Family Law Matters

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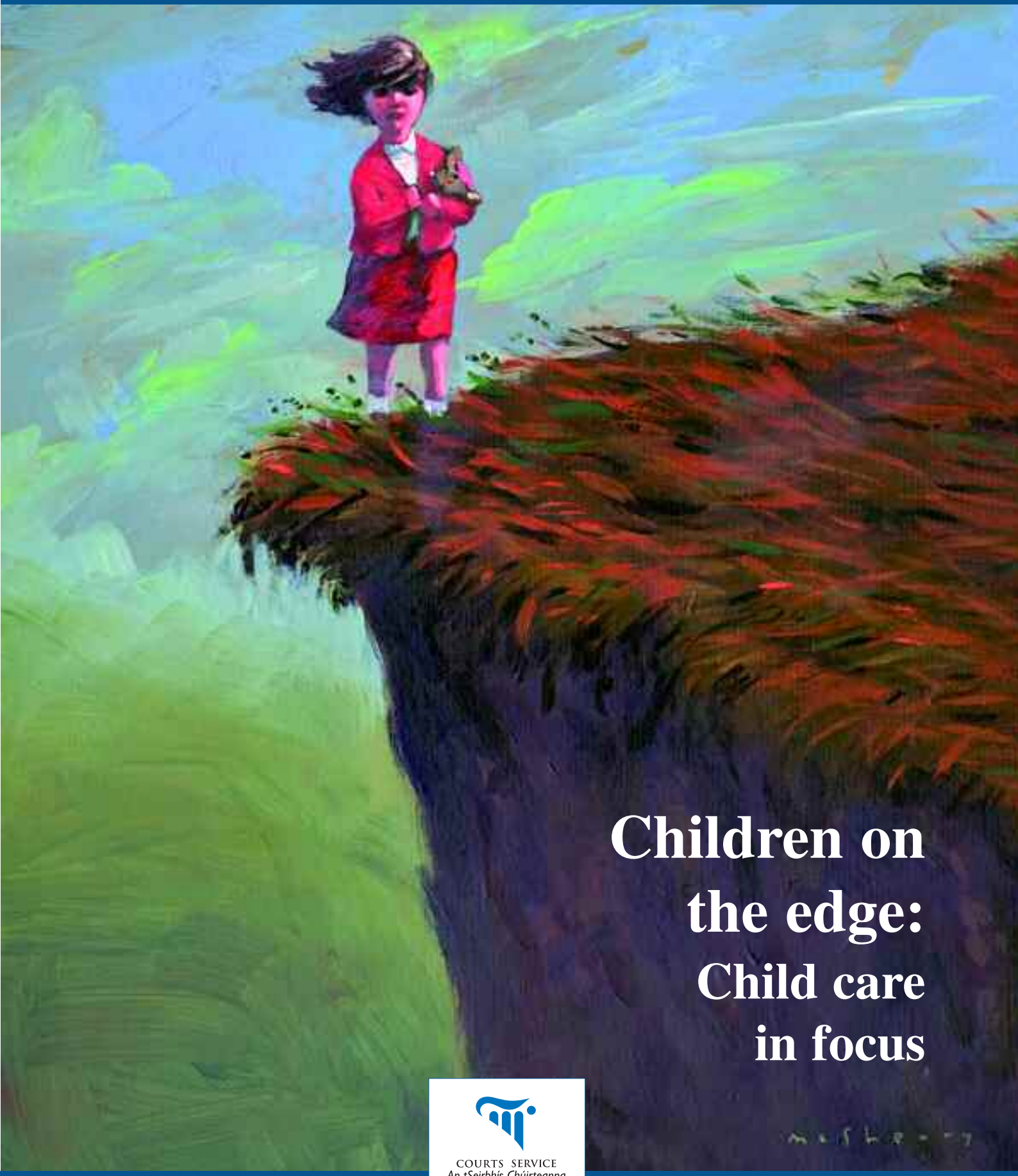

Children on the edge: Child care in focus

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Credits

Edited by
Carol Coulter

Sub-edited by
Therese Caherty

Illustrations by
Kevin McSherry

Charts and tables by
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Child care in the spotlight

This edition of *Family Law Matters* is arranged slightly differently to the first, published last February. As with the previous issue, we have divided the subject matter into reports, judgments, and statistics and trends. Reports from Dublin Metropolitan District Court Number 20 are preceded by a contribution from Judge Conal Gibbons, who sits in this court. The reports from various Circuit Courts are divided thematically, under the headings of custody and access, the family home, conduct and delay. The statistical analysis comes from Cork in this issue, there are three judgments, including one from the High Court on a "full and final" settlement, and a contribution from Pensions Ombudsman Paul Kenny.

The question of children in care was brought into sharp focus earlier this year by the High Court case concerning "D", the 17-year-old pregnant girl who wanted to travel to Britain for an abortion because her baby would not survive. This brought public attention, as well as that of the court, to the taking of children into care by the HSE, and the powers of the HSE in these circumstances.

By coincidence, before this item was conducted *Family Law Matters* had been attending the Dublin District Court where many of these cases are conducted. Thus we were in a position to report on a number of them, showing the kind of circumstances in which children are taken into care, or where they become the subject of supervision orders in their own homes.

We are also very fortunate to have the permission of Judge Conal Gibbons, who heard many of these cases, to publish a section of a paper he gave to the Judicial Studies Institute last year on how the law works in this area. He stresses the vulnerability of the children whose cases come before him, and outlines the reasons they are taken into care. The cases we publish here represent a cross-section of these reasons. They also show that the HSE's involvement in the welfare of vulnerable children does not necessarily mean they are permanently removed from their families. On the contrary, their situation is the subject of continuing review.

The other area where the courts consider the future of children is where parents dispute their custody, and the access to them of the non-custodial parent. These issues can be decided in the District Court, and often are, especially where the couple is unmarried. The next issue of *Family Law Matters* will focus on the work of the District Court, but in this issue we have examined how the

Circuit Courts deal with custody and access, either in the context of separation and divorce, or where a decision of the District Court has been appealed.

The main asset in most divorce and separation proceedings is the family home, and the concerns that surround its disposal are illustrated in the cases we report on here.

The question of the conduct of one or other of the spouses is also often raised in family law proceedings, though it only becomes a factor in the final outcome if it is "gross and obvious". In general, the courts like to look forward, seeking to assist the parties to move on with their lives, rather than dwell on how the marriage came to break down. Sometimes conduct, especially the conduct of the case where it has been long drawn out, can affect the outcome, however.

There has been some concern about the delay in cases getting to court. In one court on the Midland Circuit this led to a special family law week, presided over by Judge Con Murphy, who sought to process a large number of cases. We publish an account of how he fared.

The two Circuit Court judgments relate to applications for nullity, of which there were 39 in 2005, the last year for which figures are available. Where a nullity is granted, this has important implications for the reliefs available, as the parties are deemed never to have been married.

Finally, we are very pleased to be able to publish an important contribution to a discussion on a very complex area of family law, that of pension adjustment orders, by Pensions Ombudsman Paul Kenny.

Dr Carol Coulter

Children on the edge: District Court 20

Judge Conal Gibbons, one of the judges who sits in the Dublin Metropolitan District Court 20 where child care cases are heard, delivered a major paper to the 2006 national conference of the Judicial Studies Institute. We publish here an edited excerpt from that paper

Our decisions have lifelong impact on those whom we seek to protect and care for

Child care law is a hidden world in the sense that like private family law proceedings generally public law child care applications are heard in camera. It is hidden in the sense that the citizens are not aware of it and its workings do not permeate the public consciousness as some of our other courts do. Much media attention is focused on the terrible abuses that happened in the recent past in the various residential homes, and on the awful sexual abuse of children, but little attention is paid to the trials and tribulations of families in crisis today.

According to Professor Powell, of the Department of Applied Social Studies, UCC, Cork, in a letter to the *Irish Times*, the powers of social workers came about because of rampant child abuse in the late 19th century. Court provision and child protection followed the successful Mary Ellen case in New York in 1875, when an abused child was brought to the courts under animal welfare legislation as there were no child protection laws in force then. He said that a vigorous child-protection movement emerged, including organisations such as Barnardos, the ISPCC (then NSPCC) and many others, which sought to uphold children's rights and insist they be treated as citizens with a right to care and protection by the State. The 1991 Child Care Act, replacing the 1908 Act, to quote Mr Geoffrey Shannon in his book *Child Law*, "replaces a legal framework that was best described as skeletal". The new Act defined a child as a person under the age of 18 years. Thus began the modern era of child care proper in Ireland. The promotion of the welfare of a child became the focus of the courts. In the case *State (Kavanagh) v Sullivan* Kennedy CJ said that welfare had to be taken in its widest sense, not merely physical comfort.

The District Court has a huge responsibility. It has a power that is similar to a life sentence in effect, because the consequences of our

Percentages of children in HSE care

Former Health Board Area	Care Order	Voluntarily
Eastern Region	40%	60%
Midland	23%	77%
Mid-Western	64%	36%
Nth-Eastern	53%	47%
Nth-Western	65%	35%
Sth-Eastern	29%	71%
Southern	43%	57%
Western	51%	49%
National	**43%**	**57%**

HSE analysis of reasons children are in care

	Abuse				Child Problems						
Former Health Board Area	Emotional abuse	Neglect	Physical abuse	Sexual abuse	Abusing drugs/ alcohol	Involved in crime	Pregnancy	Emotional/ behavioural problems	Mental health problem/ intellectual disability	Other	Physical illness/ disability
ERHA	13	618	120	59	0	0	2	35	1	98	0
MHB	36	59	13	9	3	4	0	19	0	0	0
MWHB	16	80	23	15	0	0	0	11	2	5	1
NEHB	17	202	28	9	0	0	0	2	0	10	0
NWHB	6	28	18	12	2	0	0	4	0	0	2
SEHB	11	117	23	29	0	0	4	39	14	27	4
SHB	40	206	53	12	3	0	1	14	1	1	1
WHB	8	76	12	14	1	0	0	10	1	5	0
National	**147**	**1,386**	**290**	**159**	**9**	**4**	**7**	**134**	**19**	**146**	**8**

decisions have lifelong impact on those whom we seek to protect and care for.

Statistical Information

The number of children in care in the Irish republic, according to an *Irish Times* article August 16th, 2006, was over 5,000. It stated that there was a greater likelihood of children going into care in the east than the west of Ireland. It also found that the west had higher investment in family support services than the east. In 1989 there were 2,700 children in care compared to the current figures. I contacted the HSE seeking information and Mr John Smith from the chief executive's office kindly obliged me in this regard.

The figures garnered from the Courts Service with respect to care orders reflect the urban/rural dimension shown in the HSE figures. I was surprised to learn that the court only deals with about 43 per cent of children placed in care. This means that children are being placed in care on a voluntary basis *simpliciter* or under section 4 procedure, without any court involvement at all.

The reason why the interim care orders (ICOs) were drastically reduced from 2002 to 2003 was simply due to the amendment made to section 17(2)(b) of the Child Care Act by section 267(1)(a) Children Act 2001. This increased the maximum time for an ICO from eight days to 28 days. By consent of one of the parents that period may be extended but this is done rarely.

My inquiries to the HSE sought further analysis of the figures, which is outlined here.

The figure here that stands out is that of neglect and the one that also intrigues me is the heading that denotes there are four children in care because of their involvement in crime.

Children on the edge

It is troubling at times to consider the children who come before Court 20. I describe these children as being on the edge; they are on the edge of society, on the edge of their families, on the edge of the care system and often on the edge of their lives. It just takes one little push to put them over the precipice. It is difficult to get Irish statistics, but according to figures for children in care in the UK half of all children in care are failing to achieve a single qualification in school, with only six in 100 making it to university. They are five times more likely to have a diagnosable mental illness and almost one third will not have received their basic inoculations. Many children in care end up in prison or turning to drugs and prostitution, according to Baroness

The figure that stands out is that of neglect

Breakdown of numbers in different types of care

Former Health Board Area	Foster Care General	Foster Care Special	Foster Care Relative	Pre-Adopt. Placement	Residential General	Residential Special Care	Residential High Support	At Home Supervision Order	Other	Total
ER	988	0	603	5	221	12	12	10	229	**2,080**
Mid	199	0	74	2	18	4	2	0	1	**300**
MW	266	13	121	3	4	1	12	10	8	**438**
NE	274	10	97	2	14	0	2	0	38	**437**
NW	126	0	47	0	16	1	1	7	6	**204**
SE	367	2	121	9	48	5	16	2	5	**575**
S	446	0	197	9	30	1	4	3	14	**704**
W	203	0	89	8	14	3	1	0	4	**322**
National	**2,869**	**25**	**1,349**	**38**	**365**	**27**	**50**	**32**	**305**	**5,060**

Morris of Bolton, quoted in *Hansard*, October 9th, 2006.

