The court adjourned the case until May.

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<sup>410</sup> Legal Aid Board annual report highlights increasing demand (2008) [online]

[http://www.legalaidboard.ie/lab/publishing.nsf/Content/Press\\_Release\\_Annual\\_Report\\_2008](http://www.legalaidboard.ie/lab/publishing.nsf/Content/Press_Release_Annual_Report_2008) [accessed 1 September 2013]

<sup>411</sup> Legal Aid Board reports significant increase in demand for legal services (2012) [online]

[http://www.legalaidboard.ie/lab/publishing.nsf/content/Press\\_Release\\_Annual\\_Report\\_2011](http://www.legalaidboard.ie/lab/publishing.nsf/content/Press_Release_Annual_Report_2011) [accessed 1 September 2013]

***We cannot act for the husband in this matter.***

Case ref; C420 March 2010. A motion was before the court to attach and commit the respondent husband post judicial separation. The husband had been served with the notice and attended at court as a lay litigant. He indicated he had applied for legal aid and produced a letter. The court read it out; *“Please note that we cannot act for [the husband] in this matter, he requires a solicitor from the criminal aid scheme”*. The judge asked the solicitor for the wife, who was appearing as a legal aid solicitor to ensure that some priority was given to the respondent. The matter was adjourned.

***15.2 Understanding of litigants of how legal aid works***

The most commonly expressed misunderstanding was that legal aid was free. The majority of litigants applying for legal aid assumed that there would be no charges for the service.

***Legal aid, not free***

Case ref; C1041 October 2011. The applicant wife sought judgment in default of defence, the respondent attended court as a lay litigant. The wife sought orders to transfer the family home into her name, and a property in England to be sold, the net proceeds being divided 50/50. The court asked the respondent why he hadn't submitted a defence, given that he had indicated at the last hearing that he had been approved for legal aid. The respondent replied, *“Free legal aid want € 1,000 from me because we have two properties that are not worth much. I thought legal aid was free and I don't have any money, I get € 196 a week on social welfare”*.

***Wife seeking legal aid to contest orders made 2 years prior***

Case ref; C1028 October 2011. A respondent wife indicated to the court that she had applied for Legal Aid and wished to appeal the orders made on divorce. The divorce was granted, on consent, in 2009. The applicant wife who was hearing impaired, attended the divorce proceedings as a lay litigant, with her son as a Mc Kenzie friend. She indicated to the court that she had been told she was entitled to legal aid, but she would have to wait 8-9 months to get an appointment. The court indicated that it was too late to contest orders made in 2009, and questioned why she had applied for legal aid. The motion before the court was by the applicant husband for specific performance of the terms of the consent divorce.

### *15.3 Conclusion*

The Irish family law court system is impossible to navigate without specialist legal knowledge and experience. Those who cannot afford to represent themselves have no reliable information resource provided by the State. Long delays in Legal Aid representation, exacerbated by reduced budgets, will mean that more lay litigants will present in a system, that has been for many years a system that is essentially broken.

*Delays in the processing of legal aid applications and waiting times for appointments pose a substantial challenge to the Family Law Courts, which judges endeavour to manage as best they can.*<sup>412</sup> **White J.**

It was not possible to determine how many cases were aided by the Legal Aid Board. Very few family law lists stated when a party or parties were represented by the Board. It was not usually enunciated in court, unless an issue arose, and the court referred to the status of the legal representation. As the research progressed it became clear that cases were being adjourned as a Legal Aid representative had not yet been appointed due to long delays. Significant Legal Aid delays, in excess of six months, occurred in all eight Circuits. Solicitors acting for the Legal Aid Board always sought costs<sup>413</sup>, however, costs were not granted in any case observed.

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<sup>412</sup> Mr. Justice Michael White (2013) 'Current Challenges in the Family Law Courts', Consultative Seminar on Family Law Courts, Incorporated Law Society, Blackhall Place, Dublin, 6 July 2013 pg 8

<sup>413</sup> S 33 Civil Legal Aid Act 1995

## 16 Chapter 16 Dispute Resolution

### 16.1 Mediation

*“Our family law courts are still too adversarial in nature. That is not to underestimate the importance of the availability of courts to adjudicate on disputes, which regularly centre on disputed facts, which have to be resolved by a judge. Alternative dispute resolution is not a panacea, but the certificate system which is set out in Section 5 of the Judicial Separation and Family Law Reform Act 1989, Section 6 of the Family Law (Divorce) Act 1996 and Section 20 of the Guardianship of Infants Act 1964 has not been successful in diverting cases into alternative dispute resolution modes”.*<sup>414</sup>

**White J.**

A finding of this research, is that mediation is a very rare phenomenon at any stage of the process post the break-down of the marriage, despite the fact that comprehensive and out-of-court mediation in Ireland has been adjudged cost effective<sup>415</sup>.

- (a) Mediation was mentioned seven times in court by litigants, who said they knew about mediation, but hadn't used it as they didn't want to reconcile
- (b) Two different judges strongly recommended mediation, urging the parties to engage in mediation to create parenting agreements. The parties declined to do so.
- (c) Mediation was used four times, without any agreement. The Family Mediation Service was used.
- (d) Mediation was used four times, with agreements successfully concluded. The Family Mediation Service was used.

Mediation was tried in only 0.7% of the cases before the courts, during this research period.

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<sup>414</sup> Mr. Justice Michael White (2013) 'Current Challenges in the Family Law Courts', Consultative Seminar on Family Law Courts, Incorporated Law Society, Blackhall Place, Dublin, 6 July 2013

<sup>415</sup> Dr. Conneely, S. *supra* n.32,

*“Mediation really helped”* Applicant in a consent divorce case February 2011.

### ***Mediated parenting agreement***

Case ref; C46 October 2008. In a consent divorce, the parties indicated that they attended mediation and agreed a co-parenting plan, which set out the weekly arrangements for the care of their daughter. They shared parenting time equally, with neither paying maintenance to the other for the child. The husband agreed to pay all medical and educational costs while the child was a dependent.

### ***Access agreed in mediation***

Case ref; C108 October 2008. In a contentious divorce, where division of marital assets was at issue, the parties agreed that access arranged through mediation was working well.

### ***Mediation perceived as means to reconcile***

Case ref; C379 May 2009. The parties married in 1987, and had two children, one of whom was dependent. The marriage ended in 2004 and the wife filed for divorce in 2008. When asked by the court if there was any prospect of reconciliation, the wife answered that they had tried mediation, *“mediation didn’t get us back together, but helped us to sort out some things”*.

### ***“My solicitor did tell me about mediation but I decided no”***

Case ref; C499 February 2011<sup>416</sup>. In a judicial separation case, where arrangements around access with the 3 younger children of the marriage were particularly contentious, the court asked the parties if they had considered mediation to create a parenting plan. The respondent husband stated, *“I tried to settle this numerous times, and I suggested mediation”*. The wife responded, *“my solicitor did tell me about mediation, but I decided no.”*

Self-help, rather than adversarial proceedings, as a means of maintaining harmonious relationships, under-pinned the ancient customs and law of the East, and anthropological

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<sup>416</sup> See also chapter 11, section 11.3.1

evidence exists of a form of mediation in African custom. However it was the 1960s, and the emergence of a “rights” based culture, particularly in the United States, that renewed the interest in alternative dispute resolution mechanisms.<sup>417</sup> This renewed interest was driven by common concerns, congestion, delay, and expense in the courts. Research conducted while shadowing Judge Von Dadelszen in January 2012 in Wellington, indicated that the development of family mediation as practiced in the New Zealand family courts may have been directly influenced by the Maori culture, resulting in legislation to provide for judge-led mediation in 1980<sup>418</sup> In 2013 reforms to the Family Court in New Zealand were brought in following a review of the family courts and ancillary services, mandatory participation is now required, pre-litigation, for court applicants in the ‘Parenting Through Separation’ programme, and a Family Disputes Resolution service has been introduced using trained mediators to assist the parties reach out of court settlements.<sup>419</sup>

*“Perhaps the greatest weakness of mediation is its diversity”<sup>420</sup>*

Dr. Sinead Conneely

Currently there is no consensus on the definition of mediation, family mediation, and conciliation, and there is a dearth of information regarding the models of mediation used by mediators dealing with family disputes, and their effectiveness, including “transformative”, “therapeutic”, brief-structured mediation”, “settlement based mediation”, “anchor mediation”, “co-mediation”, “shuttle mediation”, “sole lawyer-mediator”, “caucus mediation”, “muscle mediation” and “scrivener mediation”, as identified by Dr. Sinead Conneely.<sup>421</sup>

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<sup>417</sup> Dr. Conneely, S. (2002) ‘Family Mediation in Ireland’, Ashgate and Dartmouth, pg 5

<sup>418</sup> Family Proceedings Act 1980 Part II ss.8-19.

<sup>419</sup> Ministry of Justice, New Zealand, (2013) ‘Family Court Review’, [online]  
<http://www.justice.govt.nz/policy/justice-system-improvements/family-court-review/family-court-review-1>  
 [accessed 28 March 2013]

<sup>420</sup> Dr. Conneely, S. (2002) ‘Family Mediation in Ireland’, Ashgate Dartmouth, pg 75

<sup>421</sup> Dr Conneely, S. (2002) ‘Family Mediation in Ireland’, Ashgate Dartmouth, pg 25

The pre-litigation ancillary service provided by the State is family mediation, a free service with lengthy waiting lists, which was transferred from the Family Support Agency, F.S.A. to the Legal Aid Board in November 2011. An on-site mediation pilot project in Dolphin House District Court in Dublin, run by the F.S.A., produced initial reports in February 2012 indicating that 294 agreements had been reached in a 12 month period. In the same period 1,623 applications were made.<sup>422</sup> The FSA released figures for 2011-2012 that showed there were 1,144 first contact sessions. Statistically, the outcomes would appear to fall far short of Ontario, Canada, where 81.1% of mediated cases at the Family Courts reached full or partial settlement<sup>423</sup>

Dr. Sinead Conneely identified the “therapeutic” model, as the model practiced by the State run mediation service in Ireland. A model that uses techniques derived from family therapy, differing little from clinical therapy and usually practiced by those with a human sciences background. Arguably, where a mediator deals with substantive issues, such as division of assets and financial provision, the therapeutic model is not appropriate.

3 of the mediated agreements were criticised by the court as being unenforceable.

*“Mediated agreements must “stand up”, a poorly worded mediated agreement that does not deal clearly with the legal issues arising, creates significant problems later on. I have seen some really bad agreements. A great number of mediated agreements that have come to my court, have been prepared by non-legally trained parties, and this is an issue where there are issues around financial provision for children and assets to be divided”.*<sup>424</sup> Judge 2

A combination of evaluative and facilitative mediation, and conciliation by way of option development, could be more effective. Evaluative, only in so far as the mediator is required to have legal knowledge of family law, including relevant international law. Facilitative - where

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<sup>422</sup> Dr. Coulter, C. ( 2012), ‘Mediation scheme saves on legal costs’, Irish Times 14 June 2012

<sup>423</sup> Long S.C., J. (2010) ‘The Family Court in Ontario’, presented at the Canadian-Irish Family Law Conference Maynooth Ireland 2010, 9 October 2010

<sup>424</sup> Judicial Interviews Appendix B (i)



the mediator assists the parties to communicate effectively to pursue formal arrangements dealing with the break-down of the marriage- and Conciliation, where the mediator proposes various options where the parties may have reached an impasse. Family mediation, where the parties wish to formally separate, ought to be carried out consciously in the ‘shadow of the law’ by those competent to do so, which includes a competency in understanding the best interests of the child. They must be capable of constructing legally enforceable agreements, with the parties availing of independent legal advice before signing. A two-step family mediation process that requires any mediated agreement to be subsequently re-drafted, in its entirety, into a legal document by legal practitioners, is an unacceptable and unnecessary additional cost and may lead to an unintended outcome.

*“Mediated agreements that come before the court show lack of consistency, often are written in unenforceable language and showed disregard for possible legal outcomes. Only those with legal training should construct separation agreements in mediation that deal with financial provision and asset division.”*<sup>425</sup>

Judge 7

The Canadian Unified Family Court (UFC) includes a range of dispute resolution options along with other supports for families experiencing separation or divorce, such as mediation, conciliation, facilitation, Settlement conferences, Case conferences and pre-trial conferences and trial. Conciliation is defined as a form of mediation with a third party “who is more interventionist” and may “shuttle” between disputing parties. Facilitation is defined as the use of techniques to improve the flow of information in a meeting between parties to a dispute and Settlement. Settlement conferences, Case conferences and pre-trial conferences are case management processes that involve an informal inter-action with a member of the judiciary, legal representatives and/or the parties, prior to a hearing or trial.<sup>426</sup>

The Court annexed services provided in Ontario, Canada, include on-site and off-site mediation, information and referral co-ordinators and in 2011, a Mandatory Information

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<sup>425</sup> Judicial Interviews Appendix B (i)

<sup>426</sup> Department of Justice Canada, (2009) ‘The Unified Family Court Summative Evaluation: Final Report’, Evaluative Division, Office of Strategic Planning and Performance, March, pg 16

Programme was introduced. There was an expansion of Family Justice services to 32 court districts in Ontario during the latter half of 2011, the primary objective being to improve the experience and outcomes of clients who have family law issues.<sup>427</sup> The M.I.P. is delivered by lawyers and mental health professionals, usually a social worker or mediator. Part I deals with the effects of a relationship break-down, legal issues, options for dispute resolution and going to court. 98.4% of those who participated in court affiliated mediation services in Ontario in 2009/2010 indicated they were satisfied with the service they received.<sup>428</sup>

The Family Court in Australia, introduced a separate counselling arm to provide mediation and dispute resolution services to court users in 1975, which was a world first. Court staff included counsellors who could work with families and guide them to child focused agreements.<sup>429</sup> The central purpose of the Family Court, established in New Zealand in 1980, was to be the resolution of disputes in a non-adversarial way. Conciliation became the primary dispute resolution method, with the Court for cases that required an urgent hearing or as the last resort for litigants unable to come to agreement.<sup>430</sup>

*“I support mediation as an appropriate dispute resolution mechanism particularly for parenting arrangements, but a significant number of cases will still need to be heard in court.”*<sup>431</sup> Judge 1

Family mediation has developed in very similar ways in all European countries. Professionals embrace the practice, they then organise into Associations, and national legislation usually

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<sup>427</sup> Long, S.C., J. (2012) ‘Family Justice Services and Information Programs in Ontario Canada’, presented at the International Family Law Workshop, Waterford Institute of Technology, March 30th 2012.

<sup>428</sup> Long, S.C., J. (2010) ‘The Family Court in Ontario’, presented at the Canadian-Irish Family Law Conference Maynooth Ireland 2010, 9 October 2010

<sup>429</sup> The Honourable Justice Judy Ryan, Family Court of Australia (2013) ‘The Australian Experience of a specialist family court- where strange tales begin and happy endings are possible’, presented at the Consultative Seminar on Family Law Courts, Blackhall Place, Dublin, 6 July 2013, pg 9

<sup>430</sup> Judge von Dadelszen, P. (2007) ‘Judicial Reforms in the Family Court in New Zealand’, presented at the Symposium of Chief Judges of Family Courts, Singapore, 23 July pg 1

<sup>431</sup> Judicial Interviews, Appendix B (i)

follows, with the concurrent development of more detailed Regulation. The difficulty is that mediators do not universally agree on the theory and practice of their profession. Codes of Practice for mediators were set out in Recommendation R (98)1 of the Council of Europe in 1998 - and more recently the European Code of Conduct for Mediators, 2004, sets out a number of principles to which individual mediators, and organisations providing mediation services, can voluntarily decide to commit. Family mediation is in its infancy in Eastern European countries that have been under soviet influence for decades, and in some European countries there is significant confusion between the terms, reconciliation, counselling and mediation.

In this project, it was clear that the judiciary, legal profession and litigants often equated mediation primarily with reconciliation, perhaps influenced by the ‘therapeutic’ model of family mediation in Ireland, developed by the State run Family Mediation Service.

***Not reconciling, so mediation not an option***

Case ref; C387 May 2009. In a consent divorce application, the parties were married in 1989 and had two dependent children. Both were now in new relationships and living with their partners. When the applicant wife was asked by the court if there was any prospect of reconciliation she responded, “*we were advised about mediation, but it was not an option as we were not getting back together*”.

Research carried out in the family courts in Toronto Canada in October 2009, found a system in operation that emphasised early settlement discussions, meaningful court appearances, and consistent judicial supervision. ‘Case Management in the Family Court’<sup>432</sup> was published in 1995 by the Office of the Chief Judge, Ontario Court of Justice, edited by The Honourable Judge Mary Jane Hatton and The Honourable Judge Joseph C.M. James. The publication came after a three year planning period and the simultaneous establishment of a pilot project. Case Management was fully implemented in the busy multi- judge Toronto Family Court of the Ontario Court (Provincial Division). The key elements of case management include; same judge supervision of a case, early settlement discussions, and consistent judicial supervision

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<sup>432</sup> Justices Hatton, M.J. and James, C.M. ,*Case management in the Family Court*, (Toronto: Office of the Chief Judge, Ontario Court of Justice (Provincial Division), 1995)

of the process. The focus is on resolution, not litigation. Mediation can happen, and is encouraged to happen, at any stage in the process.

*“Mediation should be the number one priority for family law disputes”*<sup>433</sup>

Judge 7

Almost two decades of effective case management and ADR, employed by the Family Court of Ontario Court, Provisional Division, indicates that not only does mediation work, in 2009 81.1% of the cases that proceeded to mediation through the court affiliated services reached full or partial settlement<sup>434</sup>, but it is cost effective. As Justice Brownstone said in ‘Tug of War;

*“...when you choose...alternative dispute resolution, you are making peace”*.<sup>435</sup>

Internationally, there appears to be a consensus that the adversarial route should not be the first step in access or custody disputes, separation or divorce proceedings; less confrontational avenues such as mediation and collaborative law ought to be explored, if possible. It is clear that litigation is a call to arms, animosity exponentially increasing, the longer the process takes – in family law proceedings, time is of the essence.

One judge followed during the course of this research was a strong advocate of mediation, both during interviews and in the court-room;

***“Once we got legal advice, things got dug in”***

Case ref; C314 April 2009. The applicant wife had submitted a maintenance pending suit application seeking relief pending a full hearing of her judicial separation application. The respondent, no longer able to afford legal representation, presented as a lay litigant, his

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<sup>433</sup> Judicial Interviews, Appendix B (i)

<sup>434</sup> Long, S.C., J. *The Family Court in Ontario*, presented at the Canadian-Irish Family Law Conference, Maynooth, October 2010.

<sup>435</sup> Mr. Justice Harvey Brownstone, *supra* n. 3

solicitor having filed a motion to come off record. The court asked if the parties had tried to agree terms, given that they were both in debt and the house was in negative equity, stating, “*I think you should go to a mediator and try and sort this out*”. The respondent replied “*We had hoped to go that route in the beginning, but once we got legal advice, things got dug in*”.

Court note; Waterford February 2010. Counsel expressed a view on mediation; *I’m all for mediation, but it just isn’t going to work where one party is psychologically bullied by the other*”.

### ***Mediated agreement not intended to be legally binding***

Case ref; C1022 July 2011. The applicant wife, sought to have pension adjustment orders made on foot of her application for judicial separation. The parties had entered into a separation agreement with the Family Mediation Service which was subsequently ruled by the court. In the agreement it was stated that the wife had sought legal advice before signing but the husband had not. A clause in the agreement stated “*We accept that this agreement is not legally binding, and is not intended to be so*”. The respondent husband, a lay litigant, was not agreeable to a judicial separation if it meant that the separation agreement was not enforceable as other matters had been agreed, including that they would make no claim on each other’s pensions. The court adjourned the matter and suggested to the husband that he file a defence to his wife’s application for judicial separation setting out his view of the mediated agreement and its terms.

## ***16.2 Conclusion***

Mediation was the only form of ADR referred to during this research. Collaborative law was not mentioned nor did it appear to be used in any instance, despite the fact that training programmes have been established by a significant number of family law practitioners.<sup>436</sup> The Association of Collaborative Practitioners was established as a limited liability company in 2005, with the objective of promoting collaborative law as a mechanism for settling disputes, and advocates a model where legal representatives assist their clients to negotiate settlements against the established legal context.

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<sup>436</sup> Dr. Crowley, L. (2009) *Collaborative Law: The Future Cornerstone of the Resolution Process?* Judicial Studies Institute Journal 1 pg 29

It is a finding of this project that mediation as a dispute resolution option was not genuinely explored or considered by the over-whelming majority of litigants.

This is particularly of concern given that a State mediation service has been in existence in Ireland since 1986. Academics in Ireland and internationally have consistently recognized the role that mediation can play in resolving family law disputes, and yet the uptake in the Circuit Court was extraordinarily poor. Notwithstanding that ss 5 and 6 of the Judicial Separation and Family Law Reform Act, and ss. 6 and 7 of the Family Law (Divorce) Act 1996, require that solicitors discuss with their clients the possibility of engaging in mediation to effect a separation on an agreed basis, litigants clearly did not understand the purpose or breadth of mediation. Dr Elaine O' Callaghan stated in 2010 that "family mediators are required to have a competent knowledge not only of family law and the courts, but also of child development..."<sup>437</sup>, however these are currently aspirational rather than legal or regulatory requirements in Ireland, and there was no evidence of such comprehensive competency in the mediated agreements in dispute before the court.

Given the cross-border nature of a significant percentage of cases observed, it was surprising that no form of ODR (on-line dispute resolution) was discussed, or proposed, by lay litigants, legal practitioners or by the court. Given the uncertainty of the scheduling of family law lists and the discretionary nature of the selection of cases heard before the court on any given day, those living outside the jurisdiction were faced with significant costs and time to attend at the courthouse, on the chance that the case may go before the court. Equally those who resided in the jurisdiction, with a respondent living outside the jurisdiction, had their case adjourned, on the basis that the other party was unable to take time off work or could not financially afford to travel to Ireland for the hearing. In its most basic form online dispute resolution through the F2F (face to face) forum of Skype could offer timely and cost effective mediated solutions, particularly in relation to Parenting Agreements and maintenance agreements.

Early electronic online dispute resolution operative procedures included a system called Peruvian Cibertribunal which utilises arbitration and conciliation techniques, and another

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<sup>437</sup> Dr. O' Callaghan, E. (2010), *The Role of Mediation in Resolving Disputed Contact Cases: An Empirical View* I.F.J.L. 2 pg 48

called iCourthouse which is based on a mock jury procedure.<sup>438</sup> ODR mechanisms commonly available include automated negotiation procedures, that rely on a software programme rather than a third party to resolve the dispute, or a basic human operated form of ODR such as emails, used in B2B ( business to business) disputes and B2C ( business to consumer disputes). These types of systems do not recognize the human voice, or understand images, nor are they capable of problem solving, without human expertise<sup>439</sup>, however, Skype or video conferencing is a cost effective realistic ODR mechanism that could and should be employed to ease the costs associated with geographical distance.

As a natural evolutionary step, access to justice via ICT (information and communications technology) developments will be further facilitated by e-justice mechanisms such as ODR, bringing e-justice into the mainstream. F2F in conjunction with specific automated elements, guided by expert facilitators with appropriate ODR regulation and Data protection compliance, could address the primary cross border access to justice issues of cost and delay. While ICT developments will bring online dispute resolution to a level where F2F operates efficiently with synchronous tools such as IM (instant messenger) and chat-rooms, it will increase the burden on the mediator/arbitrator to have the necessary technical competency to manage the online tools, process, operate mute, and ensure confidentiality, particularly in joint sessions. However, the most important task that needs to be addressed is how to raise awareness of the benefits of mediation such that it becomes a forum of first choice to resolve conflicts arising post the break-down of a marriage, and before either party commences litigation.

Most judges interviewed supported mediation as an appropriate dispute resolution mechanism. In a 2013 case where two parents could not agree a choice of school for their 12 year old son, in the course of judicial separation proceedings, on allowing the appeal to the High Court, Hogan J stated;

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<sup>438</sup> Shiavetta, S. (2008) *Electronic Alternative Dispute Resolution – Increasing Access to Justice via Procedural Protections*, Oslo: Unipub AS, pg 3

<sup>439</sup> Susskind, R. (2000) *Transforming the Law: Essays on Technology, Justice and the Legal Marketplace*, Oxford: University Press pgs 182-183

*I would, however, venture to suggest that it would be very desirable that disputes of this kind might be resolved through mediation rather than the acrimony which is inevitably generated through the judicial process.<sup>440</sup>*

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<sup>440</sup> B.B. v A.A. [2013] IEHC 394, 34



## **17 Chapter 17 Reform Recommendations**

### *17.1 A Family Justice Model*

Family law is not like other areas of law. The parties have been intimately connected, and are inextricably bound together into the future, where there are children. That intimate knowledge, combined with the emotional context, can ignite a bitter war of words and a battle of wills, where negative behaviour dominates such as anger, revenge, betrayal, fear, jealousy, control, distress and sadness. The on-set of litigation, with advice from counsel, who are traditionally trained to do battle, can quickly evolve into a full blown conflict. This research shows, that the longer the conflict is fuelled by the ability to litigate, and do battle in the arena of the courtroom, the more entrenched that conflict is likely to become. Court ordered solutions cannot deal with the emotional and psychological needs of the parties and their children. Indeed an imposed outcome, during a brief hearing, or contained in a pressurised settlement, which one or both litigants believe to be unfair or unjust, can trigger a powerful reaction. Litigants have travelled a perplexing and often costly legal path with the expectation that “justice” will be delivered on their day in court. A brief hearing dealing with complex issues will inevitably fail to adequately address the needs of either litigant or their children.

The primary reform recommended in the LRC 1996 report was the establishment of Regional Family Courts, operating as a division of the Circuit Court, having a unified and comprehensive family law jurisdiction with ancillary services, very much along the lines of the original “full service” Family Court or Unified Family Court model first proposed in Ontario, in 1974, by the Law Reform Commission of Canada.

I recommend that we move away from a family ‘law’ centred approach, and create an overarching family justice system, with law as one component. The primary aim of such a system would be to offer holistic support to all members of a family, through a range of appropriate services, and court ordered outcomes if required, to address all aspects of family/relationship disputes.

We could now begin to develop that model using existing resources. Ancillary services provided through Family Justice Centres may include; mediation, conciliation, collaborative law, legal aid, a free information counter, parenting agreement co-ordination, child advocacy and child friendly material, with broader access to parenting education and information, Child counselling, parent counselling, a contact resource for non-resident parents and their children in a safe environment, and information resources, both hard copy and on-line. Front-line staff, operating within the ancillary services, must receive training that enables them to have a specialised knowledge of family dynamics and family law; well trained and highly skilled professionals will give confidence to the judiciary, barristers and solicitors, whose support is crucial to ensure that clients receive optimum benefits from the system. These services should be supported by the State, but means tested fee structures should apply to all services.

To facilitate a defined ‘cooling off’ period, mandatory information programmes and mandatory mediation could be introduced, with potentially a costs sanction for failure to comply where attendance is not in ‘good faith’ or failure to attend. A motion to waive any of these requirements could be sought, but the County Registrar or Court should decide when to enforce. Mandatory information sessions and mandatory parenting programmes would be delivered by members of the legal profession and other professionals working in this area such as mediators, mental health professionals and social workers. Professional credits should apply for those who present. Low asset and/or legal aid litigants would be encouraged to use one legal representative, where the matters at issue involve maintenance, division of assets, custody, parenting arrangements and guardianship.

If this part of the family justice system was in force across all EU Member States this would negate the incentive to issue first. These services should be multi-lingual, accessed through Family Justice Centres, and incorporate ODR (on-line dispute resolution) hubs. Within these centres, legal information should be accessible, with workshops to assist with identifying and filling out the correct forms, as in San Diego.<sup>441</sup> Access to information and some certainty of outcome is vital, particularly for lay litigants. We need to find ways to improve the profile of mediation across Ireland and the Member States to increase uptake; but first, we need to

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<sup>441</sup> Long S.C., J. (2012) ‘Family Justice Services and Information Programs in Ontario Canada’, presented at the International Family Law Workshop, Waterford Institute of Technology, March 30th 2012. *J. Long referenced the workshops provided in San Diego to assist people fill out divorce petitions.*

agree training standards, competency, define the role of lawyers in mediation, and indeed reach consensus on what constitutes mediation, conciliation, and collaborative law.

Centralised administration for all aspects of a case from the start, is a vital tool to enable case management. Well structured management systems, user friendly forms and inter-faces, and databases need to be developed to streamline and simplify the steps involved for those cases that move through the system. Data mining and analysis would inform the development of the system. For cases that are, or develop into, inter-jurisdictional cases, secure information sharing between courts administrators is required. The creation of ICT systems supporting, legislatively compliant and secure storage management, would facilitate the sharing of citizens information. Such a system being developed in full compliance with various Data Protection EC Directives, transposed into national laws; CE Directive 95/96 about “privacy” and the implications of long-term storage and data management of personal data and Regulatory information gathering, CE Directive 2006/24 “Data and services for Public Administrations, implications on accesses to data and on long term storage”.

We need to go beyond the traditional role of the court and develop a family justice system comprised of all laws, programmes and services that effectively and meaningfully contribute to the resolution of family law issues. During this process of reform we need to develop a body of jurisprudence with recorded decisions and law reports, which will allow the court to evolve bringing more certainty to the users of the system.

The break-down of marriages and relationships requires not only legal solutions but solutions that deal with the needs, interests, values, and emotions of those experiencing that loss and change.

## *17.2 Starting point – pre-litigation*

### **17.2.1 Information**

Information is the single most important requirement, in the after-math of the break-down of a relationship. Multi-lingual free information should be readily accessible, on-line, in leaflets distributed by the State and ideally at the Family Justice Centres, for both adults and children. That information flow should be designed to clearly signpost resources to support the dignity of all those experiencing the bewilderment of life post the ‘family’. All documentation and court forms should be simplified and written in plain English.

- (a) Up-to-date information on the range of resources available in the community for adults and children, including counselling and self-help groups
- (b) Information on a broad range of issues including access, custody, guardianship, maintenance, separation, divorce, with a focus on various options for resolving disputes
- (c) Information on the benefits of mediation and possible outcomes
- (d) Information about the family court processes, and the provision of simplified court forms, written in plain English and a check-list of what is expected from litigants in all matters.
- (e) General information about the role of a solicitor and how to seek advice to support mediated outcomes, or failing an agreed solution, how the legal process works.
- (f) Information about legal aid
- (g) General information about possible outcomes in a court, how to manage expectations, and the potential costs of litigation.

### ***17.2.2 Mandatory Information Programme***

Before any person can file an application with the court, relating to division of property, the family home, spousal support, civil partner support, orders under the Domestic Violence Acts (excluding emergency applications), or any other matter not directly related to children, they should be required to complete a mandatory information programme. This could be provided on-line, or delivered in information sessions offered at regular intervals at the Family Justice Centre. The sessions would be provided by members of the legal profession, social workers, mental health professionals or mediators, to a set brief. The mandatory programme could include the following;

- (a) The effects of a relationship breakdown on adults
- (b) Domestic violence
- (c) Legal issues
- (d) Self-help guides to complete an Affidavit of Means
- (e) Options for dispute resolution
- (f) Going to Court<sup>442</sup>

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<sup>442</sup> Long S.C., J. (2012) 'Family Justice Services and Information Programs in Ontario Canada', presented at the International Family Law Workshop, Waterford Institute of Technology, March 30th 2012.

An exemption could be sought from the County Registrar, or Court, where the matter is sufficiently urgent, or where cases are proceeding on consent, or where the party has already attended the programme in the last 12 months. Emergency applications under the Domestic Violence Acts would automatically be exempt.

### ***17.2.3 Mandatory parent information sessions***

Before any parent can file an application with the court, relating to a child or children, there should be a required attendance at a parent information session, provided by the State. These sessions could be available on-line or available on a regular basis at the Family Justice Centre, provided by members of the legal profession, social workers, mental health professionals or mediators, to a set brief, to include;

- (a) Effects of a relationship breakdown on children
- (b) Parenting Plans
- (c) Legal issues involving children
- (d) Options for dispute resolution
- (e) Going to court
- (f) Self-help guides for bringing a motion to vary access or maintenance

A good reference point for what those sessions could entail would be the Parent Information Sessions provided in Ontario;

The main objectives of those sessions are to:

- (1) increase parents' understanding of the impact of separation on their children;
- (2) inform parents about the benefits of developing cooperative parenting arrangements where appropriate; and
- (3) encourage parents to consider their children's needs throughout the process of resolving their disputes.

The sessions usually include information on;

- (1) the impact of separation and divorce on the family, and in particular, on children;
- (2) children's needs at various stages of development;

- (3) the negative effects on children of protracted litigation and hostility between parties;
- (4) the benefits of developing co-operative parenting arrangements where appropriate;
- (5) parenting responsibilities and effective strategies for problem solving after separation;
- (6) the impact of domestic violence on the family, including the impact on children of witnessing violence; and
- (7) community resources for children and adults.<sup>443</sup>

An exemption could be sought from the County Registrar, or Court, where the matter is sufficiently urgent, or where cases are proceeding on consent, or where the party has already attended the programme in the last 12 months. Emergency applications under the Domestic Violence Acts would automatically be exempt.

#### ***17.2.4 Mandatory mediation, but not a mandated outcome***

Regulation should be introduced to clearly establish competencies and ongoing training requirements for mediators practising in the jurisdiction, regardless of which professional organisation they are a member of. Issues to be mediated in family disputes, post the breakdown of the relationship/marriage, should be broken into two distinct areas. Where there are children, the mediation should first focus on a Parenting Agreement working from a best practice parenting template<sup>444</sup>. Where division of assets and/or financial provision is at issue, mediation should be conducted in the “shadow of the law”, with written agreements capable of enforcement. Knowledge of family law should be required for any mediator operating in the latter area.

Mediation can be provided by the State, both on-site and off-site, fees being charged on a sliding scale based on disposable income.<sup>445</sup> Where the State funds a mediation service, such a system must include “*complimentary guidelines, extensive training and support for*

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<sup>443</sup> Long S.C., J. (2010) ‘The Family Court in Ontario’, presented at the Canadian-Irish Family Law Conference, Maynooth, October 2010.

<sup>444</sup> ‘Parenting Agreement’ Template, Appendix C (ii)

<sup>445</sup> See ‘Family Mediation Model’, Appendix C (i) *Studies in New Zealand and Canada have shown that “free” mediation may encourage long-term engagement with the service.*

*mediators who seek to involve children directly*".<sup>446</sup> Participants complete a financial statement similar to an Affidavit of Means, and their fee level is determined. State mediation can be offered through mediators employed by the State, and through a list of private mediators, contracted to work at agreed sliding scale hourly rates when required. All parties who engage in mediation should be encouraged to seek legal advice at the start, during the process, and at the end. Where a party cannot afford legal advice, they should give an undertaking to bring the agreement to the family court for ruling, by the County Registrar or the court. Where no agreement is reached or not all issues have been dealt with, the mediator will sign a certificate to the effect that the parties have attended in good faith, but issues remain to be resolved.

An exemption could be sought from the County Registrar, or Court, where the matter is sufficiently urgent, or where cases are proceeding on consent, or where the party has already attended the programme in the last 12 months.