The most troubling cases are those where children are physically or sexually assaulted, those who suffer non-accidental injury (NAI) and the separated children who arrive here unaccompanied, destitute and often destined for a life of domestic slavery or worse, such as being absorbed into the sex industry.

We as judges have the ultimate responsibility. We are obliged to inquire about such matters and in particular to ensure that the children are being correctly cared for. It is appalling to hear of children who are supposed to be in care of the HSE availing of bed & breakfast accommodation, the out-of-hours emergency accommodation service despite the provisions of section 5 of the Child Care Act, which could not be clearer with respect to the HSE responsibility for homeless children.

Cases such as *PS v EHB* set the position out in clear terms. Geoghegan J, then of the High Court, made clear the position and obligation of the HSE in this regard where a child was staying in unfit accommodation. I accept that social workers and the HSE do a difficult job and people do not become social workers in order to make money, they are caring people.

At times though, there is little or no communication between the duty social workers and the assigned teams in different areas. You even get cases occasionally where a garda will have activated the section 12 emergency procedures but due to communication breakdowns, children at risk will have been returned to a parent in crisis without discussion or consultation between the social work teams, or the original garda, who initiated the process. It brings to mind a recommendation of the Laming Report into the Victoria Climbie case:

> *Managers of duty teams must devise and operate a system which enables them immediately to establish how many children have been referred to their team, what action is required to be taken for each child, who is responsible for taking that action, and when that action must be completed.* (Laming Report, HMSO, 2003)

A case as tragic as Victoria Climbie does not appear to have happened here as far as I am aware, but we have a system not unlike that in the UK where social workers are dealing with impossibly large caseloads, in a climate of scarce resources and crisis management. They have not the necessary technology and systems that any modern agency would require. Sometimes files are unfortunately shut for the wrong reason. Too often children move from one care area to another without proper reference onwards or communication to those who should be responsible. At times, proper assessments of

the children are not made and the different agencies and personnel do not have the means or systems to deal properly or appropriately with files in a systematic way. Of course, in the majority of cases proper procedures work, but we have to ensure that they work in all cases that come before us.

The appalling circumstances or the terrible reality for many children worldwide has been well documented at every level, most recently at the International Association of Youth and Family Judges and Magistrates XVII World Congress in Belfast, held in September 2006, which set out some of the horrors that children face.

The congress delegates heard among others issues of human rights violations of children, of execution by death squads, torture, unfair detention, forced genital mutilation, slavery, trafficking in human organs, the murder and abuse of street children, forced marriage, and forced conscription. Is it any wonder that some children are washed up on our shore, alone, unaccompanied and separated? It is said that at any one time, there are approximately 200 separated children in State care.

The legal framework used by the HSE for unaccompanied or separated children is usually that of section 4 of the Child Care Act 1991, which is a deemed voluntary care order in circumstances where parents are not contactable. Section 8 of the Refugee Act and sections 3, 4 and 5 of the Child Care Act 1991 are also utilised in these cases.

The National Children's Strategy commits the Government to treating separated children in accordance with international best practice. The strategy includes a commitment to undertake research into the needs of refugee children and to provide an independent *guardian ad litem* to look after their best interests.

The hostels which accommodate the children have posed difficulties in the past and often have appeared to have minimal levels of staffing which is a likely contributor to the fact that some of these children go missing.

In any case that comes before Court 20 now with respect to these children, or any child who is being placed in a residential institution, I believe that it is appropriate that the court should make the following minimal inquiries of the HSE to ensure that these institutions are proper places for these children:

1. Who owns the institution;
2. Is it owned by limited liability company, unincorporated association, charity, a private provider, or the HSE;

3. Depending on details supplied, if a company or private agency, confirmation that it is registered, compliant and up to date;
4. Details of directors or persons in charge or accountable;
5. Copy of the most recent social services inspectorate report or HSE inspection report if it is not covered by the Social Services Inspectorate;
6. Details of staffing and confirmation that they are appropriately qualified and numbers sufficient in accordance with best practice;
7. In view of young people going missing, I ask what controls and management systems are in place to deal with this risk.

Work of the Dublin Metropolitan District Court

Court 20 deals exclusively with child care issues under the Child Care Act 1991 as amended and the District Court (Child Care) rules 1995 on a daily basis and its business consists of the following applications:

(1) Emergency care orders (ECOs), returnable for eight days;
(2) Interim care orders (ICOs), returnable for 28 days if not on consent, unlimited time if on consent;
(3) Extension of interim care orders, returnable for 28 days if not on consent, unlimited time if on consent;

(4) Matters for review if care order in place, (usually a day or half day to hear);
(5) Full Care Order hearing (anything from one day to 30 days may be required);
(6) For mention matters, which are heard each morning.
(7) Any emergency care *ex parte* application which the court may not be on notice of at the commencement of the court.

The number of cases heard daily at present ranges from five to 12 ICOs and then from 11.30 am to 4.00 pm we list the full hearings for care orders. Until recently, the system was differently handled. Each Tuesday and Thursday, ICOs, ECOs and Supervision Orders (SOs) applications were heard from 2-4 pm. This system became unwieldy and caused problems for the court and its users.

At times it was impossible to fit in the number of cases in the hours allocated and judges often found that they were sitting until 5 pm, 6 pm or 7 pm and even after. There was an obligation on the judge to read relevant reports, hear evidence and then submissions in many of the cases. At many hearings, applications were consented to or they were uncontested. If uncontested, the judge had to hear the evidence and read relevant material. The only difference between the uncontested and contested hearing in this context is that there is no cross examination. These hearings deserve time and attention; more importantly the children and the parents are entitled to it.

ICO applications often determine how the case will proceed. The vast majority of cases that come before the court at interim care order stage end with care orders. Thus it is crucial that they are given a proper listing and parents are given time to deal with the matters arising. Unfortunately at this crucial stage most are not represented. This is simply because the civil legal aid system cannot react quickly enough to represent these clients and has a backlog of appointments. I do not have a statistical analysis to illustrate this point, but I believe it has a major impact on the quality of justice in the court.

It is important that I acknowledge the work of my colleagues who have created the system that has worked so well to date. It would be invidious if I mentioned names, but I believe their work is well recognised as indeed has been the work of judges in other courts, who have ploughed a furrow in the apparently barren soil of children's rights. For example, it was agreed that the HSE would produce reports at each application and that at the hearing of the care order application they would produce a Book of Reports, not unlike a Book of Evidence, and furnish this to the respondent's solicitors in advance of the time for the hearing.

Judges of the District Court applied the provisions of the Child Care Act carefully, and when their decisions were challenged or appealed to the higher courts this resulted in a process of child care law being reviewed, to the benefit of the development of the jurisprudence. An example of this is the fundamental case of *EHB v District Judge McDonnell.*

Each day produces new issues and challenges but I believe that we in the District Court take our responsibilities seriously in this very important area of our work.

The full version of this paper is available from the Judicial Studies Institute, Phoenix House, Dublin 7.

The Act is available to download from www.irishstatutebook.ie

The number of cases heard daily ranges from five to 12

Orders Granted by the Dublin Metropolitan District Court 2002-2005

	Supervision Orders	Care Orders	Interim Care Orders
2005	78	35	212
2004	29	20	243
2003	22	28	205
2002	45	32	937

Estranged husband takes wife's passport

'Is the child the daughter of your client? How did the child leave Ireland and when? What were the circumstances and what arrangements did your client make with the father?'

The HSE sought an emergency care order in Dublin District Court for a child stopped by immigration officials while coming through Dublin airport. The 3½-year-old girl was with a man who said he was her father and a woman claiming to be his wife.

A garda told Judge Conal Gibbons he had arrested the family because the photograph on the woman's passport did not appear to be hers. She said the passport was her sister's and she was the child's aunt. Because there was no proof at all that the child was related to the woman the garda decided to invoke section 20 of the Child Care Act and the couple was arrested.

The man had a US passport and a passport for his African country of origin, both genuine. He also had €30,000 in cash. He said he was the estranged husband of the child's mother.

Inquiries established that the child's mother was in Ireland and that she had arrived in October 2003. The child was born in November that year. The mother obtained residency in Ireland as the mother of an Irish-born child.

The HSE social worker said they had tried unsuccessfully to contact the child's mother. The child had been placed with a family and was in good form. She spoke good English and knew her mother's name. This accorded with the name given by the man.

Judge Gibbons made an emergency care order for a week, and ordered that the child not leave the jurisdiction or the care of the HSE without returning to court.

When the case resumed a week later the child's mother was in court. She said her husband lived in the US and visited her in Ireland in order to get to know his daughter. He had applied, as a US citizen, to live here and had spent some weeks in Ireland in August. She became pregnant again and the baby was due in April.

She had asked him to take the child in March because she was heavily pregnant and in full-time education. He took her with him on a business trip to another African country. She said she did not know he had also taken her passport. Breaking down in the witness box, she said her husband was having an affair with her sister, which she had not known about.

"When I asked him to take the baby I did not know he took the passport for my sister," she said.

Addressing the woman's solicitor, Judge Gibbons said: "The issues I have to determine are: Is the child the daughter of your client? How did the child leave Ireland and when? What were the circumstances and what arrangements did your client make with the father?"

The woman said she had asked her husband to take the child and he had not given any specific date of return, except to say it would be before the birth of the baby.

"What is worrying me is this – I can understand you seeking the assistance of your husband at this time. But why take the child to [the African country]? It's a long way away. And then he presented at the airport with a person impersonating you. It is hugely concerning for me from a child-protection point of view. A child has gone a considerable distance from home and arrives back in Ireland in very strange circumstances. The child has been out of Ireland for a month. We don't know where she was."

The woman said her husband had told her where he was going. "But he also took your passport without telling you," said the judge.

The mother's solicitor said the woman's confidence in her husband had been abused.

She was a good mother. She was in full-time education and had just had a baby. "It turns out her husband created this mess. I see her as an innocent party in all this," said the solicitor.

Counsel for the HSE said it was concerned that she had allowed the child to travel with the father but that this issue could be addressed without splitting the family. Judge Gibbons said a supervision order was the correct way of dealing with the issue. He granted this order for 12 months, with a review in six months.

The child's passport should be handed into the Garda and the mother would have to give an undertaking that the child would not travel outside the jurisdiction without the court's permission. The passport could be released to the HSE if needed to register the child in school.

Poor school attendance prompts supervision order

In Dublin District Court, Judge Conal Gibbons continued a supervision order relating to an eight-year-old girl. Concerns about the child's poor school attendance had given rise to the order.

The social worker said the HSE had concerns about neglect of the child and cannabis misuse by the parents. Family support services visited the family three times a week but got little co-operation from the parents.

Social workers had difficulty engaging them in tasks such as budgeting and had not got as far as food preparation yet. The HSE wanted the parents psychologically assessed on their ability to care for their daughter.

The child was of average ability, but poor school attendance meant she was very behind in her education. This had improved a lot, and she had only missed one day since the last hearing. She was attending the school breakfast club, and stayed in school to do her homework. Additional tuition had been arranged for her during the summer holidays.

Reading from the social worker's report, the judge noted that the *guardian ad litem* previously appointed by the court had said the child's emotional equilibrium had been disturbed by her father telling her she would be taken into care.

"That's outrageous," he told the parents. "You don't discuss matters with her. If you have a problem, take it up with the social workers or the *guardian ad litem*. Don't discuss it with the child. It's not fair to her."

"I just panicked," the father said. "I thought she would be taken from the family home. I wanted to prepare her. Any father would want to do that."

"I accept you did it without thinking. But the consequences can be terrible for a child," the judge said.

"Matters have improved since the last day," he continued. "The *guardian ad litem* recommends that the supervision order be continued and that I order you to adhere to the terms of the supervision order. A supervision order is a court order. If you have difficulties with it, instruct your solicitor to come into court and get it changed. Until then it must be obeyed.

"The HSE and the court are anxious that [the child] remains with you and the purpose of this is to give you a dig out so that she will thrive and prosper and get on well in school.

"I accept it's not nice to come in here and hear me pontificate. But a family support worker is a fantastic resource. Look on it as an opportunity and grab it with both hands. It won't last long."

'A family support worker is a fantastic resource. It won't last long'

Woman turns up drunk at mother's house

The HSE sought the attachment and committal to prison of a young woman for a breach of an Interim Care Order.

She had turned up at her mother's house drunk, demanding to see her children, who had been placed in her mother's care by the HSE.

In Dublin District Court, Judge Conal Gibbons asked the young woman if she was taking any substances. "I took nothing today. I'm on methadone. I have a urine test every Friday," she said.

"I want the HSE to get copies of those results. Do you consent?" asked the judge.

"Yes. I have nothing to hide," she replied. She told the judge she had been on methadone for 10 years.

"Experts have told me you can live a perfectly normal life on a base level of methadone. You can keep a job and look after your family. Is that how you understand the position?" the judge asked.

"Yes," she said. "I want to come down [in dose]. It's something I've discussed with my doctor. I'm living with my dad. He's a good man."

Asked if she drank to excess, she said: "I probably do." She said she did not drink in front of her father, who was a non-drinker, but went to her room at night, where there was a television, and drank cans of beer.

"Do you go to your mother's after a few cans?" asked Judge Gibbons.

"A few times," she replied. "I miss me kids. They're away a long time." She also objected to the social workers being around all the time on access visits.

"In view of what has happened access has to be supervised at the moment," the judge said.

"The social workers won't try to interfere, so that you and the kids can interact freely. But you're not in contact with the social worker so there can be no access. Then you get upset and you go up to your mother's house, and one thing leads to another, an incident happens and all hell breaks loose.

"The whole reason Mr [the social worker] came in here is to put you in prison. It's part and parcel of our [the courts'] job."

"We don't have a good relationship. I don't like the man," the woman said, referring to the social worker.

"We're not here to like each other. You don't have to like me," the judge said.

"You're all right," she commented.

"Mr [the social worker] is at the end of his tether," said Judge Gibbons. "He has responsibility for the children in law. I want you to give an undertaking that you won't contact the children or your mother until Monday or Tuesday next. Talk to Mr … and set up structured access. Go to the law centre and get a lawyer, and I will talk to you again on Monday," the judge said, adjourning the application.

When the case resumed the following Monday the woman took the witness stand and said she understood she had broken a court order and she apologised sincerely for doing so. She had done so because it was the children's birthdays. Asked by her solicitor about her plans for the future, she said she and the social worker would come together and make arrangements for access, she would abide by them and never break the order again.

"The problem I have is that if the kids are in a placement with your mother and that is put at risk the HSE will have to take them and put them with a stranger. That would be very troubling and would have repercussions for the children," Judge Gibbons said.

"Having the children with your mother is second best until you get back on your feet. That's never ruled out under our system, even if a care order is made. The best

'Having the children with your mother is second best until you get back on your feet. The best outcome for everyone is the children back with you'

outcome for everyone is the children back with you."

"I admit I do have a problem with alcohol," the woman said. "The judge also knows I'm on methadone.

There's two problems there. I'm dealing with one at a time. I would be willing to go somewhere to look at dealing with the alcohol."

The solicitor for the HSE said that they were looking at residential programmes for dealing with alcohol abuse but most residential centres did not accept people who were taking methadone.

The woman said she wanted to deal with the alcohol problem. She added that last Christmas her grandmother had died, then two of her uncles had died, one in a road traffic accident, and all the deaths had taken place within weeks of each other. The whole family had been very upset at that time. Access was difficult because the social worker was beside her all the time.

"I'll be blunt," said the judge. "Because of your behaviour trust was down at rock bottom. Their job is to protect the children. Supervised access is a loose term. You have to rebuild trust and put up with a bit of shadowing, and you will find that as trust builds it will disappear.

"At any time when a child is in care if a parent gets over the difficulties they have they can take over the care again. Whatever you do, when you are going on access with the children, don't drink."

"Never," she said.

The judge discharged the application for committal.

Father rejects psychotherapy advice

A father agreed to a supervision order made by Judge Conal Gibbons in Dublin District Court relating to his five dependent children but he objected to one condition.

His wife had died the previous October leaving him with six children, the oldest was 20. He was working and doing the best he could for them and accepted the help of the HSE. But he objected to being asked to receive psychological treatment for an alcohol problem. His counsel told the court he denied he had such a problem.

He was willing to accept that the social worker came to his house three mornings and two afternoons a week. He was also willing to give an undertaking that he would refrain from alcohol abuse. But he denied he needed psychotherapy.

"I feel ordering people to go to a psychotherapist is self-defeating," Judge Gibbons said. "Unless a person wants to go is it useful?"

"There were recommendations to assist," counsel for the HSE said. "They were included because the social worker was of the view that there was a difficulty."

"What Mr … needs is practical assistance," said the judge. "I have heard him. I feel if he thought he would benefit from this he would go for it."

"The problem is that if it is an order and it is not obeyed Mr … can be jailed," said the man's counsel.

"We don't go there in this court," said the judge.

He pointed out to the social worker that the man had agreed to refrain from alcohol abuse and from verbal abuse of the children. He also agreed to the social workers calling unannounced.

"They might be the last people you want to see at the time," he told the man. "I think things will work out for you and your family. I will delete condition two [referring to psychotherapy] in the circumstances."

'I feel ordering people to go to a psychotherapist is self-defeating. Unless a person wants to go is it useful?'

Teenager in care wants to go to college

Dublin District Court approved an after-care plan for a 17-year-old girl in HSE care who wanted to go to university.

The social worker said the girl was doing very well in school, especially in light of what had happened to her, including her mother's death the previous year.

She was living with foster carers and was about to do her Leaving Certificate. She wanted to study law and business at university.

"Is it the position that the HSE will support her if she does it?" asked Judge Conal Gibbons. Counsel for the HSE said it was and that the girl would be assigned an after-care worker.

"I would be anxious to ensure this after-care plan covers all the angles," said the judge. "There is no statutory provision. I want the HSE to agree to support [the girl] at third level, that it exercise its discretion in favour of providing help, and set out the support in the plan, including even [her doing] a professional course if necessary. I want it written in some form that is enforceable."

He asked that the plan be reviewed in September, when the girl's Leaving Cert results would be known.

He added that section 45 of the Act, which gave the HSE discretion in after-care for children who had reached the age of 18, was a very important section.

In Brief

Teenager awarded maintenance

Judge Donagh McDonagh awarded an 18-year-old girl maintenance in the Western Circuit Court against her father on the basis that she was in full-time education.

The girl's parents were separated, and her mother had died two years earlier. Her father was in a new relationship, where he had two children. Her father had been paying maintenance while she was under 18 and agreed to pay €3,200 a year while she was in third level education.

She had done her Leaving Certificate in 2006 and was now doing a post-Leaving Certificate course. She had applied to do a course in university, starting in the coming academic year. Her barrister said that the father had not paid a lump sum of €5,000 promised the previous July to the court. She said there was also a question over whether the PLC course was third level education.

The father's barrister said it was not a black-and-white situation. Paying the maintenance was no problem but her client could not pay this and the lump sum.

He was in a new relationship and had two young children. There was a question about whether the girl was engaged at present in full-time education.

Judge McDonagh said the order for the lump sum still stood and should be paid next September if it was confirmed that the girl had a place in a third level institution.

'You can't be moving children around too much'

In Cork Circuit Court Judge Harvey Kenny reduced an unmarried father's access to his two children when the man appealed against a District Court order relating to his existing access.

The man's barrister said the couple had two children aged eight and four. They had cohabited for 12 years and separated in 2003. In May 2006 they had agreed an access schedule where the father had overnight access Monday to Wednesday one week, and Wednesday to Friday the other week, with every second weekend. He could be flexible in his working hours while his former partner could not. A child-minder cared for the children after school though the father took them out on his designated days. This agreement was made an order of the District Court last May.

After this, the mother moved to a town about 60 miles from the city without consulting the father and changed the children's schools. The father challenged this in the District Court where the judge ordered that he have access three weekends out of four, with access midweek on two days in the rural town. The mother appealed this and the father's access was reduced to two weekends, along with his contact midweek.

The father said he had been married previously and had two children in this marriage. In 1990 he had been awarded sole custody of these children whom he had reared alone. They were now grown up and working.

He lived with the mother of these younger children in the city from 1996 to 2003, when the relationship broke up. At this stage he sought guardianship and joint custody, which was granted. His access consisted of 16 nights out of 33.

He got a trampoline in his house which meant the children's friends could come and play with them. He took them swimming and helped them with their homework. They had the same child-minder since the older child was 18 months old, and his daughter's son, who was the same age as the younger child, was also with this child-minder.

In the summer the children's mother told him she was moving with the children. His eldest daughter was distressed. "I was devastated," he said. "The children are now in [the town] being minded by a Polish au pair. Their mother is working five or sometimes six days a week in Cork, leaving at 7 am. Both their parents are in Cork. I have to travel 300 miles a week to see the children. I gave up work to spend time with them. It doesn't make sense that their parents are in Cork and they're in [this town] with a Polish person.

"All I want is to be able to give them the time they need. The District Justice said what she did was wrong and I was an excellent parent. The eldest says she wants to leave and move back to Cork where she has her friends. When they come to Cork for weekends they're in a huddle with their friends.

"From the day they were born I spent time doing things with them."

Asked what he wanted now, he said: "They could live with me in Cork and she could see them after school. She could bring them to [the town] on weekends after school and back to school on Mondays."

The mother's barrister suggested to him that it was better for the children to be in a town surrounded by their mother's extended family, in their own home after school rather than in a child-minder's.

The father's barrister said the joint residence was agreed following the advice of psychologists and was made a court order in May 2006. The move frustrated this order.

'I have to travel 300 miles a week to see the children. I gave up work to spend time with them'

The mother said she came from this area, and in the summer her sister had been diagnosed with cancer and she decided to move back there. Two sisters and a brother lived in the town, and her mother lived nearby. "In Cork I had no family around me. I lived quite far from the school and there was a lot of travelling for the children."

She said she left about 7.45 am and was home about 6.30-7 pm, though occasionally it was later. She was looking for a job locally. "They love it there. They love having family around and they have friends. When we separated the older one felt it hugely, but the younger one was only 14 months. Before we moved the older one was complaining of constant tummy-aches. She hasn't had one for nine months, and she's thriving now."

Referring to the prospect of the children moving back to Cork to be with their father, she said: "I love the ground my children walk on. I'd be devastated if they left me."

Judge Kenny said: "There's no question of that. You may have to move to Cork."

The mother said she had moved because, as a single mother, she needed the support of her family. In Cork the children were out of the house 12 hours a day. Now they were coming home from school to a warm house and her mother and sisters were around.

"Travelling takes its toll," said the judge.

The mother said she had been talking to a potential employer about working in the area. In response to the father's barrister, she said she worked nine to five. She was home about 6.30-7 pm. The children went to bed about 8.30-9 pm.

"So you have 10 quality hours a week with them," the barrister said. "When they were in Cork the younger child would have been with her father from 1 pm until the next morning. She would have had more time with her father than you do in the whole week. A childminder or au pair is always second best. Now they are being deprived of time with their dad."

The mother said they saw him for six hours two days a week.

"You have created more accessibility for your family than their father," the barrister said. She also said that in 14 mediation meetings the question of the move was never

discussed, it had come out of the blue. "If your daughter was seriously ill you are one and half hours away. Neither parent would be available. That is the situation you have created.

"You did this to frustrate the May 2006 order. Did you appreciate it was a court order? You breached it deliberately."

"When I decided to move I met [the father] to discuss it. He didn't want to discuss it," the mother replied.

"It was a court order, on agreement, after weeks of meetings with psychologists. You are going to alter that unilaterally without approaching the court.

There is objective evidence that agreement was reached in May and it was unilaterally breached in July. I put it to you that both you and the children's father would have more time with the children if you were both in Cork."

The judge asked her if she had a boyfriend or was planning to marry in the future. She said she did not have a boyfriend, and had no plans to marry.

He rose to consider the case for about 40 minutes. On his return he said the children would remain with their mother in the rural town.

"I accept that both parents have a very good relationship with the children. It is important that they keep the bond with their father.

"I have given serious thought to placing the children with their father.

But the mother's willingness to work locally has tipped the balance in her favour, hence the urgency of her getting a job. Driving takes its toll. The dangerous roads are also a consideration.

"The father will have access every second weekend from 10 am on Saturday until 6 pm on Sunday. He can elect to have the children with him in Cork once every two months, and then have them from 4 pm on Friday to 6 pm on Sunday.

The mother will vacate the house for the Saturday night on the weekends the father is there.

"Both parties must exercise civility towards each other. Problems must not be discussed in front of the children. They should not be interrogated. The mother is primary carer, and there is joint custody.

"The father will have them for a holiday [away] every second year. I think it undesirable that children have two holidays a year.

"No male friends are to be allowed at night in the mother's house. I will review this order in May, when I expect her to be working locally. If the mother does not find suitable work I might vary the order.

"I have two excellent parents. What has influenced me is that [the rural town] is as good a place as Cork to raise children. But the mother must be working there."

The father's barrister said: "You've reduced the father's access. He's very flexible. In May my client had 16 nights out of 33. Now he has one night out of 14. They have friends and cousins in Cork. You are also restricting where he can exercise his access."

"You can't be moving children around too much," the judge said.

The case came up for review in May before Judge Sean O Donnabhain in Cork Circuit Court. However, when it was called the parties announced they had come to an agreement to vary the orders made by Judge Kenny.

The terms of the variation were that the father had access to the two children every second weekend from 6 pm on Friday to 6 pm on Sunday, in Cork if desired. He also had access every Wednesday after school. The mother would facilitate this access in her home.

During holiday time, each parent would have four weeks in the summer, one week at Christmas and one week at Easter. Mid-terms were to be divided equally.