The service requirements for each Family Justice Centre would be determined based on population and other relevant demographics. Service providers would be evaluated by a Family Justice committee attached to each Centre, which would include judges. Selection for on-site service providers would be by interview, off-site service providers would submit through a public tender process. In order for private mediators and other independent contractors to be on State approved service provider lists for any Family Justice Centre, they must have the required competency and training, and adhere to professional practising standards. ADR processes should become an integral part of the Family Justice system, under-pinned by a statutory framework.

### *17.3 The Family Court*

#### **17.3.1 Specialist judges**

A dedicated and integrated Family Court should be set up, with specialist family law judges.<sup>447</sup> Judges who are appointed should be expert in family law and have the appropriate

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<sup>446</sup> Dr. Parkes, A. (2013) 'Beyond the courtroom: enhancing family law mediation using the voice of the child', I.J.F.L. 2013, 1 (Spr), 4-11

<sup>447</sup> Minister Shatter, A. (2013) 'A New Structure for Family Courts', presented at the Consultative Seminar in the Law Society, Blackhall Place, 6 July 2013.

aptitude and temperament. Judges could be re-assigned, or appointed from the legal profession, who have expressed a particular interest, or they may be appointed from Academia.<sup>448</sup> Guidelines should be drawn up setting out the criteria for appointment, and the selection process should be carried out by a panel of judges and other relevant experts. All judges should be trained in mediation, case conference settlements, hearing the voice of the child, and the dynamics of the break-down of inter-personal relationships. A code of practice would be drawn up to set out the process, and indicate what continuous professional development is required, including attendance at international workshops and conferences.

### ***17.3.2 Family Justice Regional Centres – not located in traditional courthouses***

The Family Justice Centres should be located in accessible regional locations, in buildings that are not traditional courthouses. State owned unoccupied properties could be assessed for suitability. The regional centres should include, legal information counters, on-site mediation, meeting rooms, a restaurant, a crèche, serviced office facilities, and contact areas for non-resident parents and their children, if sufficiently removed from the court area. On-line dispute resolution hubs could also be located in these centres. Rooms used for court proceedings should be less formal, and all proceedings should be recorded.

### ***17.3.3 Case Progression and Consent Orders***

When an application is filed it would first come before the County Registrar, or a Family Justice Registrar. County Registrars would have assigned periods where they are based at their regional Family Justice Centre. A unique national case identification number would be assigned, and data would be entered into the national Family Justice Centre database. Where the matter is on consent, the Family Justice Registrar should be empowered to make orders. Where the matter is in dispute, the Registrar will proceed to prepare the case for trial. The Registrar should have one mediation session, with the parties to see if any issues can be settled, if issues remain unresolved, the case moves forward for case conferencing. Where one party is not in the jurisdiction, the Registrar should have discretion to take the session to the on-line hub, and interact with the other party using the on-line, face-to-face, protocols.

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<sup>448</sup> *In Ontario family law judges may be appointed from Academia, where appointees have a specialised knowledge of this area of law.*



The Registrar would have access to a Windows application that would calculate the maximum and minimum range of child or spousal maintenance, based on the needs of the dependents, and the disposable income and assets of the liable spouse/s. Where any issue is agreed, or an application is by consent, the Registrar may make orders. Cases settled would use template forms, and the Registrar would complete same for all possible orders.

#### ***17.3.4 Case settlement conference***

The case would be assigned to a judge who is not the trial judge for the case, who would meet with the parties and their legal representation in chambers for a settlement conference. The Registrar would have set out the issues in the file for the judge, and a mini trial would ensue. The judge would then indicate the way he or she would rule if they were the trial judge. The parties would be invited to retire to a meeting room with their counsel for settlement discussions, or engage in on-site mediation. Cases that do not settle would move on for trial on that same day if possible.

#### ***17.3.5 Trial***

The trial judge would have time to read the case file and will note the comments of the case settlement judge. If time has elapsed between the first calculation of child or spousal maintenance, the court clerk will ensure that the figures are updated. The calculations indicated under the spousal and child maintenance guidelines are discretionary, the trial judge may vary these amounts where in all the circumstances it is reasonable to do so. The trial will now proceed. Where the case needs to be adjourned the trial judge will keep *seisin* of the case, and take responsibility for managing the case until final orders. The court will use templates for all orders, to be completed by the judge. Where a reserved judgement is given, it would be completed in writing by the judge and placed on the file.

#### ***17.3.6 Hearing the voice of the child***

Regulation should be introduced to clearly establish competencies and ongoing training requirements for all experts practising in the jurisdiction, who carry out investigations ordered by the court. Experts will work with set guidelines, detailing the format of interviews, will be given criteria to guide the report, and will be trained in writing objective

factual reports to inform the court. Where a parent wishes the voice of the child to be heard, or a child expresses the wish for their voice to be heard, a child advocate could be appointed, paid for by the parent/s, to attend with the child and the judge, or the judge may elect to hear the child in chambers, adhering to set protocols.

### ***17.3.7 Public and private law***

The stark delineations currently drawn between public and private law, in the context of families and their children, ignores the reality that families experiencing break-downs, whatever the root cause or causes may be, need to be viewed holistically. An example of the joined up thinking approach that ought to drive family law reform is the development of the Integrated Domestic Violence Court in the Ontario pilot scheme. A single judge hears both the criminal and family law cases that relate to one family, with some exclusions, where the underlying issue is domestic violence. The impetus to set up this Canadian pilot came from the combined efforts of Canadians Justice Geraldine Waldman and Patti Cross LL.B.<sup>449</sup>

## **18 Further Research Required**

### ***18.1 ADR***

The fact that there is no professional governing body, statutory or otherwise, in Ireland, leaves the way open for significant variations both in standards of performance and forms of practice. The therapeutic model so widely embraced in Ireland is not predominantly used in other jurisdictions. Those who may have competence to deal with issues such as parenting plans may not be competent to draft agreements “in the shadow of the law” such as division of marital assets. The Law Reform Commission has reported serious concerns at the increasing number of people practising mediation with little or no training, recommending formal training under the auspices of a third level institute at post-graduate level. Research is required to determine how many mediators are practicing in Ireland, whether privately or

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<sup>449</sup> Waldman, G. & Cross, P. (2010) ‘Building a Specialty Court for Families from the ground up’, presented at the AFCC 47th Annual Conference, Denver Colorado 2010

within an organisation, what mediation model/s they use, what are the outcomes and what are the shortfalls and benefits of agreements created and the process. Research in the European context is also required to determine what kind of mediation is practiced in each Member State, what are the training and competency requirements, and what national regulations apply. A research objective should be to standardise the training and competency of mediators and conciliators attached across Europe, to best international standards.

### *18.2 Children*

An in-depth analysis needs to be conducted, with Ministerial consent, of all s 47 reports conducted in the last 10 years, with a view to determining recommended training standards, guidelines to carry out the investigation, and a uniform format for the report in line with a best practice international approach. Judicial training programmes must be developed to enable judges to directly hear the voice of the child, to ensure that their best interests are served, and research is needed to determine what kind of training programmes would be appropriate.

### *18.3 Assessment of Unified Courts to inform Family Justice System*

Research needs to be undertaken to assess existing Unified Family Court models in the European Union, Canada, New Zealand and Australia, to identify elements that have good performance outcomes, both from the perspective of the State and the litigants involved. The research would seek to determine what ancillary services would best serve the needs of families in dispute; a primary focus of such services being the provision of on-site and off-site mediation and other forms of ADR to divert litigants away from the courts. There are common issues arising from South Africa to New Zealand, that we also experience in our family courts- the difficulties in structuring a parenting plan; how to address the conflicting needs of the parents and the child; how the voice of the child could be heard; how to identify and deal with high conflict cases; how to deal with lay litigants; how to deal with inter-jurisdictional issues; and how to ensure the best use of court time and resources. All family courts can benefit from a cross-fertilisation of concepts and research. Inter-jurisdictional, inter-disciplinary networking and data sharing between academics, the judiciary, practitioners

and administrators can facilitate knowledge transfer, which in turn can connect the various “spokes of the wheel”, ensuring that we all learn from one another, to create a best practice approach to assisting those families who struggle to deal with the aftermath of marital or relationship breakdown.

## **19 Conclusion**

This research has addressed the dearth of information, available to date, regarding family law proceedings and their outcomes, a much neglected area of research. The veil of secrecy, which has shrouded those proceedings in the Circuit Court, has now been lifted. This work provides, for the first time, comprehensive empirical data, and qualitative analysis of a significant number of family law cases. The findings highlight the absence of a cogent body of legal precedents and the inconsistency of judicial decision making. The research shows that the family law system still suffers from long delays and over-burdened lists, and indicates that children who were at the centre of most disputes, were not directly heard by any court, nor was there any clear mechanism for their views to be heard.

There were some limitations to this study. Family law lists were scheduled sporadically across 6 of the 8 Circuits, and were subject to amendments or cancellations. Cases observed on any given day, may just give a “snapshot” of a singular issue, or be adjourned, therefore substantive hearings with final orders were not observed in all cases. Some judges were assigned to be “moveable” which meant they may be listed to hear cases more frequently than other judges, making it difficult to observe as many judges as possible. The 8 Circuits were spread out over the country, creating cost considerations for the researcher in terms of attending at the geographically distant locations. Court orders were not always clearly enunciated by the court, and that material could not be recorded. Settlement discussions primarily took place outside the courtroom, and the terms agreed, of cases settled, were sometimes partially enunciated or not at all. However, all 8 Circuits were covered, and the sample of cases observed in each Circuit is proportionally representative based on the number of final orders made in the period, except for the South Eastern Circuit, which was marginally over-represented based on easier access for the researcher.

According to Moloney, Weston and Hayes, four social changes appear to be gathering pace at this time; Women’s increasing participation in the workforce; changing perceptions of fatherhood; the formal articulation of family violence and the increased emphasis on the

rights of the child.<sup>450</sup> The impact of these social changes are being played out in the disputes over children that follow separation and divorce, continuing research and evaluation is required internationally to better understand the formation, development and dissolution of families, so that we can create justice systems that respond effectively.

### *19.1 Template for a family law data system*

This research brings together a large body of case law, enabling an examination of the workings of the court. While case reporting is not in itself an innovation, the significant volume of material collected from those court notes were input into a database, which was specifically developed to provide detailed information on all aspects of cases coming before the court. 1,087 cases were observed during the period of the research, a statistically significant sample size, giving confidence levels of between +/-3% and +/-0.6%, indicating that the final findings are good indicators of what is happening across all cases dealt with by the courts during the research period. The development of a statistics gathering system, capable of gathering significantly more material than any comparative research carried out to date, is of value to researchers and to the public, and will allow further research findings to be extrapolated and published. It is a user friendly, comprehensive, and inter-linked database, with 184 data fields and multiple options within many of those fields, and is capable of gathering the fine detail of every case. These statistical findings were compared to the research questions, enabling quantitative findings to be made.

### *19.2 Dearth of mediation*

On the few occasions that mediation was mentioned, it was primarily equated, incorrectly, with reconciliation. Mediation was referenced, or used, so infrequently as to be almost a non-existent element in family law disputes. Efforts must be made to increase the awareness of what mediation is, and how it can address all matters post the break-down of a relationship.

### *19.3 Children, and family law proceedings*

Where there were children, they were at the core of every dispute in every case before the courts. No child was in the court-room, no written statement was received from a child, no

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<sup>450</sup> Moloney, L., Weston, R. and Hayes, A. (2013) 'Key social issues in the development of Australian family law: Research and its impact on policy and practice', *Journal of Family Studies*, Vol. 19 Issue 2 pg 30

judge met directly with a child. In the overwhelming majority of cases, children had no specific rights enunciated by the court, their rights were not promoted by practitioners, or acknowledged by parents. Children were primarily dealt with by all parties as “chattel”, moveable possessions, to be “divided” between competing ownership rights of parents. Significant amounts of court time were taken up with evidence relating to the experiences of parents who were in conflict over their children. This evidence consisted of parents seeking to convince the court of, (a) how bad the other parent was and (b) how they were being deprived of their rights and the suffering they were going through. In stark contrast, “access” arrangements were ordered at speed, and were predicated primarily on reducing the amount of contact between the parents, to avoid conflict. “Access” arrangements for a non-resident parent, were based on the history of conflict, the gender of that parent, the conduct of that parent and an accepted bi-weekly pattern that appears to have evolved from recommendations of 47 experts over the years. At no time were the circumstances of an individual child given meaningful consideration, to produce parenting arrangements that would be in the best interests of the child.

Children and the family home, were inter-connected “chattels”. Whosoever had the children, usually got the house. The primary carer in all but a small fraction of cases was the mother, however where the father had the children, the same outcome was observed only in exceptional circumstances. The majority of orders made were informed by the *tender years* principle, either overtly or by default. The courts, by their actions, endorsed that principle that young children should be with their mother. Where the mother and children resided in the family home, the majority of orders locked down that position, to the exclusion of the father, and to the detriment of the children, who no longer had frequent contact with one parent.

The voice of children must be heard in all family law cases that relate to them. **The following principle should be adopted, that;**

*The court must take the preference of the child into account, if he or she is old enough, to express a preference.*<sup>451</sup>

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<sup>451</sup> Judge Mc Nabb, D. (2010) ‘Out of the Mouths of Babes: The Evolution of a Child’s Right to be Heard in Michigan Family Court’, presented at the Canadian-Irish Family Law Conference, Maynooth, October 2010. *Judge Mc Nabb in referencing Michigan Child Custody Act 91 of 1970.*

The test for “old enough” could be based on the protocols of the Scottish Child Law Centre.<sup>452</sup>

#### *19.4 Long-term effects of Section 47 investigations*

Section 47s were, in the main, the least factual and most emotive submissions made to the court, containing substantial hearsay, and conducted in a subjective style, without any coherent investigation procedures or report format. Section 47s were perceived by the judiciary to be the only way for the voice of the child to be brought to the court. Litigants and practitioners showed a keen awareness that an allegation of sexual abuse or other forms of abuse against a parent, would result in recourse to a s 47. The effect of such an order was restricted or curtailed access to the parent accused and a significant time delay, of between several months and a year, before that report would come back to court. The effect on children and their interim needs, of such an order, was not given consideration. No court discussed “supervised access”, specifically as a means to ensure the needs of a child could be met, while such an investigation was underway. A substantial number of s 47 orders had previously been made or were ordered in cases observed. All but one report deemed the allegation to be “inconclusive”. It was observed that where an “inconclusive” finding was made, the delay meant that the relationship between the child and that parent had been damaged, which was acknowledged by the courts. It was observed that subsequent complaints were sometimes made, which resulted in a further investigation. No s 47 expert gave evidence, or wrote in their reports, detailing any analysis carried out as to the impact of a previous s 47 on the relationship between the child and that parent, nor did the experts indicate an awareness of the harm that could be done through multiple allegations and assessments. Each report appeared to be conducted *de novo*, and by different experts. Only one counsellor gave evidence to that effect, but was not involved in the s 47 report itself. An overhaul of the s 47 investigation is required to create consistency of reports that are objective in nature, consistency of experts assigned, it must be conducted with the best interests of the child to the fore, and the court must cross examine the expert to determine the basis of recommendations. **The court could be guided by this principle;**

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<sup>452</sup> Driscoll, M. (2012) ‘The Scottish Experience’, presented at the International Family Law Workshop, Waterford Institute of Technology, 30 March



*Where the court has ordered a Section 47, or a Section 20, investigation be carried out, it must satisfy itself, that the recommendations of the expert are based on an objective assessment of the allegation/s made, in all the circumstances.*

### *19.5 Parental conflict and lack of an appropriate remedy*

The most frequent matter at issue between parents, was “access”. This was the primary control “tool” used by parents in the war post the break-down of the relationship. Whosoever had the children, had the control, and invariably exercised it. In the overwhelming number of cases the mother was the primary carer. Mothers would frustrate and frequently unilaterally cease access. Fathers would frustrate access but were not observed to unilaterally cease access. Where access orders were repeatedly breached, and enforcement orders were ignored, the sanction sought was an attachment and committal order. In no case was this order granted. Where the court enunciated a view, it stated that the court could not order that the mother be jailed when the mother was the primary carer of the child or children. The court did not consider an interim change of custody as an appropriate sanction. The ability of a father to be the primary carer did not appear to be an option for the court. The word “access” should be removed from use, as the word automatically puts one parent in a secondary parenting role. “Contact” or “SPT, Scheduled parenting time”, would be suitable replacements. Where a parent frequently breaches court ordered access, the court must consider a change in custody as the appropriate remedy. **The following principle should be adopted by the court for consideration, that;**

*Where court ordered access is unilaterally with-held, or court orders are determined to be breached on more than two occasions, by the primary carer custodial parent, the transference of sole custody to the other parent should be considered.*

### *19.6 Litigants*

Male lay litigants experienced the worst outcomes in proceedings, followed by male litigants. Certain presumptions appeared to underlie the decisions of the court; (a) that men were in the traditional role of primary earner, (b) that men were not best suited to be the primary carer of children, (c) that men, not women, had an obligation to provide financial support to their children and/or spouse (d) that men were more likely to be an aggressor, (e) that men were more likely to abuse their children and/or spouse, (f) that men would seek to avoid their responsibilities if they could, (g) that men should cede both occupancy and often equity in the

family home to the primary carer and the child or children. Where unilateral withdrawal of access occurred it was done by women, however, no sanction was ordered. Fathers who sought sole custody or the role of primary carer were not given due consideration by the court, unless the conduct of the mother was exceptionally bad. Lay litigants and non-nationals also experienced poor outcomes, the rules, legal language and indeed the language of English, acted as a bar to adequate representation and/or understanding.

### *19.7 Judicial influence and decision making*

It was evident that settlement discussions, on the day, were not conducted in isolation from the court. Practitioners advised their clients of the particular disposition of a judge, or the court stated its inclination, either by stating to counsel, *“you know the way I go on this”*, or by enunciating the orders that the court believes it might make if asked to do so. These types of discussions were pressurised, conducted in a hostile and uncomfortable environment, and were carried out directly in the shadow of the court. The outcomes of cases settled on the day varied little between the kinds of orders a particular court would make. In only one Circuit, the Northern Circuit, was this not so. It became clear that the practitioners did not know the ruling trends of this judge, and so created consent agreements that the court would not approve. This research finds that settlements reached at the courthouse on the day were not controlled by the desires or requirements of the litigants, but were constructed to appease the particular judge sitting on that day. Counsel, in particular, engaged in directive “negotiation” with their client, informed by the known decision making style of that judge. These types of pressurised settlements must cease.

For the first time judges hearing family law cases were interviewed, and their ruling trends identified. This research shows that each judge had a particular style, and approach, to cases and litigants, which influenced the outcomes. The decision making processes and ruling trends of each judge were known to the practitioners who frequented that court, which enabled the case to be “pitched” to the court, bearing in mind the disposition of the court. This knowledge was essential where a judge was known to have a particular intolerance for certain behaviours, or for certain kinds of litigants. Individual trends were noted in terms of division of assets, the family home, maintenance, and “proper provision”. The only clear common factors between the courts, were the statutory provisions, and the legislation available to make orders. In terms of maintenance no court applied any form of mathematical calculation based on Affidavits submitted. In terms of lump sum provision, values rather than

percentages were commonly stated. Sale of the family home or division of the equity in the family home appeared to be arbitrary, and based more on the circumstances before the court in terms of who resided in the house. An alternative to the ad hoc practices noted, is the adoption of quantitative guidelines for child and spousal support based on the annual income of both litigants, the number of dependent children, and their needs.<sup>453</sup>

The family law system isolates judges, such that; (a) they are not aware of the approaches and decision making trends of their colleagues and (b) it entrenches particular personal approaches over time. Judges were not informed when their orders were appealed or the outcome of any such appeal. The lists are too large to allow the court reasonable time to deal with cases. Training was not provided to judges to deal with the emotional and psychological complexities of family law, nor did there appear to be professional support for those judges who were primarily assigned family law cases, which appeared to take an emotional toll on some of them. There were some judges who showed great aptitude for family law, which made the experience less distressing for litigants, but they were in the minority. The general view of the court and the practitioners, varied from outright distaste, to dislike for family law, and it was perceived as a difficult, unsatisfying and inferior area of law in which to practice.

### *19.8 The future of family law*

When this work began, Ireland had just entered into an economic recession. The collapse of the value of property, crystallised debt, rising unemployment, pay cuts and additional taxes all fed into the courtroom. The economic crisis further added to the distress of litigants, many of whom could no longer afford legal fees, or to discharge prior maintenance orders made. A system that does not openly quantify the distribution of financial resources, in combination with clear principles, is an unjust system, prone to subjective and opaque decision making. The *in camera rule* and its current implementation is the single greatest barrier to reform. As has already been done in other common-law jurisdictions such as Canada and New Zealand, *in camera* restrictions must be lifted, to allow public scrutiny and reporting. Discretion should remain with the court as to when the *in camera rule* be imposed, but it should be the exception rather than the rule. It is time for a radical overhaul of our entire family law system, which must be opened up, such that the judiciary and the public are aware of the

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<sup>453</sup> See, The Federal Child Support Guidelines, Department of Justice, Canada, [on-line] developed by Prof. Carol Rogerson et al. <http://www.justice.gc.ca/eng/rp-pr/fl-lf/child-enfant/guide/> [accessed 1 July 2013]

decisions made, where principles and formulae underpin division of assets and financial provision, and where realistic court lists ensure a fair and measured hearing for all litigants.

## **Appendix A - Consent and Research protocols**

- (i) Research Protocol
- (ii) Ministerial consent
- (iii) Case form – to summarise court notes

*Research Protocol***PROTOCOL FOR FAMILY LAW RESEARCH AND REPORTING**


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**Developed by Researcher; Róisín O' Shea, BA Hns Legal Studies  
Integrated masters by research/PhD, supervised by Dr. Sinead Conneely  
Waterford Institute of Technology**

**Research Title; Judicial Separation and Divorce in the Circuit Court**

*Approved by the Minister for Justice, Equality and Law Reform under regulation 2 (b) of S.I. 337 of 2005, research and reporting as provided for in Section 40(3) of the Civil Liability Courts Act 2004.*

**Project Aim; To examine, holistically, the Family Law System in Ireland, specifically in relation to Judicial Separation and Divorce. Empirically based research will form the foundation for analysis, and subsequent development of, recommendations for reform.**

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- (i) The researcher will introduce herself to the appropriate Registrar or Office Manager no less than one week in advance of commencing observations in any given court-room.
  - (ii) Any material for publication will first be presented, by email or fax, to any Judge/s referenced in the piece. Each judge shall have the right of veto in relation to any direct quotations.
  - (iii) **The researcher shall take the utmost care to preserve the anonymity of any party to the proceedings, or any child involved in the proceedings.**
    - (a) There shall be no use of the initials of the parties names. Fictional names/initials may be used for the purposes of clarity, and shall be stated to be such.
    - (b) Cases will be given a coded reference known only to the researcher.
    - (c) Where the parties live outside Dublin or Cork, the references used shall be the Circuit, and, "City", "provincial town", "village", or "rural location", etc.,
    - (d) Property will be described in general terms.
    - (e) Unless relevant to the proceedings, there shall be no specific mention of a person's trade or profession.
    - (f) There shall be no identification of children's schools.
    - (g) Particular care shall be taken where allegations of abuse, physical/sexual, in relation to children arise, in the context of custody and access disputes.
  - (iv) **Where a party to a case is personally known to the researcher, the researcher will leave the court-room if the case goes to trial.**
  - (v) This protocol may be modified in light of experience as the research progresses.

Signed; Róisín O' Shea Date; 21<sup>st</sup> Nov., 2008

Róisín O' Shea- Presented to the W.I.T. Research Ethics Committee.

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## *Ministerial Consent*



DEPARTMENT OF JUSTICE, EQUALITY AND LAW REFORM  
AŃ ROINN DLÍ AGUS CIRT, COMHIONANNAIS AGUS ATHCHÓIRITHE DLÍ

### TO WHOM IT MAY CONCERN

The Minister for Justice, Equality and Law Reform has conveyed his approval under regulation 2(b) of S.I. 337 of 2005 for the following person to attend Circuit Court family law *in camera* court proceedings, as provided for in section 40(3) of the Civil Liability and Courts Act 2004:

Ms Róisín O'Shea  
Waterford Institute of Technology  
Waterford

Ms O'Shea meets the requirement of regulation 2(b) of S.I. 337 of 2005. In addition to being approved by the Minister, she has been nominated by a body specified in the Schedule to these Regulations.



John Kenny  
Principal Officer  
Department of Justice Equality and Law Reform

25 July 2008

*Case Form*

<b>Case No;</b>	<b>Application;</b>	<b>Applicant;</b>	<b>Circuit;</b>
<b>Case ref;</b>	Judicial Separation- post JD	Male	Judge;
<b>Amt of time;</b>	Divorce	Female	
Court;			
<b>Date:</b>	Post Divorce		
-----			
<b>-----Consent/contested</b>			
<b>Year of marriage;</b>			
<b>Children;</b>	<b>Live with;</b>	<b>Access;</b>	
<b>Prior agreement;</b>			
<b>Mediation;</b>			
<b>Family Home;</b>			
<b>Proper provision</b>			
<b>Reconciliation;</b>			
-----			
	<b>Applicant;</b>	<b>Respondent;</b>	
Not in court			
Not in court, rep			
Lay litigant			
Free legal aid			
Barrister/sol			
Sol			
Non-national			
Christian/Muslim/other			
Resident; Ir/EU/world			
FIS			
Disability			
Loan parents			
Unemploy.benefit			
Job seekers			
Education grant			



Children's allowance
State pension
Unemployed
Employed PT
Employed FT
Pensioner
Mortgage
Loans/debt/car lease
Maintenance C
Maintenance S
Other Property
Assets/cash/shares
Pension
-----
<b>OUTCOME; SOS    hearing            Full hearing    Adjourned by Judge    Not heard</b>

## **Appendix B- Interviews and Assessments**

- (i) Judicial interviews
- (ii) Judicial trends
- (iii) General interviews

### *Judicial Interviews*

**6 judges out of the 13 judges observed during the period of this research agreed to be interviewed. The protocol for the interviews being that the summaries published would be anonymised, and the researcher would not disclose the identities of the judges at any time.**

#### **Judge 6**

**Q; What are the key issues for you as a Family law judge?**

**Q; Is Family Law an area of interest for you?**

1. Not being informed when a decision has been appealed, and not being informed of the outcome of that appeal.
2. *“Private entities are offering D.I.Y services on separation or divorce and are charging € 800 and upwards for an incomplete service. Service is often not in order, proof of service must be in accordance with the legislation. The paperwork is often shoddy and dubious letters of consent are proffered”.*
3. It is extremely important to have researchers and court reporters in the court-room so that more information on decisions is in the public domain, particularly in light of the increase in lay litigants in cases.
4. Would welcome training specific to family law matters, no training currently provided.
5. Did not believe that attachment and committal was an appropriate sanction where the primary carer was the mother, where she persistently breached access orders.

6. Did not believe that attachment and committal was an appropriate sanction where the primary carer was the mother.
7. Evidence must be clear to determine if the parties are separated for the requisite periods. It is preferable to determine the date as being when one party leaves the family home. If the separation period dates from a time that the parties still resided together, then evidence must be heard to determine if normal marital relations continued.

## Judge 2

**Q; What are the key issues for you as a Family law judge?**

**Q; Is Family Law an area of interest for you?**

1. *“The lack of judicial training in family law is an issue, particularly training to deal with children. Some form of training is required to assist judges deal with children directly when required, and to understand the dynamics of parental conflict”.*
2. Advocates mediation as the preferred means of dispute resolution for most family law matters, away from the “hot-house” of a court-room, however mediated agreements must be well written and capable of legal enforcement. *“Mediated agreements must “stand up”, a poorly worded mediated agreement that does not deal clearly with the legal issues arising creates significant problems later on. I have seen some really bad agreements. A great number of mediated agreements that have come to my court have been prepared by non-legally trained parties and this is an issue where there are issues around financial provision for children and assets to be divided”.*
3. Expressed a keen awareness of the harm that can be done to young children, where high animosity exists between the parents. *“Children can become alienated from one parent 4-5 years down the line”.* Stated that children should never be in the court-room but their voice must be heard.
4. Where s 47 reports are carried out, the judge advocates that the parents should have access to the recommendations of the report, but not the parts of the report where the views of their children have been expressed.

5. Did not believe that attachment and committal was an appropriate sanction where the primary carer was the mother, but acknowledged that persistent breaches of access orders was a significant problem.
6. Advocates that the current application of the 'in camera' rule remains, where parties are not identified in any case reports.
7. Where there are young dependent children, their welfare is served best by being with the mother, and the mother should be given sole right to reside if there is a family home. The house can be sold when the youngest is no longer a dependent and the proceeds equitably divided between the parties.

### **Judge 9**

**Q; What are the key issues for you as a Family law judge?**

**Q; Is Family Law an area of interest for you?**

1. Would like to see mediation and other forms of mediation used for most family applications, particularly where parenting arrangements were required.
2. Would like to see counsel advise their clients about mediation, and explain what it entails.
3. *“While the ‘in camera’ rule is necessary to protect the parties and their children from the public eye, the lack of any record is a significant downside. Would people really attend family law proceedings if the ‘in camera’ rule was lifted, no-one comes in for civil cases and very few people attend most criminal trials, apart from the high profile cases”.*
4. *“The current inadequacies in Affidavits of Means produced for court is a serious flaw in the system”.*

5. Did not believe that attachment and committal was an appropriate sanction where the primary carer was the mother, but did not have a solution where access orders were persistently breached.
6. The advent of lay litigants is hugely problematic. “ *I would be very much against people representing themselves, you get people involved who don’t have proper training. Trust is also a huge issue, when a practitioner or officer of the court says something you can take that it is so, counsel have a high duty to the court*”. Lay litigants take a much greater amount of court time, “*instructing them in matters of law is hugely time consuming*”.

#### **Judge 4**

**Q; What are the key issues for you as a Family law judge?**

**Q; Is Family Law an area of interest for you?**

1. Firmly against the idea of a designated family court, particularly specialist judges. Took the view that specialist judges primarily dealing with family law cases would (a) create a “*narrow view*” with the same judges hearing cases again and again and (b) that it is a matter for the judiciary and not the state, as it would be unconstitutional for the State to interfere. If a designated court was brought in the case-load should be 50/50, 50% of the judges time hearing family law matters, not 75% like in Canada.
2. “*The lists are over-loaded, the quantity of work for us is too great on any given day. The system has unreasonable expectations listing multiple cases for hearing and motions on the same day. The system would never function without barristers, the court is so inundated with work*”.
3. If given a choice would prefer not to hear any family law cases, however feels strongly that there are serious issues that need to be dealt with in family law particularly regarding the welfare of children.
4. Did not believe that attachment and committal was an appropriate sanction for persistent breaches of access orders, where the primary carer was the mother.

5. 100% support for mediation as a front end dispute resolution mechanism. Took the view that most cases do not need to come to a court, particularly cases where parenting arrangements are required. Judges are not trained or best placed to make decisions around the day to day care of children.
6. Advocates a baseline of 50/50 divisions of assets where the marriage is 10 years or more. Advocates that both parents should have access to their children.
7. Difficult to deal with cases where allegations of abuse are made against a parent in relation to a child. Believes that experience of criminal cases assists a judge to assess the body language of the parties. *“Judges do have to become involved where allegations are made, forensic training helps”*.

### **Judge 1**

**Q; What are the key issues for you as a Family law judge?**

**Q; Is Family Law an area of interest for you?**

1. Fully supports the idea of a designated family court and family law judges. Would advocate that 75% of a designated judges time be spent on family law cases, and specific training should be provided.
2. *“ I Support mediation as an appropriate dispute resolution mechanism particularly for parenting arrangements, but a significant number of cases will still need to be heard in court.”* Believes that Circuit Court judges should be able to direct parties to mediation.
3. Advocates *“doing away”* with judicial separation, with divorce after two years. Believes that County Registrars should be empowered to handle consent cases including divorce.
4. Is frustrated by uni-lateral decisions made by parents, particularly mothers who withhold access, believing it to be within their gift, as no appropriate remedies are available. Will not consider committal as a remedy to persistent breach of access orders by the mother in a primary carer role. Believes that access and maintenance should be de-compartmentalised, as they currently are inter-twined in court. *“Parenting agreements should be put together by experts, every case is different and a lot of court time can be wasted trying to work out individual arrangements.”*

5. Did not believe that attachment and committal was an appropriate sanction where the primary carer was the mother, commenting *“how can I order the mother of the children to be locked up, when she is the carer of the children, does it mean that the children would go into care?”*
6. Applies the tender years principle, and does not think 50/50 parenting should be ordered, even where the father has more availability than the mother. *“ I believe that children should be left with their mother at least until they are 12 or 13 and I do not think it appropriate to order the sale of the family where dependent children reside there with the mother.”*
7. Noted the increase of lay litigants who do require more time. Believes that lay litigants are at a disadvantage particularly where the other side is represented.
8. Very annoyed by litigants who come to the courtroom inappropriately dressed or behave in an agitated manner.
9. Would welcome standardised parenting agreements or templates that could be used by the court when making orders.

## **Judge 7**

**Q; What are the key issues for you as a Family law judge?**

**Q; Is Family Law an area of interest for you?**

1. *“Mediation should be the number one priority for family law disputes”*. Believed that the current form of mediation was too expensive, with uncertain outcomes, which discouraged people from using it. *“Mediated agreements that come before the court show lack of consistency, often are written in unenforceable language and showed disregard for possible legal outcome”*. *Only those with legal training should construct separation agreements in mediation that dealt with financial provision and asset division.”*
2. Any agreements made, or orders entered into, should always deal in percentages not stated values where division of assets is at issue.
3. Court should be the last resort not the first option. Advocated mandatory attendance at mediation.
4. Advocated greater use of County Registrars, dealing with consent matters in particular.

5. Expressed concern that the only realistic mechanism to hear the voice of the child was a s 47 report, which had to date been funded by the State. *“Desperate cases, where the parents are diametrically opposed, and have no money, means that no assessment of the needs of the children can be carried out”*. Believes that a s.47 report is the only tool available to the court to hear the voice of the child. Would like to meet with children in chambers, but not alone and not without training.
6. While very interested in family law could not envisage being a designated family law judge. *“I can manage short bursts, but if I had to do a long stint, I would go mad”*. Intensely dislikes the emotional context of family law cases. Indicated that no training in family law was received, nor any specific training to assist in dealing with the emotional dynamics, particularly around parenting issues.
7. Concerned about the increase of lay litigants and the serious issues that poses. Those who in better times would represent themselves are taking solicitors off record. Long lists for legal aid or ineligibility fuelling the increase in lay litigants. Indicated that *“there were two categories of lay litigants, those who were forced to self represent due to economic circumstances, and the “jihadists” who become obsessed with the court process, coming frequently to court through multiple applications, who have become embittered about what they perceive as injustices or wrongs wrought against them, often believing there is some form of conspiracy”*. Advocated the use of an Isaac Wunder order as an appropriate remedy.
8. Indicated that the second category of lay litigant has taken to writing directly to judges. Believed that all cases should be recorded to provide a record to protect judges, but saw a problem with litigants seeking transcripts of those recordings.
9. *“The delays in the legal aid system and the provision of service is open to abuse, and is used strategically to delay the progress of a case”*.
10. Believed that a general principle of joint parenting should be applied, 50/50 co-parenting as a presumption. Acknowledged that persistent breaches of access orders by mothers created a significant problem for the court, no appropriate sanction.
11. Indicated that parties deserve the benefit of experience and negotiations that counsel can bring, but practitioners should not indulge in personal animosities at the expense of their clients.
12. *“ I am concerned that allegations of sexual abuse are at times being used as a very effective weapon, but a court is obliged to ensure that the HSE or the Gardai*



*investigate all such complaints*". Believes that while experts are best trained to investigate and identify issues, their reports should be queried as a matter of course.