The father was entitled to visit the children on their birthdays and on Christmas Day, and they would stay with him from noon on December 26th to 2 pm on December 27th.

He was also entitled to proof of the mother's employment as soon as it was available.

He would pay €1,200 a month in maintenance for the two children.

'In May my client had 16 nights out of 33 – Now he has one night out of 14'

Parents berated for bad example to children

'The pair of you should be ashamed. What example are [your children] going to follow when they go out into the world?'

A Circuit Court judge who overturned a custody order made in the District Court told the parents they ought to be ashamed of themselves. Judge Pat McCartan said: "It is terribly tragic that they cannot find the means to behave civilly towards each other. Do you ever stop to think of the example you're giving? You are the models for your children.

"You cannot find it in yourselves even to refer to each other by your first names. The pair of you should be ashamed. What example are they going to follow when they go out into the world?" he asked.

A District Court judge had ordered that the applicant father have custody of his two teenage boys and that the mother have custody of her teenage daughter. The parents lived in separate provincial towns. The three children were living with their mother and all attended the same school. They had been visiting their father at weekends and the father had argued in the District Court that his sons should live permanently with him as they had sporting activities and friends in the town in which he resided.

The mother, who is a foreign national, appealed this decision to the Circuit Court. She wanted the arrangements to remain as they were.

During the lunch break, Judge McCartan saw the children alone in his chambers and later their mother gave evidence that they were doing very well in the school they all attended.

"They are teenage children. They have to be minded all the time. They need supervision. When they're with him, they're allowed to come in whenever they want," she said. She told the judge she was not saying their father was neglectful but that she was at home when they came in from school except for two days a week when she had to work. "I have someone come in those days to look after them," she stated.

When the judge told her he had seen the children separately and the issue was whether the boys were going to be with their father and friends, the mother said she would never see them if they went to reside with their father as she could not visit them there.

"They're not allowed to switch on their phones when they're with him. I can't talk to them at weekends." She said one of the sons was very immature and needed her and the other needed supervision. "After four years of separation, they're very confused children. I want a psychological assessment done."

Judge McCartan said he was not going down that route. "Whenever we – lawyers, parents – find things not going our way we reach for a psychologist. I'm not prepared to get them involved in that."

The father then gave evidence. "It's what I feel the kids want. I can be with them when they need me." He said he was self-employed and when one of the children was sick he was able to stay at home and be with him. When Judge McCartan put it to him that it would be better for their education to stay in the same school as they were in a pattern of learning, the father stated that they had previously attended school in the town where he resided and were engaged in sporting activities there. He said their mother could come and watch them play their matches. But the judge said that was his patch "and you don't talk to her". The father replied: "I got a barring order on me four years ago and I honour that. I don't get involved with her. I'm just there for the kids."

Asked if he accepted that the children were getting on well under the present arrangement, he said he did not get any information on that. The judge said: "Why not? You're the father and you can phone the school."

The father's barrister interjected, saying that the mother was the subject of a deportation order and might not be there to look after them. The father said she had gone abroad to visit her family and had left the children with a babysitter. He had only found out by accident and had taken the children to stay with him.

Judge McCartan said that having talked to the children he was not disposed to move them. He had decided to leave the situation as it was with regular visits to the father at weekends.

"What the children said to me in my room I said would remain confidential. However, I am satisfied the decision I am making will not upset any of them unduly." He said he would revisit the issue in a few years. "When there is doubt it is better to leave things as they are."

Judge adjourns case to speak to child

'I am reluctant to involve children. They should not be asked to take sides if at all possible. But there comes a time when the parties are able to agree on nothing'

Judge Bryan McMahon adjourned a case in the Dublin Circuit Court to talk to a child who was the subject of a dispute over access.

Her father was seeking a variation in an access order that involved him travelling by bus to a town about 30 miles from Dublin on Saturdays to take out his two daughters, aged eight and 15, for the day.

His barrister told the court that there was a long history where the children stayed for weekends with their father, but issues had arisen with the older child the previous April as a result of which access had changed.

He was anxious to return to overnight access once a fortnight rather than have to hang around cinemas and shopping centres on Saturdays with the children. Both parties were in new relationships and he had young children in his and was anxious that his daughters spend time with them.

The wife's barrister said that there was a problem with the overnight access. Her daughter had difficulties with it and her doctor recommended that she and her father attend family counselling. "She is a young woman who knows her own mind," she said.

"A child of 15 is not going to be amenable to an order of the court if she doesn't want to," the judge said. "I have no difficulty in interviewing a child of this age and seeing if she is being unduly influenced. Is there a section 47 report? What about the eight-year-old?"

"The two children are extremely close," replied the barrister.

The husband's barrister acknowledged that there were difficulties with the older child. "A section 47 report has been mentioned. They are hugely expensive. My client does not believe it is necessary.

He is very concerned that the elder child is being involved in the marital difficulties. He is concerned about bringing her into court and into the case and asking her to take sides."

The wife's barrister said that there was a letter from the girl's doctor, who was an independent person.

"My view on this matter is that I am reluctant to involve children. They should not be asked to take sides if at all possible," said Judge McMahon. "But there comes a time when the parties are able to agree on nothing. There is fundamental conflict in the affidavits.

"The daughter is almost 16. We are talking about access that related to her. The situation of the child is being referred to more and more in our legal system. I am always of the view that when the child reaches a certain maturity he or she should be consulted; not interrogated but seen in chambers in a non-adversarial arena.

"There is access taking place. It is not ideal from the respondent's point of view. I don't want to make orders that might make the situation worse. I could order counselling or a section 47 report but I am reluctant to until I speak to her.

"In the meantime the existing access should continue.

"I would be very concerned if the child is being used as some kind of pawn between the parents. It is difficult enough for children to come to terms with this situation as it is, especially in their teenage years. The younger child may well be affected by the attitude of her sister. I would like to speak to the girl some day next week."

Father may not take toddler to UK

A father was refused permission to take a 2½-year-old child to the UK on holiday to see his mother while a dispute with his former partner on access was still unresolved. The matter came before Judge Donagh McDonagh on the Western Circuit.

The man's barrister told the court that a 50/50 arrangement existed at the moment. He said that his client was unable to be in court but the mother was present. She outlined her reasons for objecting to the journey.

She said that when the child returned from access visits to her father she was not very clean and sometimes she came back in boy's clothes.

The father had two children with another woman and the child visited her siblings along with her father. When she came home she was angry and afraid of being hit, the mother said.

She said the father removed the child from the special formula milk she (the mother) had her on, without agreement, even though she sent the formula milk with her. "She has continuous chest infections. She is on antibiotics. He refuses to pay the doctor's bills."

"We're talking about whether she can go to the UK next week. Do we need to go into all this?" asked the judge. "Your client is not here to make his application," he said to the man's lawyer.

"He went to the District Court because he was not given access for four months," the lawyer replied. "A section 20 report was ordered. It said neither parent should be restricted in access in any way. Both were entitled to take the child on holiday. The mother appealed that. It didn't come on last Wednesday [in the District Court]. The orders are in our favour. She is in breach of the order by refusing."

"She is not," said the judge. "She is seeking an order of the court."

"I appealed because I'm not happy with the level of access," said the mother. "I don't get the addresses he takes her to. There is stuff in the [section 20] report that is not correct. My problem is that she will not receive the care she needs. If she is sick over there [in the UK] he will not take her to a doctor. He will not pay for a doctor. I know his routine. He'll go on the ferry, stay a night with his mother, then drive seven hours to London. She'll be in the car all the time."

"There is one issue to be decided here, the trip," said the judge. "It will be decided on the balance of probabilities. I will not permit the child to be taken out of the country by [the father]. Every other aspect of the access is to be unchanged until there is a full hearing of the appeal. Both parties should bring a bit of realism into this as well."

'If [our daughter] is sick over there he will not take her to a doctor'

Mother ordered to permit access

'I am not inclined to grant unsupervised access at all until I am satisfied it is in the best interests of the child'

Judge Miriam Reynolds in the Midland Circuit Court ordered a mother to permit supervised access to her child from the child's father. The woman had objected to the venue and the supervisor and had proposed supervised access in a venue closer to her, with a different supervisor.

The judge referred to the social worker's report which said the child was happy and bright.

Access was stopped in 2006 following an altercation between the child's parents, who were unmarried. There was a very bad history between them. An earlier hearing had concerned a criminal conviction against the father arising from his conduct towards the mother. But the judge said nothing had been produced to suggest the relationship between the child and her father should not be developed.

The head of the family resource centre where the child and father met told the court that access had been going well. It was a difficult time for the child's mother.

The mother said she found it difficult to get to the centre because she had to collect another child from school in the area where she lived, about 25 miles away. "I feel that access should be child-centred and close to where the child lives," she said. "A friend has offered to supervise access in [the local town]."

"Orders have been made both in the District Court and here about access," Judge Reynolds said. "With a little girl it has to be in a controlled environment with an objective person. Why do you object to Ms... [the head of the centre]?"

"It is mainly the location. But she seems to be in charge of how the access goes," the mother replied.

"It seems that when she felt it was time for unsupervised access that was when access was withdrawn," the judge said.

"Yesterday she was talking to Mr... [the father] and not me," the mother said.

"You feel Mr... is communicating with her?" asked the judge.

"Yes," replied the mother.

"There does not seem to be anywhere else for access to take place that is a calm and objective environment," said Judge Reynolds. "I am not inclined to grant unsupervised access at all until I am satisfied it is in the best interests of the child. I order supervised access every two weeks here for two hours. I will review the situation in three months.

"Mr... should be accompanied and should leave his telephone outside. The HSE should look into a location that is closer to [the mother's] home, and an agreed independent person to supervise. The father is to pay €20 towards her petrol costs in bringing the child here."

In Brief

More time with daughter for recovering alcoholic

A recovering alcoholic successfully sought greater access to her eight-year-old daughter in the Eastern Circuit Court.

Her barrister told Judge Pat McCartan that the woman was getting assistance to remain alcohol-free and her two AA sponsors were present in court. At present she had one hour's supervised access with her daughter every week in a parent and child centre and was seeking longer unsupervised access, leading eventually to overnight.

The woman's husband, who represented himself, said she was still drinking, she had been drunk at Christmas.

He said he had once left his daughter with his former wife but an hour later had got a call from the local Garda station to say the child had been put out of the house and her mother was drunk.

An AA sponsor told the court she (the sponsor) had been alcohol-free for 10 years and she was employing the woman in the B&B she ran. This was a live-in position.

The husband told the judge that his daughter, when asked if she would visit her mother in this place, had asked where the Garda station was. There was none in the village.

Judge McCartan told the man that the sponsor impressed him and he was proposing that she be present at the next two meetings between the girl and her mother so that the child could get to know her. This would happen initially in the centre and the first meetings would be on Saturdays at 2-5 pm. There was no impediment to all those involved coming to their own arrangements.

"I wouldn't expect a child to be about someone who is drinking," he said.

Judge revises consent terms

Judge Donagh McDonagh asked a couple to reconsider the terms of a settlement agreed by the parties to a divorce application before him on the Western Circuit.

The couple had married in 1978 and had two children, who were now in their 20s and no longer dependent. There was no prospect of a reconciliation and the man was the applicant for the divorce, to which the wife agreed.

Asked to explain the terms of the agreement, the man's barrister said that his client was looking for an order to register the family home in his sole name, on payment of €33,000 to the wife. He would take over the small outstanding mortgage. The house was valued at €150,000.

"So for a debt of €50,000 he gets the house?" asked the judge.

"Yes," replied the barrister. "He has a loan application for €62,000 over 15 years so that he can also discharge a motor loan and certain expenses as well as the mortgage. He will be paying it until he's 68. No order is being sought for maintenance."

The wife's barrister said: "She has an occupation and is in another relationship."

"It strikes me that €33,000 is very little given the value of the property," Judge McDonagh said.

The wife was called and said she was happy with €33,000, €3,000 of which would go to the Legal Aid Board. She said she was working and in a new relationship.

"I think €30,000 is light. I would say a fair distribution would be a third of the net value," said the judge. "To me that would indicate adequate provision in the circumstances, that is, €45,000. I think that would be proper provision."

The parties withdrew to consider what the judge had said, and returned agreeing on €45,000 for the wife's interest in the house. This was made an order of the court.

Child's disability complicates case

'You are working out access between yourselves in an admirable fashion. You have a basic respect for each other's position. This is positive for the children'

The sale of the family home, change in access arrangements and a variation in maintenance payments were all raised by a lay litigant in a case where a judicial separation had been granted and a divorce was now sought. One child had a disability and this complicated matters.

The husband told Judge Bryan McMahon in Dublin Circuit Court that the couple had married in 1983 and bought the family home in 1994. Their first child was born in 1996 and a second three years later.

The wife was a full-time home-maker at this time and kept language students to supplement the family income. He moved out of the family home in 2001 following an affair. His wife began judicial separation proceedings in 2003.