*Judicial Trends*

**13 judges were observed during the course of the research and the following general trends were identified:**

**Judge 5**

1. Usually commenced the day at 10.45, went through list and sought to address short matters first. List usually over-loaded and not concluded on the day.
2. Usher actively involved in managing case list and finding parties when required.
3. Allowed adjournments off the list without asking why the matter is being adjourned
4. Ordered maintenance even where payor is at subsistence income level on basic State support
5. Accepted testimony from lay litigants that the spouse has consented to their application for divorce, without proof of service or formal written consent.
6. Didn't hear evidence on divorce, where it is on consent, and was a long marriage
7. Where there were dependent children living with the mother in the family home, did not order the sale of the home until the youngest dependent turns 18 or 23.
8. Did not seek evidence to establish "proper provision", where terms have been agreed, but relied on the solicitors and barristers to have satisfied themselves that "proper provision" had been made. Where both parties were lay litigants, the judge sought evidence to determine if proper provision was made.
9. Ordered that maintenance be continued for a 23 year old still in college, when a lay litigant father sought to have the maintenance discharged.
10. Prioritised the payment of maintenance for children ahead of any other financial obligations
11. Openly stated the view that taxi drivers always under-declare their income
12. Applied the tender years principle, that the primary carer for young children should always be the mother, unless exceptional reasons why this was not appropriate.
13. Was very intolerant of lay litigants, particularly men who presented as anxious/frustrated/agitated.
14. When setting a value on a property, ordered two valuations, the value being the average of the two.

15. Took the view that ordering the sale of the family home was to be avoided
16. Default position of 50/50 equitable division of the family home, unless maintenance was not being paid.
17. In a contested hearing, this judge often indicated the possible outcome and adjourned for a few minutes to allow time for the parties to have further discussions. In each case the parties agreed terms.
18. Kept evidence short, discouraged “story-telling”, quickly moved to the core issues and encouraged settlement
19. Rarely referenced the case files
20. Read recommendations of court ordered reports
21. Rarely enunciated the orders made in consent cases. Any orders enunciated were done quickly without reference to the relevant legislation.
22. Took lunch between 1 and 2 p.m. and usually concluded around 4 p.m.

#### **Judge 6**

1. Usually commenced at 10.30, would go through the list and dealt with short matters in the morning, dealing with the rest of the cases as they arose on the list. List usually over-loaded and not concluded in this court.
2. Usher was actively involved in managing case list and finding parties when required.
3. Always checked if service had been properly executed and did not proceed if the paperwork was not in order.
4. Case ref; C189 February 2009 An applicant wife, represented by legal aid, sought a consent divorce. The respondent was not present, or represented, however written consent was provided. The judge queried why sole custody had been granted on judicial separation and why there was no access. The wife submitted that the respondent had ignored all proceedings and had never requested access. The judge adjourned the case on the basis that the service documents were not in order, “*the respondent must be served by registered letter and you must provide proof of service*”.
5. Case ref; C225 February 2009. The applicant wife was seeking a judgement in default of appearance on divorce. She was represented by a legal aid solicitor and barrister, the respondent did not attend, nor was he represented. On checking the paperwork the judge noted that the document purporting to be a receipt from the post office proving service by registered post was an unstamped copy, and the affidavit of service of

notice of motion was also a copy. The court let the case stand until the original documents were produced. An hour later the legal aid solicitor brought the file, the judge did not accept any of the documents produced as all were copies. The case was adjourned for 3 weeks for proper service to be completed.

6. Where the parties or their legal representatives did not attend at the court for call-over, this judge struck out the case.
7. Allowed adjournments off the list without asking why the matter was being adjourned
8. Always sought evidence to determine "*proper provision*", and to establish if the parties have ruled out reconciliation
9. Was very intolerant of lay litigants, and did not answer any questions posed by them in relation to court procedures or the law.
10. Rigorously applied procedural requirements and the law
11. Case ref; 196 February 2009. In a divorce case where both parties were lay litigants, the applicant husband when questioned could not remember how long they had been separated. The wife stated that they separated in July 2005. The judge noted that if they separated in July 2005 and the application was made in December 2008, that the required 4 years had not elapsed and struck out the application.
12. In order to determine whether there should be a 50/50 division of the family home, applied criteria such as the length of the marriage and the financial contributions or homemaker contributions of both parties.
13. Always read and checked the case files
14. Always read court ordered reports in full
15. Always enunciated the orders, referring to the relevant legislation
16. Usually concluded the day by 4 p.m.

### **Judge 3**

1. Would usually commence between 10.45 and 11 a.m. Dealt with the cases in the order listed. After lunch would deal with any short matters before commencing hearings listed. List usually over-loaded and not concluded in this court
2. Very irritated by counsel seeking to mention a matter at the end of the call-over. Took the view that it was an attempt to "*jump*" the list.
3. Usher actively involved in managing case list and finding parties when required, however often carrying out other tasks for the judge away from the court-room.

4. During call-over would agree to adjournments on consent, without questioning the reason for the adjournment.
5. Engaged in a friendly manner with all litigants, speaking directly to them.
6. Always placed the best interests of children to the fore, showing genuine concern for the welfare of children.
7. Encouraged “*story-telling*”, empathised with litigants when distressed
8. Was openly critical of counsel at times
9. Took a pragmatic approach to each case
10. Assisted lay litigants to understand any requirements of them, and the process
11. Reluctant to commence case for hearing after 3 p.m., usually adjourned the case.
12. Granted divorce where marriage certificates had not been produced, but would be provided at a later date.
13. Granted divorce without evidence of consent, Case ref C295
14. Enunciated the effect of orders rather than state the actual orders referencing legislation, except where a reserved judgement was given.
15. From interview; Indicated interest in family law, but did not wish to be assigned for the majority of the time to a designated family court.
16. Briefly referenced case files, and always read court ordered reports in full
17. Usually concluded before 4 p.m.

### **Judge 11**

1. Usually commenced by 10.45, dealt with short matters and then commenced list.
2. Usher actively involved in managing case list and finding parties when required.
3. Promoted settlement over court ordered outcomes

Case ref; C185 February 2009. In divorce proceedings, the parties agreed terms of settlement at the court before the case was heard. After making the Orders, the judge commented, “*Counsel cannot come to agreement without their clients. I want to congratulate the parties on settling their differences in such a comprehensive and clear manner. I can only get a snapshot of the marriage, voluntary agreement is a better way to proceed*”.

Case ref; C53 October 2008. A detailed offer was made by the respondent husband on divorce, which included assigning the mortgage-free family home to the wife, spousal maintenance of € 317 per week, maintenance for the 22 year old dependent child of € 200 per week, 50/50 division of the cash value of a life policy, and € 11,000 lump sum provision. The

wife sought more spousal maintenance and an extension to the family home to be paid by the respondent or an additional € 30,000. The judge indicated that he believed that the offer made was more than fair and that he might be inclined to make less generous orders. He adjourned for 10 minutes to allow the applicant consider the offer. The offer was accepted with a minor amendment, that spousal maintenance increase to € 500 per week after the dependent turned 23.

1. Spoke directly to litigants in an informal manner, whether represented or not.
2. Praised those who had achieved settlement terms, at the conclusion of the case.
3. Enunciated any orders very quickly, in a low tone of voice, without reference to legislation
4. Usually concluded by 4 p.m.

## **Judge 2**

1. Commenced between 10.45 and 11 a.m. Lunch between 1 and 2 p.m.
2. Usher actively involved in managing case list and finding parties when required, however often carrying out other tasks for the judge away from the court-room.
3. Went through the full list at the start and commenced with short matters. Would state that the list would be dealt with in the order listed, however ceded to requests from counsel to “jump” the list. List usually over-loaded and not concluded in this court
4. Allowed adjournments off the list without seeking reason why
5. Adopted a pro-active settlement approach, often sitting for long periods in chambers rather than starting cases on the list, to encourage settlement discussions.
6. Rarely sought evidence on proper provision in consent cases, relying on counsel to have carried out due diligence.
7. Reluctant to take seisin of a case, given the delay that may ensue
8. Usually asked if reconciliation is possible on divorce.
9. Does not hear evidence relating to dependent children, other than by way of expert reports
10. Usually orders sole right to reside in the family home to a wife who is the primary carer of young children, applied the tender years principle.
11. Encourages “story-telling”.

12. In interview; indicated interest in family law cases, but would not wish to be assigned to a designated family court for the majority of the time.
13. Always read court ordered reports in full
14. When enunciating orders, spoke quickly and in a low voice.
15. Would sit until 6 p.m. on most days to try and clear list, the latest sitting being 8 p.m.

### **Judge 10**

1. Commenced by 10.30 a.m. Dealt with cases as listed.
2. Usher actively involved in managing case list and finding parties when required.
3. Adopted a pro-active settlement approach, often remaining in chambers for long periods to allow settlement discussions. Would urge counsel to keep trying where settlement seemed unlikely.
4. Always checked if service had been properly executed and did not proceed if the paperwork was not in order.
5. Always sought evidence to determine “proper provision”, and to establish if the parties have ruled out reconciliation
6. Was very intolerant of lay litigants, and did not answer any questions posed by them in relation to court procedures or the law.
7. Rigorously applied procedural requirements and the law
8. Dealt with division of assets on a case by case basis, no clear pattern of assessment
9. Always placed the best interests of children to the fore, showing genuine concern for the welfare of children.
10. Read recommendations of court ordered reports
11. Enunciated orders at a rapid speed.
12. Usually concluded by 5 p.m.

### **Judge 9**

1. Commenced by 10.30 a.m. Dealt with cases as listed.
2. Usher actively involved in managing case list and finding parties when required.
3. Questioned why adjournments are sought of cases listed

4. Adopted a pro-active settlement approach, willing to return from chambers when parties sought direction or clarification, and adjourn again for further discussions.
5. Engaged in a friendly manner with all litigants, speaking directly to them, allowing time for “story-telling”.
6. Showed empathy and understanding of litigants, in particular lay litigants, and explained the law when required, notwithstanding which, the required procedures and law were adhered to.
7. In interview; would prefer never to be assigned family law cases.
8. Read recommendations of court ordered reports
9. Applied procedural requirements and the law
10. Usually concluded by 5 p.m.

#### **Judge 12**

1. Commenced call-over at 10 .a.m.
2. Allows adjournments without questioning why
3. Dealt with cases in the order they appeared on the list
4. Usher assisted with case list, but did not actively seek parties or manage list
5. Always sought evidence to determine “proper provision”, and to establish if the parties have ruled out reconciliation
6. Was very intolerant of lay litigants, and did not answer any questions posed by them in relation to court procedures or the law.
7. Applied procedural requirements and the law
8. Lunch between 1 and 2 p.m. and usually concluded by 4 p.m.

#### **Judge 4**

1. Commenced between 10.30 and 10.45 a.m. Lunch between 12.15 and 2 p.m.
2. Usher usually involved in managing case list and finding parties when required, however often carrying out other tasks for the judge away from the court-room, or remained outside the court-room.
3. Went through the full list at the start and commenced with cases in the order listed. List usually over-loaded and not concluded in this court



4. Allowed adjournments off the list without seeking reason why, and actively encouraged adjournments
5. Struck out any cases if litigants and counsel were not at call-over or did not attend when the case was called.
6. Encouraged settlement discussions, would spend significant time in chambers with a busy list.
7. Never sought evidence in any consent judicial separation or divorce cases.

Court note; March 2011. At call-over a barrister queried the procedure this judge wished to follow in terms of evidence as “*different judges run their courts in different ways, and have different requirements*”. The court responded, “*if the matter is by consent then I don’t need evidence...I don’t require the parties to be called to give evidence*”.

Case ref; C1075 March 2011. In a divorce case the applicant wife’s motion was for judgement in default of defence, she was represented, the respondent did not attend and was a lay litigant. Counsel for the wife submitted a letter of consent from the husband to the divorce. A judicial separation was granted in 2008 and all assets were dealt with. The court granted a divorce and 18(10) orders. The wife was not sworn in. Counsel for the wife put a query to the court, “*so you don’t need the applicant to give evidence?*” The court responded, *No, I take a pragmatic view.*”

Case ref; C787 March 2011. In a contested divorce, the applicant wife sought an order to transfer the family home, valued at € 120,000 to her, and 44 acres to the respondent. Counsel for the wife submitted that the husband, a lay litigant and not in court, had paid no maintenance since he left the family home five years ago. The applicant sought orders in default of appearance. The court made the orders requested. Counsel put a query to the court, “*Your honour, do you not want any formal evidence?*”. The court responded, “*No*”. The matter took four minutes.

8. Reluctant to take seisin of a case.
9. Usually did not allow time for lay litigants to be sworn in, on consent matters
10. Had a stated view that assets, including the family home should be divided 50/50, where there was a long marriage.

11. Very intolerant of lay litigants, particularly those with a poor grasp of English.
12. Appeared to intensely dislike hearing family law cases
13. Strong advocate of the right of children to be with both parents, critical of mothers who frustrate/with-hold access.
14. Willing to grant sole custody to fathers.
15. Acknowledges the role of “homemaker” on division of assets
16. Did not feel bound by the recommendations of s.47 “expert” reports
17. Usually rose before 4.

### **Judge 1**

1. Commenced by 10.30 a.m. Dealt with cases as listed.
2. Usher sometimes involved in managing case list and finding parties when required, or engaged in tasks assigned by the judge away from the court-room.
3. Took the view that cases on the list should run, not willing to give much time to settlement discussions. Questioned why cases were being adjourned.
4. Always sought evidence to determine “proper provision”, and to establish if the parties have ruled out reconciliation
5. Looked closely at Affidavits of Means and pointed out inconsistencies or excessive spending
6. Dealt with division of assets on a case by case basis, taking time to ensure that proper provision was being made, even where consent terms had been agreed.
7. Would not order the sale of the family home until the youngest child no longer a dependent
8. Applied the tender years principle, that young children should be in the primary care of the mother, and would not entertain applications for sole custody by any father.
9. Was very intolerant of lay litigants, and did not answer any questions posed by them in relation to court procedures or the law.
10. Where lay litigants entered into consent terms on division of assets requested that they seek legal advice.
11. Very intolerant of male litigants who appeared agitated or anxious, whether represented or not.
12. Very intolerant of male litigants who dressed badly, chewed gum or had their mobile phones ringing.

13. Always sought detailed evidence where conduct was alleged, particularly where adultery was at issue.
14. Placed the best interests of children to the fore, admonishing parents who were in conflict over access arrangements, particularly mothers who frustrated or withheld access.
15. Read recommendations of court ordered reports, and abided by the advice of the expert
16. Enunciated orders clearly.
17. Usually concluded by 4 p.m.

### **Judge 13**

1. Commenced by 10.45 a.m. Dealt with cases as listed.
2. Usher involved in managing case list and finding parties when required.
3. Took the view that cases on the list should run, questioned why cases were being adjourned.
4. Always sought evidence to determine “proper provision”, and to establish if the parties have ruled out reconciliation
5. Looked closely at Affidavits of Means and pointed out inconsistencies or excessive spending
6. Dealt with division of assets on a case by case basis, taking time to ensure that proper provision was being made.
7. Placed the best interests of children to the fore. Expressed frustration with the inability of the current system to “hear” the voice of the child. Deemed s.47 the only mechanism available.
8. Read recommendations of court ordered reports, and abided by the advice of the expert
9. Ill at ease with lay litigants, preferring to speak to counsel for the other party on all matters where the other party was represented.
10. Enunciated orders clearly.
11. Usually concluded by 5 p.m.

**Judge 8**

1. Commenced by 10.30 a.m. Dealt with cases as listed.
2. Usher involved in managing case list and finding parties when required.
3. Asked court registrar to find relevant paperwork in the case file as required
4. Where lay litigants did not attend call-overs, let the case stand to see if they arrived later
5. Dealt with short matters first
6. Always sought evidence to determine “proper provision”, and to establish if the parties have ruled out reconciliation
7. Looked closely at Affidavits of Means and pointed out inconsistencies or excessive spending
8. Dealt with division of assets on a case by case basis.
9. Placed the best interests of children to the fore, frustrated by the inability of the current system to “hear” the voice of the child.
10. Read recommendations of court ordered reports, and abided by the advice of the expert
11. Enunciated orders clearly.
12. Usually concluded by 5 p.m.

**Judge 7**

1. Commenced by 10.30 a.m. Usher involved in managing case list and finding parties when required.
2. Took very pro-active approach to settlement. Would withdraw to chambers to allow settlement discussions and willing to briefly come back into court to give direction when asked. Encouraged litigants to enter into settlement agreements as the better way. Congratulated parties who entered into settlement agreements.
3. Engaged in a friendly manner with all litigants, speaking directly to them.
4. Always placed the best interests of children to the fore, showing genuine concern for the welfare of children.
5. Usually dealt with cases as listed, but occasionally took short matters after call-over.

6. Always sought evidence to determine “proper provision”, and to establish if the parties have ruled out reconciliation
7. Looked closely at Affidavits of Means
8. Dealt with division of assets on a case by case basis.
9. Critical of mediated agreements that state they are not intended to be legally binding.
10. Placed the best interests of children to the fore. Spent time hearing evidence to determine best access arrangements.
11. Stated view that 99 out of 100 times where conduct is at issue costs should be awarded against that party.
12. Read recommendations of court ordered reports, but questioned experts closely about findings/recommendations.
13. Enunciated orders clearly.
14. Usually concluded by 5 p.m.

## *General Interviews*

### **24<sup>th</sup> of March 2011 – s.47 expert, retired probation officer**

#### **1. What qualifies you to be a s 47 “expert”**

*“I used to work for the probation service, and in the 1980s I did a certificate of social work CQSW. Many of us who worked in the probation service now do court ordered assessments”*

#### **2. What ongoing training or CPD do you undertake?**

*“There is no official CPD path and I haven’t done any additional training since my CQSW certificate. There were monthly meetings but they are now gone”*

#### **3. Who contracts you and what guidelines do you get?**

*“I am usually asked to do reports by Barnardos, the HSE or Courts Service. My usual fee is € 1,980 for a court ordered assessment, although I know that some experts in Dublin charge € 5,000 or more. I have been paid by Courts Service until now, but funding was withdrawn on the 31<sup>st</sup> of January this year and I don’t know how I will be paid now. The guidelines I am given by the HSE and Barnardos is to do two interviews with each parent and one to two interviews with the child. I see my role as working to resolution, something like mediation. We are told by Principal social workers who are involved to always keep the best interests of the child front and centre.*

### **Two County Registrars were interviewed; December 14<sup>th</sup> 2011**

1. Affidavit’s of Means were rarely properly vouched, practitioners are not ensuring that the documents are in order for the case to progress. “ *The purpose of Case Progression is to ensure we have a clear picture of the assets and liabilities , which we often cannot achieve*”. County Registrar 2

2. *“Lay litigants don’t know what they are doing, and if they chose to seek Legal Aid, that system is under severe pressure which is causing inordinate delays of up to a year”* County Registrar 1
3. *“Frequently counsel and the solicitor are not on the same page at Case Progression”* County Registrar 1
4. *“ If there is a lay litigant on one side and counsel on the other, it becomes extremely difficult to create any balance. We are seeing a steady increase in lay litigants”.* County Registrar 1
5. Both County Registrars questioned if the court was reading the orders on the file coming from Case Progression.
6. *“Discovery is an issue with documents often not given or given at the last minute”.* County Registrar 1
7. Both County Registrars believed that they should have the power to send litigants to mediation.
8. Both County Registrars believed that they should be able to deal with all consent matters and make orders. *“Pension adjustment orders particulalry are a waste of the courts time”* County Registrar 2
9. *“The in camera rule is too restrictive at times, there needs to be a more practical approach”* County Registrar 1
10. *“ Reserach needs to be available to show trends and orders should be public knowledge”* County Registrar 2
11. Both County Registrars believed that training should be provided specific to family law, and how to deal with the emotional and psychological context.

## **Appendix C- Published research papers**

- (i) *Exploring the Concept of an EU Community Family Justice Model: Informed by the World*. Published November 2012, International Family Law Journal, Jordan Publishing London.
- (ii) *Family Law: Common Threads and Unique Opportunities*. Part I Róisín O' Shea, Part II Justice R James Williams, Supreme Court, Nova Scotia, Canada. Published June 2012, International Family Law Journal, Jordan Publishing, London
- (iii) *Go Your Own Way*. Published March 2009, Law Society Gazette, Dublin
- (iv) *Dad's Army*. Published October 2008, Law Society Gazette, Dublin

*Exploring the Concept of an EU Community Family Justice Model*

### **Exploring the Concept of an EU Community Family Justice Model: Informed by the World**

**Published November 2012, International Family Law Journal, Jordan Publishing London.**

**Róisín O' Shea, Doctoral Scholar, The Irish Research Council, Ireland**

On the 30<sup>th</sup> of March 2012 Waterford Institute of Technology convened an International Family Law workshop, funded by The Irish Research Council, to explore the concept of a One World Family Law/Dispute Model. Principal Investigator, Róisín O' Shea, invited 17 experts, to present at the workshop to kick-start discussions. The workshop was broken into 8 segments and this paper follows that format. Each participant also submitted feed-back forms at the end of each session, which have also informed this paper.

**Principle aim of the workshop;** To determine a core list of issues that require investigation inter-jurisdictionally, and to identify issues of mutual concern, for the purpose of developing an over-arching international family law model.

#### **Workshop Participants;**

**Róisín O' Shea;** Principal Investigator, W.I.T. and certified Family Mediator Mii



**David Hodson**; Eng and Aus Sol., International Specialist London, DDJ at PRFD England  
**Jane Long SC**; Family Policy and Programs branch Ministry of the AG, Toronto, Canada  
**Deborah Mc Nabb**; Circuit Court Referee, Family Court, Grand Rapids, Michigan U.S.A.  
**Owen Connolly**; Consultant Psychologist, Connolly Counselling Centre, Dublin, Ireland  
**Josepha Madigan**; Sol., – Chair of Family Lawyers Mediation Committee DSBA Ireland  
**Dr. Louise Crowley**; Law Lecturer, University College Cork, Ireland  
**Oliver Connolly**; BL, ADR Lecturer Trinity College, Founder of Friarylaw Dublin Ireland  
**Marianne Gabrielsson**; Project Leader Barnfried, Research assistant on project; High Conflict Families of Divorce, Lund University Sweden.  
**Dr. Tamar Morag**; Associate Professor Haim Striks Law School, Colman, Israel  
**Ann Thomas**; Managing Partner at the International Family Law Group LLP, London  
**Morag Driscoll**; Director of The Scottish Child Law Centre, Edinburgh, Scotland  
**Inge Clissman**; SC High Court, Dublin, Ireland  
**Judge James O’ Donohoe**; Circuit Court, Ireland  
**Dr. Sinead Conneely**; BL, Law Lecturer at Waterford Institute of Technology  
**Susan Ryan**; County Registrar, Co. Dublin, Ireland  
**Mary O’ Malley**; County Registrar, Co. Meath, Ireland  
**Shane Dempsey**; Senior IT Researcher at TSSG, Family Mediator, Waterford

### **The break-down of a relationship**

Family law is different from other areas of law. It is fluid, it evolves, and it is uniquely set in an emotional context from the moment the relationship breaks down. There is a significant increase of non-traditional families, and increasing numbers of international families. Some families are created where no relationship existed, sexual intimacy resulting in a child that binds both parents into a long-term legal and “family” commitment. The stark delineations currently drawn between public and private law, in the context of families and their children, ignores the reality that families experiencing break-downs, whatever the root cause or causes may be, need to be viewed holistically. An example of the joined up thinking approach that ought to drive family law reform is the development of the Integrated Domestic Violence Court in Ontario, which is being piloted for two years. A single judge hears both the criminal and family law cases that relate to one family, with some exclusions, where the underlying issue is domestic violence. The impetus to set up this Canadian pilot came from the combined efforts of Justice Geraldine Waldman and Patti Cross LL.B. who were inspired by the

development of Integrated Domestic Violence Courts in New York, which were expanded across the State of New York in 2003 ( Waldman & Cross *Building a Specialty Court for Families from the ground up* AFCC 47<sup>th</sup> Annual Conference, Denver Colorado 2010). I suggest that we take the integrated holistic approach a step further, to a one family, one judge, one specialty court and an over-arching one family justice system. A system that is fully integrated, with clear lines of responsibility for case management and progression, for every application related to a “family”, including when the State deals with children who are at risk or in need of care. That family justice system being front-loaded with inter-linked State supported mandatory information programmes, counselling, mediation, parenting plan development and settlement conferences.

The first question that arises for the State, is what is the appropriate role of the State in family disputes, pre-litigation, and how can it respond quickly and effectively to the needs of families. The State must balance the requirement for a cost effective use of resources, while recognising that early positive intervention is desirable, particularly for low income families, who cannot afford to pay a private counsellor or mediator (M O’ Malley). Where a relationship has existed, the process of loss that ensues impacts on the ability of one or both parties to make rational decisions. The on-set of litigation, with advice from legal counsel who are traditionally trained to do battle, can quickly evolve into a full-blown conflict. There is ample evidence, from Canada (Jane Long SC *The Family Court in Ontario* (Canadian-Irish Conference 2010) and New Zealand in particular, that early intervention by the State, in the form of conciliation, is effective in resolving some of the issues, particularly child care arrangements and financial provision.

*“Early self resolution out of court, achieves better outcomes for children and families. We need to promote conciliation over litigation”.*

(Reviewing the Family Court, A public consultation paper, September 2011, Ministry of Justice New Zealand Government)

According to Owen Connolly, consultant psychologist, shock is the usual response to a relationship breakdown. Invariably one partner realises that the relationship/marriage has failed and makes a decision to separate, often surprising the other partner ( O.Connolly, *The Break-down of a Relationship*, International Family Law Workshop March 30<sup>th</sup> 2012). Connolly believes that the announcement that the marriage or relationship is over, can have a similar psychological impact to the loss experienced when a friend or close relative dies

(Schoore A (2003) *Affect Regulation and Disorders of The Self*). The natural alarm system is triggered, grief for the loss ensues, and the reptilian part of the brain over-rides any rational thought processes or decision making (MacLean PD (2003) *The Triune Brain in Evolution*). It is his view, a view supported by other experts in this field, that unless professional help is secured in the first two months, that this emotional response may become chronic, resulting in a psychological state of mind similar to PTSD (Shapiro, Kaslow, Maxfield *EMDR and Family Therapy Processes* (John Wiley & Sons 2007 pg 6). From the Swedish perspective, it is accepted that the initial “crisis” can last up to a year, after which it is usually only the “high conflict” parties that go on to litigate. However, few interventions are available in the Swedish system for high conflict parties ( M Gabrielsson & C. Johansson-Granberg *Meeting the Needs of High Conflict Families in Sweden AFCC 47<sup>th</sup> Annual Conference 2010 Denver Colorado*). Legal experts in Ireland also acknowledge that an emotionally distraught client, or a client presenting with personality disorder issues ought to be referred to counselling, as informed decision making can be impossible until the emotional and psychological aspects of their problems are dealt with (G. Shannon *Family Law* (Oxford University Press 2011 pg 3, pg 5). So if a cooling off period is required before litigation can commence, how long should that period be, how can it be initiated and, do current legal frameworks assist or frustrate the difficulties associated with the “shock” process?

The single greatest obstacle to the discussion around a “cooling off ” period in the EU context, to avoid entrenchment and possible onset of PTSD, would be the rush to seize a forum at the earliest opportunity, to gain the greatest perceived advantage. The race to issue was introduced into family law in the EU in Brussels II, and discourages the resolution of family disputes through alternative non-court orientated options such as mediation. (D. Hodson, *The International Family Law Practice*, Second Edition, (Jordan Publishing Ltd. 2012, pg 636). To create a “cooling off” period there must be no incentive to issue first, and prescribed pre-litigation steps that must be taken.

### **Ancillary services pre-litigation**

Self-help rather than adversarial proceedings, as a means of maintaining harmonious relationships, under-pinned the ancient customs and law of the East, and anthropological evidence exists of a form of mediation in African custom. However it was the 1960s, and the emergence of a “rights” based culture, particularly in the United States, that renewed the interest in alternative dispute resolution mechanisms. This renewed interest was driven by

three primary concerns, congestion, delay, and expense in the courts (Dr. S. Conneely *Family Mediation in Ireland* (Ashgate Publishing Limited 2002). Interviews I conducted while shadowing Judge Von Dadelszen in January 2012 in Wellington, indicated that the development of family mediation as practiced in the New Zealand family courts may have been directly influenced by the Maori culture, resulting in legislation to provide for judge-led mediation in 1980 ( Family Proceedings Act 1980 Part II ss.8-19).

Currently in Europe there is no consensus on the definition of mediation, family mediation, and conciliation, and there is a dearth of information regarding the models of mediation used by mediators dealing with family disputes, and their effectiveness, such as “transformative”, “therapeutic”, brief-structured mediation”, “settlement based mediation”, “anchor mediation”, “co-mediation”, “shuttle mediation”, “ sole lawyer-mediator”, “caucus mediation”, “muscle mediation” and “scrivener mediation” as identified by Dr. Conneely. In Ireland there have been some positive new developments regarding mediation. The Draft General Scheme of mediation Bill 2012 provides that a barrister must also advise a client of the possible use of mediation. Currently where the services of a barrister are engaged, he/she is instructed by the solicitor and not directly by the client. However the explanatory note for head 5 indicates that a significant change in that system is now likely under the Legal Services Regulation Bill 2011 (O. Connolly). The pre-litigation ancillary service provided by the State is family mediation, a free service with lengthy waiting lists, which was transferred from the Family Support Agency, FSA, to the Legal Aid Board in November 2011. An on-site mediation pilot project is underway in the Dolphin House District Court in Dublin, run by the FSA, and initial reports to February 2012 indicate that 469 separated parents attended mediation, relating to custody and access, with 264 agreements reached (J Madigan Sol., *Appropriate Dispute Resolution (ADR) in Ireland* Jordan Publishing Limited London 2012). By March, 294 agreements had been reached. Statistically this would appear to be a lower resolution figure compared to other jurisdictions referred to in this paper, such as Ontario, where 81.1% of mediated cases at the Family Courts reached full or partial settlement (J. Long SC *The Family Court in Ontario* Canadian-Irish Family Law Conference Maynooth Ireland 2010). However, not all of the 469 cases had concluded at the time the statistics were released, and a clearer picture will emerge later this year. In 2002 Dr. Sinead Conneely identified the “therapeutic” model, as the model practiced by the State run mediation service in Ireland. A model that uses techniques derived from family therapy, differing little from clinical therapy and usually practiced by those with a human sciences background (S.

Conneely). I would argue that where a mediator deals with substantive issues such as division of assets and financial provision, which may be the subject of an agreement, that the therapeutic model is not appropriate. A combination of evaluative and facilitative mediation, and conciliation by way of option development, would be more effective. Evaluative-requiring the mediator to have adequate knowledge of family law, including relevant international law. Facilitative - where the mediator assists the parties to communicate effectively to pursue formal arrangements dealing with the break-down of the relationship/marriage- and Conciliation, where the mediator proposes various options where the parties may have reached an impasse. Family mediation, where the parties wish to formally separate, ought to be carried out consciously in the “shadow of the law” by those competent to do so, which includes a competency in understanding the best interests of the child. They must be capable of constructing legally enforceable agreements, with the parties availing of independent legal advice before signing. A two-step family mediation process that requires any mediated agreement to be subsequently re-drafted, in its entirety, into a legal document by legal practitioners is an unacceptable and unnecessary additional cost and may lead to an unintended outcome.

The Court annexed services provided in Ontario, Canada, include on-site and off-site mediation, information and referral co-ordinators and more recently in 2011 a Mandatory Information Programme. There was an expansion of Family Justice services to 32 court districts in Ontario during the latter half of 2011, the primary objective being to improve the experience and outcomes of clients who have family law issues ( J. Long S.C. *Family Justice Services and Information Programs in Ontario Canada* International Family Law Workshop March 30<sup>th</sup> 2012). The MIP is delivered by lawyers and mental health professionals, usually a social worker or mediator. Part I deals with the effects of a relationship break-down, legal issues, options for dispute resolution and going to court. Judges have consistently reported that the Mandatory Information Programmes helped litigants better understand the court process (J. Long). In Sweden mediation is offered free in all municipalities, however no formal training is required, there is no clear definition of the process and professionals improvise (M. Gabrielsson *Parents and High Conflict Divorce from a Swedish perspective* International Family Law Workshop March 30<sup>th</sup> 2012).

In Europe research is required to comprehensively determine what State and private conciliation and counselling resources are, and ought to be, available to parties in dispute both pre-litigation, and during all stages of litigation. Based on existing research from

Canada and New Zealand, a system that front-loaded meaningful assistance, could potentially divert all but the high conflict cases, or emergency cases (abuse/drugs/violence) away from the courts. The courts are then dealing with litigants who are in the 10-15% of high conflict cases, which should be assessed on a case by case basis by specifically trained judiciary with no presumptions applying. The aim should be to make expert information and services accessible to families at the earliest possible stage, with a coherent consistency between all initial steps, particularly inter-jurisdictionally, that is reinforced by all experts/advisors, which would assist in weakening assumptions before positions become entrenched. The difficulties created by the *lis pendens* of Brussels II on divorce, and the resultant uncertainties of applicable law, would have to be addressed to ensure that litigants wheresoever they reside within the EU are encouraged or perhaps mandated to access family justice services prior to the filing of most family matters. Earlier this year Yakima County in Washington State introduced mandatory mediation for family law matters (Family Law Proceedings- LSPR Rule 94.04w, effective 01/01/2012). The parties must have attempted mediation in good faith, and neither can opt out, or mutually agree to opt out. An exemption from mediation is at the discretion of the court.

### **Parents, and the best interests of the child**

*“Parental separation does not necessarily mean poor outcomes for children but research shows that prolonged exposure to frequent, intense and poorly resolved conflict is associated with a range of psychological risks for children”.*

(Reviewing the Family Court, A public consultation paper, September 2011, Ministry of Justice New Zealand Government pg 28)

There is widespread support for the view that children should retain a meaningful relationship with both parents, and extended families, after the break-down of a relationship, where this is safe. The Children (Access to Parents) Bill 2012-2013 which had its first reading in the U.K. House of Commons on June 25<sup>th</sup> 2012, would require courts, local authorities and other bodies when making decisions relating to residence and contact to “operate under the presumption that the rights of the child include the right to grow up knowing and having access to and contact with both of the parents involved in the residence or contact case concerned; and for connected purposes” (Summary of the Bill [www.parliament.uk](http://www.parliament.uk)). The

Massachusetts chapter of the Association of Family and Conciliation Courts sponsored a Shared Parenting guide for parents living apart, collated by the legal and mental health communities, and supported by then Chief Justice Sean Dunphy of the Probate and Family Court. The guide supports the view that children do best when both parents have a stable and meaningful involvement in their children's lives, and outlines what is appropriate at the various developmental stages of a child (*Planning for Shared Parenting: A Guide for Parents Living Apart* Massachusetts AFCC, 2005). In the Family Justice Review, the panel took the view that both parents should be involved in raising their child wherever possible, their key recommendations are aimed at strengthening shared parental responsibility, particularly as the parents make arrangements post separation for the child or children's upbringing. Education is identified as key to assist parents to understand their responsibilities and to enable them to cooperate in their parenting (Ministry of Justice, the Department for Education and the Welsh Government *Family Justice Review Final Report* 2011).

From my experience as a Family mediator, "shared parenting" is often misunderstood to mean a right to equal parenting time. Several parents have painstakingly calculated each hour they "have" the child or children, and forcefully pursue a rights based approach to secure an absolute equal share of the child/children's time. Automatic and literal shared parenting, i.e. dividing the time equally between parents, makes no sense, particularly if one parent has lengthy working hours and third party carers essentially parent the child, or if one parent had little or no involvement in the child's life pre-separation. In the Irish context, the parent who can establish themselves to have the main care and charge of their child, who resides with them, can secure entitlement to One Parent Family Payment, calculated per child, where their gross earnings do not exceed € 425 per week. It must be shown that the child or children spend the greater amount of time weekly with the claimant. A successful claimant may also be entitled to Family Income Supplement. In my experience as a family mediator and from my research in the family courts - the potential combined State benefits create a significant financial incentive to secure the greater timeshare of the child/children. Shared parenting should first and foremost be about the needs of the children, and then be based on the ability and availability of the parents.

Safety issues must be a consideration in shared parenting planning, where there is chemical or alcohol dependency, or serious physical or mental illness, or domestic violence. In the United States 41% of assault calls to police were domestic violence, even though it is thought that the majority of such assaults are not reported. Over 90% of the female victims are

mothers, and 3 out of 5 women experience more domestic violence after a personal protection order is entered (*The Cost of Violence in the United States* National Center for Injury Prevention and Control CDC, Atlanta, GA: 2007) The system responds by limiting or suspending contact. However, limited or supervised parenting time may not be in the children's best interests, particularly where there is a lack of resources. (D. Mc Nabb *Domestic Violence & Parenting* International Family Law Workshop March 30<sup>th</sup> 2012). We should not ignore the fact that domestic violence by women against men does happen, and occurs in the presence of children. I witnessed such an incident when I arrived early for a mediation at the family home of clients, and I have heard evidence in court of violence by women against men, which is not given the same weight of consideration.

Many parents do not know where to get the information and support they need to resolve their issues without recourse to court, and the Family Justice Review Panel advocate an on-line information hub and helpline, which would disseminate information and provide support outside court, for separated parents following separation or divorce (Family Justice Review pg 26). This recommendation mirrors elements of the Mandatory Information Programme recently implemented in Ontario, Canada. The Canadian programme is delivered through live presentation or DVD, and is available on-line in French and English. The second part of the Mandatory Information Programme in Ontario is dedicated to child related issues, addressing the effects of a relationship break-down on children, helping children adjust to the separation, parenting plans, legal issues involving children and options for creating both a parenting plan and a child support agreement.

When a relationship ends, we need to identify and implement appropriate steps that are generally understood should be accessed pre-litigation. How we go about creating that "norm" is the question, and it may be that there should be mandatory requirements (in most cases) to complete these steps before an application can be filed with the court regarding access/custody/parenting arrangements. Where there are children, the State has a duty of care to ensure that parents have the possibility to access guidance and assistance, quickly, to engage in planned co-parenting, which will reduce the amount of applications to the courts and will greatly benefit children who invariably become pawns in the war that can ensue between parents, where positions become entrenched.

In line with the provisions of the UN Convention on the Rights of the Child 1989 (the Convention), there have been developments internationally to ensure that the child's views



and wishes are placed before the court. The Family Justice Review panel advocate that children should as early as possible be supported to make their views known (Family Justice Review pg 10). In Scotland, under The Children (Scotland) Act 1995, there is a presumption that a child of 12 has the capacity to instruct, however a child of any age can express their views if the solicitor feels that the child has capacity. A key challenge for the Scottish system is overcoming the presumption that children should not be involved (M. Driscoll, *The Scottish Experience* International Family Law Workshop March 30<sup>th</sup> 2012). The Israeli Child Participation Regulations provide that all children have the right to express their feelings, views and positions, and to be heard freely in every matter affecting them, arising in the family court (Chap.20.2 (Participation of Children) in the Civil Procedure Regulations 1984, KT 5744, 2220 Isr). Where children's views are recorded, what level of confidentiality should be applied? A 2009 survey, carried out under the auspices of the Childwatch International Research Network, found that Canada, Ireland, Nigeria, Northern Ireland, Scotland and Costa Rica offer the least confidentiality, with families invariably having access to the full record of their children's views ( Dr. T Morag *Child Participation in Family Courts* International Family Law Workshop March 30<sup>th</sup> 2012). Where children met with judges in an Israeli pilot project, 2006-2009, the judges reported that in 54% of the cases, that meeting with a child had aided their understanding of a case and brought a different perspective to bear (Dr. T Morag & Dena Moyal *Child Participation and Child Representation in Israel and Ontario* AFCC 47<sup>th</sup> Annual Conference, Denver Colorado 2010).

In the international context additional research in the area of child abduction and relocation is required to provide an analysis of trends and outcomes. There are many difficulties around the implementation of the Hague Convention provisions since it was first introduced. Significant delay, in spite of article 11 obligations on the contracting states to process return applications expeditiously, and too many countries flout the provisions for immediate return (A. Thomas *International Movement of Children* International Family Law Workshop March 30<sup>th</sup> 2012). Hague cases ought to be dealt with by specially appointed judges with appropriate training and briefing, with particular reference to international family law. Too many cases are heard by low-level judges or judges with little family law or international family law experience (A. Thomas). Research is needed into who is the abducting parent, why did they abduct the child or children, and what criteria do the courts use in assessing the best interests of the child in relocation cases? At the Four Jurisdictions Conference in Liverpool, one

panellist judge from N. Ireland described two similar relocation applications by two mothers residing in N. Ireland, he consented to the relocation application for Australia, but refused the other application to Dublin. To better assist families, relocation principles need to be standardised internationally ( I. Clissman).

### **Practice and Procedure**

My observations in the Circuit Court in Ireland indicate that lawyers and the Court primarily determine the progress of a case, rather than any clear rules based procedures, often to the bewilderment of the individuals involved in the litigation. Adjournments are a significant cause of delay, due to over-crowded lists, tardy expert reports, changes in legal representation, change of status to lay litigant or agreement by consent to adjourn, often for unclear reasons. Pressurised settlements in the foyers and hallways of the courthouse, on family law days, are routine. Enhanced Case Progression or case settlement mechanisms through County Registrars should be developed to facilitate earlier, less pressurised, settlements. The Family Justice Review panel advocate improved judicial leadership and a change in judicial culture, with designated family judges taking leadership responsibility for all courts within their area (Family Justice Review pg 13). In the Circuit court in Ireland I have observed that it is almost impossible for judges to hold seisin of a case, due to the disconnected nature of judicial scheduling and the construction of family law lists. I would concur with the Family Justice Review panel that the aim should be judicial continuity in all family cases, and stronger case management (Family Justice Review pg 14).

The designated family court, with judges specially appointed to it as envisaged by the Hon., Justice Beattie and others in 1978 in New Zealand ( *Report on the Royal Commission on the Courts, 1978, at 183 rec.1*), has also been recommended, and in some cases implemented, by several other countries around the world. In his address at the Four Jurisdictions Conference this year, Judge Peter Boshier, Principal Family Court Judge, New Zealand, stressed the importance of specialist judges in the family court, who are legally trained and qualified by “personality and interest” ( Judge P. Boshier *Family Justice: Aligning Fairness, Efficiency and Dignity* Four Jurisdictions Family Law Conference, Liverpool, February 2012). Dublin County Registrar Susan Ryan submits that the judiciary should have professional experience in the area of family law, and training should be provided before they preside over contentious and difficult family law disputes. She advocates that training should more

specifically be provided in matters concerning children, particularly regarding how to speak with children, as is the case in England and Wales. ( S. Ryan *An International Workshop to Develop the Concept of a One World Family Law Model: Practice and Procedure* International Family Law Workshop March 30<sup>th</sup> 2012). In the Irish courts currently there is a lack of an express obligation to take the views of children into account, however, there is significant case law that indicates that the Irish judiciary must consider the welfare of children in any decisions that affect them. Susan Ryan suggests that such an obligation be extended to practitioners who should be obliged to act not only in the interests of their clients, but to take account of the best interests of their client's children. I would support the U.K. Magistrates' Association emphasis on the importance of separate legal representation for the child, where there is no Guardian provided, which would ensure that the views of the child are represented ( *Written evidence from the Magistrates' Association submitted by the Family Courts Committee (FC 21)* September 2010 [www.publications.parliament.uk](http://www.publications.parliament.uk))

From the judicial interviews I have conducted in Ireland, Canada, America and New Zealand, there is a consensus that presiding over family matters can be very difficult and emotionally draining. Some judges I have observed patently do not have the "interest" and "personality" referred to by Judge Boshier, while others show a keen interest in, and aptitude for, family law, which translates in the court-room to the benefit of the litigants. A best practice approach would include specially trained family law judges, who have an expertise and interest in family law ( I. Clissman S.C. *Practice and Procedure* International Family Law Workshop March 30<sup>th</sup> 2012)

The *in camera* rule and its application is a contentious issue for most jurisdictions. In Ireland, the lack of a court record or written judgements in the Circuit court, means that the judiciary are not aware of each other's decision making processes, or interpretation of legislation and there is no development of case law. The administration of justice is effectively carried out behind a veil of secrecy. A court that is closed to the scrutiny that natural justice requires, must balance the principle of open justice with the protection of the vulnerable, particularly children. In Ireland I believe that the overly restrictive interpretation of the rule creates a myriad of injustices, including; the lack of a record on appeal - no case law, no consistency – lack of access to sealed expert reports that contain serious allegations against one party – the inability to challenge false testimony- lack of recourse against counsel for negligence – no record for a judicial review – no public scrutiny- no certainty of outcome. On analysing the public access to the Family Courts in Australia, the New Zealand Law Reform Commission

noted that public access had not contributed in any meaningful way to greater openness of the proceedings, and that those attending tended to be with one of the parties or waiting for their own case to be heard ( NZLC (2004) 304-305). Currently in New Zealand family law cases are not open to the public, but the media can attend and report with some restrictions. In Canada all family cases (except child protection) are heard “in public”. As the number of family law cases with an international element increases, enforceability of the *in camera* rule will prove increasingly problematic (S. Ryan), particularly where one of the parties resides in a country that has a different interpretation of the rule. The breaching of *in camera* restrictions was also debated at the Four Jurisdictions Conference in Liverpool, with questions arising around the use of social networks and sharing of information via the internet. The international context of many family cases raises difficult questions, including how to enhance international cooperation on attendance of witnesses, can evidence from other countries be submitted by electronic means, and what kind of translation facilities should be available? ( I. Clissman)

### **Financial Re-distribution**

On divorce in Ireland, the court must ensure that “proper provision” is made for spouses and dependent children (S. 20 Family Law (Divorce ) Act, 1996), however, since “proper provision” has not been prescribed clearly by the Houses of the Oireachtas, the outcome may vary from trial judge to trial judge.

The recent landmark decision in *Y.G. v. N.G.* [2011] IESC 40, has addressed a number of issues that have significant relevance in the Circuit Court in Ireland. In delivering judgment, Denham C.J. set down a number of general principles that should be applied, where there has been a prior separation agreement, followed by a subsequent application by a party to court. The Supreme Court stated that a separation agreement is an extant legal document, and should be given significant weight, when determining proper provision (The Family Law (Divorce) Act, 1996 Section 20). That while the circumstances of each case should be considered specifically, inherited assets will not be treated as assets obtained by both parties in a marriage (pg 14 (xv)). That “a party should not be compensated for their own incompetence or indiscretions to the detriment of the other party”(pg 14 (xvi)). That changed circumstances of either of the spouses, must constitute significant change, before the court is required to “consider all the circumstances carefully”(pg 13 (vi)). Changed circumstances which may also be considered as relevant factors can include a significant change in the value

of assets such as an altered value due to “the bursting of a property bubble”( pg 14 (xvii), or an “ exceptional change” in the value of assets which was not foreseen (pg 14 xvii). Significantly the Supreme Court emphasised that the requirement of the courts on divorce is to make proper provision, not to seek to redistribute wealth (pg 13 (vi)). Through the years of my research in the Circuit Court, the judges have shown a uniform, consistent approach to the division of assets on divorce; where there has been a marriage of reasonable length, the division of the assets of the marriage should be on a 50/50 basis. That starting presumption is modified based on whether there were children of the marriage, and if one spouse became the primary carer of those children and did not work outside the home. The Constitution provides that the court must make “proper provision” based on the circumstances that exist on divorce. Where formal separation agreements exist with a “full and final settlement” provision some Circuit court judges are reluctant to re-examine those agreements, unless there has been a significant change in circumstance and/or a long period in between separation and divorce.

*“Often in the Circuit Court an agreement will be expressed to be “in full and final settlement” where one party has paid to the other a capital sum which can often be quite limited. In coming to a decision in relation to the revisiting of provision previously made either in a Separation Agreement or in Judicial Separation, a Court must, in my view, examine the extent of the provision previously made, even if same is expressed to be in full and final settlement”. Judge O’ Donohoe The Changing Legal Landscape in Family Law International Family Law Workshop March 30<sup>th</sup> 2012)*

The 2011 Census in Ireland shows a people moving away from the church. Immigration, emigration and changing attitudes are effecting the rate of marriage- co-habitation, single parenthood and same sex couples are on the increase (Dr. S. Conneely). Financial redistribution of unmarried families is now addressed in the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, acknowledged by then Minister for Justice & Law Reform, Mr. Dermot Ahern T.D. as “...one of the most important pieces of civil rights legislation to be enacted since independence...” (Department of Justice and Law Reform, 2010). As of January 2011 Ireland now recognises same-sex relationships from 27 other States ( Civil Partnership (Recognition of Registered Foreign Relationships) Order 2010 S.I. No.649). When dealing with married or unmarried international families, the resolution of the financial affairs of the parties is currently compartmentalised in some EU countries, with maintenance requirements and property division being potentially dealt with in a separate country with separate laws, by separate lawyers with different criteria ( D. Hodson

*Discussion document* International Family Law Workshop March 30<sup>th</sup> 2012). The cost implications can be significant for the litigants, with perhaps unsatisfactory outcomes.

### **Access to Justice and Forum Shopping**

The three concerns of congestion, delay, and expense, were enunciated in Ireland in 1985 (Report of the Joint Oireachtas Committee on Marriage Breakdown) and by the Irish Law Reform Commission in 1996 (The Law Reform Commission *Consultation paper on Family Courts* 1996).

They were highlighted in the European Commission Green Paper, 2002, on alternative dispute resolution in civil and commercial law. The New Zealand Government, in its September 2011 consultation paper, acknowledges that the process and progress of a family law application is perceived to be largely driven by the Court and lawyers, rather than clear rules-based procedures that must be adhered to, which would ensure clarity in what should be a client-focused service. In November 2011, the Family Justice Review Panel, noted that cases are taking far too long, the cost is too high for the taxpayer and the individual, and adults and children are confused about the process and timelines (Ministry of Justice, the Department for Education and the Welsh Government *Family Justice Review Final Report* 2011). Access to information, clear procedures, with some certainty of outcome, is fundamental to ensuring access to justice. So the concerns identified by the American legal establishment in the 1960s would appear to still prevail internationally, over 40 years later. There seems to be an inability to address these concerns in twenty first century participatory democracies, which constitutes a significant access to justice problem.

Dr. Louise Crowley identifies forum shopping in family law, as provided under Brussels II, as the most significant impediment to any harmonised approach to family law in Europe. Brussels II promotes the race to issue, which sounds the death knell for possible negotiations. Other shortcomings include, differing national substantive provisions, differing conflict of laws rules and scope for judicial discretion in most cases. ( Dr. Crowley *Access to Justice and Forum Shopping – placing reform in context* International Family Law Workshop March 30<sup>th</sup> 2012). With the impetus to secure the forum, to ensure that the law applies where the proceedings issue, mediation or any other form of dispute resolution cannot be an option. Dr. Crowley recommends that Brussels II be amended to tackle the issue of where best to file, and eliminate the capacity of litigants to “rush” to court.

There can be dramatically different financial outcomes between different countries. Features that can impact on outcomes include marital agreements, non-marital assets, maintenance (needs) and disclosure. Real financial hardship can be the outcome for economically weaker parties, who don't have the resources to follow the case internationally to the forum selected by the wealthier party ( D. Hodson *Forum Shopping, First to Issue, Applicable law- and a Future Global Family Law Solution* International Family Law Workshop March 30<sup>th</sup> 2012). David Hodson argues that Applicable Law is not the answer, not least because it increases costs, adds to uncertainty and makes settlements slower and less likely. He believes that a uniform global family law imposed from above is practically and politically impossible, that the best approach for a long-term solution should incorporate various elements, such as the appointment of a small group of specialist family court judges, in each jurisdiction, to deal with complex international cases, cross border powers of disclosure and investigation and a hierarchy of jurisdiction with each of them only applying their own local law, given that it is the law of the country with which the couple have the closest connection on the hierarchy of the jurisdiction.

### **The role of IT**

To successfully process inter-jurisdictional cases, secure information sharing between courts administrators is required where, for example, issues relating to jurisdiction and enforcement of Orders arise where a spouse/partner and/or children reside in different jurisdictions on the break-down of the marriage/relationship, or re-locate subsequently. The Magistrates Association's evidence to the UK Parliament Justice Committee noted that even within the UK,

*"...there is a need for a single comprehensive and complete Family Court data recording and reporting system. This would make reference to the generally accepted situation that current reporting by HMCS, Legal Service Commission and Local Authorities is inconsistent and there is a lack of agreement on the number of cases, number of children involved, number of cases in the FPCs and County Courts etc."*  
(Written evidence from the Magistrates' Association submitted by the Family Courts Committee (FC 21) September 2010 [www.publications.parliament.uk](http://www.publications.parliament.uk)).

That report goes on to urge that such a data recording and reporting system, should also include reliable court statistics on workload, the performance of the courts and the cost of the family justice system.

Across the Member States we need to develop a stream-lined system of case referencing, and an IT framework for its incorporation within an inter-connected web of inter-jurisdictional information sharing. The framework should address requirements such as privacy protection and training/support for systems users and integrators. There are a number of difficult issues that will need to be addressed such as the variations between Member States in terms of the quantity and nature of the information stored, and how, when, and how much, data should be shared, particularly where the system interfaces with child welfare.

Data analysis across the family courts in Member States would assist in determining consistency of outcomes. Trend analysis may highlight social problems, arising from the process and outcomes of family law, on a national or global basis. Defaulting jurisdictions could be identified. The object would be to create a web of auditable and secure inter-connected requests for an analysis of information. ( S. Dempsey *Challenges & Technologies for Inter-jurisdictional Information Sharing* International Family Law Workshop March 30<sup>th</sup> 2012

## **Conclusion**

Family justice systems within Europe are slow and internationally unresponsive, the development of a unified system of family justice, across Europe, is long overdue. There is a dearth of both quantitative and qualitative data available around issues of ADR, and cross-border mediation in particular. The 2011 diagnosis of the Family Justice Review Panel could equally apply to cross-border family law in the EU, “a system that is not a system, characterised by mutual distrust and a lack of leadership, by incoherence and without solid evidence based knowledge about how it really works” (D. Norgrove, Chair pg 3). There is no information on the movements of international families who are involved in family proceedings, and no coherent, inter-linked, case referencing system exists inter-jurisdictionally. The collation and sharing of data through an ICT approach, relating to divorce and parental custody matters, and an inter-linking of administrative systems, is vital to ensure access to justice issues are addressed. A coherent approach to mediation training for practitioners, the judiciary, and administrators, with an emphasis on cross-border family disputes, will greatly assist the development of dispute resolution and reduce the stress and costs associated with litigation.

At the end of the workshop, I realised that it is not an over-arching ‘family law’ model that we need to pursue, it is an over-arching ‘family justice’ model, with law as one component.



We should now begin to develop Stage 1 of that model; to the forefront are the Multi-disciplinary experts and advisers; Mental Health professionals including Counsellors and Psychologists – Social workers - Information disseminators, both legal and sociological – Mediators, which may include stand-alone Parenting planners and conciliators. These services should be supported by the State, but the question is how many of these services should be State funded and to what extent. To facilitate a defined “cooling off” period, mandatory information programmes and mandatory mediation could be introduced, with potentially a costs sanction for failure to comply where attendance is not in “good faith” or failure to attend. A motion to waive any of these requirements could be submitted, but the court should decide when to enforce. If this part of the family justice system was in force across all EU Member States this would negate the incentive to issue first. These services should be multi-lingual, accessed through assistance centres. Within the assistance centres legal information should be accessible, with workshops to assist with identifying and filling out the correct forms, as in San Diego. (J. Long). Access to information and some certainty of outcome is vital, particularly for lay litigants. Currently there is a lack of information for people in crisis (Dr. L Crowley). We need to find ways to improve the profile of mediation across the Member States to increase uptake; but first we need to agree training standards, competency, define the role of lawyers in mediation and indeed reach consensus on what constitutes mediation, conciliation, arbitration and collaborative law.

The world started to change dramatically in the 1990s, with the advent of the world-wide web, the dotcom boom, affordable air travel and the development of GSM phones as standard. People and information began to move globally with speed and ease, and there is now a growing trend of technologically mediated auto-didacticity. The EU project has moved countries from 2<sup>nd</sup> world to 1<sup>st</sup> world- the free movement of goods and people has driven economic development, with an abundance of harmonised employment law to ensure parity of rights, without a parallel development of family law. There are more and more international families, with international children and international assets. The lacuna created by the dearth of legal information hubs, is filled to overflowing with self-appointed experts proclaiming their views/experiences through social networks, forums, blogs, and gender specific support websites. Google based solutions inform family law internationally rather than State supported legal information programmes and advice centres, both real and virtual. The “Judge Judy” syndrome, of ‘can do’ self-taught lay litigants is a growing trend, usually

driven by financial hardship, that is a real access to justice issue, and poses significant problems for the judiciary and opposing counsel.

A common thread of Family Court Reviews carried out by Governments of different countries, is the desire to cut back on spending, particularly when financial pressures are created in the bust of 'Boom-Bust' cycles. " A major concern has to be the fact, that while there is the emphasis in the Consultation Paper on the need to reduce costs, there is no indication that, before any changes are contemplated, there will be any attempt to provide a cost/benefit study" (*Submission of the Judges of the Family Court of New Zealand on "Reviewing the Family Court- A public consultation paper"* 2012) Resource led reviews, without an in-depth cost/benefit analysis, can impose cuts where the families accessing the system can least afford it to happen. It is our job as researchers, practitioners, judges, mental health professionals and all those engaged in the development and reform of family law, to network and collaborate internationally, with a view to pooling our research and knowledge, to develop a best practice global approach, which can inform the decisions, both fiscally and policy driven, that Governments must make; to ensure that those families who need assistance are not denied access to justice.

## *Family Law: Common Threads and Unique Opportunities*

### Family Law: Common Threads and Unique Opportunities

A two part paper by Justice R. James Williams, Supreme Court, Nova Scotia, Canada and IRCHSS Scholar, Róisín O' Shea, Ireland

Part I by Róisín O' Shea

#### **The Irish Context**

Organizations and groups that deal with families in crisis, and researchers and policy-makers, need information on what happens in the Irish family courts. The veil of secrecy, that has traditionally lain over family law proceedings in Ireland, by way of the *in camera* rule<sup>454</sup>, has meant that the judiciary are not aware of each other's decision making processes or interpretation of legislation; there is no development of case law, and the public cannot see justice administered publicly. While cases are developed in the normal way, with High Court appeals (de novo) and written judgments, a serious problem is the lack of written judgments in the Circuit Court, with the vast majority of cases being heard in this court. It is this, combined with the *in camera* rule which creates the especially closed off nature of the Irish system. In May 2011 the digital audio recording system was turned on in the Dublin Family court-rooms, these digital records are not being provided to litigants or their counsel, the record is merely intended to be of assistance to judges in judicial review cases. It remains to be seen whether the provision of such records will be sought by litigants. A striking feature of family law proceedings is the relative invisibility of children. Where children are caught in the crossfire of marriage/relationship break-down, the child's perspective is often non-existent.<sup>455</sup> Contrary to developments in family law proceedings in other jurisdictions Ireland has developed no voice for the child through an advocate. Justice Harvey Brownstone, Ontario Court of Justice, stated in his book on family law proceedings 'Tug of War'<sup>456</sup>

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<sup>454</sup> The *in camera* rule first made its appearance in the Emergency Powers Act 1939 S.7(1), and was later reinforced in S.45 of the Courts (Supplemental Provisions) Act 1961

<sup>455</sup> Geoffrey Shannon *Divorce ten years on: The case for reform* Editorial Irish Journal of Family Law [2008] 1

<sup>456</sup> Mr. Justice Harvey Brownstone, *Tug of War*, [Toronto: ECW Press, 2009]

“...when you start a court case, you are starting a war...”; in Ireland that “war” culminates in a day in court, with often unexpected, and perhaps inequitable results.

### **Impact of the recession**

In the last three years the dramatic effects of the recession are being seen in Irish family court proceedings. As predicted by Gerard Durcan S.C., a significant number of previous orders and agreements, which were made during the boom years of the Celtic Tiger are being reviewed or revisited<sup>457</sup> having regard to the reduced financial circumstances of the parties, the parallel deterioration in property values, and the on-going stagnation in the market. Married couples who now wish to separate or divorce are being forced to face up to the harsh reality of long-term debt and significantly reduced standards. Many separating couples are seeking legal separation while living under the same roof. Where once the primary asset was the family home, the collapse in the property market has meant negative equity, mortgage arrears and debt, that change being coined at the onset of recession by solicitor Ann Fitzgerald, “ it’s no longer about the size of the pot, but in some cases, it’s no pot”<sup>458</sup>

The latest statistics available from the Circuit Court, 2010<sup>459</sup>, show that the majority of applications for Judicial Separation and Divorce are made by women; 74% of judicial separation applications and almost 55% of the Divorce applications were made by women. To date I have not seen a single case where the wife was ordered to pay maintenance for a child/children or a spouse- without fail, where maintenance is at issue, it is the husband who will be ordered to pay. This is undoubtedly due to the traditional nature of the marriage break-downs that I have observed, where the children remain with the wife, most often in the family home, and the husband leaves to find accommodation elsewhere. In only .5% of the 675 cases before the court, the children resided with the Father, none of those fathers seeking

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<sup>457</sup> Durcan G. S.C. *Divorce and Judicial Separation. Recent Developments in the Superior Courts*, Roundhall Family Law Conference, 6<sup>th</sup> December, 2008

<sup>458</sup> Ann Fitzgerald, *Crouching Tiger, Hidden Dragon- Unlocking the Assets*, Roundhall Family Law Conference, 6<sup>th</sup> December 2008

<sup>459</sup> Courts Service Annual Report 2010

<http://www.courts.ie/Courts.ie/Library3.nsf/16c93c36d3635d5180256e3f003a4580/95ae983ce17f6cb3802577660034ec0e?OpenDocument>

maintenance from the wives. Where the children live, clearly determines who will pay. In most contested cases, where maintenance is before the court, the fathers argue that they are being denied access to their children, even where the father is a joint custodian. Many fathers ask the court for 50/50 living arrangements, which to date I have seen ordered by the court in only two cases.

### **Increase in lay litigants**

It is clear that the economic circumstances of many married couples who wish to separate or divorce and/or deal with access and custody issues, is forcing them to represent themselves in court, often to their detriment. In 2008, of the cases I observed, 26% of all parties were lay litigants or unrepresented, by 2009 that percentage had jumped to 34%. My 2010/2011 observations indicate that a lay litigant or litigants will present in one in five cases, the majority presenting on divorce. This is hugely problematic for the courts, as these self representing parties come to court with scant knowledge of the law, and even less knowledge of the process involved in family law proceedings. While the majority of lay litigants clearly do so from financial necessity, their lack of understanding is impeding their ability to present their case clearly to the court.

### **Dearth of Mediation**

Family Law proceedings in Ireland are invariably complex, involving many participants including the Applicant and Respondent, Judges, usually two legal counsel, a solicitor and a barrister, and experts such as accountants, auctioneers, mental health specialists, and on a very rare occasion a mediator. To date of the 675 cases I have observed in the Circuit Court, mediation was referred to 7 times, and used in only one case, despite the fact that comprehensive and out-of-court mediation in Ireland has been adjudged cost effective<sup>460</sup>. The Circuit Court has no power to direct the parties to mediation, which makes little sense given that 98% of all Family law applications are made in this court.

To discover whether mediation and other forms of ADR impacted favourably on the resolution of Family law applications, I went to Toronto Canada in October 2009, to observe

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<sup>460</sup> Dr. Sinead Conneely, *Family Mediation in Ireland* [Aldershot; Ashgate Publishing Company, 2002]

hearings and interview family law judges. I found a system in operation that emphasised early settlement discussions, meaningful court appearances, and consistent judicial supervision. ‘Case Management in the Family Court’<sup>461</sup> was published in 1995 by the Office of the Chief Judge, Ontario Court of Justice, edited by The Honourable Judge Mary Jane Hatton and The Honourable Judge Joseph C.M. James. The publication came after a three year planning period and the simultaneous establishment of a pilot project. Case Management was fully implemented in the busy multi- judge Toronto Family Court of the Ontario Court (Provincial Division). The key elements of case management include; same judge supervision of a case, early settlement discussions, and consistent judicial supervision of the process. The focus is on resolution, not litigation. Mediation can happen, and is encouraged to happen, at any stage in the process. Fifteen years of effective case management and ADR, employed by the Family Court of Ontario Court (Provisional Division) tells us that not only does mediation work, in 2009 81.1% of the cases that proceeded to mediation through the court affiliated services reached full or partial settlement<sup>462</sup>, but it is cost effective. As Justice Brownstone said in ‘Tug of War’, “ ...when you choose...alternative dispute resolution, you are making peace”.<sup>463</sup>

### **International issues of mutual concern**

With the support of the Hon. Justice George Czutrin, Superior Court of Justice Ontario, I was awarded a conference scholarship to attend the 47<sup>th</sup> Annual Conference of the Association of Family and Conciliation Courts, in Denver, June 2010. AFCC is an interdisciplinary association of professionals, mainly from America and Canada, dedicated to improving the lives of children and families through the resolution of conflict. The conference theme was ‘Traversing the Trail of Alienation: Rocky Relationships, Mountains of Emotion, Mile High Conflict. Almost 1,000 Academics, Judges, Mediators, Attorneys and mental health professionals attended with papers presented at eighty workshops. I could only attend a

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<sup>461</sup> Justices M.J. Hatton and C.M. James, *Case management in the Family Court*, (Toronto: Office of the Chief Judge, Ontario Court of Justice (Provincial Division), 1995)

<sup>462</sup> Jane Long S.C. *The Family Court in Ontario*, presented at the Canadian-Irish Family Law Conference, Maynooth, October 2010.

<sup>463</sup> Mr. Justice Harvey Brownstone, *Tug of War*, ( Toronto: ECW Press, 2009)

fraction of those, but it was evident that there were issues arising from South Africa to New Zealand that we also experience in our family courts in Ireland. The difficulties in structuring a parenting plan, how much detail is too much detail?<sup>464</sup> How to find the resources to set up a Specialty Court;<sup>465</sup> How to address the conflicting needs of each parent and each child, while respecting the rights of the child under Article 12 of the U.N. Convention<sup>466</sup>, enabling the voice of the child to be heard<sup>467</sup>; What role can mediators and Parenting Plan Co-ordinators play in Family law proceedings?<sup>468</sup>; What kind of early intervention is appropriate in high conflict cases, and how to identify potentially high conflict cases<sup>469</sup>

### **The EU Community**

It is also evident that family law matters in Ireland cross many boundaries, particularly EU inter-jurisdictional issues requiring the intervention and cooperation of different Member States<sup>470</sup> Many cases presenting in the Circuit Court, which hears the majority of Separation and Divorce applications, are dealing with at least one non-national parent, and/or children

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<sup>464</sup> Leslie Ellen Shear JD, the Hon. Thomas Trent Lewis, Dr. Bruce Harshman, *Anatomy of a Parenting Plan AFCC 47<sup>th</sup> Annual Conference*, Denver Colorado, June 2<sup>nd</sup> 2010

<sup>465</sup> Patti Cross L.L.B., the Hon. Madam Justice Geraldine Waldman, *Building a Specialty Court for Families from the Ground Up*, AFCC 47<sup>th</sup> Annual Conference, Denver Colorado, June 2<sup>nd</sup> 2010

<sup>466</sup> United Nations Convention on the Rights of the Child, entry into force 1990  
<http://www2.ohchr.org/english/law/crc.htm>

<sup>467</sup> Tamar Morag LL.B. LL.M. SJD, Dena Moyal LL.B, *Child Participation and Child Representation in Israel and Ontario*, AFCC 47<sup>th</sup> Annual Conference, Denver Colorado, June 2<sup>nd</sup> 2010

<sup>468</sup> Marianne Gabrielsson and Cecilia Johansson-Granberg, *Meeting the Needs of High Conflict Families in Sweden*, AFCC 47<sup>th</sup> Annual Conference, Denver Colorado, June 2<sup>nd</sup> 2010

<sup>469</sup> The Hon. Peter Boshier, Dr. Fred Seymour, Dr Nicola Taylor *How Early Intervention in New Zealand Family Court Cases Helps Reduce Conflict and Alienation AFCC 47<sup>th</sup> Annual Conference*, Denver Colorado, June 2<sup>nd</sup> 2010

<sup>470</sup> The Hon. Justice Henry Abbott, *Irish Family Law in the International Context*, Canadian-Irish Family Law Conference, Carton House, Maynooth Ireland 2010

that have moved within the EU and elsewhere during their lives to date. There are questions of validity of Orders made in other jurisdictions, validity of marriage, validity of by-proxy marriage, how and when should a court take account of religious or cultural, beliefs, questions of residency, inter-jurisdictional maintenance and division of assets, enforcement, forum shopping, and child abduction by a parent or family member.

Wider access to justice is a problem faced by citizens in many countries and is highlighted in the European Commission Green Paper, April 2002<sup>471</sup>, on alternative dispute resolution in civil and commercial law. The Green paper outlines three grounds for the increasing problem of access to justice in Member States; (1) the volume of disputes before courts is increasing, (2) proceedings are becoming more lengthy, and (3) the costs involved in such proceedings are increasing, grounds which were mirrored in the 1996 LRC Report on Family Courts, and is borne out in my research today. While self-representing is a reasonably new development in Ireland, my research shows we are following patterns already firmly established in other jurisdictions. The European Commission strongly advocates the use of Mediation and other forms of ADR, and yet there is no clear understanding across the members States as to what national regulations should govern the practice of mediation. Family mediation is in its infancy in Eastern European countries that have been under soviet influence for decades, and in some European countries there is significant confusion between the terms, reconciliation, counselling and mediation. In Ireland it is evident that the judiciary and legal profession equate mediation primarily with reconciliation, perhaps influenced by the ‘therapeutic’ model of family mediation in Ireland, developed by the State run Family Mediation Service, established in 1986. A model that has not found favour in other common law jurisdictions.