The house, valued at €250,000, carried a mortgage of €80,000. In the judicial separation proceedings it was envisaged that the man's wife and children live in it until the children were no longer dependent, and that it then be sold and the proceeds divided. There was no order. He was now living in rented accommodation.

The man said he had been legally advised initially but then could no longer afford the cost. He had received some help from a group representing unmarried and separated fathers and from a barrister friend.

The judge asked him what he wanted and he said he wanted an order that the house be sold when the children were no longer dependent so that he would not have to come back to court in 11 years. He was paying the mortgage and house insurance and wanted a 55 per cent share on its sale. His wife was looking after maintenance on the house.

Along with the mortgage, he was paying €70 a week in maintenance for the two children which he wanted to reduce. The mortgage had risen since 2005. He was living in a one-bedroom apartment and wanted a two-bedroom one so the boys could stay with him.

He also wanted different access arrangements, including the children staying overnight in his parents' house down the country. His father had been accused of abusing the older boy but the health board had investigated the allegation and it proved unfounded.

The wife's barrister asked him if he had had an affair with one of the language students, resulting in the language school not allowing any more students to stay in the house. This had affected his wife's ability to earn a living. The husband said that after he had moved out this was no longer an issue.

The barrister also said that the older child's disability meant that his wife could not work full-time. The husband said that she could take students. The barrister suggested that it was too early to make an order on sale of the family home, as there was uncertainty about the older child's future independence.

The wife said the older child had two teachers and a classroom assistant. Regular routine was very important to him. She did not know how much looking after he might need in the future.

Referring to access, she said the school had expressed concern about sexualised behaviour on the boy's part. The health board had had difficulties with its investigation because of his disability. She was not happy about overnight access in the grandfather's home.

She said she was earning about €520 a month from keeping a student out of which she paid for his food. She would like an increase in maintenance of €10 a week.

In his judgment, Judge McMahon said he would like to emphasise that the differences between the parties was not great.

"The positions adopted by the parties are very moderate. The wife is not looking for €120 a week, he is not seeking to reduce it to €10. The only issue at stake relating to access is the grandfather. You are working out access between yourselves in an admirable fashion. You have a basic respect for each other's position. This is positive for the children and especially for the difficult situation of the older boy."

Granting a decree of divorce, he said the parties had been living separate and apart for four years and there was no reasonable prospect of a reconciliation.

In considering proper provision for each of the spouses, he had to bear in mind section 20 of the 1996 Act, and to have regard to the previous judgment that was less than four years old.

In terms of earning capacity, the wife was a home-maker most of her life, and kept students to supplement her income. The financial needs were known and no one was shirking their responsibility. These were ordinary people who were finding it hard to make ends meet. Both parties were in their 40s, which was relevant to their working lives and the wife's prospects of returning to work.

In terms of physical and mental health, the most distinguishing aspect of the case was the condition of the older boy, which placed a heavy burden on the parents.

The contributions made to the marriage were known. The husband did have some shares in his employment which, when they matured, would help him to provide himself with accommodation.

On the earning capacity of both spouses, the judge said the wife had sidelined herself from the marketplace to mind the children, which was commendable. In relation to conduct, he said he had heard the explanation for the break-up of the marriage. While not of a "gross and obvious" nature, it was no doubt deeply wounding.

Referring to the accommodation needs of the parties, he said the boys' needs were known. The husband was living in a one-bedroom apartment and was entitled to aspire to a two-bedroom one. His shares would enable him to make moves in that direction.

Ruling on the maintenance issue, he said that having considered the man's income he would not vary it. He would link it to the Consumer Price Index, with the first increase due in 2008.

On access, he said there was no proof before the court of any wrongdoing on the part of the grandfather but it was clear the wife had great fear and apprehension. "Even if it is irrational I must respect it. While she is of this frame of mind it would be disproportionate of me to order an overnight. I would be doing more harm than good.

"I know this will be hard on the applicant husband. But the summer is coming, and the long evenings. I know from experience that the tolerance of a 75-year-old for young children is not great. I am not condemning anyone here."

'The tolerance of a 75-year-old for children is not great'

Referring to the family home, he said that again no one was asking for very much. The husband wanted an order that the house be sold when the children were no longer dependent. This would be 11 years, and could be 14. If the older boy did not recover it could be longer.

"Can any of us anticipate what relationships any party will have in 11 or 14 years' time? Someone could win the Lotto." He affirmed the previous order, which said that the wife and children should live in the family home until they were no longer dependent.

He gave leave for the parties to apply for orders if there were any significant changes in their circumstances.

'I was a good contributor … then the drink got hold of me'

'There is no doubt the marriage is over. I am satisfied Mrs... has not been paid any proper maintenance for herself and 10 children for 10 years and most likely more … Mr… has burnt his boats'

A man wanted the price of a site for his mobile home as his share of the €220,000 family residence during divorce proceedings on the Northern Circuit before Judge John O'Hagan.

The couple married in 1972 and had 11 children of whom 10 survived. The youngest was now 20. Two of them, and the baby of one, lived with the mother. The couple separated in 1997.

The woman said her father gave her the family home site shortly after the marriage. She was a public servant but had to leave work when she got married. Her husband became addicted to alcohol and was mainly unemployed. He was asked to leave the family home in 1997.

She did not seek maintenance from him because she believed his drink problem would prevent him from paying it. "I felt more secure with payments from the government," she said. She borrowed €30,000 from the credit union to send the children to college and to refurbish the house. There was no mortgage and she was now working.

Her father had contributed £5,000 towards the cost of building the house. Asked if she could raise a mortgage of €20,000 to €50,000 to pay her husband something for his interest in the house, she said she did not think so.

The judge then asked her if any of her children could help and she said she did not want to put any pressure on them.

Her husband's barrister said: "He's living in a mobile home at the moment. All he needs is a plot of land to put a mobile home on. He built the house in the early days. Unfortunately alcohol took over. He has good relations with his sons. There has been some reconciliation."

"I haven't spoken to him in 10 years," the wife said.

The husband told the court that before his alcohol problem he had been a good contributor. He had worked in the black economy and given his dole money to his wife, keeping his earned money. He had built the house with the help of another man. It had cost £12,000 to build in 1976. "From 1976 through the 1980s I was on the dole. The drink got hold of me."

Asked what he now wanted, he said a site and new mobile home, which would cost about €50,000.

"He did give me the dole," the wife said. "He was building walls and cow-houses and he was drinking that. Nine times out of 10 I went up to collect the dole and forged his signature to pay the bills and it was never enough."

"There is no doubt the marriage is over," said the judge. "I am satisfied Mrs... has not been paid any proper maintenance for herself and 10 children for 10 years and most likely more. My guesstimate would be probably 17 years, a sum of over €200,000.

"Mr... has burnt his boats. Mrs... reared the children. She borrowed heavily to put them through college.

"The Family Law (Divorce) Act provides for what must be taken into account. What do I think is a reasonable share for Mr … given his abnegation of his responsibilities? In one sense – nothing. But I am inclined to give him something. I feel a sum of €30,000 should be paid to Mr… Then the entire family home should be transferred to Mrs..."

He granted the divorce, and adjourned the case to the next sitting to see if the woman could raise the €30,000 either through her children or a building society. If not, he said he would direct the sale of the family home.

Strategy 'boomerangs' on husband

Judge Pat McCartan on the Eastern Circuit took the conduct of a case into account in deciding the division of assets in a long-running judicial separation application. The husband had counter-claimed for nullity but had abandoned this claim.

The wife's barrister said the husband was a public servant with a good salary and a substantial pension entitlement. He also owned two properties apart from the family home, and a house in Spain, and there was over €800,000 in a bank account that had been frozen by court order. The parties had operated a building development company during their long marriage.

She said there were also liabilities, including the costs of a court case that arose out of litigation between him and his adult children. Her client denied any share in this liability. His wife was seeking a 50/50 split of the assets in the form of the family home and the closer of the two houses, where her daughter was living. This was unencumbered by mortgage, and was the more valuable of the two investment properties. His balance could be made up from the frozen assets.

The husband's barrister said her client had substantial liabilities. As well as the legal costs, he had also received €500,000 for selling his share in a building development company on which he had paid no tax. She needed to take the advice of an accountant on the extent of the tax liability and the full extent of the liabilities. He was also now looking for a divorce.

Judge McCartan allowed the parties two days to examine the figures.

When the case resumed the wife said they had married in 1979 and had five children, one of whom was still dependent and was doing her Leaving Cert. She outlined her involvement in the building business where she had delivered materials and paid the workers, as her husband was working.

The husband's barrister said she wanted to raise issues about the applicant's conduct in signing cheques and in alleged assaults on her client.

Judge McCartan said: "You opened the case on the basis that your client had no difficulty with a 50/50 split. Conduct is not relevant to that."

"I was not finished that day," she said. "I said I had no objection to 50/50 provided we were clear on the liabilities."

"What relevance do the history and conduct have to the position you put forward?" asked the judge.

"I have instructions from my client. He says he wants to live in peace. There are extraneous issues. He was brought up on an assault charge. He was assaulted by a third party and he believes his wife is responsible for that. The District Court won't deal with it until this court deals with the separation."

She said the husband had counter-claimed for nullity. Psychological reports on both parties were commissioned. Then he refused to pay for them and this application was abandoned.

"The husband says the marriage broke down in October 2003 but there were difficulties from eight months into the marriage. He says you [to the wife, who was still in the witness box] were under the care of a psychologist and were abused by two brothers and that you dramatically changed on the night of the marriage, and used the withholding of sex as a weapon. You trapped him into marriage because you were pregnant."

"He was very demanding," the wife said. "He wanted sex every hour of the day and night, whether I was pregnant or not, and one night I told him about my two brothers

'He beat [the children] all their lives. When he was sick I begged them to go and see him, and they all said, ring me when he's dead'

and afterwards he always threatened me he'd tell everyone about my brothers. He never stopped about my family. I didn't want to wash my linen …"

The wife broke down, and this line of questioning was discontinued.

Asked if she had not refused to work outside the home, she said she had five children, four of them under five at one stage. "We had 25 acres. I did hay, everything."

Asked if she had signed cheques on her husband's account, she said: "He was big into going to Lourdes and when he went to Lourdes every year he left cheques signed for me to pay wages and so on. One year I used the cheques to do up the house."

'The regrettable events of today were entirely unnecessary'

Asked about his relations with the children she said: "He beat them all their lives. When he was sick I begged them to go and see him, and they all said, 'Ring me when he's dead.' So many times I said [naming the eldest son] that he'd fallen out of a tree. He made him sweep the floor of that building until the blood flowed out of his hands."

The husband's barrister suggested she had been instrumental in turning the children against their father and that he denied hitting them.

"If he did why did you not go to the health board and report it?"

"I should have," replied the wife. "It did happen."

The husband's accountant was then called and said his liabilities were considerable. As well as the legal costs of over €200,000, he owed the Revenue Commissioners about €700,000, as the €500,000 he had been paid for his share of the building company in 2001 would be considered as income for that year, and would be taxed accordingly, with interest and penalties. He had also failed to pay capital gains tax on another property.

An accountant called by the wife's counsel said that capital gains tax, not income tax, would be due on the money made from the sale of the share in the company. This would be considerably less than suggested.

The husband then gave evidence and said he never wanted to be in this position. He had tried to help his wife with her problem. Asked if he hit his children he said: "I may have given them a tap if they did something wrong."

He also said that the wife had proposed the conduct that had led to the civil case with his adult children.

"We're going into all this because you gave specific instructions to your counsel," said the judge. "It could all have been avoided."

"She's out to get me," the husband said. "Times were rough. It's a pity things came out the way they've come."

Giving judgment, Judge McCartan said that this was now an application for divorce. There was no dispute about the parties growing apart. There were adequate resources to allow the parties get on with their lives. There was one dependent child, and the central issue was the division of assets.

At the outset of the case there was no reference made that the sad history would be a factor in the case.

"Something happened between then and now. The regrettable events of today were entirely unnecessary. This is a process that has boomeranged on Mr... [the husband]."

He said the parties agreed there should be a 50/50 division. The question was whether the wife should be saddled with the legal costs arising from the civil case with the adult children, and the tax liability.

"There has been the washing of very private linen which has been unfortunate. That is why we hear these things in private ways, and the wife can go away from court knowing that."

Referring to the legal costs of the civil case, he did not believe for a moment that the damage caused was at his wife's instigation. This claim had not been put to his wife. The present proceedings began in 2004.

"If there was any shred of truth in that allegation it would have emerged in the High Court in 2004. I'm sure he would have relied on that assertion if there was any truth in it. The fact that it only emerged today leaves me in no doubt that the costs should be his and his alone," he said.

Referring to the tax issue, he said that the accountant had only come to the case late and he had behaved admirably. But there was ambiguity about the detail of the agreement to transfer the shares and it had not been fully complied with. The tax liability was not clear and was nothing like what the husband wanted him to believe.