### **The Commonality of Humanity and the One World Model**

During the course of my research I can see that there are many shared issues of mutual concern. Different jurisdictions are researching and investigating elements of family law proceedings, and bringing in reforms, with a view to reducing the stress and costs associated with litigation. New Zealand are currently carrying out a full review of their family law

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<sup>471</sup> Green Paper *Alternative Dispute Resolution in Civil and Commercial Law*, 2002



system, primarily from a resource perspective<sup>472</sup>. In Ontario Canada there is now a mandatory information programme that almost all family law litigants must attend, and information and referral coordinators, and mediation services are available at all courts. Internationally there appears to be a consensus that the adversarial route should not be the first step in access or custody disputes, separation or divorce proceedings, less confrontational avenues such as mediation and collaborative law ought to be explored, if possible. Litigation for some can become an all-consuming battle, particularly where one or both parties are “high conflict” litigants. Personality disorders affect about 10% of the general population<sup>473</sup>, and according to Ross Beckley PhD, adjunct Professor at Siena Heights University Adrian Michigan, statistically speaking, 90% of people filing for a divorce can accomplish the task with little or no help/influence from the legal system. Of that remaining 10% it has been estimated (Gould) that 90% of those exhibit the fully fledged personality disorder,<sup>474</sup> this would explain the so-called “frequent flyer” that all family courts are familiar with, the parties that come again and again to court, clogging the system. In 2009 New Zealand commenced a two track Early Intervention process at the Family Court in Christchurch, which provided earlier and more meaningful intervention for urgent or high risk cases<sup>475</sup>. Those who are “fast-tracked” through the system, are identified as cases requiring robust judicial intervention at the outset, where mediation is considered inappropriate, and also may include cases where there are demonstrable violence issues. William Eddy, author and President of the High Conflict Institute San Diego CA, has identified “high conflict” parents as those who are characterised by certain personality traits; lacking emotional boundaries; lacking self-restraint; they are used to all or nothing thinking; they are preoccupied with blaming others; they take no responsibility for their own behaviour and seek validation for themselves through the legal

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<sup>472</sup> Ministry of Justice New Zealand, *Reviewing the Family Court, A public consultation paper*, 20<sup>th</sup> September 2011

<sup>473</sup> Joel Paris, M.D. *Borderline Personality Disorder: What is it, What causes it, How can we treat it?*  
[http://www.jwoodphd.com/borderline\\_personality\\_disorder.htm](http://www.jwoodphd.com/borderline_personality_disorder.htm)

<sup>474</sup> Ross Beckley PhD, Child, Marriage and Family Psychologist, *How to Identify the Personality Disordered Parent* Referees’s Association of Michigan Conference, Traverse City, Michigan, May 26<sup>th</sup> 2010

<sup>475</sup> Judge Peter Boshier, Principal Family Court Judge of New Zealand, *Why Early Intervention Works in New Zealand*, a presentation at the Canadian-Irish Family law conference, Carton House Maynooth, Ireland 2010.

process<sup>476</sup>. Given my experience as a Family mediator I would add irrational vengeful behaviour as a common characteristic of High Conflict separating couples. Litigation is a call to arms, animosity exponentially increasing the longer the process takes – in Family law proceedings, time is of the essence.

Upon completion of my PhD I hope to commence postdoctoral work developing the concept of a one world, best practice, family law holistic model, that reflects the commonality of humanity, whilst being capable of adaptation based on religious/cultural/national grounds. That project will reach out to the international community, embracing the multi-disciplinary approach of the AFCC, to consult with professionals engaged in Family disputes, by way of Family law proceedings, dispute resolution or conciliation, to develop all the strands that will assist families in conflict to reach settlement sooner rather than later.

*Family Law: Challenges, Change and Opportunity*

Part II Justice R. James Williams, Supreme Court

Halifax, Nova Scotia October 2010

This note arises from my remarks at the Canadian-Irish Family Law Conference sponsored by the Waterford Institute of Technology held at Carton House Hotel, County Kildare, Ireland on October 9-10, 2010.

It was an honor to be asked to participate in this program and to be part of what I hope will become an ongoing exchange of ideas and experiences between Canadian and Irish legal professionals.

My remarks on October 9<sup>th</sup> to Irish lawyers and judges sought to identify two things:

- A. “Common Threads” in the challenges facing Family Law professionals in Canada, Ireland and to some extent other common law countries; and
- B. “Unique Opportunities” that the Irish bench and bar have in addressing these challenges.

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<sup>476</sup> William Eddy, MSA, JD *Old Ways, New Ways: How “New Ways for Families” is Different*, High Conflict Institute 2009

My comments come from outside of Irish Family Law experience and are limited by that - but my reading of authors like Geoffrey Shannon and Dr. Carol Coulter suggests that we in Canada share many of the same challenges as Irish Family Law professionals. My conversations with you, Irish Family Law judges and lawyers has reinforced that.

#### COMMON THREADS: Some Challenges Family Law Professionals Face

Family Law is at once dynamic, stimulating, fluid, emotional and frustrating. A number of issues, circumstances and factors combine to ensure that Family Law is constantly evolving. These include:

##### 1. **Family Law Affects All of Us**

There are few, if any, of us who have not been personally involved or had a friend or family member or been personally involved in a Family Law legal process. It is an area of law that touches all of us. One consequence of this is that there is an abundance of individual and public opinion with respect to real and perceived problems in Family Law process. These opinions will not go away.

##### 2. **Family Law is Different**

Geoffrey Shannon in his book Family Law<sup>477</sup> discusses the fact that Family Law is different than other areas of law. Family Law involves or concerns:

- Individuals who have a relationship - past and future - with each other, and extended family;
- Issues that are emotionally and psychologically meaningful to the parties. They involve identity - as husband, wife, father, mother - of those involved.
- Matters that are private;
- Individual family structure that is dynamic, ever-changing and evolving;
- A family may involve married or unmarried relationships, with or without children.
- When families “break up” individuals often re-partner and/or remarry, they get more complicated structurally.
- An over-riding issue - the welfare or best interests of children within their family;

The task of Family Law professionals is to assist in, or to make, orders that restructure rights and obligations within the family - concerning parenting, support, and property and debt

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<sup>477</sup>Law Society of Ireland

division. The decisions are largely prospective.

- Issues - children, support, property, debt - that are inter-related from the perspective of individual family members. Legal professionals may attempt to separate support and parenting issues. Family Law litigants, in my view, experience them emotionally as connected.
- Many of the issues are non-legal, or interdisciplinary in nature - parenting psychology, economics, budgeting are examples;
- A significant degree of judicial discretion - setting levels of support, dividing property and creating parenting plans or arrangements.

Some Family Law reform - child support guidelines in Canada, for instance - has been aimed specifically at managing that discretion, and creating more predictability.

### **3. The Economy**

These are difficult economic times. Fewer economic choices, unemployment and increased debt<sup>478</sup> place more stress on families and individual members of families.

These realities impact on families within Family Law systems. More limited economic circumstances decrease the financial options when families break-up and restructure, leaving individuals frustrated and angry. Families and individuals within families have a diminished ability to pay for legal counsel. Debt becomes an issue of heightened importance, and impacts upon support needs and ability to pay.

### **4. Increase in Self-Represented Family Law Litigants**

Virtually all common law jurisdictions report significant increases in self-represented Family Law litigants. The face of those litigants is changing. At one time the most self-represented litigants seemed to be those who “just missed” legal aid eligibility. The difficult economic times create a “soup” of reasons for more self-representation:

- legal aid services get cut back;
- legal services are viewed as too expensive;
- more people either cannot afford legal services or take the view that their economic resources should be targeted elsewhere than hiring lawyers.

The increase in self-representation means judges and lawyers must deal with and face lay people in a professional environment - the Courtroom. Systemically and individually judges and lawyers are faced with about how much help and information to provide the self-litigant

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<sup>478</sup>The Irish Times of April 30, 2009 stated that household debt had doubled in Ireland in the previous five years to 115,000 Euros per family.

within an adversarial system. This has implications for everything from Court Rules and Forms to the content of continuing legal education programs for judges and lawyers. Do access to justice concerns, mean that, systemically, litigation information programs should be established to enhance the legal literacy of self-litigants? Should the provision of legal services adapt?

In North America, unbundled legal services (retainers for discrete specific purposes, for example, affidavit preparation) are one response. In Ireland the traditional barrister/solicitor model appears to require litigants who seek counsel to pay for two legal professionals. Ironically collaborative law (a development which seeks to focus on negotiation rather than adversarial litigation by “collaborative” lawyers agreeing that they will not initiate or attend Court proceedings) creates an analogous model.

### **5. The Family Itself is Changing**

Ireland has a relatively new divorce regime. In Canada, divorce and re-partnering, non-marital cohabitation and partnering, same sex partnering and marriage, and new reproductive technologies have all impacted on family structures. The same social realities are or will to some degree impact family structure in Ireland.

New realities face Family Law professionals:

- “family” can no longer be seen as simply a married man and woman. If the concept of “family” in Family Law excludes the children and partners in relationships other than first marriages between a man and a woman, it (Family Law) will diminish its own relevance and credibility to large segments of society.
- individual family structure is fluid - people cohabit, marry, divorce, re-partner and sometimes do it all over again;
- seemingly straight forward issues such as “who is the parent?” are complicated by new reproductive technologies and “social parenting” (parenting by individuals who are not biological parents to the child).

### **6. Society is Increasingly Multi-Cultural**

For Family Law this means issues such as race, religion, culture, language, education, heritage are increasingly part of the conflict or context of the conflict when families breakdown.

How evidence of these issues comes to a Court is often problematic. Litigants who do not speak national language(s) have rights. Lawyers and judges must literally deal with and be responsive to a world of cultural differences.

There are significant issues concerning the role of the Judge and Court and continuing professional education for judges and lawyers that arise.

### **7. Society is Increasingly Mobile**

Families and individuals move within countries and between countries. Opportunity (employment, re-partnering and other) is global. This mobility adds complexity to Family Law conflict - particularly when adult opportunity impacts on the locale of a child's residence.

Evaluating and deciding mobility issues involving children is difficult and complex - and often takes place in a context where time is an imperative - for example, when an employment opportunity may be lost by delay.

Our legal process and judicial decisions now have an international audience. There are times when I will be asked to rely on Irish decisions or process. Hague Convention, international cases are part of Family Law. This is even more of a reality in Ireland with its European Union membership and the impact the Brussels Convention has on Family Law<sup>479</sup>.

### **8. Communication Technologies Are Changing The Way People Relate And Communicate**

Information - some of it accurate, some not - is available as never before. Everyone feels they are capable of being an expert. How are courts and lawyers to cope or manage this information in a timely fashion?

E-mail, instant messaging, cell phones, texting mean everyone is available all the time. We are all more impatient than ever before. Our expectations are that others be responsive, quickly. Delay is less tolerable.

The web means advocacy has a public face and context - groups supporting and opposing various Family Law issues have active web-based organizations on topics from alienation to gender-based rights.

### **9. Privacy Issues**

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<sup>479</sup>See "Brussels Beware" by David Truex. Paper delivered at the National Conference of the Family Law Lawyers Association of Ireland, January 27, 2001.

The current ease of information access and distribution heightens concern over privacy issues in Family Law.

On the one hand it is desirable that there be public access to proceedings and decisions. Judicial process should be accountable. It is difficult to argue that this can be achieved in a process that is not public.

Precedent and predictability encourages settlement and consistency. Both are desirable.

On the other hand, there is a desire to contain access to private information (for example addictions, mental health issues, sexual practices and transgressions) - and not have them publicly known. There is also concern that children may be harmed by public access to family conflict and private issues.

Balancing these concerns is difficult - but necessary.

#### **10. The Role of Children in Family Law Process**

Family Law struggles with the how, when and who of hearing the children's "voice". What effect should a child's wishes or statements be given? Should judges speak to children? When? On the record?

Children have interests in Family Law proceedings but are not parties. What responsibilities do judges and lawyers have to children?

Delay is always an issue in Family Law. Concern over delay is a major concern when children are involved in a family dispute.

If judges are to "talk" to children, engage in contact with children involved in Family Law litigation, there are issues about process and judicial education that should be addressed.

#### **11. The Role of Judges in Family Law Process.**

This is an area of significant controversy. Should judges be:

- passive listeners who sit, hear, decide cases within an adversarial process?
- managers of court process, controlling the litigation process, tune times(? - do you mean "time lines"?), filings, etc.?
- part of settlement process - doing settlement conferences to facilitate settlement, taking part in Judicial Dispute Resolution as a form of ADR?
- some combination of all of the above, hybrids of the above?

If roles are expanded, what impact does this have on Judicial Continuing Legal Education?

Should judges actively make referrals to mediation, support collaborative law, embrace parent coordination, be part of parent education or parent information programs?

## **12. Family Law is Increasingly Complex**

The factors and challenges I have referred to make Family Law more complex and difficult.

Interdisciplinary issues like domestic violence, addictions, gender roles, alienation, high conflict families, attachment and personality disorders add to this.

Financial issues such as pensions, business valuations and corporate financial sheets add another layer.

Judicial notice and tension between a rights-based adversarial approach versus a public-solving integrative approach, are but two controversies that visit Family Law judges daily.

An inevitable question arises - should Family Law be dealt with by specialist courts? Specialist judges?

## **13. Public Reviews of Family Law Process**

A host of common law jurisdictions have reviewed (by Royal Commission, consultation or Law Reform Commission) Family Law process<sup>480</sup>.

Almost uniformly these reviews have:

- expressed concern about the ill-fit of an adversarial court model and Family Law;
- recommended that judges have an active role in managing cases, controlling timelines and filings, i.e. has judges controlling the litigation process, a more inquisitorial court process like those of some European countries;

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<sup>480</sup> Australia and New Zealand have been leaders in this regard. Recent North American examples include "Access to Family Justice Taskforce: Report to the Minister of Justice of New Brunswick" (Canada), March 18, 2010; "Elkin's Family Law Taskforce: Final Report and Recommendations", California, March 18, 2010; "Law Commission of Ontario: Voices from a Broken Family Justice System", Consultation Results, Ontario (Canada), September 2010. The U.K.'s Family Justice Review issued its final report in November 2011. New Zealand's Department of Justice is "Reviewing the Family Court" and issued "A Summary" with that title in September 2011.



- recommended a more problem-solving approach that includes Judicial Dispute Resolution (Settlement Conferences) and court connected or referred Alternative Dispute Resolution or mediation;
- specialized courts and judges where Family Law jurisdiction is unified and not in multiple courts;
- a court process that is understandable and accessible for the self-represented;
- the need for organized and regular education and/or information programs for judges, lawyers and litigants;
- identified a need for early out of court resolution;
- expressed concern over personal and systemic cost;
- expressed concern over delay;
- stated a need to hear the voice of the child.

## CHANGE AND OPPORTUNITY

The reality is that Family Law has changed, is changing and will continue to change and evolve. The challenges, pressures and issues I have enumerated (and others) ensure that Family Law and the context and landscape within which Family Law professionals work is fluid and dynamic.

The real questions are how do we as Family Law professionals react and adjust - personally and systemically to improve the delivery of Family Law dispute resolution to litigants and their families in the face of these “challenges”. Innovation is necessary. Cost and delay have to be addressed.

Reform or change is how we as family law professional respond to these challenges, reform comes in a variety of ways, some big, some small. Whether we re-think how we do things individually, re-orientate or enhance professional education, undertake a pilot project or seek broader systematic change, we are responding to the pressures upon family law. If we do not respond, we will be overwhelmed or shoved aside as being more part of the problem, than part of solutions. Cost, delay, adversarialism and accessibility are issues that challenge the sustainability of the existing Family Law legal system.

Ireland’s Family Law professionals are, I would suggest, facing all of these challenges.

Two factors put Ireland in a unique position to become a leader in addressing the evolution of Family Law process:

- (i) Ireland has a culture of change in Family Law. Ireland’s constitution was amended in

1996 to enable divorce legislation. The Brussels Convention came into force in 2001, affecting enforcement of international judgments, orders.

- (ii) Ireland's membership in the European Union places it in a position to learn from and be informed by the experience of inquisitorial court systems in Europe.

In the end, sharing problems, frustrations, innovations and experiences is the best form of professional education. My contact with Irish judges and lawyers in October of 2010 has reinforced this belief, left me feeling certain that we share many of the same challenges in Family Law, and that we can learn from each other's attempts to respond to and initiate reform as we attempt to manage these and other challenges.

“The best ships are friendships  
And may they always be”

**The Honourable Justice R. James Williams, Supreme Court of Nova Scotia (Family Division), Canada**

Justice R. James Williams is a Justice of the Family Division of the Supreme Court of Nova Scotia since 1999. His qualifications include; B.Sc. Psychology University of Alberta, M.S.W. and LL.B. Dalhousie University, and Master of Judicial Studies University of Nevada, National Judicial college. He holds the post of Associate Director of the National Judicial Institute and is Co-Chair of the Organising Committee of the Federation of Law Societies Summer Program on Family Law. He has lectured in Family Law in Dalhousie Law School 1978-2008 and in September will commence a judicial leave for a Semester to teach 'Family Law' and 'Techniques in Negotiation' at the University of Alberta.

## *Go Your Own Way*

### **Assets; What Assets?**

Writes Róisín O' Shea

It seems reasonable to anticipate that ever greater numbers of applications will be made in 2009 to re-open past settlements or orders, which given the dramatic down-turn in the economy can no longer be realised. How the courts will deal with the vexed question of how far they can go in revisiting these prior court orders, in light of changed circumstances, remains to be seen.

### **From boom to bust**

There is without doubt a dramatic sea change in market conditions, as coined by Solicitor Ann Fitzgerald, "it's no longer about the size of the pot but in some cases, it's no pot", (Crouching Tiger, Hidden Dragon- Unlocking the Assets, Dec 2008).

In the majority of applications in the Circuit Court the primary asset is the family home; according to Morgan Kelly, Professor of Economics in UCD, house prices may fall by 80% from peak to trough in real terms (Irish Times 13<sup>th</sup> Jan. 2009). This would take the market back to at least 1993 pricing. While it may sound overly pessimistic, this writer remembers the giddy sensation of benefiting from the dramatic onset of the housing bubble, buying a new 3 bed semi-d furnished show-house in Dublin for £41,000 in 1995, selling three years later for £98,000. A national fever took hold in the early 90's, infecting consumer, builder and banker alike. When the fever eventually broke, reality came crashing in.

Gerard Duncan SC recently wrote; "It is likely that a significant number of previous agreements and orders which were made during the boom years of the Celtic Tiger, may have to be reviewed or revisited having regard to the Credit Crunch"( Divorce and Judicial Separation, Recent developments in the Superior Courts, Dec. 2008).

Having observed 170 Family Law cases in Cork Circuit Cork, Michaelmas 2008, I can confirm that the credit crunch is already having a dramatic impact. In case after case, it is becoming clear that making "proper provision" is clouded by uncertainty as property values

plummet and unemployment rises. Parties are returning to re-open past settlements or orders, or seek to divide dwindling resources, and it is the Judiciary, rather than the State, who are in the front-line dealing with the harsh financial realities of post-property boom Ireland.

### **Collapsing property market**

In the cases before Judge Sean O' Donobháin, a common theme arises; the impact of the falling property market. Agreements previously entered into cannot now be realised, as the value of property has plummeted subsequent to the Orders being made, and parties continue to have unrealistic expectations in relation to market value of their house/property. "This is what will become a classic case. Up until now everyone had it too easy", Judge O' Donobháin was prompted to say in a case where an applicant ex-wife sought to vary the initial consent to sell farmlands. The lands went on the market, but after some time only one offer was received on a portion of same. The Applicant's counsel raised the issue of a post divorce matrimonial bill to seek a variation, so that the portion, the subject of the offer, could be sold and the ex-wife's financial settlement be satisfied. The position of Counsel for the Respondent was that the consent had been signed and was final. "The present consensus is that full and final settlement means nothing", said Justice O' Donobháin, "there is a sea change here, you're going to have to take it on board. Are we finished with the world of finality?".

In the majority of cases observed, particularly in relation to Divorce proceedings, the wife with any dependent children, resided in the family home, at the time of the application, the husband living in rented accommodation. Whether they wished to sell the family home by consent, or by the application of one party, the Court hit the same problematic issues. Firstly, valuations could not be relied on in a falling market, yet the parties still had unrealistic expectations of a quick sale at a good price; as summed up by Judge O' Donobháin, "Putting a house on the market now seems to be hopeless...unfortunately I've been telling the barristers here we were only making auctioneers more profitable, and no-one would listen to me". The Judge did propose a novel approach, one which is not likely to be embraced wholeheartedly by auctioneers, but could bring a necessary dose of reality to valuations, "could we invent a scheme where if the valuer gives a price, and it doesn't get that, then the valuer pays the difference?"

**“Proper provision”**

The second issue arising relates to “proper provision”, as provided in section 20 Family Law (Divorce) Act 1996. The Court on divorce must be satisfied that proper provision, having regard to all the circumstances, is made for the future needs of both spouses and any dependent children. “Given the current state of the depression, we may not be selling homes even in two years”, said Judge O’ Donobháin, in a case where he wrestled with making “proper provision” for both spouses on divorce. The court consistently took the view, that putting a house on the market in the current economic climate was not a realistic option, preferring to delay any sale, where possible, until dependent children were older, leaving liberty to apply at that stage.

“If the market comes back up, then maybe it can go on the market. Realistically this house won’t be sold...and may not be of any benefit until one of you dies”, O’Donobháin J. responded to an applicant husband, who objected to the continuing right of sole occupation by the wife, “the house is only worth €300,000, it’s not enough for the two of you to buy a place each in this market” O’ Donobháin J. concluded. An applicant wife, in one case, asked the court to transfer the family home and lands into her sole name on divorce. The three children were no longer dependents, the property virtually mortgage free. The position of the Respondent husband was that he was 64 years of age, had been working in the building trade but was now getting little work, was paying maintenance and financing a mortgage on a small second property to live in. He wanted the lands adjoining the family home sold and divided 50/50, as “ proper provision” for his future needs, lands which he says the wife had greatly under-valued. Such was the disparity in valuations from the “experts” that the judge suggested putting the land on the market, the best offer securing. The judge directed the auctioneer who testified on behalf of the Respondent to mark out two sites and place them on the market.

**Downwards variation of maintenance**

Case after case entered the court-room where fathers were now suffering reduced financial circumstances, and sought downward variations on Maintenance Orders. Some asked the Court to strike out the Order completely, as they maintained they were existing at or below subsistence levels themselves. A maintenance debtor under section 6(1) of the Family Law (Maintenance of Spouses and Children) Act 1976, can apply for the discharge of a maintenance order, one year after the Order was made. The basis of this application can be new evidence coming to light, or changed circumstances (s 6(1)(b) 1976 Act). Where a respondent pled changed circumstances and sought a downward variation re maintenance for his children, Justice O' Donobháin questioned the repayment of debt ahead of the duty to provide maintenance, "I cannot see why you are paying Bank of Ireland ahead of paying for your children. Banks have a long history of waiting". When it transpired that the Respondent was in arrears with the existing maintenance order the Judge responded, "your client has got to realise that coming in here paying nothing is not sustainable, it is not acceptable, I'm striking out the application. This man needs a serious dose of reality".

Now more than ever it is vital that practitioners, when drafting a Separation Agreement, ensure that it contains a clause providing for downwards variation of maintenance. The absence of such a clause in the Agreement means that the paying spouse will continue to be bound by his/her contractual obligation, even if he/she no longer has the ability to pay (P.J. v. J.J. [1993] 1 I.R. 150). In one case the Judge agreed to vary a maintenance payment for a child downwards from €150 per week to €60 per week, as the man was now unemployed. A taxi driver sought a downwards variation on maintenance and was surprised when the judge, based on the respondent's current income, varied the maintenance order upwards. The court ruled status quo, in the case where an applicant father whose pay had been cut by 10%, sought to decrease his monthly payments of €600 for his child. The only certainty in these uncertain times is that this is but the beginning of what could prove to be an avalanche of hardship applications.

## **Conclusion**

Applications to re-open past settlements could bring about a highly ironic situation, a spouse who is now bust may well view it as a good thing that his/her assets were transferred to his/her spouse, rather than taken by financial institutions, allowing this spouse to seek to retrieve some of those assets at a later date by way of "proper provision" on divorce (Gerard

Durcan SC). In general, practitioners will have to advise their clients to lower their expectations, and conduct a reality check in formulating a settlement proposal. Selling the family home may not be an option for some years where there are dependent children. An interim suggestion could be 50/50 ownership of the Family home, with a change in title to reflect this.

The harsh reality for practitioners themselves may be that getting paid becomes ever more difficult as the resources of the parties dwindle. As Judge O' Donobháin put it, "is it going to come down to dividing up negative equity and debt?" Many academics, including this writer, believe that the adversarial route should not be the first step in separation or divorce proceedings, less confrontational avenues such as mediation ought to be explored, if possible. The stark reality in 2009 for many couples who no longer wish to live together, is that they will no longer be able to afford to move apart.

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Family Law (Divorce) Act 1996, "proper provision" Section 20.





## *Dad's Army*

### Recommended reform in relation to Rights of Unmarried Fathers

*Abridged version of winning essay*

#### **Introduction**

Unless we rectify the current dearth of rights for unmarried fathers, Ireland is likely to be taken to the European Court of Human Rights.<sup>481</sup> There is no automatic right in the Republic of Ireland for fathers to care for or bring up their children, a situation repeatedly highlighted by vocal unmarried father and journalist, John Waters, who maintains that the “attitude of officialdom and the wider society to this issue, is that the welfare, wishes, and needs of the mother are the only matter to be considered”.<sup>482</sup> Reform is needed to protect the best interests of the child; by ensuring that the child and its father can have a relationship protected by way of an amendment to existing guardianship legislation.

#### **Constitutional position of the family**

There is a constitutional presumption that the welfare of the child is best protected by the parents, as part of the Family. The original common law definition (Lord Penzance in *Hyde v Hyde*)<sup>483</sup>, constantly referred to by the courts, is that of a Christian (voluntary) union for life of one man and one woman to the exclusion of all others. For 120 years this definition stood in Ireland until 1995, when divorce became legal, and the permanency aspect of that definition no longer applied.<sup>484</sup> Under Article 41<sup>485</sup> the married family is recognised as the fundamental unit group of society, having rights under natural law, that pre-date and are

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<sup>481</sup> F. Gartland, “Unmarried fathers getting a ‘raw deal’ in Irish Law”, Irish Times March 2007

<sup>482</sup> J. Waters “Unmarried fathers’ rights are ignored”, Irish Times, July 1997

<sup>483</sup> *Hyde v Hyde and Woodmansee* [1861-1873] All E.R. Rep. 175

<sup>484</sup> R. Aylward “The problem with defining marriage” (2006) 4 I.J.F.L. p 21.

<sup>485</sup> Article 41.1 “*The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.*”

superior to positive law. The constitutional presumption, that the welfare of a child is best protected within the married family; is rebuttable in two ways. Firstly, where the parents have failed in their duty towards their children, under Article 42.5<sup>486</sup> - or secondly under the “compelling reasons test” as stated by Finlay C.J. in *Re J.H.*<sup>487</sup>

### **Married parents retain superior rights**

The 1980 landmark judgement in *G v An Bord Uchtala*,<sup>488</sup> should have heralded the start of constitutional jurisprudence on the rights of the child; and indeed a re-defining of “family” and “parent” outside lawful wedlock. This case has become the principle authority for the independent existence of children’s rights, rights which according to Ruth Kelly were held to stem not from the position of that child as a member of the marital family, but “from a scheme of natural rights under Article 40.3 of the Constitution”<sup>489</sup> The most significant aspect of the interpretation by Walsh J., of the independent existence of children’s rights, is that he drew no distinction between children of married parents and children of unmarried parents.

Only five years later Finlay C.J. rowed back on that potential expansion, when in *Re J.H.* he re-defined the rights of the child as a member of the family- as defined under Article 41. According to Alan Shatter, this case “renders it impermissible to regard the welfare of the child as the paramount consideration in any dispute as to its upbringing or custody...”<sup>490</sup> The re-trenching by Finlay C.J. ensures that married parents retain superior rights over the rights of their child, such rights being copper-fastened in *North Western Health Board v H.W. and C.W.*<sup>491</sup>

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<sup>486</sup> Article 42.5 “*In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means, shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child*”

<sup>487</sup> [1985] I.R. 375, hereafter *In Re J.H.*

<sup>488</sup> [1980] 1 I.R. 32 55-56

<sup>489</sup> R. Kelly “Baby Ann’s Constitutional Rights” (2007) 1 I.J.F.L. p 4.

<sup>490</sup> A.J. Shatter, *Shatter’s Family Law*, (4<sup>th</sup> ed., Butterworths, Dublin 1998), pp.43-49

<sup>491</sup> [2001] 3 I.R. 622

The current statutory position in relation to fathers, under the *Guardianship of Infants Act 1964*, is that they have an automatic right to be a joint legal guardian only if they are married to the mother of the child.<sup>492</sup> Crucially the Act defines a “father” as not including the natural father of an illegitimate infant.<sup>493</sup> Under the same Act an unmarried father can apply for custody and/or access (s.11(4)). Where the parents are unmarried at the time of birth of the child, it is only the mother who has automatic legal guardian rights s.6(4).

### **Justice McKechnie and the “De facto” family**

In the recent Mr G case the High Court, for the first time, gave recognition to the rights of unmarried fathers in Ireland under European law.<sup>494</sup> Mr Justice McKechnie referred to Article 8 of the ECHR<sup>495</sup> which guarantees the protection of family life; finding that the couple “constituted at all relevant times, a de facto family within the meaning of that article”. This case indicates that we ought to have regard to the substance of the relationship rather than the form. Mr. Justice McKechnie set down tests that unmarried fathers may be able to avail of to invoke their rights such as: how long the couple lived together; the length of the relationship, and the ways in which the parents showed their commitment to one another. As posited by Geoffrey Shannon, “there is a need now for a framework to reflect our obligations under the European Convention within domestic law”. The issue is, how do we draw up such a framework?

### **United States**

*In Re J.H. Hardiman J.* stated that “ the Constitution does not prefer parents to children. The preference the Constitution gives is this: it prefers parents to third parties”. According to Ruth Kelly, “academic commentary in the US supports this position to a point, ...it being observed in 1979 in the Harvard Law Review, that “parents typically possess a sensitivity to a child’s personality and needs, that the state cannot match, and because the closeness of the familial

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<sup>492</sup> S.6 *Guardianship of Infants Act 1964*

<sup>493</sup> S.2 *Guardianship of Infants Act 1964*

<sup>494</sup> C. Coulter “ Case ‘recognises’ unmarried fathers’ rights” (2007) *The Irish Times* hereafter C. Coulter

<sup>495</sup> *The European Convention on Human Rights 1950 and its five protocols 1952-1966*

relationship provides strong assurance that parents will use their special knowledge of the child to act in his best interests".<sup>496, 497</sup> Unlike their married counterparts, unwed fathers in most states in the United States of America are not automatically presumed to be the biological parent of their children, despite the fact that they may be listed on the child's birth certificate. In California, for example, where children are born out of wedlock, "paternity" may only be found if a person voluntarily signs a declaration (usually at the hospital) stating they are a biological parent (with the consent of the mother), or if the court is involved through the filing of a "Paternity" Case. The focus in the U.S. in relation to the birth of illegitimate children, like other common law jurisdictions, has historically been on the "unmarried mother problem", ignoring or giving little attention to unmarried fathers.<sup>498</sup>

In *Stanley v Illinois*<sup>499</sup> Mr. Chief Justice Burger held that the failure to afford Stanley, the father, a hearing on his parental qualifications, while extending it to other parents, denied him equal protection of the laws; such a denial constituting a breach of his constitutional rights under the 14<sup>th</sup> Amendment. It has been well documented that custody, visitation and indeed guardianship issues have taken a back seat to child support during the past few years in the U.S., with the emphasis on establishing paternity to pursue so-called "dead-beat dads". The U.S. model would not suggest any answers to the reform issues identified by Geoffrey Shannon in relation to unmarried fathers and their rights in Ireland.

### **U.K. position**

In the U.K. an unmarried Father can acquire parental responsibility, and rights, by subsequent marriage to the Mother; or by being appointed Guardian in the Mother's Will if she dies; or by formal agreement with both signatures witnessed by the Court; or through the terms of the Adoption and Children Act 2002: which provides that unmarried fathers, who jointly register the child's birth, acquire parental responsibility without any further formality. According to legal correspondent Claire Dyer "Ministers (In the U.K.) believe that the distinction between

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<sup>496</sup> " Developments in the Law, the Constitution and the Family", 93 Har.L.Rev. 1161 at 1353-1354

<sup>497</sup> R. Kelly supra n 10 p7.

<sup>498</sup> B.R. Leashore " Human Services and the Unmarried Father: The Forgotten half" (1979) The Family Coordination Vol 28 No.4 pp 529-534

<sup>499</sup> *Stanley v Illinois*, 405 U.S. 645 [1972] Supreme Court appeal

married and unmarried fathers is now out of date”.<sup>500</sup> While there may be consensus that such a distinction is out-dated, legislative change is slow in coming; with a continuing absence of automatic rights for unmarried fathers.

### **Canadian model**

Most Canadian provinces, however, declare that unmarried fathers are joint guardians with the mother. The automatic presumption is subject to certain conditions, conditions that are curiously mirrored in the tests recommended by Justice McKechnie in the recent *Mr G* case. For example, under the *Domestic Relations Act 1980 as amended, Alberta Province*<sup>501</sup>, s.50(1), it is stated that the joint guardians of a minor child are the mother and the father; subject to certain conditions, including that he co-habited with the mother of the child for at least one year immediately before the birth of the child.<sup>502</sup> In New Brunswick, under the *Family Services Act 1981*<sup>503</sup>, the commencement acknowledges the family as the basic unit of society, its well being inseparable from the common good, and children having rights (fundamental freedoms) no less than those of adults. Under this Act the definition of a child, s.1(c), includes a child whose parents are not married to one another. A father who is a “parent” is defined: “as the natural father who must have signed the birth registration form<sup>504</sup> or; have filed with the mother, a statutory declaration under s.105, or; has been named the father of the child in a declaratory order under Part VI, or; is a parent with whom the child ordinarily resides and has demonstrated settled intention to treat that child as a child of his/her family”. There is therefore a presumption<sup>505</sup> that where the parents of the child “ who live together or have lived together at any time during the life of the child, whether or not married to each other, they are deemed joint guardians of their child.

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<sup>500</sup> C. Dyer “ Unmarried fathers offered full parental rights” (2001) Society Guardian.co.uk

<sup>501</sup> *Domestic Relations Act, R.S.A., 1980 c D-37 as amended in R.S.A. 2000, .c D-14*

<sup>502</sup> *50(1) Unless a court of competent jurisdiction otherwise orders, the joint guardians of a minor child are (a) the mother, and (b) the father if...(iii) he cohabited with the mother of the child for at least one year immediately before the birth of the child.*

<sup>503</sup> *Family Services Act Chapter F- 2.2 1981 consolidated to June 2006*

<sup>504</sup> *S.9 Vital Statistics Act*

<sup>505</sup> *S.22(1)Family Services Act supra n 28*

## Conclusion

The above cited provisions remove the distinction between married and unmarried parents, replaced by a presumption that is both conditional and rebuttable, but significantly improves the rights of unmarried fathers; which is ultimately in the best interests of the child. As stated by Ross Aylward, “ not only is the definition of marriage (in Ireland) a matter that needs to be tackled, but so too is the State regulation of this definition”<sup>506</sup>. We are on the cusp of significant new developments in Family Law brought about by the technological advances of Assisted Reproductive Technologies, these advances bring with them a myriad range of legal, ethical and social problems. Sooner rather than later the Legislature must move to define who is now a “parent”, particularly who is a “father”. An amendment to existing guardianship legislation could incorporate elements of the above cited Canadian provisions, allowing for a redefining of the family unit, subject to the tests as recommended by Justice Mc Kechnie, to include the de facto family referred to by Geoffrey Shannon in relation to Article 8 of the ECHR.