"The argument can be made that all of these assets were gained by both parties and the pluses and minuses ought to be carried between them.

"But given [the husband's] conduct of these proceedings and the way he instructed his solicitors to conduct this case, and his conduct towards his children and in the marriage I am going to find against him."

He agreed to the wife's application that the family home be transferred to her and that the mortgage be discharged from the funds on deposit. The endowment policy of €35,000 was to be shared between them. The more valuable and closer of the two investment properties was also to be transferred to her. The third Irish property and the Spanish property were to go to the husband, along with the balance of the money.

This would provide the wife with a home and a property from which she could derive income. The husband would have cash enough from which to provide a home and meet his liabilities. He would have a very comfortable pension on retirement. He ordered €300 a week to be paid to the wife and dependent child until the husband's retirement and the division of the pension 50/50 between him and the wife.

The husband's barrister asked if there could be an alteration of the spousal benefit in the pension, saying he was concerned for his safety.

"He's afraid he'll be bumped off? No," said Judge McCartan.

He granted mutual barring orders against both parties to ensure they stayed away from each other, and ordered each party to carry their own costs.

'Given the conduct of these proceedings... I am going to find against him'

Adultery claim abandoned after a day's evidence

Judge Harvey Kenny heard a day's evidence in Cork Circuit Court where the husband cited his wife's alleged adultery as grounds for judicial separation. The matter was settled the following day.

The man said the couple had married in 1992 and had three children, now aged eight, five and three.

"We had an excellent relationship for a long number of years," he said. "After the birth of the first child it was different. The child needed to be fed every two hours and was admitted to hospital. She [his wife] was exhausted after the pregnancy and it seemed natural that I stayed in the hospital with the child."

The second child was born two years later.

"We were not doing better or worse than any other couple at that stage. The third child was born in 2004. It was a tough time. We already had two young children. We were building a house. I had not noticed the post-natal depression before. In retrospect I realise that she had post-natal depression and things got better when the children were less dependent."

He said they slept in separate rooms during the third pregnancy. "The relationship was suffering. We both said things we didn't mean over the years but I wouldn't have seen it as outside the norm."

He recognised his wife needed an outlet outside the home and he encouraged her to pursue an outside interest, which became

part-time employment. There was no real improvement in the marital relationship. He was very busy at work and in the evenings she was out pursuing her interest and he was at home with the children.

In 2005, he took an opportunity to go abroad for his company for several weeks. When he returned he fell asleep upstairs with the children. He woke at about 11 pm to hear voices downstairs and an intimate exchange between his wife and a man with whom she worked. When he confronted her she admitted to a "relationship" with the colleague.

'I have no doubt in my mind that had there not been a third party our marriage would still be in existence and stronger than ever'

He said his wife had gone to marriage guidance counselling alone. They had initially attended two sessions together but he did not see the point of them. He hired a private investigator who advised that full surveillance would be very expensive. He bought a digital recording device and recorded telephone calls which, in his view, proved the adulterous relationship.

His wife then told him that the marriage was definitely over and he moved out to his parents' house initially. He was now sharing a house with four other men. He said his wife worked weekend evenings as well as midweek.

"I feel I can offer the children care at weekends. They're at school in the day time. It makes sense for her to relax at weekends and for me to be there [with the children]. The children are extremely attached to me."

When asked if he and his wife differed in their attitudes to the children he said: "I want them to be company for each other. I would take them into bed at night and played games with them before they went to sleep. She would be more regimented about bedtimes and sleeping in their own rooms."

He said the family home was worth about €800,000, with a mortgage of €75,000. They were both working. If the family home was sold there would be enough money for both of them to get a home. If custody was split 50/50 there would be no need for maintenance and they could split the costs of the children.

Replying to the wife's barrister, he agreed the marriage had had difficulties from an early stage. Asked if he had told her in 2001 that he was only staying for the sake of the children he said: "All couples have arguments." He agreed that the marriage was in such difficulties in 2004 that he had suggested he move out. Specific arguments concerning trips to the cinema and weekends away were described.

"You are basing this [application] on adultery," the barrister said.

"He's not. It's based on the breakdown of the marriage," the judge said.

"In the alternative," the barrister replied, referring to the different grounds for judicial separation.

"We want to find out how best to deal with the future of the children," said Judge Kenny. "We've gone all around the houses on adultery and which film to go to."

"I have no doubt in my mind that had there not been a third party our marriage would still be in existence and stronger than ever," the husband said. He agreed he had not seen his wife in a sexual encounter with the other party but said he had taped evidence.

"The parties might talk overnight," said Judge Kenny. "They are fortunate to have a family home worth €800,000. If it was sold, they could buy two more modest family homes. Mrs... could be the primary carer. One of the homes could be close to the children's school. Access could be agreed. The only matter would be maintenance. These are the issues in my mind. The bogey in all of this is the allegation of adultery. If it was not there they might have reached agreement, I stress might.

"I don't particularly want to hear these cases, I don't mind saying. The cross-examination has made the point there was no proof of sexual intercourse. Is the recording proof? It would not be in a criminal trial. But here?"

The husband's barrister said that a recording of a conversation suggested sexual activity in July. The wife's barrister said this was after mediation seeking to resolve financial matters when the marriage had already broken down.

The wife said the marriage had been going downhill from 2001. She said her husband

was away a lot. They argued about the children. “He came in with sweets from work when I was trying to feed them meat and vegetables. He’d make up fresh dinners with just potatoes.

“On numerous occasions I’d be downstairs in front of the television pregnant and crying and he’d be upstairs in bed with the eldest.”

She said they had sexual relations only twice in 14 months. He slept with the children. “I could not talk to him. I used to get the silent treatment. It would go on for a week. Then there would be the next argument.”

She said she consulted her doctor in 2004 who said she was slightly depressed and recommended counselling. When she told her husband he refused to go as a couple.

In 2005 she confided in a male friend. “He listened. He respected what I said. I did become very close to him. We did hug and kiss. It is true that when my husband was in the house he [the other man] gave me a big bear hug. There were no sexual relations.”

She stopped seeing this man for a time hoping the marriage would improve but it did not.

They then went to mediation and she resumed seeing him afterwards, but still there was no sexual relationship. They did begin a sexual relationship after her husband moved out of the house in 2006. “Until then I felt that in case he and I ever got back together I would be able to say I did not have sex with another man.”

Judge Kenny said he would take the case up again the next day but urged the parties to explore the issues overnight.

The next day the lawyers for the two sides said the case had been settled on the basis of a judicial separation on the grounds that the marriage had broken down, the house was to be sold with the proceeds split 55/45 in favour of the wife, there would be joint custody of the children with a schedule of access, and the husband would pay €250 a week in ongoing maintenance for them. The remaining assets would be divided.

Clearing the backlog on the Midland Circuit

'This is a special family law week. Now is the hour for everybody. Anything that is adjourned from this family law list could be meandering around forever'

Delays in getting a case heard are a regular feature of complaints about the family law system. Court officials, judges and practitioners all agree that there is rarely enough court time to ensure all cases are dealt with speedily.

But the lack of court time may not be the only reason why some family cases take a long time to be heard. A special family law week was scheduled for the Midland Circuit in January, but a number of the cases listed for that week still did not get heard.

Twenty-nine cases were listed for hearing over the four days, and one *ex parte* application (without the presence of one party) was also taken. By the end of the week, 15 had been adjourned and 14 were dealt with, mostly settled during the week.

At the outset Judge Con Murphy warned: "This is a special family law week. Now is the hour for everybody. Anything that is adjourned from this family law list could be meandering around forever."

One barrister sought an adjournment of his case on the grounds that his client, who lived in England, had suffered a sudden bereavement and had to attend the funeral.

"A funeral in England takes a day," said the judge. "Which day?"

He asked the barrister to return later in the week to mention the case and see if it could go on, but when it was then mentioned it was not ready as time was needed to study documents that had only recently been handed over.

Another case concerned an appeal of a District Court order refusing the father access to his children. The appeal was not ready because psychiatric reports had been prepared for the court and an expert engaged for the father had not yet had access to them. Such access required a court order, which was granted, and the case was adjourned to allow the expert to study the reports.

In a judicial separation case the barrister for the husband said his client was extremely unhappy about it going ahead as he had expected it to be heard later. He was elderly and in poor health, and not happy with his legal representation as his barrister had been changed. The man gave evidence that his GP had said going to court would be stressful for him. His daughter also said her father was not happy with the case going ahead.

The wife in the case had first sought a judicial separation in 2001, and there had been numerous adjournments. Her counsel said she was ready to go on.

"There is no reason in the world why it can't go on on Friday," Judge Murphy said. "I have had a look at the pleadings and it greatly puzzles me why there are 12 witnesses. I don't see the need for them."

"Will my dad's barrister be there?" asked the daughter.

"There is always a problem with a barrister, he might be tied up elsewhere. This week is to deal with contentious cases. It will go on. Friday morning," replied the judge.

When the case was called on the Friday the court was told that it was settled.

Two other cases were adjourned until March because discovery was not complete. "Unless one party or the other is hiding something of significance discovery is just a puff of smoke," said Judge Murphy. "There is a need to distinguish between cases where this is happening and where it is not."

"I agree," said the barrister. "But the difficulty often is that sometimes if one is given strict instructions they have to be followed up."

In another case an adjournment was sought, and granted, because the respondent was just out of a rehabilitation centre.

One judicial separation case was settled

while other cases were being discussed, the terms were reduced to writing and made a rule of court. The case concerned a couple with two grown-up children and about €1.8 million in property between them, including the family home. It was agreed that the wife should have the family home and another property, while the husband would keep a third of the property and about 26 acres of land. He would also pay a lump sum of €50,000 in lieu of maintenance.

A case where talks continued over many hours related to a cohabiting couple who had a child. This was the last case listed for that day, so no other case was heard. The hearing was adjourned at 11.15 am on Thursday and a settlement was announced at 3 pm. The mother was to pay €50,000 to the father for his interest in the house they had lived in, and he was to pay €500 every Christmas for the next 10 years for his son, without prejudice to the mother's right to seek maintenance for the son in the District Court.

Another case which took several hours concerned the parents of a 17-year-old girl who had entered into a relationship with a 37-year-old man when she was 16. The parents had sought the assistance of the courts in having her return home, claiming her safety and welfare were at risk. The parents were seeking a court order against the man compelling him to return the girl to the custody of her parents. The girl was a notice party in the case, and had her own legal representation.

Following prolonged discussions, it was agreed that the previous orders against the man should be vacated and that the parents would pay a deposit and the rent on a flat or bedsit for their daughter in the local town. The man agreed not to stay in this flat and to visit it only once during the week and at weekends. The parents and the girl were also to agree times when they would meet there. The girl was to continue with her education and her parents were to receive reports of her progress and attendance. The case was adjourned for review in October.

The first case that was heard was an *ex parte* application for a declaration of parentage. A young woman told the court that her father, a bachelor farmer, had died suddenly and intestate. She was his next of kin. He used to spend all or part of the day with her mother, a neighbour, and some years ago the daughter had undergone a DNA test which proved her to be his daughter. He also probably had a son. She was close to her father.

She said she needed the declaration of parentage in order to be executrix of his estate, and Judge Murphy granted it.

In Brief

'This is as final as it gets'

A typical example of a consent divorce was one granted by Judge Bryan McMahon in Dublin Circuit Court.

The couple appeared as personal litigants and the husband said they had married in 1965. They had eight children, the youngest of whom was now 32. All were alive and well. Both parties were now retired.

They had separated about 15 years ago. They had had a judicial separation then and both of them had been legally advised. Orders were made regulating their affairs at that time. The wife said she lived in the house which was mortgage-free. Judge McMahon said since the conditions had been met of the couple living apart, no prospect of a reconciliation and the orders made on the separation, in the circumstances it was appropriate to grant a decree of divorce. Nil pension adjustment orders were agreed.

"This is as final as it gets," Judge McMahon said. "You were married once. In this jurisdiction that means that if a sea-change occurs in your circumstances, issues relating to maintenance could still arise by virtue of that historical fact. If one of you becomes ill, or wins the Lotto, you should contact a solicitor."

In Brief

Separate and apart – but not for long enough

The meaning of the condition that a couple should be living "separate and apart" for four years was tested in a case before Judge Bryan McMahon in Dublin Circuit Court earlier this year.

The couple sought to convert judicial separation proceedings into divorce proceedings, by consent.

The man was called and said they had five children and the youngest was nearly 20. He said they had been separated since 2001 in that they did not share a bedroom. His wife had moved out of the house the previous April.

Asked if they had meals together, he replied: "From time to time." Asked if they went out together socially he said: "With the family, yes." Asked if they were civil to each other he replied: "Yes, we got on well."

"Did you regard yourself as still in a marital relationship?" asked his counsel, and he replied: "Sort of."

At this point the judge intervened to say: "Go back to a judicial separation."

Counsel for both parties said there was agreement on the length of the separation and the matter was adjourned for a brief break.

When it resumed, the husband's barrister asked the judge at least to hear the wife's evidence, which he did.

Asked when and why the marriage had broken down in 2001 she said: "I fell in love with a woman. I had a sexual relationship with her. The marriage broke down at that point. I moved down to Cork with her. Eight months later she sadly passed away. I moved back home to Dublin but did not resume a normal marital relationship.

"I'm a lesbian. I'm not going to go back to a man. I have had other lesbian relationships. My husband and children are aware of it. We are in separate bedrooms. I could not afford to move out.

"It's not as if we had fights every 15 minutes when the children were around. If I was cooking for the children and he was around he could have some. If his washing was in the basket with the others' I would shove it in the machine."

Judge McMahon asked how the bills were paid and she said there was a card for the electricity which they both topped up. The husband paid the mortgage and they shared grocery bills.

"We live separate lives," she said. "I'm upstairs on the computer to my girlfriend."

Giving his decision, Judge McMahon said there was insufficient evidence that the couple had lived separate and apart for the four years necessary to consider a divorce application.

He dated the beginning of the separation from April 2006 and adjourned making the order of judicial separation until April, when a year would have elapsed.

Wife criticised for not using skills

A husband reduced his payment of the outstanding mortgage on the family home following an application to Judge Raymond Groarke in a court on the Western Circuit.

The man was paying €1,440 a month for the two children along with the mortgage, of which €20,000 was outstanding. "No effort is being made by the respondent wife to obtain employment that would allow a reduction of maintenance," the barrister

In Brief

said. His client wanted to pay only half the balance.

Both parties were professionally qualified. The husband had a business in his profession while the wife had previously exercised hers in the public service. More recently she had tried to set up two service businesses which had failed, according to her barrister.

"We feel there is no motivation on her to go out to work," the husband's barrister said. "My client's net income for 2006 was €68,000. He is paying the mortgage on the family home of €490 a month, nearly €20,000 in maintenance, plus education expenses, plus VHI, plus his own mortgage."

Judge Groarke said he had in mind to adjust the matter so that the husband would pay €14,000 of the outstanding mortgage, and the wife just under €7,000. Her barrister said she would accept that if there were no further reviews.

"I cannot say that," Judge Groarke said. "The law does not permit me to say that. It is always possible for either party to return."

Giving his ruling, he said: "I know this case well. Ms … was under an obligation to better herself. She had considerable skills. Mr … has an obligation to provide for the children. So has she.

"For good or bad reasons she has not been able to use her talents to the full. Mr … is entitled to express his disappointment, so he is entitled to some easing of the burden on him. I propose to vary the orders and if he pays €14,000 off the mortgage he will have no further obligations in relation to it."

'You want a divorce? It's done'

A case was decided by Judge Pat McCartan in the absence of a barrister who arrived in court after her client.

The client entered the court on the Eastern Circuit and said her solicitor and barrister were somewhere in the court building. "Take the oath anyway," said the judge. "You want a divorce?"

"Yes," said the woman. She said she had been married in 1998, had one child and had been separated for more than four years. Her husband had been contacted about the proceedings but was not present.

"I grant a divorce pursuant to Section 5 (1) of the Family Law (Divorce) Act, 1996. Anything else?" asked the judge.

"Yes," replied the woman. "There's the issue of a passport. I can't contact him to get his signature for a passport for the child."

"OK. An order dispensing with the father's consent for a passport. Goodbye," said Judge McCartan.

At this point the woman's barrister rushed into court, saying she was appearing for this client.

"It's done," said the judge.

"With no appearance?" asked the barrister.

"She was here. She said her solicitor was somewhere."

"There were issues about a passport," said the barrister.

"It's done," said Judge McCartan.

"If she moved the application herself then I'll hand back the brief," the barrister said.

All settled in Cork

Carol Coulter profiles the second busiest Circuit Court dealing with family law, which in 2005 heard 10 per cent of all Circuit Court family law applications and District Court appeals

In the previous issue of *Family Law Matters* we took a "snapshot" of cases finalised in Dublin Circuit Court in October 2007 and examined the orders made. Many were divorces based on consent between the parties, with only 10 per cent of the total number going to a full hearing and a court decision.

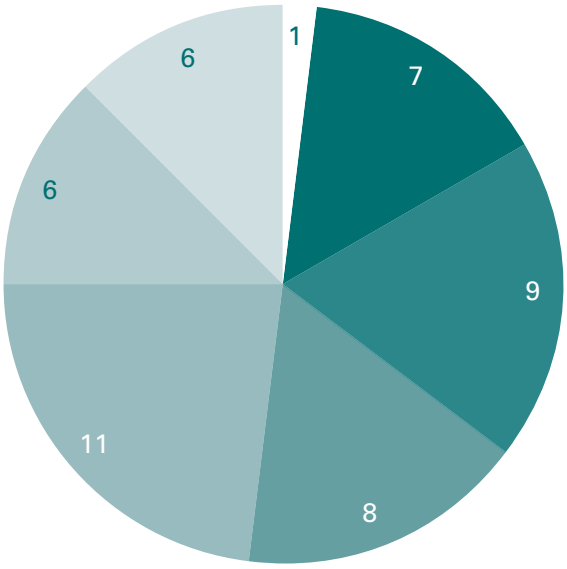
The second busiest Circuit Court dealing with family law is Cork, which in 2005 (the last year for which figures are available) heard 10 per cent of all divorces, judicial separations, nullity applications and District Court appeals. In this issue we conducted the same exercise for Cork Circuit Court, examining the court records of the cases concluded in October.

The Cork records I examined differed somewhat from those in Dublin, as in the Dublin cases I combined an examination of the computer records (where simple cases were recorded with minimal orders) with a study of the more detailed "consents" filed with the cases settled following negotiation. In Cork all the cases had paper files. In most cases where there were ancillary (additional to the main issue) orders, these were contained in the file. In most cases, however, the pleadings (the initial arguments put forward by both parties) were not on the file, therefore the case background and the starting position of the parties were not recorded.

Two weeks were devoted to family law in Cork that month, and only one court sat, presided over by Judge James O'Donohue, compared with two full-time and one part-time court sitting in Dublin in October. Fifty cases were disposed of in those two weeks. Two were judicial separations that were abandoned, and divorce proceedings were to be taken instead, as the requisite four years' separation requirement had been met. Of the remaining 48, 40 were divorces and eight were judicial separations. No District Court appeals, guardianship applications, nullities, declarations of parentage or similar matters were decided that month.

All 48 were settled, though this does not mean the settlement was always amicable. Some of the terms indicate considerable discord before the settlement, with the file recording several appearances and, in some instances, motions for discovery.

Figure 1 Length of marriage ending in divorce/judicial separation



Total: 48

- Less than five years
- 6-10 years
- 11-15 years
- 16-20 years
- 21-25 years
- 25-30 years
- 31-35 years

Note: One judicial separation where marriage lasted less than five years

I also attended Cork Circuit Family Court late last year. There I saw a pattern of cases adjourning while negotiations took place. Other cases opened in court, some evidence was heard and the case was then adjourned, sometimes several times, while negotiations took place, frequently ending in settlement terms. Some cases did go to a full hearing and a court decision. It is easy to imagine some settlements achieved in October following a similar pattern, in this instance achieving a 100 per cent settlement rate.

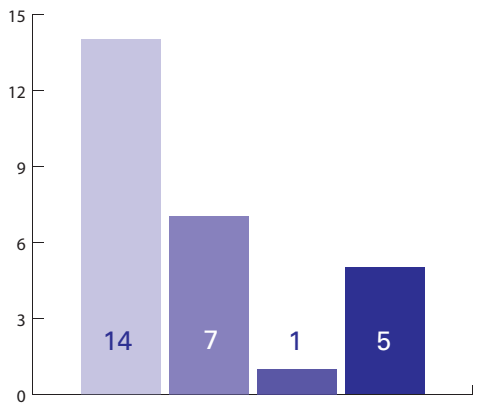
The majority of the cases (33) were initiated in 2006, with 13 applications having been made in 2005. Two of the cases went back to 2004.

As was the case in Dublin (Issue 1), there was no single age-group dominant among those who ended their marriage through judicial separation or divorce. The length of the marriage ranged from less than five years (one judicial separation) to over 30 years, with the largest single group (11) being couples married 21-25 years.

Judicial separations

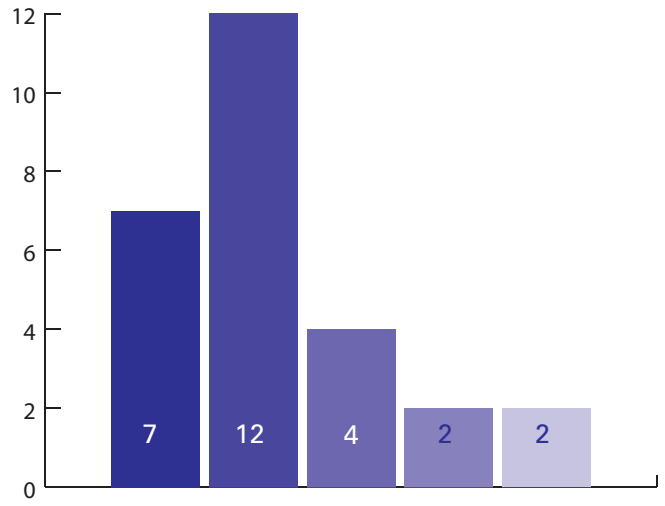
When marriages break down couples frequently seek a judicial separation, as this can be sought after a year's separation, as compared with divorce, where a separation of a minimum of four of the past five years is necessary. This means that some couples undergo two sets of proceedings – a judicial separation, where matters concerning the family home, maintenance, other financial matters and the custody and care of the children are dealt with. This paves the way for a divorce where often the terms of the judicial separation are incorporated into the terms of the divorce. Sometimes the judicial separation has contained a clause specifying that the settlement will provide the basis for a later divorce and that it constitutes a "full and final" settlement of financial matters between the parties.

Figure 2 Children: Access



Six of the eight judicial separations agreed concerned dependent children. In five joint custody was agreed, with the primary residence with the mother. In the sixth case the child was 18 and in full-time education, living with the mother, and no custody or access was mentioned. There were no children in two cases. In all instances, where access was mentioned it was stated to be

Figure 3 Children: Custody



Total number of cases involving dependent children: 27

- Joint custody, no primary residence specified
- Joint custody, primary residence with mother
- Mother custody only
- Father custody only
- One child with each parent

agreed, with specific times mentioned. In no case was there any indication that either party had initially sought a different outcome.

Maintenance ranged from €1,000 a month for two children to €65 a week for the student, to be reduced if he worked during the summer. In three other cases where there were two children in each case the maintenance was €125 a week, €190 and €200 respectively. There was no spousal maintenance paid in any case.

The family home was transferred to the wife on payment of a sum in three cases, and to the husband, also on payment of a sum, in two. In one case no transfer was agreed, but the children were to live in the family home with the mother. In the two remaining cases no reference was made to the family home.

There were two nominal pension adjustment orders agreed, and one transfer of pension entitlement.

A striking feature of the judicial separation decrees made on consent was that six of the eight contained a "full and final" settlement clause, stating that the financial arrangements come to were final.

Divorce

It was striking in the divorce cases that most were settled with few additional orders, indicating amicable settlements. In half the 40 divorces granted on consent a previous judicial separation was in place, and the terms of the separation were imported into the divorce settlement and made a rule of court. Eighteen such judicial separation consents were included in the divorce files, and in two cases they were referred to, but not included in the file.

In seven of the remaining divorce cases the only orders made in addition to the decree of divorce was an order mutually extinguishing the parties' succession rights (known as an 18(10) order). In some of these there may have been separation terms in place but they were not referred to or made rules of court. It is equally possible that these divorces followed long years of separation when the parties had established independent lives and wanted to bring a formal end to their marriages.

In the remaining 13 cases, where there had not been a judicial separation consent in place, the issues settled ranged from disposal of the family home, to other property issues, to children. In two cases the house was sold and the proceeds divided 50/50 between spouses, in one it was transferred into two names, and there were three instances each of the husband and the wife buying out the other spouse. In four cases there were other financial orders, including one where a considerable amount of property was divided.

Children

There has been considerable public debate about what happens to children in the context of marriage breakdown. It is likely that the most contentious issues are dealt with if and when the couple seeks a judicial separation, which can be done a year after

the breakdown of the marriage. When a divorce is sought the couple must be separated for a minimum of four years, and children-related matters may have been largely resolved.

In the 19 divorce cases where the question of children was dealt with, joint custody was agreed in 11. In eight of these the child's primary residence was with the mother, and in two this was referred to the District Court, while in one this was left to the wishes of the child. In four of the remaining eight the child's residence and/or access was shared equally between the parents, or some children lived with each parent. In two cases custody went to the mother alone, and in two to the father alone.