Societal changes and technological advances dictate that our traditional concepts and definitions of parenthood, and indeed the family unit, need redefinition: as Judith Masson pointed out we must question what legal recognition we give to the manifold ways of “parenting by doing” and “parenting by being”, inter-related concepts that define the position of parents vis-a-vis their children in law.<sup>507</sup> Without addressing the absence of the rights of unmarried fathers we continue to ensure that the best interests of the child are not served in this jurisdiction, and that the rights of marital parents trump both the rights of children and those of natural fathers.

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<sup>506</sup> R. Aylward supra n.4 p 21

<sup>507</sup> J.R. Spencer and A. Du Bois-Pedain, “*Freedom and Responsibility in Reproductive Choice*” (Oxford: Hart Publishing, 2006)

*Hyde v Hyde and Woodmansee* [1861-1873] All E.R. Rep. 175

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## **Appendix D- Material developed**

- (i) Family Mediation Model
- (ii) Parenting Agreement template
- (iii) Guidelines to complete an Affidavit of Means

### *Family Mediation Model*

#### **Family Mediation Pilot Southeast Region May – December 2013**

Author; Róisín O’ Shea June 2013

A Family Mediation Pilot implementing the family mediation model developed by Irish Research Council Doctoral Researcher Roisin O’ Shea, May to December 31st 2013. All issues can be mediated relating to the breakdown of a relationship or marriage, or where no relationship existed but a child was conceived; including Guardianship, Custody, Access, Legal Separation and Consent Divorce.

#### **Pre-mediation – Part I**

Key documents/forms;

- Pilot Information Document
- Family Mediation Information, terms and conditions
- Financial Declaration document
- Agreement to Mediate
- General intake form
- Individual intake form
- Domestic violence screening form
- Case Management form

#### 1. Direct contact

Where a potential participant contacts the project administrator by phone, email or walk-in, the administrator will use the pilot check-list;

Check-list for Pilot Enquiries

#### 1.1 Complete top of General Intake form on clip board

\* Ask for an email that you can send pilot information to



\* Email/post/they collect, pilot information document, and Family mediation information.

\* Make a note of when the information was sent/collected

#### 1.2 If someone wants to make an appointment-

- get the contact details for the other person ( write their details on the Intake form)
- Assign Case ref, write on General Intake form and put in red file
- set a provisional date and check availability with other person
- Complete the individual intake forms with both parties
- Enter case details into general pilot database

#### 1.3 When an appointment has been set;

- Email/ask them to collect/post Pilot Financial Declaration Form
- Tell them they must return the form one week before their appointment or they will lose that appointment slot – send email/phone reminder when affidavit is due.
- Set their fee based on their Financial Declaration [Shane]
- Send them an email confirming their fee and email/ask them to collect/post a copy of the Agreement to Mediate
- If Domestic violence is a possibility ask the lead mediator to conduct screening.

#### 1.4 Book mediators and room

- When both Financial Declarations have been received, and are satisfactory, book the mediators for the case and put the case into Google calendar. Initial sessions are always two hours, subsequent sessions are usually one hour.

[tell the clients that where we post any documentation that cost is added to their fee]

## **2. Referral; where an application is being considered or litigation has commenced.**

### 2.1 Solicitor referral

Where a potential participant indicates that their solicitor has recommended that they participate in the pilot, or where a solicitor directly contacts one of the pilot team mediators, this should be noted on the General Intake form, and the standard Check-list process should be completed.

### 2.2. Judicial referral to mediation

**DISTRICT COURT (Waterford)**

Parties that are already engaged in litigation may be referred to mediation by way of a recommendation of the judge. The judge may suggest that the matter remain on the list (stand) while the parties attend an information and assessment session at the ARC offices on District Court family law days (Wednesday each week). The parties will be advised to ring the ARC offices to arrange an appointment that day. They should attend this information session together. The fee is € 5 per head for 15-30 minutes. They will be provided with information about family mediation, the pilot and the costs, and asked if they wish to participate. If they both agree to try mediation they will be given a letter to bring back to the court which confirms that the parties wish to engage with mediation and the court is asked to adjourn the matter, to be reviewed at a later date. If either of the parties do not wish to participate they will each be given a letter to bring back to the court to say that the parties will not be participating in mediation. [ we may agree to also email the District court office]

Where a Judge has referred/recommended that the parties attend mediation, they do not sign any resulting agreement at mediation, they return to court to sign it there, for the agreement to be made an Order of the court, unless otherwise agreed with the solicitors for the parties. Where one party is unrepresented the agreement must be made an Order of the Court.

**CIRCUIT COURT (Waterford)**

Where parties agree to adjourn proceedings on the recommendation of the judge, they should ring the ARC offices to make an appointment to attend an information and assessment session. The fee is € 5 for 15 minutes, to a maximum of 30 minutes. The parties will ask the court to let the matter stand if an appointment is possible that day, or will ask the court to adjourn the matter to allow the parties consider mediation as an alternative to litigation.

District Court/Circuit Court Wexford, Carlow, Tipperary, Kilkenny;

Where the judge recommends that the parties consider mediation, the matter may be adjourned to allow the parties to attend an information and assessment session or to allow them time to individually speak with the project administrator.

**2.3 Where litigation has commenced and one party wants to mediate**

When a party contacts the office and says that they would like to attend mediation although legal proceedings have already commenced. Determine what the application/s is/are, and if both are legally represented. Contact their legal representatives and discuss. Secure

agreement that adjournment will be sought, by consent, if both parties wish to participate in mediation.

### **3. Lay Litigants**

3.1 Where either party is a lay litigant and cannot afford legal advice before signing agreement

Both parties undertake that any agreement, other than an interim parenting agreement, will be brought to court to be signed there and made an Order of the Court.

### **4. Pre-mediation, ready to mediate**

The project administrator will insure that the General Intake form, both individual intake forms and the Pilot Financial Declaration are completed. The administrator will also ensure that the parties have received the following documents; Pilot information; Information on Family Mediation & terms and conditions and the Agreement to Mediate. The case will be assigned to a mediator/lead mediator and if possible a co-mediator, and a file will be opened. Where the project administrator believes that domestic violence has been flagged or may be an issue, she will notify the lead mediator who will contact both parties by phone using the domestic violence screening document.

## **Mediation Commences – Part II**

Key documents/templates;

- Interim Parenting Agreement
- Permanent Parenting Agreement
- Affidavit of Means
- Guidelines for Affidavit of Means
- Statement of Welfare for child/children
- Separation Agreement
- Consent Divorce Agreement
- Session report form
- Final case report form

### **5. The Mediation Process**

5.1 Mediators

Co-Mediation, male and female

Co-Mediation, female and female

Co-Mediation, male and male

Sole mediator female

Sole mediator male

All mediators participating in the pilot must be an employee of W.I.T., or a Partner/Associate of ARC, or provide evidence of appropriate insurance.

## 5.2 Co-Mediation

### 1. Training

During training, co-mediation has a lead mediator/trainer, who has responsibility for case management, drafting any agreements, directing the process and training the co-mediator. A co-mediator should discuss in advance with the lead mediator any concerns or anxieties they may have. Initially during training a co-mediator may take a more passive role, but the expectation is that co-mediation should involve active mediation by both mediators. Any mediator who is new to this pilot model is deemed a trainee, irrespective of any prior mediation experience. The lead mediator will determine when the trainee has gained enough experience, of the pilot model, to no longer be deemed a trainee. To conclude the trainee phase, the trainee will be asked to present a case at a Sharing and Learning session of all mediators involved in the pilot, submitting that case in writing to the lead mediator after the presentation. The lead mediator/trainer will write a review of the case presentation, and indicate if the trainee is ready to become a pilot mediator/trainer.

### 2. When should co-mediation be used?

Co-mediation should be used where financial provision and division of debts/assets is required as part of a formal Separation Agreement, a Consent Divorce or dissolution of a Civil Partnership. Co-mediation can be used for any issue in dispute between the parties for the purposes of training.

### 3. During co-mediation

The lead mediator will handle the introduction process, and will introduce the co-mediator. It will be agreed in advance whether the co-mediator is introduced as a trainee or a “full

blooded” mediator. The lead mediator will direct the session. It is expected that the co-mediator will actively contribute to the process, including meeting in caucus with one of the parties as per the pilot process.

#### 4. De-briefing and evaluation

The lead mediator and co-mediator will discuss the mediation immediately after the session if possible, or as soon as possible after the session. They will discuss what “worked”, what didn’t, and what needs to be addressed. If the mediator is a trainee he/she may ask questions and give feedback about the experience, the lead mediator may suggest topics for discussion. Where draft agreements are required they will be done by the lead mediator, and provided to the co-mediator for comment before sending to the parties to review. Where the co-mediator is a “full-blooded” mediator they should actively contribute to the drafting of any documents if required. The lead mediator will also have responsibility to compose and send the “check-list” to the parties. The mediators will complete a report form together at the end of each session for the purposes of research, and will write a brief case report together when the case concludes or is terminated. It is the responsibility of the lead mediator to manage the case from start to finish, and actively trigger subsequent sessions by sending reminder emails to the participants.

The notes taken by the mediator/s will be filed immediately at the end of each session into the case file.

### 5.3 Sole Mediation

#### 1. When should sole mediation be used?

Sole mediation is appropriate for single issue mediation such as Guardianship, Custody, Parenting Agreements, or any issue relating to a family that does not involve financial provision and division of assets/debts as part of a formal separation agreement, a Consent Divorce or the dissolution of a Civil Partnership.

#### 2. During mediation

A sole mediator needs to ensure that they are engaging both parties equally in the process. Active listening is required, under-pinned by notes at the session. A sole mediator must direct

the process and ensure that the focus is on the agreed agenda for that session. To caucus, a sole mediator should arrange separate appointments with each of the parties (usually second session).

### 3. When issues arise for the sole mediator

When mediating alone and an issue arises that is problematic or outside the competency of the mediator, speak to the project co-ordinator, or another experienced mediator on the team, however, do not disclose the identities of the parties or divulge information that may identify them or their children.

### 4. Evaluation

After each session a sole mediator will complete the report form, will draft any required agreements and send the “check-list” to the parties. It is the responsibility of the sole mediator to manage the case from start to finish, and actively trigger subsequent sessions by sending reminder emails to the participants.

The notes taken by the mediator will be filed immediately at the end of each session into the case file.

### 5.4 Key elements

Iterative and incremental

Child issues take priority in the process

Conducted in the shadow of the law

Full disclosure

Option development led by the mediator/s

Agreement focused

Enforceable agreements

Timely

Cost effective

Directive – specific agenda for each session

### 5.5 Interdisciplinary considerations

Mediators will identify;

When counselling is required for one or both participants  
When parenting support/courses are recommended  
When child support/courses are recommended  
When domestic violence is an issue  
When child safety and welfare issues require action  
When personality disorders or mental health issues arise  
When third party experts are required  
When a participant is not engaging in mediation in good faith  
When language is an issue  
When geographical distance is an issue  
When religious, cultural, or inter-jurisdictional issues arise

#### 5.6 Conflict/bias

Where a mediator recognises the name of one or both of the parties, and realises that they know them socially, or in a work context, or live in close proximity, they should evaluate whether their knowledge of those people prohibits them from mediating without bias. If in doubt don't mediate. Where the mediator knows one or both of the parties, but is not a friend/neighbour, then this should be communicated to the party/ies, who may elect to proceed with that mediator, or not. Mediators must always practice within their competencies, and all pilot mediators are expected to have adequate knowledge of family law. [Required reading; Family Law, 4th edition, Geoffrey Shannon, Law Society of Ireland Manual ]

#### 5.7 Participants in mediation

The mediator/s

The two people who are in dispute, or need assistance to reach agreement.

The solicitors for the participants

The child/children

Third party experts, by agreement

Third parties, by agreement [ such as extended family]

#### 5.8 Golden Rules

1. The solicitors must communicate through the mediator at all times, during the

process, up to and including the formal conclusion.

2. Caucus discussions with either party, or their solicitors, and any information imparted to the mediator/s during such discussions, remain confidential unless otherwise agreed. It is recommended that said consent is secured in writing (by email) or witnessed (by co-mediator).
3. Where there is an existing Safety Order/Barring Order or indication of Domestic violence, the parties are not mediated together. The administrator must be informed and they will be given appointments on different days.
4. Where the mediator learns that a child may be at risk, the mediator must take the appropriate steps under the Child First Guidelines.
5. Where full disclosure is evidently not taking place, the mediation may not proceed to agreement. Where the mediator is notified by a party that they have assets they do not intend to declare, the mediation may not proceed to agreement, unless that party abides by the requirement to fully disclose all assets.
6. Where one or both parties are not engaging in a bone fide manner in mediation, then the mediation should not continue.
7. The mediator/s must always mediate in the shadow of the law, creating equitable and enforceable agreements.
8. The mediation process must remain confidential, except where the mediator has a reasonable belief that disclosure to an appropriate agency is required to prevent a person, or child, from suffering bodily harm, neglect or abuse. The administrator and anyone taking calls or dealing with drop in enquiries, must actively discourage and terminate any discussions about the details of that party's situation, particularly where court proceedings are underway or have occurred, or mediation has commenced.
9. The mediation process is voluntary, and either party may terminate mediation at any time.
10. The mediators must strive to ensure that the best interests of the child/children is a priority.

#### 5.9 Intake session – 2 hours

##### 1. Preparation

At least 20 minutes before the first session, the mediators will meet to review the documents



submitted and to discuss the approach to the case. The lead mediator will be responsible for opening the session and directing the process. Sole mediators should have a minimum of 15 minutes preparation time. It is recommended that you set a timer on your phone for the halfway point of the session and again for 10 minutes before the session ends.

## 2. Welcome/Introduction

The lead mediator or sole mediator will always go through the following steps at the start of the first session;

- (a) Welcome both parties, thank them for being willing to engage with mediation
- (b) Explain the process of mediation; Confidential/voluntary/no forced outcomes/option development/legally enforceable agreements if required
- (c) Set the ground rules
- (d) Read through and sign up the Agreement to mediate

## 3. Where there is a child or children;

The session will always commence with an information gathering discussion around the child or children, in particular detailed information about the children of the marriage/relationship, other children, and what current parenting arrangements the parties operate. If other parenting arrangements are in place with parents of any other children the parties may have, then any new parenting agreement must be cognisant of those arrangements. During this discussion ensure that both parents are asked questions and are fully involved. This is a useful time to double check information on the intake forms, such as date of marriage, duration of relationship, no relationship. The first half of the session will be dedicated to the child/children with a view to agreeing arrangements for an interim agreement which may be 6 weeks (high conflict), 3 months or 6 months. If one or both of the parents are presenting as high conflict, then you must try and ensure that an interim agreement is in place before the end of the session. It is advisable to determine if there is a new partner, either during this initial session or afterwards, as any interim agreement should deal with how and when any new partner should be introduced to the child/children. Get information about the extended family, if any, and their contact and role, if any, in the day to day care of the child/children. Where there are no children, move straight to the next step.

## 4. Second half of the session;

Using the intake form read out the issues that they have indicated they would like to discuss. Ask if someone would like to speak first. Clarify that each party will get equal time to speak,

ask the other not to interrupt, suggest they make a note of anything they wish to respond to. Ensure that delivery of the “story” and ensuing discussions remain respectful. Actively discourage “loops” [repetitive re-telling] and assist the parties to keep the story telling moving forward in chronological order.

Stress that this is not counselling, nor will the mediator/s take a “view” on any alleged conduct, however explain that it is important for the mediator/s to know the background as to why the parties are in dispute. If they are married, clarity is needed that the marriage is ended or not (yet). Where there are emotional out-breaks or one party “gets stuck” in disparaging the conduct of the other party, suggest that they speak to you the mediator, and not to each other. If that fails, switch the topic back to the child/children, likes/dislikes/talents/interests etc. If that fails take a short break, explain where the toilets are, offer water/cup of tea. If one party leaves the room, leave the door open and suspend the discussions [talk about the weather] until that party returns. If a party leaves the room distressed/angry, the lead mediator should follow and ask if they are able to continue. The mediator remaining in the room should leave the door open and suspend discussions [talk about the weather]. If a party remains angry or distressed/crying, the lead mediator may deem it prudent to terminate the session.

This part of the intake session should primarily be about information gathering to underpin option development at a later session, on any issues in dispute. Be prepared to give general information about family law and how the courts operate, but do not give direct legal advice to either party. If litigation is underway, be conscious of any time restrictions – find out when the matter is next on the list and with consent ask the solicitors to adjourn to allow the parties to engage in mediation.

In the final 10 minutes recap the headlines of what has been agreed for the interim parenting agreement (if relevant), go over the issues that have been identified and explain the next steps in the process. You will email a draft interim parenting agreement to them to review, and you will send a check-list that they need to complete before the first session.

#### 5.10 Post Intake Mediation session

Immediately after the intake session the lead mediator and co-mediator should take at least 15 minutes to discuss the case.

Where there are solicitors the lead mediator should contact them and bring them up to date with discussions. Where their client requires legal advice this should be highlighted to the

solicitor. The solicitors must communicate through the mediator at all times, during the process, up to and including the formal conclusion.

The lead mediator then drafts the interim parenting agreement and emails both parties along with the check-list. Where financial provision or division of debts/assets is at issue then the parties will be asked at this stage to complete a 12 month Affidavit of Means and will be asked to present other information such as a valuation on a property, last set of accounts for a company/partnership or details of a pension scheme.

#### 5.11 Second Session – 1 ½ - 2 hours

The second session is convened when the check-list tasks are completed and the parties have submitted the required paperwork. The administrator will schedule an appointment after checking the availability of the mediators. The Affidavits are submitted unsworn to allow the mediator/s review the affidavit and vouching documents. The mediators should meet no less than 20 minutes before the session to discuss the documents submitted.

For the first half of the second session (where unsworn affidavits have been submitted), the parties will be caucused with an individual mediator to go through the documents and discuss their financial position. Where there is a sole mediator, the parties will be asked to attend separately for this assessment and discussion. The mediator/s will also go through each element of the check-list and discuss the interim parenting agreement which may be signed at this session.

In the second half of the session the parties will come back into the same room and be asked to discuss their preferences for dealing with any of the issues arising. If it is clear that third party experts will be required, then this should be agreed. Recap in the last 10 minutes on matters discussed and explain the next stage of the process.

Immediately after the session the mediators should take at least 15 minutes to discuss the case.

#### 5.12 Third session – 1 hr

Before the third session the lead mediator, with the assistance of the co-mediator, must draft up at least three options to deal with division of assets and division of debts. These options will be based on the information provided by the parties and should also incorporate their preferences. The administrator will schedule the 3rd session when the lead mediator indicates he/she is ready.

Review the interim parenting agreement at the start of the session, where there is a child/children.

The remainder of the session will be used to discuss the options and begin to agree terms of a separation agreement or consent divorce where required. The template for the separation agreement or consent divorce should be shown to the parties. The parties will be advised to have their completed (and revised if necessary) Affidavits sworn at this stage and to provide copies of all of their vouching documents.

Immediately after the session the mediators should take at least 15 minutes to discuss the case and complete the report form.

#### 5.13 Interim Parenting Agreement

Depending on the length of the Interim Parenting Agreement you may now also be discussing a permanent parenting agreement, or a longer term agreement. The parties should be shown the template for the Permanent Parenting Agreement and explain how it can be amended by a signed Appendix as the needs of the children change.

#### 5.14 Subsequent session/final signing

The lead mediator will draft whatever formal agreements are required, such as a permanent parenting agreement and a Deed of Separation and will email them to the parties. When the parties have reviewed the documents the lead mediator will send them to their solicitors. At this stage the parties should be asked to provide a copy of their Affidavit and vouching documents to each other, and in turn they each should be asked to give their solicitor their original sworn affidavit and original vouching documents, and the copies provided by the other side. Check with the solicitors to see that this has been done.

(a) The administrator will schedule the next session as soon as the lead mediator indicates he/she is ready. The mediators should meet to discuss the case no later than 20 minutes ahead of the session. The agreements should be reviewed and stress tested with the parties.

OR

(b) If the agreements have been sent for review to the parties and their solicitors, and they are happy to proceed with the draft documents, they may elect to sign the documents at this session. Make sure you have an email from their respective solicitors saying that they have availed of their advice and are happy to sign the documents.

OR

(c) Where a deed of conveyance is required, which can only be constructed and implemented by a solicitor, the parties may elect to sign all documents with both solicitors, or sign the formal agreement with the mediators and the balance of any documentation with the

solicitors. Discuss with the parties what their preference is. If any documents are being signed with the mediators ensure that you have an email from their respective solicitors saying that they have availed of their advice and are happy to sign the documents.

OR

(d) Where the parties have agreed terms for an agreement or agreements, but one of them does not have/cannot afford legal representation, the agreements must be taken to the court, signed there, and be made an Order of the Court.

OR

(e) Where the agreement is a Consent Divorce, then the parties must make a Consent Divorce application and bring the agreement to court to be reviewed by the Judge, who will then make the relevant Orders.

Immediately after the session/signing the mediators should take at least 15 minutes to discuss the case and complete the report form. If the case is concluded, the mediator/s must complete the final case report form.

#### 5.15 Conclusion

When draft agreements are agreed, they should first be emailed to the parties by the lead mediator to review. The agreements should then be sent to their respective solicitors, along with copies of the affidavits of means and vouching documents. Sometimes more sessions are required when there is a change in circumstances during the process or one party changes their mind about any particular option. Work with the parties to resolve any issues arising, revising any agreements, with a view to concluding a formal agreement if possible.

#### 5.16 Review of Parenting Agreements

Where the parties have entered into an Interim Parenting Agreement or a longer term agreement, ensure that you advise the administrator when the parties should be making an appointment for the agreed review of that agreement.

### **6. Children**

Scottish child law centre; Child feedback forms

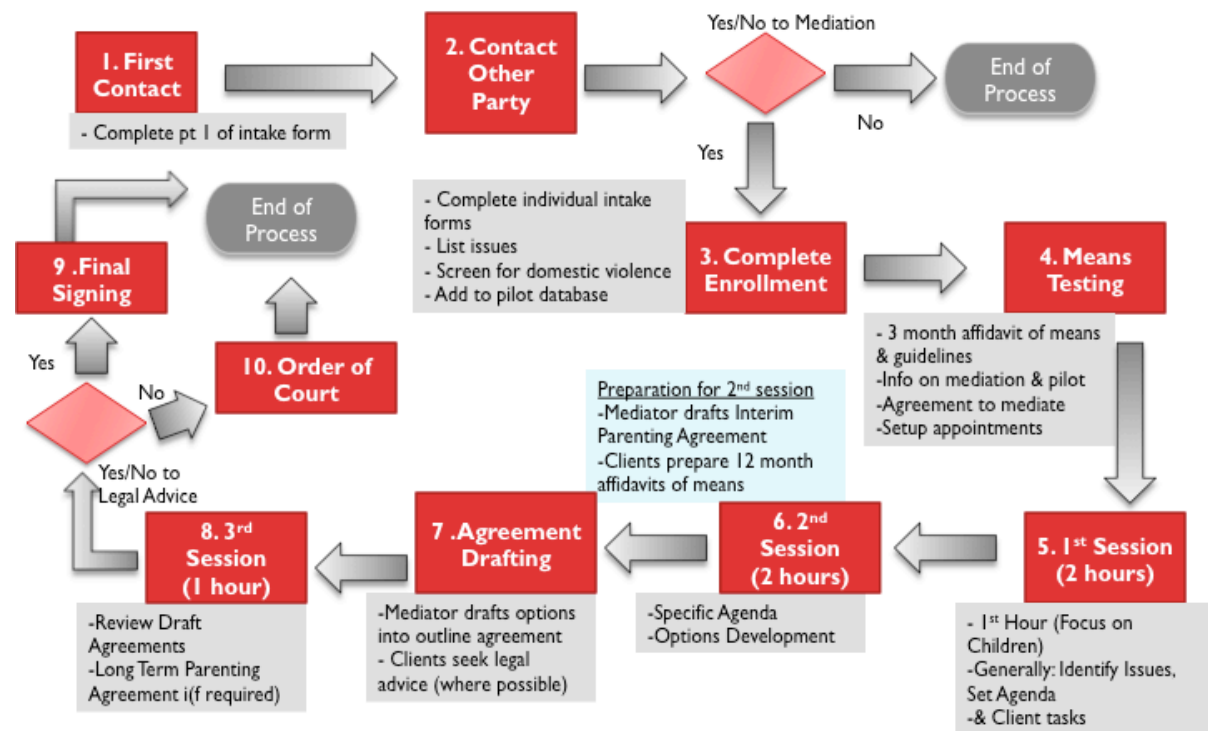
For phase 1 of this pilot the parents will be given the feedback material devised by the Scottish Child law centre and will be asked to encourage their children to submit their views to the parents for discussion in mediation where a longer term/permanent parenting agreement is being discussed.

Children will also be invited to participate in mediation, with the consent of their parents, where the child has expressed the wish to have their views heard.

**7. Geographical remedy – Skype**

Where one party is not residing in Ireland, they can participate in the mediation by Skype. Where the quality of the signal is poor then voice only Skype will be used. Skype participants will receive a Paypal request by email for payment, which must be discharged before the session commences. Mediators will be provided with Skype training and protocols. Skype may also be an appropriate mechanism for domestic violence cases.

**MEDIATION PILOT PROCESS**



## *Parenting Agreement Template*

### PARENTING AGREEMENT

Dated; \_\_\_\_\_ 2013

Parties; **[Names and address of the parents]**

#### Background and Introduction

1. The father and mother were married on \_\_\_\_\_ in the year \_\_\_\_ in \_\_\_\_\_ **[if married]**. OR The Father and the Mother were in a relationship which ended in the year \_\_\_\_ **[if not married]**
2. There are \_\_\_\_\_ child/ren of the relationship/marriage **[Name and Date of birth of each child here]**
3. At the time of this Agreement, the children reside \_\_\_\_\_
4. (a)The husband and wife shall continue to be joint guardians **[and custodians]**, with the father and mother having scheduled parenting time with the child/children as stated in this agreement.**[ if the parents were or are still married]** OR (b) The parents shall continue to be joint guardians and custodians, **[if they have joint guardianship and custody, amend as required]**, with the father/mother having scheduled parenting time as stated in this Agreement **[ if the parents did not marry]**
5. Having mutually expressed great love for their child/ren, and desiring to foster a continuing parental bond between the child/ren and each parent, and for the benefit and welfare of the child/ren, the mother and father desire to enter into a mutually agreed Parenting Agreement, that shall be activated on the day said Agreement is signed, and will remain in effect for a **12 month** period past said date, at which point it is the stated intention of the parents, subject to satisfactory performance of same, that the agreement be made a permanent agreement, This shall be done by way of a signed and witnessed appendix to this agreement or by creating a agreement. The parents agree to enter mediation no later than one month before this agreement expires with a view to agreeing an appendix or creating a permanent parenting agreement, which would remain in force, with interim modifications as the children grow older, until the child/ren are no longer dependent/s.
6. Both parents acknowledge that conflict and stress followed the break-down of the parent's relationship/marriage in **[put in year]**, which has had an impact on the child/ren. Both parents agree to work hard to defuse said conflict and stress, and to move towards civil relations with each other as quickly as possible **[may be amended]**
7. This Agreement will make provision for scheduled parenting with \_\_\_\_\_**[name of child/children]**

8. A permanent Parenting Agreement shall be subject to the voluntary participation of the parents, and shall only be entered into on foot of independent legal advice.

9. **TERMS OF THE AGREEMENT**

The following parenting schedule shall be implemented by the father and the mother;

(i) **General Parenting Schedule**

	<i>Mon</i>	<i>Tues</i>	<i>Wed</i>	<i>Thurs</i>	<i>Fri</i>	<i>Sat</i>	<i>Sun</i>
<b>Week 1</b>							
<b>Week 2</b>							
<b>Week 3</b>							

(ii) **Special occasions;**

The parents agree that both should, where possible, attend any special occasions that arise for the child/ren. It may be decided that should a birthday fall on a school day that a birthday treat is organised in a neutral venue [put in specific arrangements if required]. When the child's birthday falls on a day where one parent does not see the child, then that parent will celebrate that birthday with the child either before or after the birthday.

Birthdays ( including the birthday of the mother and father)

Communion

Confirmation

Bar/Bat Mitzvah

Mother's Day and Father's Day

Religious holidays

Celebratory events

[ special religious days, that are important to both parents, shall be rotated every second year between the parents]

Where the child/children receives an invitation to attend at another child's birthday party, that invite shall be passed to the parent who is scheduled to have the child/children at that time.



The birthday present to be brought to the party will be purchased by the parent the child/children is scheduled to be with.

*Sample Communion arrangements; (high conflict)*

Child's communion : The Parents and family members will attend at the church. After the service, there will be a period of time (approx., a half hour) where photographs will be taken. The child will then go with his Father and family members for lunch, being dropped to his Mother's house no later than 4.30 p.m. that afternoon. The Mother and family will then have a celebratory evening meal with the child.

<b>Event Description [to be completed for long-term agreement]</b>	<b>Even Years</b>	<b>Odd Years</b>
<i>This is a description of the holiday, vacation or special day event. To the right, we describe which parent or guardian will be responsible for the event on even or odd years.</i>	Mother	Father

HOLIDAYS

- (iii) **Christmas Day;** Where either parent is a Christian and celebrates Christmas, it is agreed that [name of child/children] will spend Christmas Eve and Christmas morning with one parent, being collected by the other parent at 2.30 p.m. and staying the night at that parent's house. On

Stephen's Day [name of child/children] will be dropped back to the first parent by 2.30 p.m. staying the night with that parent. The arrangement will commence with [name of child/children] spending Christmas Eve and Christmas morning with the father/mother. The duration of [name of child/children]'s Christmas holidays shall be two days, two nights rotation with each parent (excluding the stated arrangements for bank holidays elsewhere in this Agreement), returning to the other parent on the third morning- reverting to normal weekly arrangements when the holidays have ended.

[ to be amended for other religious holidays or traditions]

- (iv) **Easter and mid-term break;** Half of the scheduled holiday time shall be spent with each parent to be agreed between the parents, who undertake to be flexible in the making of said arrangements. OR half of the scheduled holiday time shall be spent with each parent, commencing with the father, on a two day, two night, rotation basis, returning to the other parent on the third morning.
- (v) **Bank Holidays;** [name of child/children] shall spend every second bank holiday with each parent, commencing with the father for the first bank holiday. The father/mother shall on his/her scheduled Bank holiday days, collect [name of child/children] at 9 a.m., returning child/dren to school the next morning.
- (vi) **Summer holidays;** The parents agree to be flexible in relation to holiday time access; either parent with the consent of the other, may have a two week holiday with [name of child/children] during the Summer period either in Ireland or abroad. The parents agree to secure individual passports for all the child/ren. The passports will be held by the father/mother. The balance of the Summer holidays shall be a week on and a week off in rotation. After a Summer holiday, the rotation re-commences with a week with the parent who was not with the children. Where any of the children under the age of 18 seek to travel to another country it must be with the express consent of both parents [unless one parent does not have guardianship rights]. Each parent agrees to give the other parent a minimum of 4 weeks notice, and to provide details (at that time) about the location of the holiday and contact information. Arrangements will also be made for reasonable telephone contact between the child/children and the non-vacating parent. Both parents agree to facilitate such travel, within reason, however where a dispute arises about any of the children leaving this jurisdiction, the Parents agree to try and resolve same through mediation, failing which, one of the parents may make an application to the District court under S.1 of the Guardianship of Infants Act 1964.

#### CO-PARENTING TERMS

- (vii) **Parent unavailable;** Where either parent is not available to collect [name of child/children] from school or any activities during their scheduled time, the other parent, if they live within a reasonable distance, shall be contacted to see if they are available, if not then members of either family may step in if required. The parent with whom [name of child/children] is scheduled to spend time shall collect him/her as soon as possible. If a parent is unable or unavailable to exercise his or her parenting time, due to illness, travel or employment, he or she will, at the earliest opportunity, give the other parent the opportunity to assume responsibility for the child/children; The parent who is unable/unavailable to exercise parenting time is responsible for making alternative care arrangements, if the other parent does not accept the opportunity.
- (viii) **Child minding;**  
The Parents agree to arrange appropriate general child-minding services when required. Said child-minder being over the age of 16 as required by law. Where [name of child/children] is sick and unable to go to school, or where one parent is not available to mind him/her for an overnight, then the other parent shall be contacted to mind him/her if that parent is available.
- (ix) **Communication with the child/ren;**  
The parents agree that reasonable telephone, email and/or skype contact should take place with the child/ren. Where possible, the child/children will be given full privacy when communicating with the other parent, the conversations are not to be monitored by the parent with whom the child is with at that time.
- (x) **Children's clothes & possessions;** The parents agree that "important items" such as clothing, toys and security blankets move freely with the children between the homes of the parents.
- (xi) **Transport-** both parents undertake to ensure that the correct child booster seat or child seat is provided for each child, and that the child and seat are secured with a proper car seat belt across the chest and lap.
- (xii) **Communication between the Parents;**  
General communication between the parents shall be by mobile phone, house phones or face to face- All communication between the parents must be with one another directly. Voice messages should be left by either parent, with the other parent, where a change in arrangements or other notifiable matters in relation to the children needs to be communicated, and the parents agree not to ask the child/dren to convey messages between them. Both parents agree to speak/communicate with each other in a respectful manner. Each parent undertakes to give the other parent their current address, telephone number (both land-line and mobile) and email address. If a parent is away with the child/children and not accessible

through their normal phone numbers, then an emergency contact number must be provided to the other parent.

- (xiii) **Daycare, School, Summercamp;** Each parent agrees to ensure that the school, Daycare provider or Summercamp provider, have up-to-date contact details for both parents, and are made aware of the relevant provisions of this parenting agreement. Both parents agree to inform the other parent promptly of any notes received from school, including exam results, parent-teacher meetings, school-trips, or any school related events or issues as soon as possible. Where school trips or other trips/events away are planned by any of the children each parent undertakes to inform the other as soon as they are aware of such events. Parents agree to make joint decisions in the selection of Daycare, School, Summercamp and grinds, furthermore both parents agree not to make any unilateral decisions about a change of schools without first discussing the proposed change with the other parent, to enable joint decision making.
- (xiv) **Unforeseen Difficulties;** Should [name of child/children] experience any difficulties with the duration of the scheduled access or if other unforeseeable problems arise, the mother and father agree to cooperate in resolving such problems as may occur, with a commitment to once again follow the above mentioned schedule. It is agreed between the parents that due care will be taken in relation to appropriate environments for the children.
- (xv) **General Co-Parenting Rules;** The parents agree to reach consensus on general rules, so that joint parenting is evident to the child/ren, with similar rules and discipline applying in both homes. These rules should include homework, normal bedtimes, how often treats are given, pocket money, what kind of discipline will be implemented for bad behaviour. The parents agree not to undermine the authority of the other parent, and where conflict arises to seek to address that directly with the other parent first.
- (xvi) **Extended Family;** The parents agree to support contact with grandparents and other extended family members.
- (xvii) **Medical Treatment;** Both parents agree that should emergency medical treatment be required for any of the children that they will seek appropriate treatment immediately, notifying the other parent as soon as possible. Where non-emergency medical treatment is required the parents will discuss what treatment is required, and both parents shall be kept informed. Both parents undertake to share all medical information regarding their child/children, including the name of the G.P. or practice; details of any visits, details of any CareDoc call-outs, details of vaccinations and any medical treatments, details of any medication being taken by a child, whether prescribed or not, and details of any allergies the child/children may have. Information will also be shared for all dental, orthodontic, mental health care, eye care and any other treatment required for the wellbeing of the child/children. The [mother/father] will

be responsible for the scheduling of routine healthcare appointments. With the general understanding that both parents are competent to care for the child/children, they shall spend scheduled time with each parent even during periods of minor illness, unless the G.P. advises that the exchange would significantly jeopardise the health of the child/children.

- (xviii) **Flexibility;** The parents express their desire to be flexible in their approach to co-parenting their children, and hope to negotiate amicable and reasonable compromises as may be required from time to time.

#### 10. PRINCIPLES OF COOPERATION

The Mother and Father agree to be guided by the following principles of cooperation throughout the period covered by this Interim Agreement;

- (i) Both parents shall at all times be respectful of each other when communicating with the child/ren, when addressing each other in front of the child/ren, and when speaking about the other parent in front of the children; and will ensure that the child/children are not present when other adults make critical or disparaging remarks about the other parent. Each parent undertakes to protect [ name of child/children] from awareness or involvement in any conflict between parents.
- (ii) Should problems arise with the scheduled collection or dropping-off times, the mother and father agree to make every effort to be understanding. In such instances, the parents agree to communicate any such difficulties as soon as possible by means of ringing the other parent and explaining any difficulty, re-committing thereafter to follow the schedule of this Agreement as soon as is possible
- (iii) Should either parent have any additional expectation of the other during any scheduled parenting period, such as picking up an item that a child may need, or a Doctor's appointment etc.,- that should be made known to the other parent as far in advance as possible, and allow for such accommodations as are necessary to fulfil this expectation.
- (iv) Both parents agree to respect the scheduled times with the child/children, and will not arrange any plans that conflict with that schedule.
- (v) Should the parent who is the primary carer wish to re-locate to another part of the country, that parent agrees to return to mediation to discuss the proposed re-location and to amend the parenting agreement as required.
- (vi) In the event that the mother and father are unable to resolve any problems as they may arise in the course of this agreement, then the parents agree to contact the mediator Róisín O' Shea, or another appropriately qualified mediator, in an attempt to resolve the problem.
- (vii) With the expectation that scheduled parenting will continue after the life of this Agreement, it is incumbent on the Mother and Father to work with the Mediator and Legal Counsel to determine a permanent arrangement, to that end the parties agree to discuss a permanent agreement no later than 4 weeks prior to the expiration of this Agreement.

(viii) The mother and father agree that this Agreement is limited in scope and duration, and is designed to create a happy and healthy atmosphere between the parents and their children. The parents acknowledge that this Agreement is not intended to address issues such as division of Marital assets and/or Maintenance, and accordingly, shall seek the further advice of their solicitors concerning such matters.

**This agreement shall be governed by the laws of Ireland**, and any part of which is determined to be contrary to such laws, shall not invalidate the remainder of this Agreement.

**Given our hands and Seals this 2013, in Ireland**

**Signed** \_\_\_\_\_ **Date** \_\_\_\_\_

**The Father**

**Signed** \_\_\_\_\_ **Date** \_\_\_\_\_

**The Mother**

**Witnessed by** \_\_\_\_\_ **Date** \_\_\_\_\_

## *Guidelines to complete an Affidavit of Means*

### **Helpful Guidelines for Completing an Affidavit of Means;**

Full financial disclosure is a very important part of the family mediation process, and is required to back up any formal agreements reached in terms of division of assets or maintenance. Supporting documentation must be provided (referred to as vouching the Affidavit) to include copies of bank/saving account statements, credit card statements, payslips, P60's/P45's, pension benefit statement, mortgage statement, lease agreements, loan agreements, tax returns etc., As many documents as are available should be provided, however it is accepted that receipts may not be available for certain types of expenditure such as cash payments for shopping. The period in question should cover the last 3 months.

When the Affidavit is completed, it should be provided with copies of the documents to pilot project intake co-ordinator.

#### **1. First Schedule; Assets;**

To include the following;

**Family Home** with approximate value provided by an Auctioneer, or value submitted for property tax

**All bank/savings accounts** to include the name of the financial institution, the account number and the current balance.

**Shares** (including ownership of shares in a company of which you are a beneficiary)

**Properties** in your name, or shares in property whether in your name or not

**Car**, to include make, model, registration number and estimated value

**Life policy**

*Where there is a joint account, the account balance should be listed in each Affidavit and stated as being a joint account.*

#### **2. Second Schedule; Income**

Provide tax return forms/payslips.

Provide most recent set of accounts if you are a Sole Trader, or involved in a Partnership

Provide most recent set of accounts if you are a Director/owner of a limited company

Income should be detailed as gross income and net income .

Where bonuses, pay increases or overtime apply then this should also be detailed.

*Income would also include social welfare payments, any State support payments, legacies, loans from third parties, royalties, rental income, dividends etc.,*

**3. Third Schedule; Debts and Liabilities.** This should include;

Any mortgages (detail name of lending institution, term of mortgage, and balance due)

Credit cards

Any loans

Hire Purchase/Lease agreements

Car lease

*- Where mortgages are in joint names the full details are listed on both Affidavits as there is joint and several liability in relation to mortgages.*

*Any other debts or debt liabilities such as a maintenance obligation for spouse and /or child/children*

**4. Fourth Schedule;** This is your weekly spend based on the bills for the 3 months leading up to this Affidavit of Means. It is your actual spending from your own income, not what you think you spent or will be spending.

*For each heading, add all the bills in a 3 month period and divide by 12.99 to get the weekly average spend for the purpose of the affidavit.*

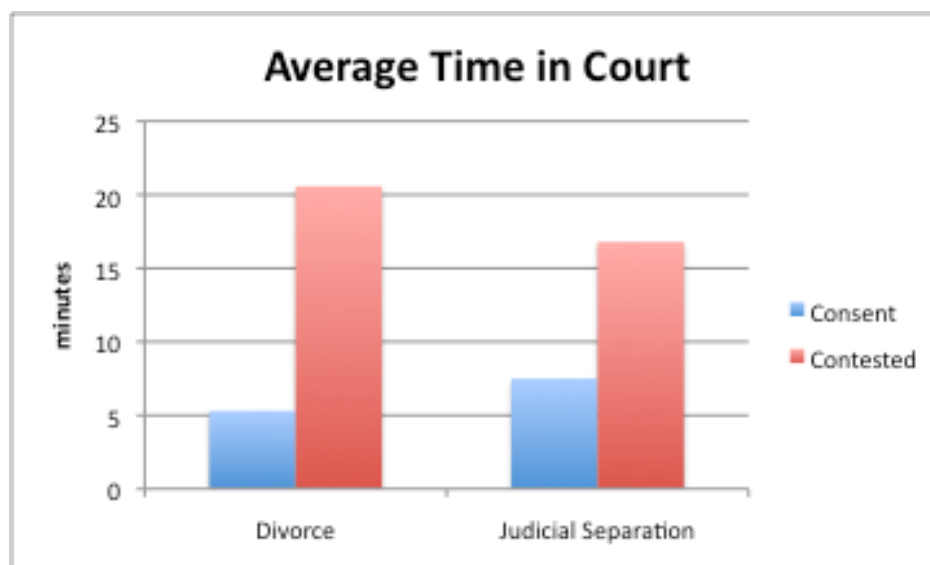
**5. Fifth Schedule;** Details of any pension scheme should be listed here, to include the name of the plan, the Trustees, and the policy number.



## Appendix E- Statistics

### *Statistics Supporting Findings*

The dataset contains cases observed from the eight Circuits from October 7<sup>th</sup> 2008 to February 24<sup>th</sup> 2012. The research sample consists of 1,087 unique cases, which were listed 1,179 times during the period of the research. The percentage of listed cases observed by Circuit were as follows; Cork Circuit 17%, Dublin Circuit 29%, South East Circuit 29%, Western Circuit 8%, South Western Circuit 3%, Eastern Circuit 5%, Midland Circuit 1% and Northern Circuit 8%. There are 184 interlinked fields in the database, enabling detailed information to be captured in digital form for analysis. The following headline findings have been extracted.



**Figure 1 - Average Time in Court (minutes)**

The shortest time in court was 30 seconds for a consent divorce, on the Western Circuit, no evidence was heard and neither litigant was sworn in. The longest full hearing observed was 5 hours. The average duration of all court sessions was 8.36 minutes. The average time for consent divorces across all 8 circuits was 5.3 minutes and 7.5 minutes for consent separations. Contested divorces took on average 20.57 minutes and contested judicial separations took 16.79 minutes.

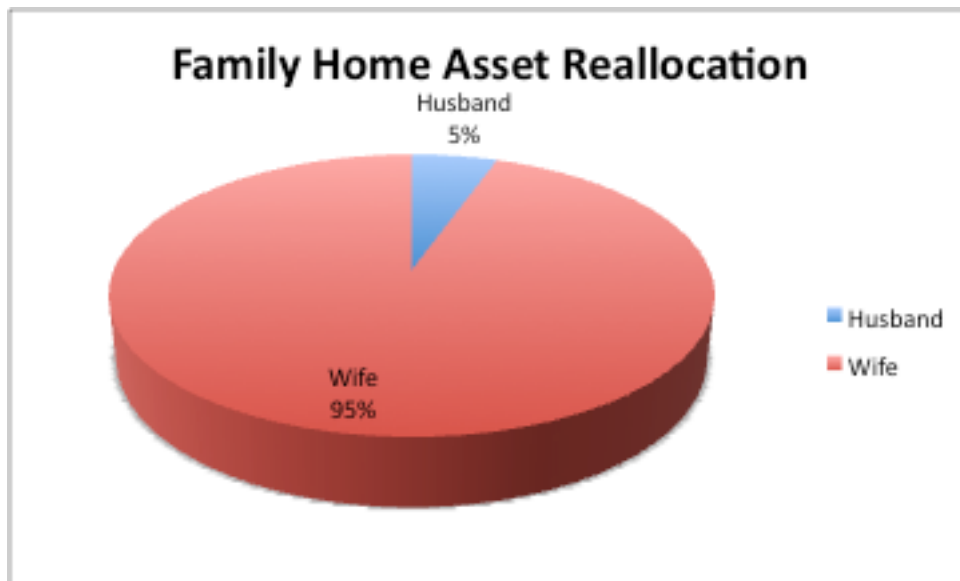


Figure 2 - Family Home Asset Reallocation

This diagram indicates that where the court ruled to allocate a greater percentage of the family home to one spouse, in 95% of cases the ruling was in favour of the wife.

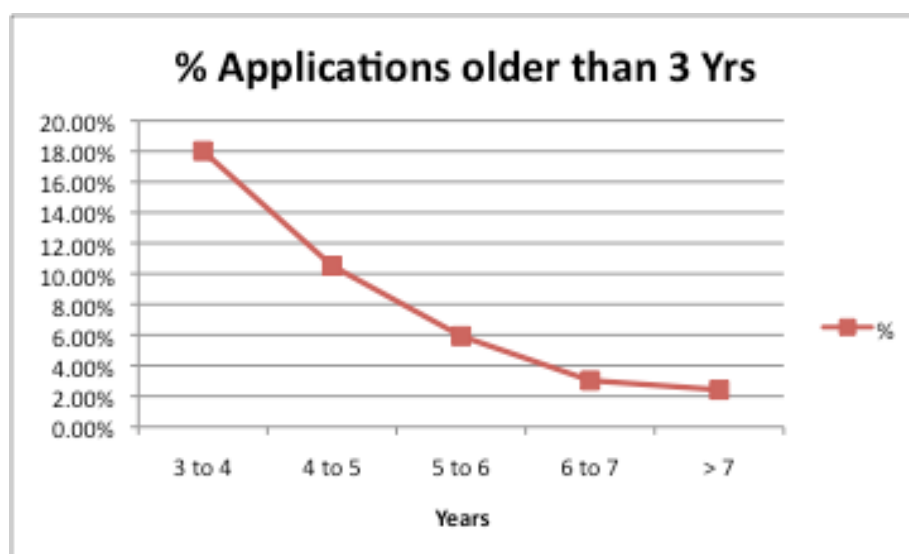
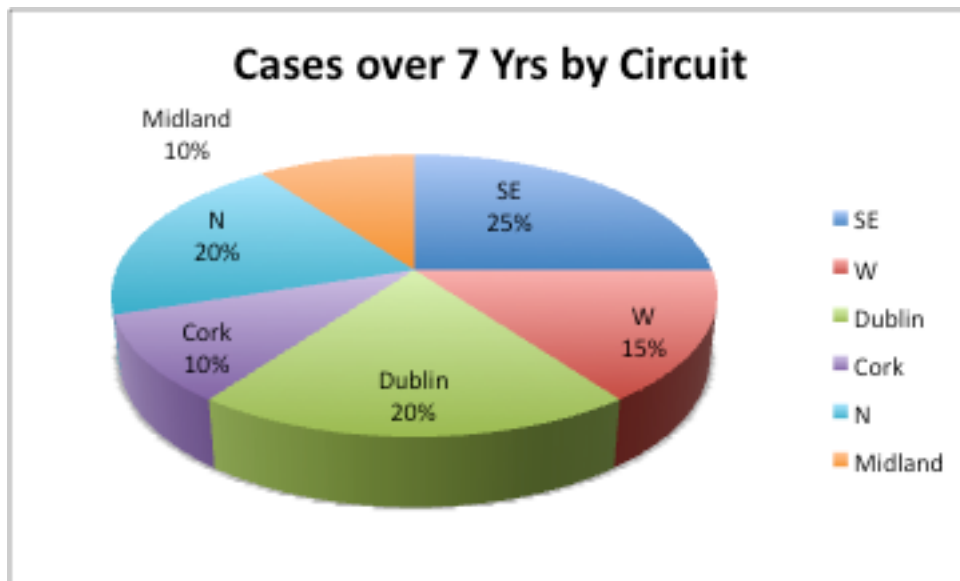


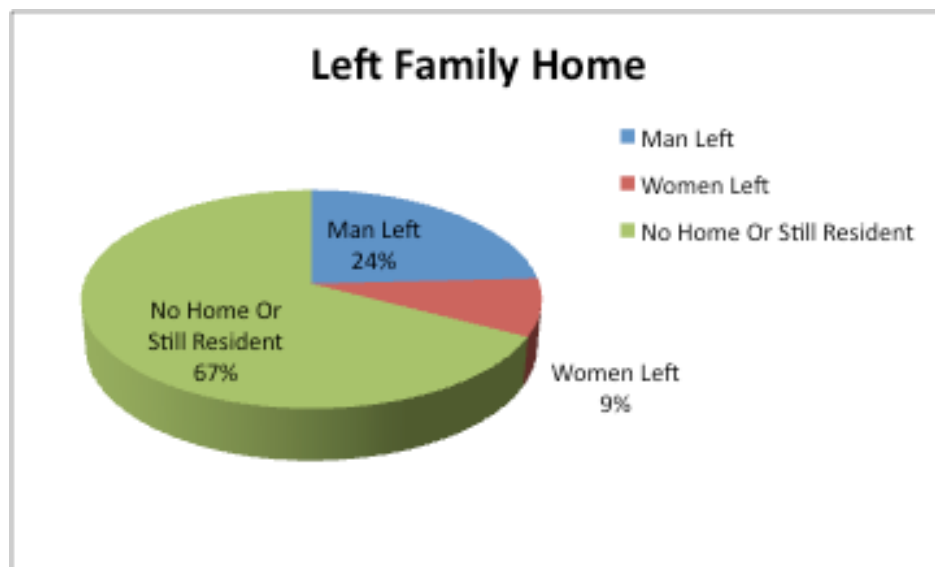
Figure 3 - % of Applications older than 3 Yrs

18% of contested cases were filed between 3 and 4 years before the case came to court, over 10% were filed between 4 and 5 years before coming to court, 6% were filed between 5 and 6 years before coming to court, 3% were filed 6 to 7 years before coming to court and 2% had been filed over 7 years before coming to court. 75% of all of these cases were divorce applications. Given that a divorce application cannot be filed until the parties are “living apart” 4 years, this indicates extraordinary waiting times.



**Figure 4 - Cases over 7 Yrs old, by Circuit**

The Northern Circuit, proportionally based on the number of cases before the court, had the highest rate of “old” cases that had yet to come to court for a substantive hearing. The Northern circuit is significantly smaller than the Dublin circuit but contributes the same number of observed cases over 7 years old.



**Figure 5 - Left Family Home**

It was indicated in court that the man left the family home in 24% of cases and the woman left in 9% of cases. Of the cases where women left the family home, the women left with the children in 99% of those cases.

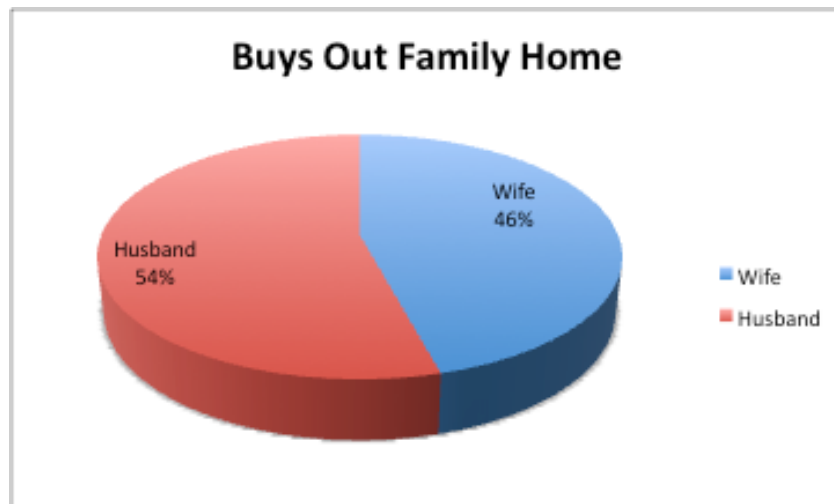


Figure 6 - Who Buys-out Interest in Family Home?

Of the roughly 5% of cases where one party bought out the interest of the other in the family home, on consent, the split was relatively even at 54% to 46%. This result is intriguing as the husband is approximately 2.6 times more likely to leave the family home than the wife.

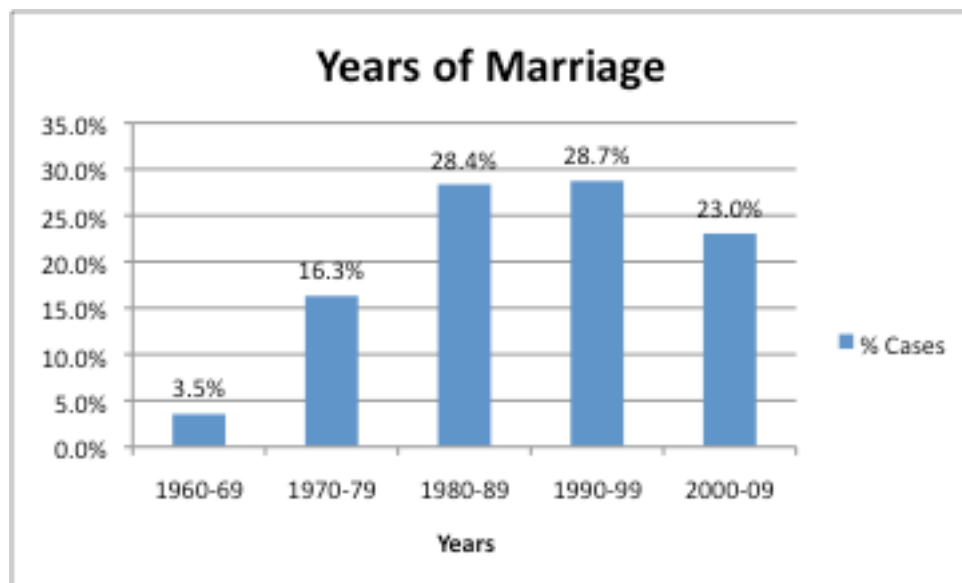
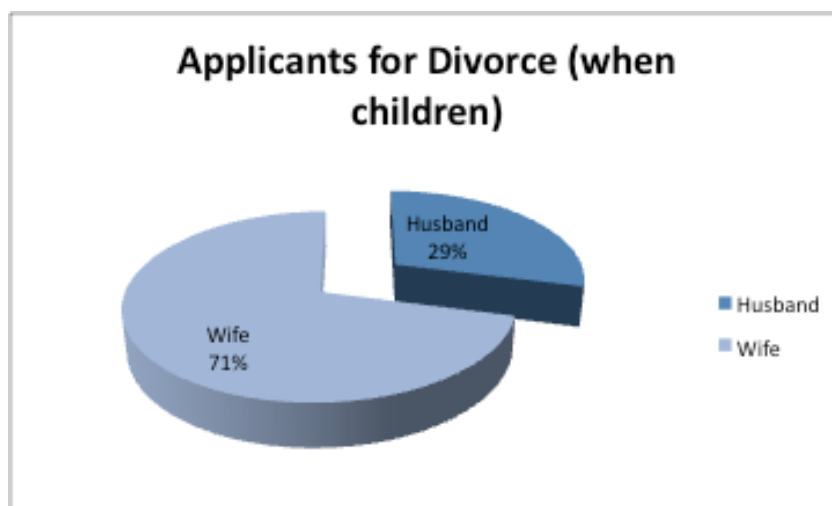


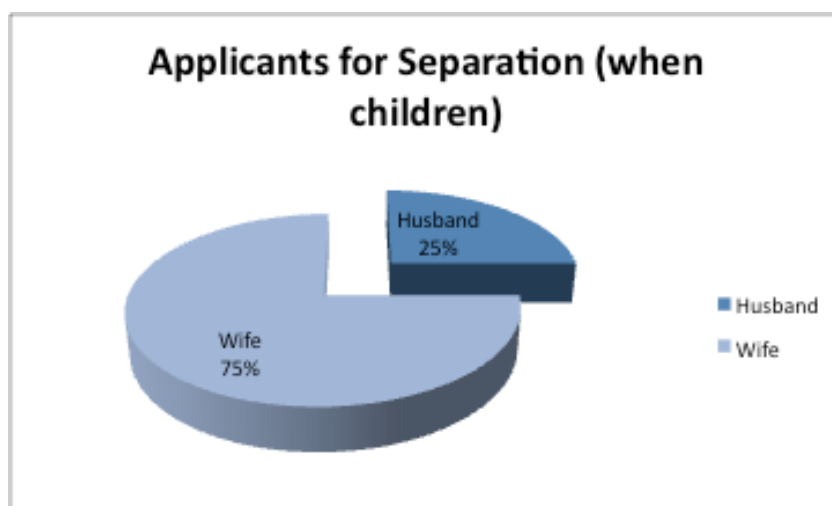
Figure 7 - Year of Marriage

The previous histogram shows the percentage of the cases where the separating or divorcing parties married during each 10 year interval. The majority of observed litigants were married after 1990.



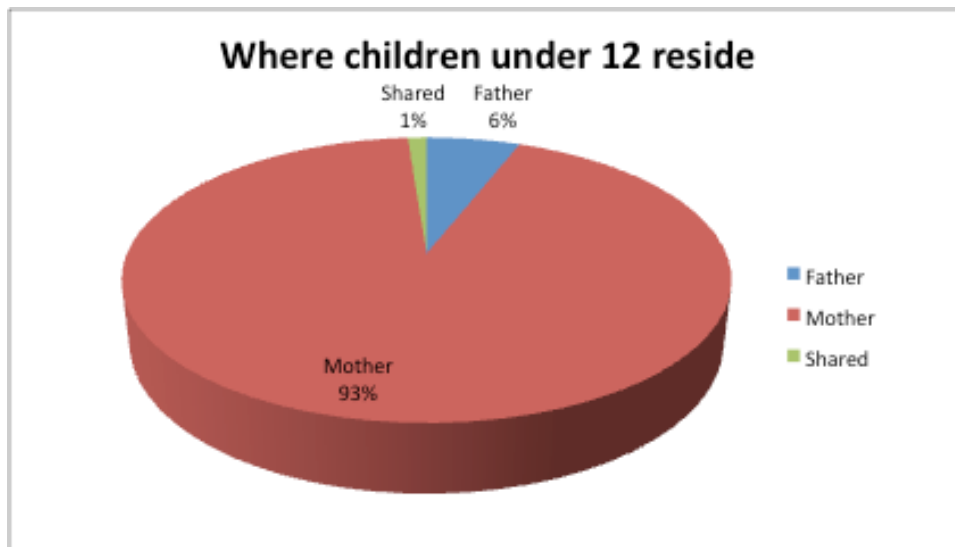
**Figure 8 - Applicants for Divorce, when children of marriage**

In divorce cases, where there were children, 71% of the applications were made by women.



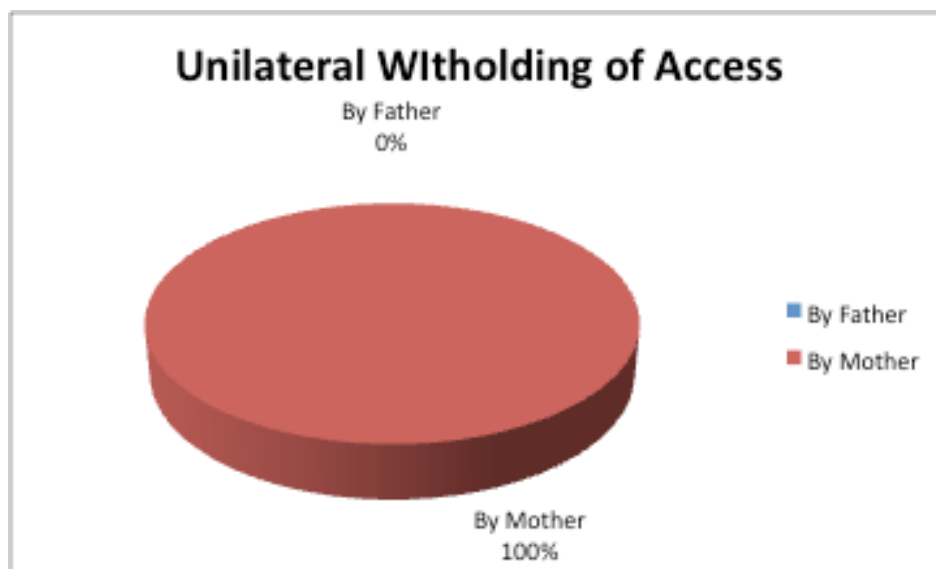
**Figure 9 - Applicants for Separation, when children of marriage**

In judicial separation cases, where there were children, 75% of the applications were made by women.



**Figure 10 - Parent whom Children Under 12 Reside With**

In 93% of the cases before the court, children under the age of 12 resided with the mother. 1% of the children resided with both parents, under 50/50 parenting arrangements.



**Figure 11 - Unilateral Withholding of Access**

Where access was unilaterally withheld, it was done by mothers in 100% of the observed cases before the court.

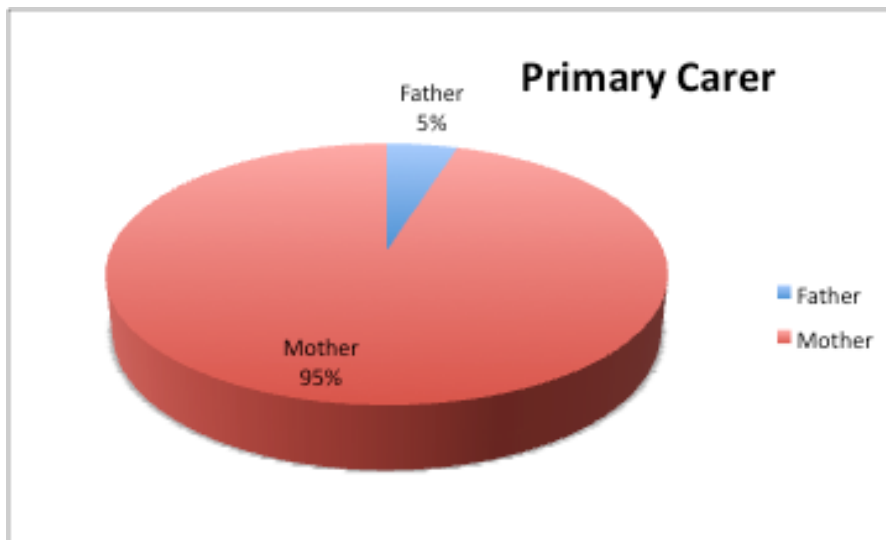


Figure 12 - Primary Carer of Children

In 95% of all cases the primary carer of dependent children was the mother.

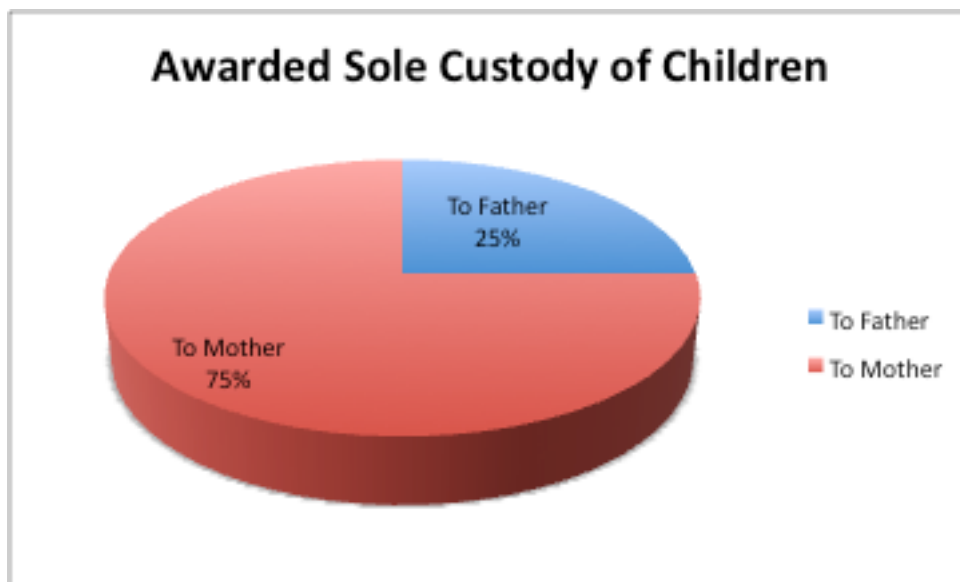


Figure 13 - Awarded Sole Custody

Where an order for sole custody had been previously made, or was made by the court, in 75% of the cases the order was made to the mother. It should be noted that sole custody was awarded to the father, but the circumstances were exceptional.

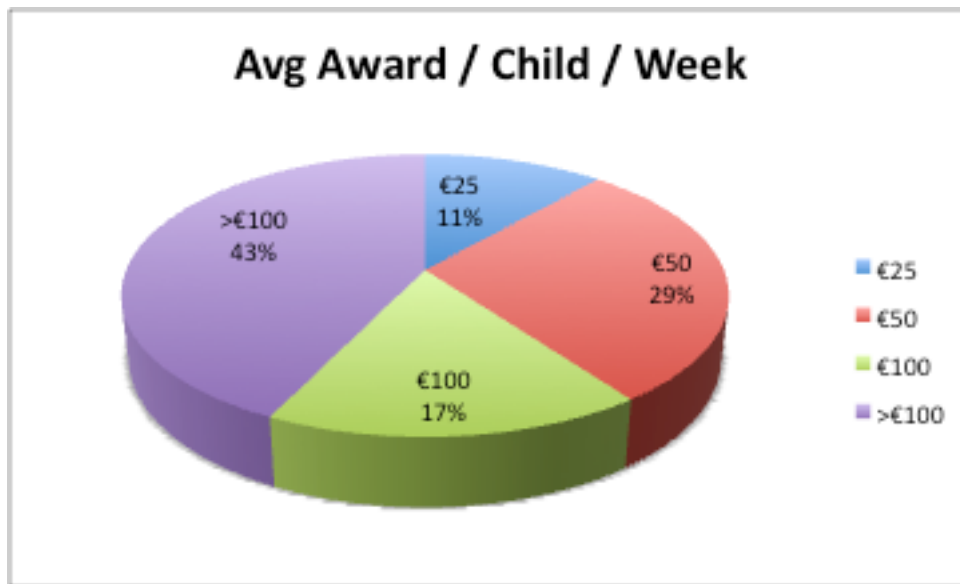


Figure 14 - Average Award / Child / Week

Where child maintenance was agreed or ordered, a sum greater than or equal to € 100 per child per week was set in 60% of the cases before the court. In almost one third of cases, maintenance per child was set at € 50 per week.

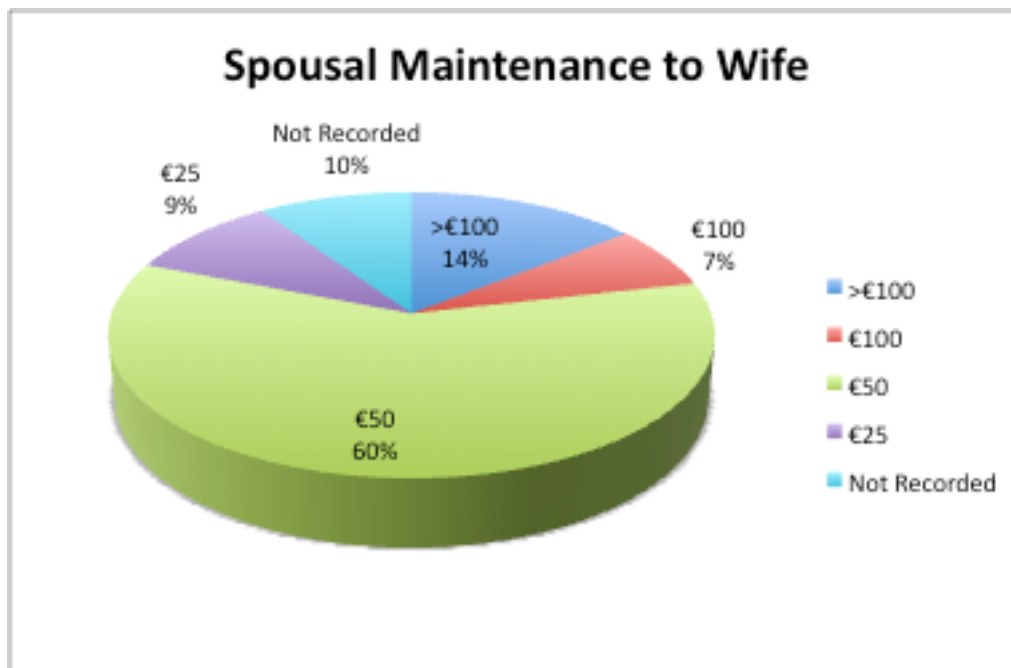


Figure 15 - Spousal Maintenance to Wife

Where spousal maintenance was agreed or ordered, € 50 per week was set in 60% of the cases before the court. In 10% of cases the value of the spousal maintenance was not stated in court.



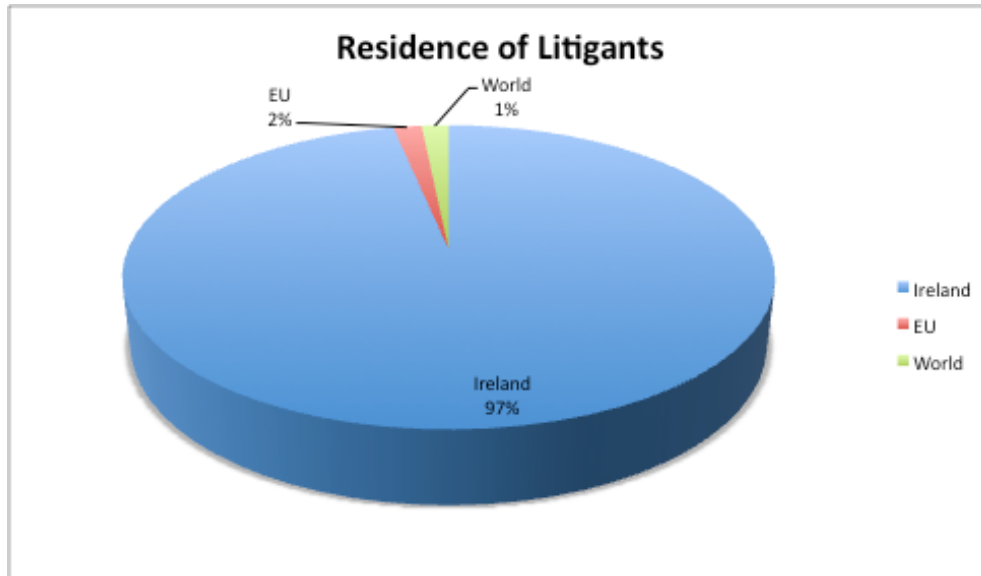


Figure 16 - Residence of Litigants

97% of all litigants resided within the jurisdiction. 2% resided within the European Union, and 1% resided elsewhere in the world.

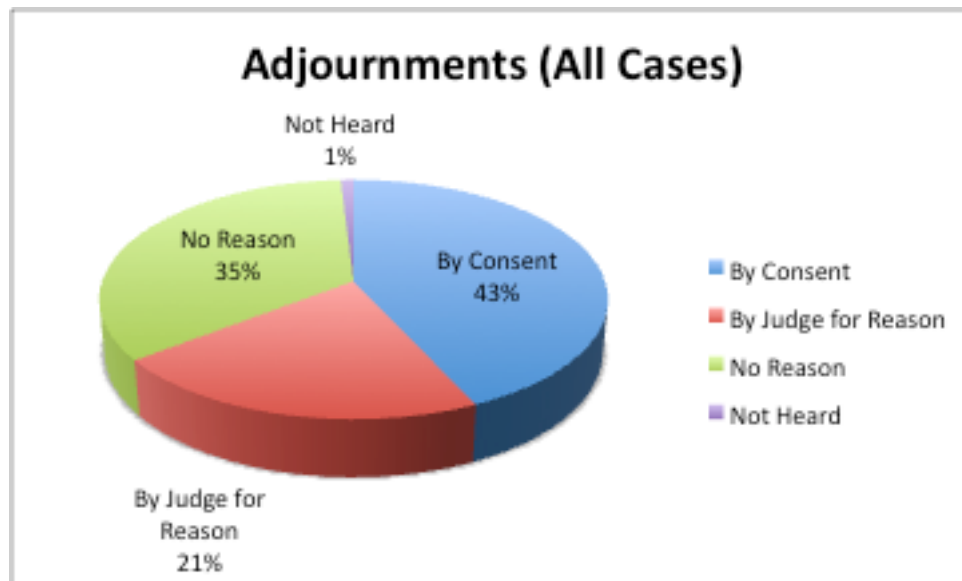


Figure 17 - Reason for Adjournment

Over-burdened lists meant that the cases listed to be dealt with on any given day during the research period could not realistically be dealt with. 24.8% of all cases listed were adjourned; of those 35% were adjourned with no reason either given or requested by the court.

The value of the Family home was available in approximately 8% of cases. The average value of the family home was €372,812, taking family home prices from 2005 to 2011 as they occurred in the database.

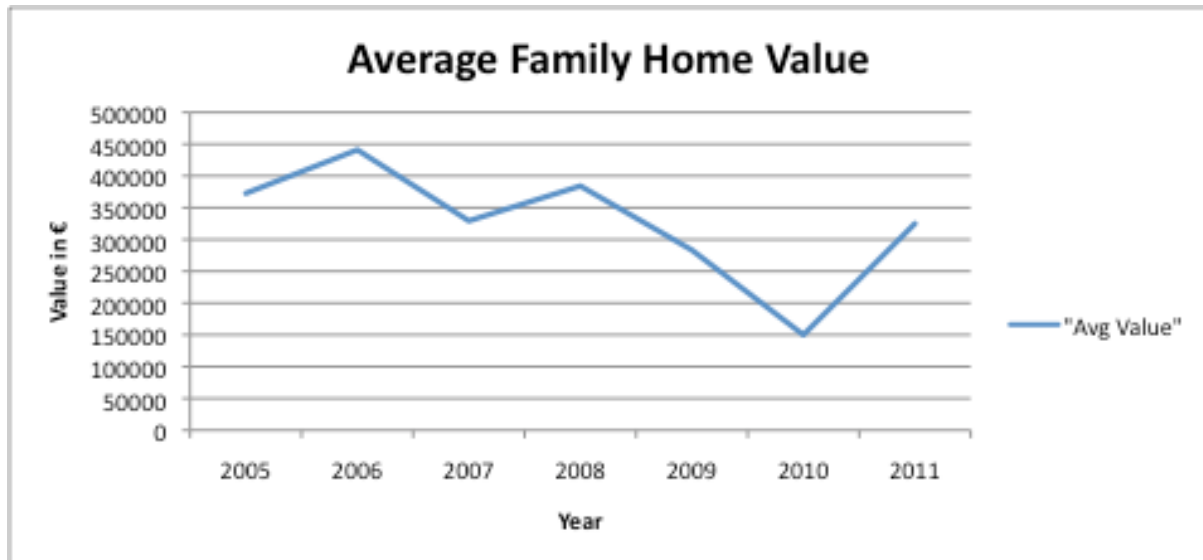


Figure 18 - Average Family Home Value

Over time the average value of family homes appeared to decrease. For 2011 there were very few observed cases (2) where a family home value was recorded. Therefore, this figure is likely to be an outlier and may be disregarded.

### *Significance of Statistical Findings*

To understand the statistical significance of the results, the confidence interval is calculated.

*A confidence interval (CI) is a type of interval estimate of a population parameter and is used to indicate the reliability of an estimate.*

The statistical approach adopted to determine the % error in a finding is the same as that commonly used by marketing companies to determine errors in surveys given a finite population. Differing from Carol Coulter's research, who compared the coverage of her sample of cases against applications to the court, the comparison made here is against orders in the court during the research period. The reason being that the data shows that applications take, on average, approximately 2.5 years to reach the court list, whereas orders made in the court are contemporaneous with the research period.

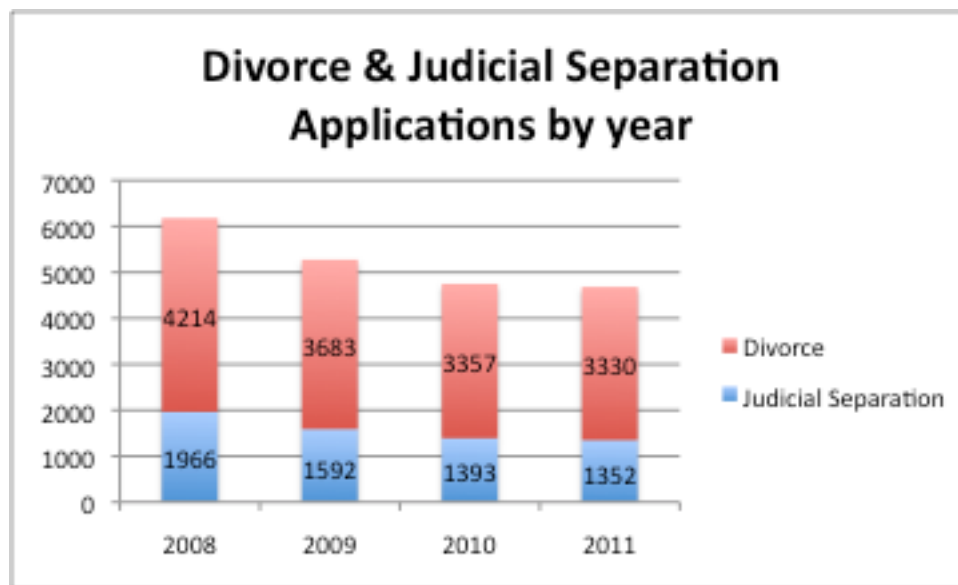
#### *Number of Applications*

The number of Applications was calculated for the entire research period from 2008 to 2012. The Number of Applications for judicial separation and divorce are shown below. 3 month estimates for both 2008 and 2012, are interpolated by assuming a consistent monthly average. The figures may not be completely accurate as a result but the contribution to the overall case number, and hence error in prediction, from seasonal variations in 2008 and 2012 will be minor.

<b>Year</b>	<b>Judicial Separation</b>			<b>Divorce</b>			<b>Totals</b>
	H	W		H	W		
2008 (1)	139	352	491	438	616	1054	1545
2009	433	1159	1592	1689	1994	3683	5275
2010	363	1030	1393	1532	1825	3357	4750
2011	339	1013	1352	1534	1796	3330	4682
2012 (2)	95	267	362	396	468	864	1226
<b>Totals</b>			<b>5,190</b>			<b>12,288</b>	<b>17,478</b>

**Table 1 - Judicial Separation & Divorce Applications during Research**

It should be noted that the numbers of Divorce and Judicial Separation applications fell from 2008 to 2011. The following graph shows the applications from 2008 to 2011.

**Figure 19 - Divorce & Judicial Separation Applications 2008-2011**

It is possible that the decrease in judicial separation applications is the result of more agreements being reached by consent, outside the court system, however, if judicial separation and divorce applications increase concurrent with, or as a leading indicator of, economic recovery, then this may indicate that economic considerations were paramount in the noted decrease.

## Number of Orders

The number of orders granted in the courts is less than the number of applications.

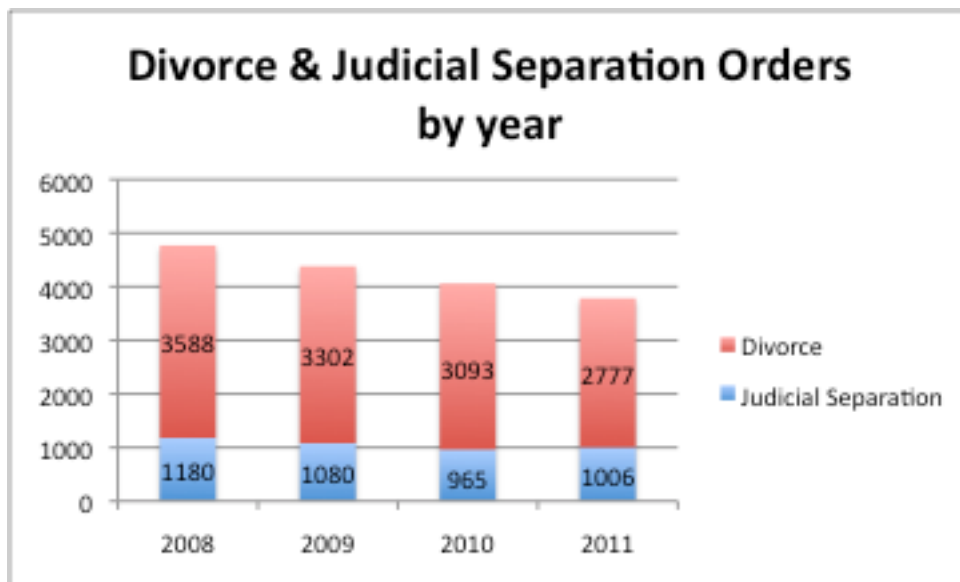


Figure 20 - Number of Orders granted 2008-2011

The following graph compares Applications versus Orders. From 2008 to 2011, there are about 18.5% less 'orders granted' than 'applications received' in the official court statistics.

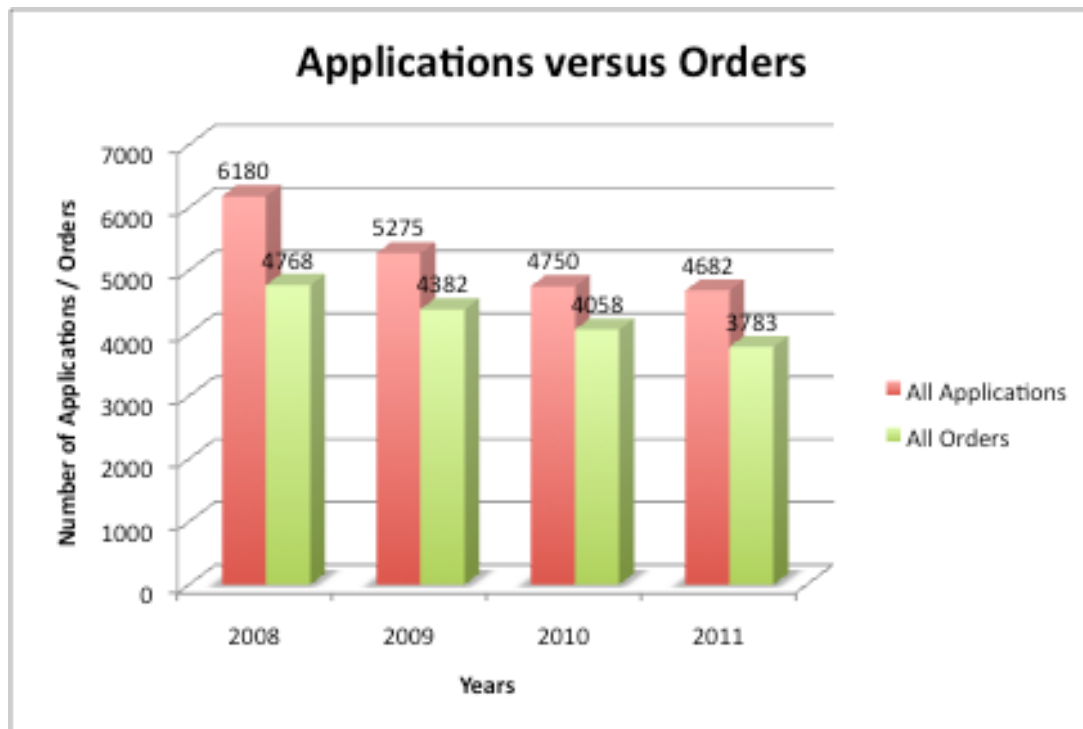


Figure 21 - Applications versus Orders in Circuit Court 2008-2011

As orders are less than applications during the sample period, the true statistical significance, and hence accuracy, of the research findings is increased in comparison with earlier comparisons, made by this researcher, against applications. The number of orders is estimated as 14,478. The estimate for the 2012 figures is based on averaging the previous 4 years because official figures have not been published by the courts service yet.

<b>Orders during Research Period</b>				
<b>Year</b>	<b>Judicial Separation</b>	<b>Divorce</b>	<b>Totals</b>	
2008	295	897	1192	
2009	1080	3302	4382	
2010	965	3093	4058	
2011	1006	2777	3783	
2012	265	798	1063	
<b>Totals</b>	<b>3611</b>	<b>10867</b>	<b>14478</b>	

### ***Calculating % Error in Findings***

The ‘Percentage Error’ is calculated based on the research sample’s coverage of the total number of orders during the entire duration of the research i.e. from October 7th 2008 – 24th February 2012. It would also be possible to calculate the % error at a greater resolution i.e. the % error for all cases during the first quarter (Q1) of 2011 is X%. This was not done however, as the research findings enable a conclusion to be drawn with a high level of confidence when comparing the entire dataset, and the courts service does not make quarterly divorce and separation figures available.

The definitions and formulae to calculate confidence intervals are shown below.

- The Confidence Interval is *CI*.
- The Sample Size is *SS*
- An adjustment to the sample size is made for a fixed population. The Revised sample size is *SSF*.
- *Z* is the *Z* score for the Confidence Level (e.g. 95%) and assumes a normal distribution of values. This is a standard assumption and easily justified.
- The finding probability is *P* and is taken from the percentage. i.e. if the finding involves of 50% of outcomes in favour of either spouse, the probability  $P = 0.5$ .

$$CI = \sqrt{\frac{Z^2 * P * (1 - P)}{SSF}}$$

**Equation 1 - Confidence Interval Calculation**

The adjusted sample size formula (*SSF*) is shown below.

$$SSF = \frac{SS}{1 + \frac{SS - 1}{Pop}}$$

**Equation 2 - Adjusted Sample Size for a Finite Population**

The following table shows the confidence interval (+/-CI) calculated for a range of sample sizes from 200 to 1200 and finding percentages from 50% to 99%. A finding percentage of 50% implies a 50:50 even split between husband and wife whereas 99% implies a ruling is strongly biased towards one party (99 to 1).

<b>Sample Sizes</b>	200	400	600	800	1000	1100

50.00%	6.98%	4.97%	4.08%	3.56%	3.20%	3.06%
60.00%	6.84%	4.87%	4.00%	3.49%	3.14%	3.00%
70.00%	6.39%	4.55%	3.74%	3.26%	2.94%	2.70%
80.00%	5.58%	3.97%	3.27%	2.85%	2.56%	2.36%
90.00%	4.19%	2.98%	2.45%	2.14%	1.92%	1.77%
99.00%	1.39%	0.99%	0.81%	0.71%	0.64%	0.59%

**Table 2 - Confidence Interval (Error) for Sample Size & Finding %**

The following graph shows the variation in the confidence interval for each finding %. The more emphatic the finding, i.e. the closer it is to 100%, the smaller the percentage error is likely to be. For instance, a finding that a judicial order for “right to reside” in the family home is made 90% of the time in favour of the woman implies 90% +/- 1.77% for our dataset, which contains approximately 1,100 cases. Such a finding suggests that the true value for the entire 14,478 cases would lie within the interval 88.23% to 91.77%.



**Figure 22 - Confidence Interval for a given Sample Size & Finding %**



The total number of relevant orders during the period has been calculated as 14,478. This figure is approximate, as we have estimated the total population of cases during her research period in 2008 and 2012.

For approximately 1,100 cases, the following approximate margins of error may be used for statistics involving percentages.

50-59%%	60-69%	70-79%	80-89%	90-99%
+/- 3%	+/- 3%	+/- 2.5%	+/- 2%	+/- 1%

This margin of error may actually be a worst-case scenario, implying that the real margin of error is less. The reason for this is that the sample data represents a sample of the findings of 13 judges. Anecdotally, it was stated in a judicial interview that around 20 judges were assigned to family law hearings in the Circuit Court, during the research period. Therefore this sample would represent 65% of the judges in the Circuit Court. If it is determined from analysing the data set, that judges are consistent with themselves, then individual rulings are not unique statistical events. For instance, if 65% of judges were to rule a particular way 99% of the time then it would be a fact, with no margin of error, that the Circuit Court rules a particular way at least 99% of 65% (64.35%) of the time. Further statistical analysis remains to be carried out to verify this.

### ***Research Cases by Circuit***

As stated previously, the dataset contains applications from 8 Circuits collected over 89 days of research. The research involved attending family law courts cases in the circuit courts from October 7<sup>th</sup> 2008 to the 24<sup>th</sup> February 2012. The research dataset consists of 1,087 unique cases, which were listed 1,179 times, some cases occurring more than once on the court lists during the period of research. The diagram below shows the research cases by Circuit.

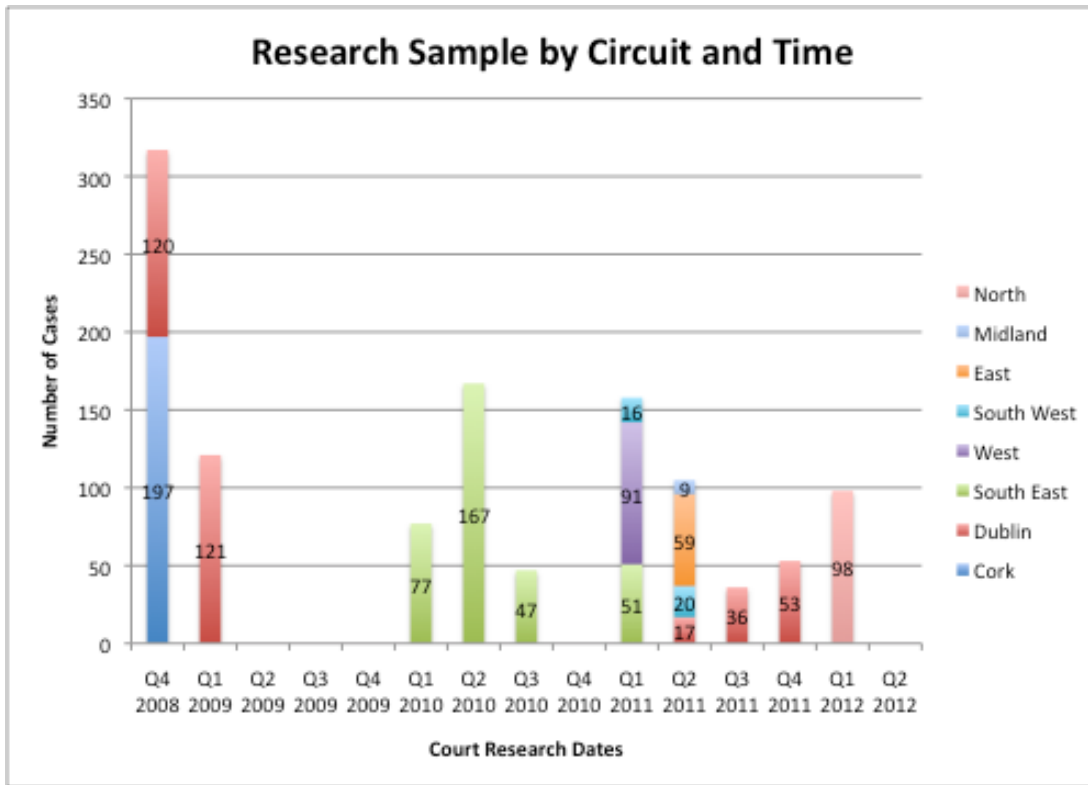


Figure 23 - Research Sample by Circuit & Time

There were no cases researched in the studied circuits during Quarter 3 (Q3) and Q4 of 2009, and Qtr 4 of 2010. Research samples by circuit are shown in the following table and diagram.

<b>Circuit Totals</b>	<b>Circuit Totals</b>
Cork	197
Dublin	347
South East	342
West	91
South West	36
East	59
Midland	9
North	98

Table 3 - Research Samples by Circuit

These show that about half the data set is taken from the Dublin and Cork circuits which is as expected given Ireland’s population distribution. The South East is perhaps over-represented, given the easier access for the researcher who is based in Waterford.

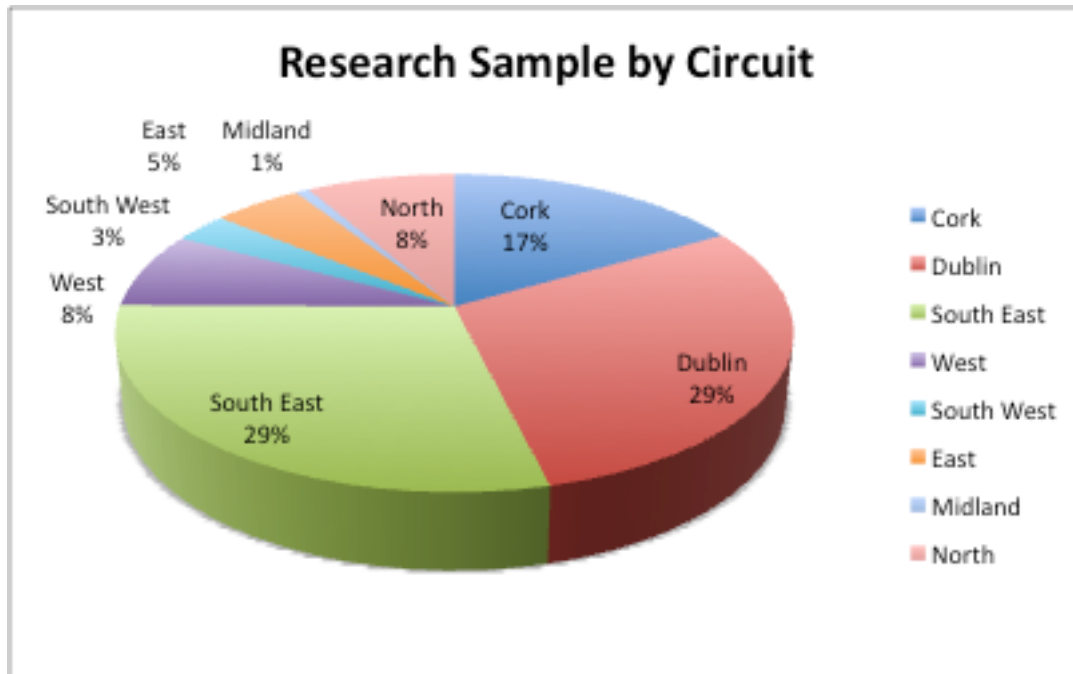


Figure 24 - Research Sample by Circuit

As previously described in this report, orders are used to determine the dataset’s coverage of family court activity during this time. There were approximately 14,500 orders (14,478).

The 1,179 cases from the list that are included in the dataset are distributed over the research period as shown below.

Court Orders versus Sample			
Year	Orders	Sample	% coverage
2008	1192	317	26.6%
2009	4382	121	2.8%
2010	4058	291	7.2%
2011	3783	352	9.3%
2012	1063	98	9.2%

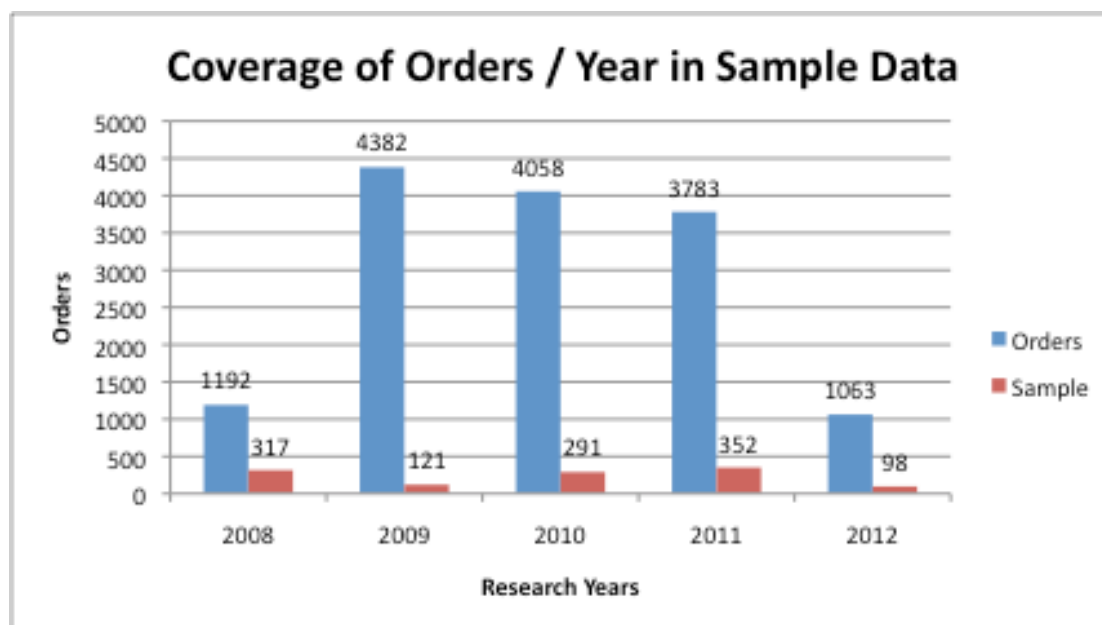


Figure 25 - Coverage of Orders Granted during the Research Period

### Assessment of the Randomness of the Data Set

*(from unpublished work co-authored with Shane Dempsey BSc. MSc)*

Statistically, it is quite complicated to answer the question as to whether the dataset represents a random sample. The court sessions that were attended were chosen in a way that was not intentionally biased. In practice, an estimate was made as to how many cases were required from each circuit. It was then determined how many days would be needed as an in-court researcher each circuit but the number of cases covered was largely dependent on the speed with which the sitting judges progressed through the list. Wide variations were observed in this speed.

Assessing the randomness of the selections from each circuit can be described within a run-test problem. There are several ways to view the construction of the run-test. One is to look at the number of cases over time. Here only one variable is being considered over time and it is therefore a “univariate” problem. A more complicated method would be to view the number of cases chosen in each circuit over time. Here, two variables are being considered and it is therefore a “multivariate” run-test. The latter test was not chosen for reasons of complexity.

The Wald-Wolowitz<sup>508</sup> “univariate” run-test is straightforward to implement. It involves breaking up a dataset into a stream of data that either exceeds the mean value (indicated with a ‘+’) or is less than the mean value (indicated with a ‘-’). The “mean” is a statistical term which is commonly known as the average. A data set of numbers representing the amount of cases sampled per quarter could then be represented as

+--++++--

which would indicate  $R = 4$  runs with  $n_1$  of 4 and  $n_2$  of 4, where  $N_1$  is the number of plus values and  $N_2$  is the number of minus values.

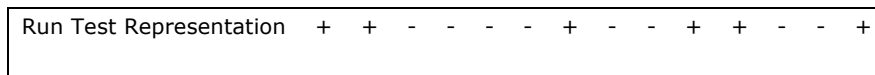
The method uses mean ( $\bar{R}$ ) and standard deviation ( $\sigma_R$ ) defined as:

$$\bar{R} = \frac{2 * n_1 n_2}{n_1 + n_2} + 1 \text{ and } \sigma_R = \sqrt{\frac{2n_1 n_2 (2n_1 n_2 - n_1 - n_2)}{(n_1 + n_2)^2 (n_1 + n_2 - 1)}}$$

$R$ : the number of runs observed in the data set.

The test statistic is then  $Z = \frac{R - \bar{R}}{\sigma_R}$

The data from the “Research Sample by Circuit and Time” graph may then be represented as:



**Figure 26 - Wald Wolowitz Run Test Representation**

Therefore  $R=6$ ,  $n_1=6$ , and  $n_2=8$ .

The mean ( $\bar{R}$ ) is 7.857 and the standard deviation ( $\sigma_R$ ) is 1.757 producing a test statistic of  $|Z|=1.056$ . As this is less than the Z-Score for the 95<sup>th</sup> percentile of values ( $\sim 2.5$ ), the test suggests that **the number of cases studied over time appears to be a random variable** i.e. not biased.

### *Database Design*

The structure of the database is informed by the research goals as described previously. Much of the effort from mid 2012 onwards has been expended producing a rich and elaborate

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<sup>508</sup> Wikipedia, Wald-Wolowitz run-test, [http://en.wikipedia.org/wiki/Wald-Wolowitz\\_runs\\_test](http://en.wikipedia.org/wiki/Wald-Wolowitz_runs_test)

database design which enables more of the information from the research to be captured in digital form for analysis within this thesis and for subsequent publications.

An SQL database has been created with separate tables described in red in the following diagram. A bespoke web-based interface was created, which simplified updating and querying the family law data. In line with the requirements of WIT's ethics committee, the database was accessed via a high security "Public Key Infrastructure" (PKI)-encrypted secure connection. The database backups were similar encrypted. The encryption was chosen by the IT researchers and is practically indecipherable. The database was not accessible to anyone except the author and the IT researchers.

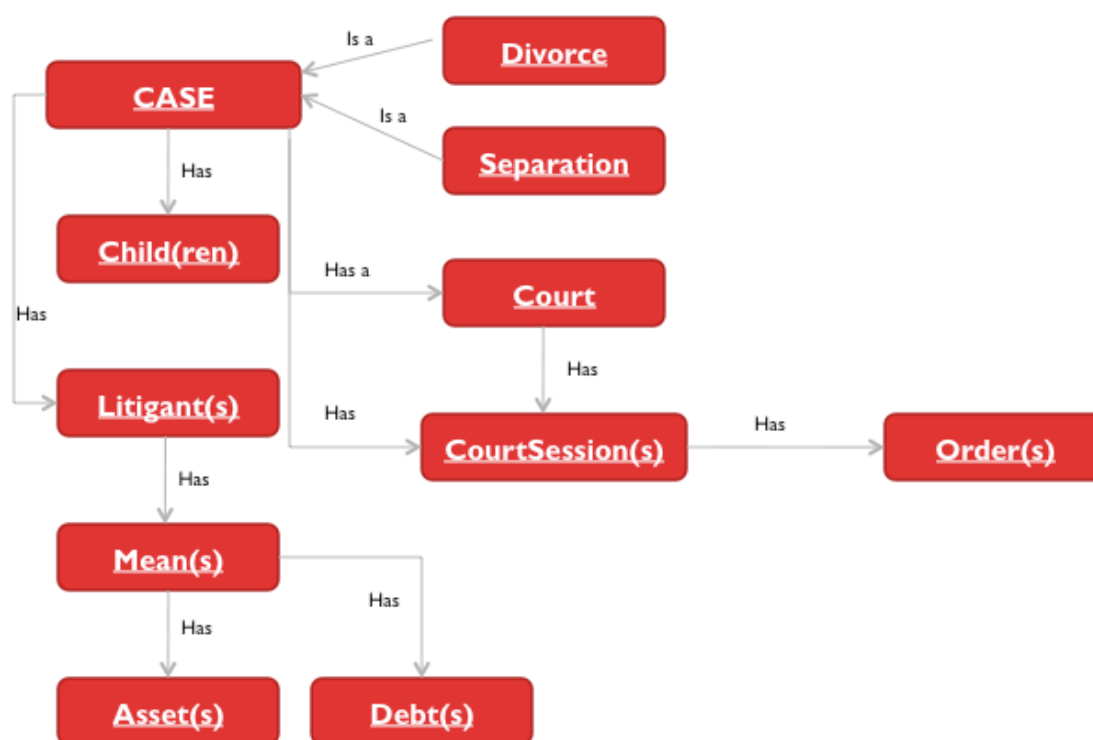


Figure 27 - Family Law Cases SQL Database Structure

The linkages between tables enable a wide variety of queries to be created, reacting to new ideas or suggestions from third parties regarding research questions. For instance:

- CASEs are connected to Litigants, Court(s) , Court Sessions, and Mean(s)
- Mean(s) are connected to Asset(s)
- CourtSession(s) are connected to Order(s)

Therefore it is conceivable to answer a research questions such as:

*Of the cases studied, how many cases were there in the Dublin circuit where greater than 50% of the assets were assigned to the separating wife during a judicial separation?*

The above query uses the linkages between case, the litigants involved in each case, the assets associated with their means, the court sessions associated with their cases and the orders (for division of assets) made during those court sessions. A researcher may then compare results of the above query for 2008, 2009 and 2010 to show how the statistic produced by the above research question varies over time.

It is hoped that the database will be usable by future legal and social science researchers within Waterford Institute of Technology.

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