The background to sole, rather than joint, custody was not indicated in the files but, based on cases I have attended, it often reflects a lack of involvement on the part of the other parent in the child's life before the divorce.

Financial matters

Maintenance was generally paid for children, but only rarely for a dependent spouse. In 17 cases the payment of maintenance was agreed, including three cases where some spousal maintenance was agreed. Inevitably, the amounts varied depending on the means of the family, but generally it fell in the range of €400-€500 a month per child. In some instances it was as little as €20, however. There were no instances of a mother paying maintenance to the father. Small levels of maintenance could reflect the fact that some settlements involved the children spending a considerable proportion of their time with the father.

There were nine other financial orders made, normally involving a lump sum. While 16 pension adjustment orders were made, nine were only nominal. The family home was disposed of in 25 cases, with it being sold and the proceeds divided in four of them. In 15 the wife bought out the husband's interest in the house, and in six the husband bought out the wife's interest. In the remainder of cases the couple lived in rented accommodation, they already had their own houses, or there was no reference to a family home.

What emerges from the 48 cases disposed of in Cork in one month's family law hearings is that broad parameters exist within which matters arising from the breakdown of marriage were eventually settled.

Figure 4 Family home

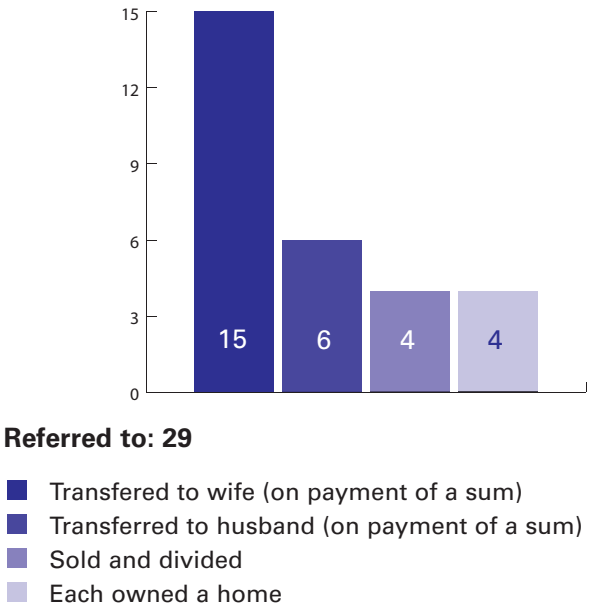
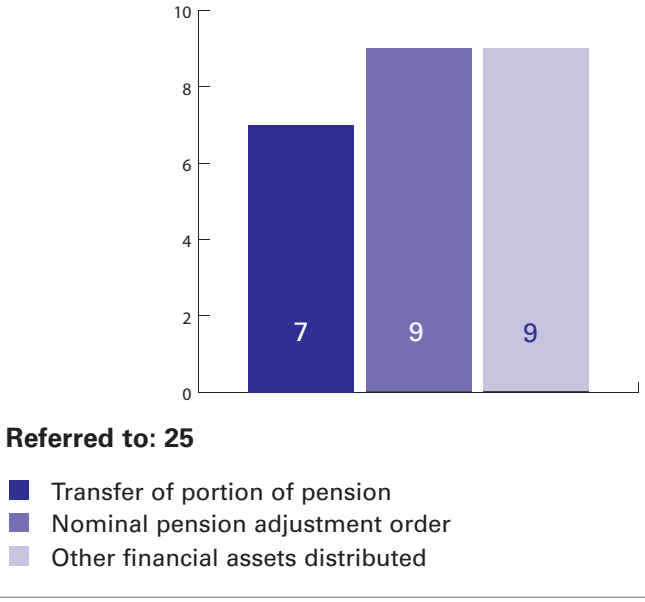


Figure 5 Pensions and other assets



Wife may return to court for second bite

When is a 'full and final' settlement neither full nor final? Carol Coulter summarises a recent High Court judgment from **Mr Justice Abbott**

In a divorce by consent case, the High Court was asked to consider how binding a "full and final" clause was and whether one of the parties, in this instance the wife, could return to the courts for a "second bite" given a change in financial circumstances. Mr Justice Henry Abbott gave his ruling earlier this year.

The facts

The couple were married in 1979 and had five children, all now adults. They were divorced in 2000 with the terms of their previous separation agreement annexed to the divorce order. Part of that read: "These terms hereof are in full and final settlement of all disputes and claims by and between the parties hereto and are agreed in contemplation of an application for a decree of divorce."

Two weeks later the husband's assets increased significantly when he sold a company of which he was director and substantial shareholder. At the time, the settlement reflected the financial reality that this company was in some difficulty. The wife claimed that the settlement's financial provisions were inadequate given the resources now available, and that the maintenance was no longer proportionate to her husband's means.

She applied to the High Court for a variation of the maintenance order for an annual payment of €48,500, which included €12,500 for the then dependent children, which would not be payable as they reached their adulthoods. She sought an increase in the maintenance payment, and/or a lump sum, and/or an annual increase in the maintenance amount.

The ruling

The court first considered whether it had jurisdiction to grant a new lump sum order and/or a new or varied maintenance order. This involved interpreting the provisions of the Family Law (Divorce) Act governing ancillary relief (matters additional to the decree of divorce).

The court considered in detail the implications for this case of the judgment in *T v T*, where the Supreme Court stated that, while there was no provision for a "clean break" divorce in our legislation, a clean break was not precluded, especially where the parties, with the benefit of legal advice, agreed to a final settlement which amounted to a clean break. It was argued in this case that a "full and final settlement" clause must be given weight by the court as the parties had chosen to make it part of the settlement.

On the other side, it was argued that the Irish electorate, in voting for a divorce regime that would not provide for a clean break, intended that it would be possible to return for further relief if circumstances warranted it. The case law, while expressing the desirability of a "clean break" in certain circumstances, and where the resources of the couple allowed it, did not make this mandatory.

Mr Justice Abbott pointed to the constitutional provenance of the 1996 Act, which states that "if and only if" proper provision has been made for dependent

members of the family can a divorce be granted. This makes what are known as "ancillary orders" of central importance, and "proper provision" is a condition of a divorce being granted. The delivery of "proper provision" may actually kick in only in the future, and there was an almost infinite variety of ways in which proper provision might be made.

He identified two "broad streams of relief" in the Act, which he termed "strategic" and "fine tuning". He stated that in terms of the internal layout of the Act it seemed that sections 12-18 (apart from 17) provided for "broad strategic options" for relief when considering "proper provision". Many of these options could be varied on an application under section 22 of the Act, which provides for variations of orders.

This section, according to Mr Justice Abbott, "provides for fine tuning rather than strategic options.".

"In the context of this case," he said in his judgment, "it is noteworthy that s. 22 (1) allows variation of a periodical payments order (otherwise knows as a maintenance order) but does not allow the variation of a lump sum order unless the order providing such lump sum orders payments by instalments, or requires the payment of such instalments to be secured."

Looking at the general application of the legislation, he stressed that it should not be interpreted just from the perspective of "ample resources" cases.

"It is easy to envisage situations where two earners had eked out a divorce settlement only to find that resources had declined into serious imbalance, resulting in catastrophe for one and good fortune or windfall for the other. To my mind, it is entirely inconsistent with the relieving nature of the legislation and the constitutional imperative underlying same that for proper provision to be made [for] the parties in such a situation, the court would not be able to relieve a catastrophe by granting an application for a lump sum even where the original divorce decree or settlement did not contain an order for such relief."

In this case before him, while the resources were substantial, they were not "ample" and the lump sum involved had mainly gone to providing accommodation for the wife and dependent children. She was therefore heavily reliant on the maintenance payments to live.

"I am thus of the view that the ample resources reasoning in the Supreme Court in *T v T* is not applicable to this case and that all other things being equal, the jurisdiction of this court to grant a lump sum order is not lost by reason only of the provision of a lump sum order," he said.

However, this did not dispose of the question of whether the "full and final settlement" clause could oust the jurisdiction of the court in this case. Such clauses constitute an attempt by the parties to have certainty and either a full or partial clean break, and there was no reason why this could not apply to cases with limited resources as well as ample resources cases. A "full and final settlement" clause should be considered in terms of proper provision under the Constitution and the Act.

He said he did not think that the court could make another order on a provision – in this instance a lump sum payment – that had been executed and performed, and "full and final" should exclude the court varying this order.

It should not apply, however, to a periodic payment or other provision that could be varied and operated forward into the future, unless there were specific provisions expressly providing for alternative provision instead of the right to seek a variation.

Accordingly he found that the court did have jurisdiction to vary the periodical payments (maintenance) order in favour of the wife, despite the existence of a "full and final settlement" clause in the agreement.

Couple incapable of normal marital relationship

A decree of nullity is granted in Dublin Circuit Court by **Judge Doirbhile Flanagan** in a case where a couple have failed to grasp what marriage entails

A decree of nullity was granted by Judge Doirbhile Flanagan in Dublin Circuit Court in a reserved judgment. The purported wife brought the application on the grounds of the immaturity of the parties at the time of the marriage, and the incapacity of both the applicant and the respondent to enter into and sustain a normal marital relationship

The facts

The couple married in 1993 and had no children. They lived in an apartment and had a mortgage.

The applicant was the youngest of five children. She had completed secondary school education but spent it in a remedial class. On leaving school she attended a Rehab centre where she had met the respondent. She had been continuously employed since leaving school.

The respondent was the seventh of 12 children. He had learning difficulties, and also a speech problem and had attended the Rehab centre where he met the applicant. They were 17 and 18 respectively when they met. Their courtship was mainly carried on in the applicant's home. He had worked after leaving the Rehab centre but was currently unemployed.

The respondent wanted the applicant to marry him but her mother opposed this. Eventually she relented and gave her permission. The couple had been going out for seven years and engaged for two years by the time they married.

At first they lived in rented accommodation but bought an apartment through a local authority rental purchase scheme, with the help of the applicant's mother, who provided a lump sum. The respondent was not involved in the financial decisions and at each stage he was told what decisions had been made and he accepted them. Savings the couple had from their time in rented accommodation were also put into the apartment.

The applicant's mother helped with renovations to the family home. She kept a close eye on all financial matters. The applicant accepted this. The respondent handed up money to the applicant and she paid bills.

A medical examiner, Dr Draper, was appointed. He believed the respondent did not grasp what marriage involved. The applicant had not understood at the time but had matured since.

He interviewed the applicant and her mother twice and the respondent once. He found the applicant to be a slow learner who was intellectually challenged. Her emotional development was slower than her age would indicate. There was a dependent relationship between the applicant and her mother.

The respondent had considerable difficulty in entering into and sustaining a marriage relationship. He did not have the skills to develop such a relationship.

The medical examiner did not explore financial matters with the parties and did not discuss with them the issue of children.

The ruling

The judge stated that it was settled law that while the court must take into account the expert evidence given in the proceedings by the court-appointed medical examiner, it was for the court to decide, based on the evidence, whether the decree should be granted. Judge Flanagan believed there were difficulties with Dr Draper's reliance on what the applicant

and her mother said. He had interviewed the applicant twice but the respondent only once. Nonetheless, his conclusions had to be taken into account.

She was also satisfied that where it was established that both parties to the proceedings lacked the capacity to enter into and sustain a normal marital relationship, it was possible for one party to rely on his or her own incapacity without the need to show that the other spouse repudiated the marriage contract. Judge Flanagan was satisfied that both parties were incapable of entering into and sustaining a normal marital relationship. The respondent did not then, and probably did not now, have a full understanding of what was involved.

The applicant lacked the ability to cope with the respondent's immaturity.

If left to themselves in all probability the relationship between the parties would have ended sooner.

The judge granted a decree of nullity. The only remaining issue was the respective interests in the family home and she set a later date to hear evidence on this.

Drug abuse and desire to help no basis for marriage

Full free and informed consent to marriage was found to be absent in a judgment given by **Judge Terry O'Sullivan**

A nullity case, scheduled for a three-day hearing on the Eastern Circuit before Judge Terry O'Sullivan, involved a couple with substantial resources. When the court opened at 10.30 am, however, it was told that discussions were taking place and talks continued until 3.30 pm in the afternoon.

When the court sat, the wife's barrister said: "Matters have been agreed between the parties which are subsidiary to the matters before the court. Its purpose is to be fair to both parties. [The wife] has been represented throughout and has come to terms relating to material matters. I have been instructed she will not participate in the proceedings."

The husband's barrister then said she was applying for a decree of nullity where the parties had gone through a "purported ceremony of marriage" in 2001. She would argue that at this date the applicant lacked the capacity to enter into and sustain a marriage, and that the same applied to the respondent. There was an issue about whether the applicant gave a full, free and informed consent. This also arose for the respondent.

There was also an issue about whether both understood what was involved in the marriage. The respondent had a history of alcohol and drug abuse.

The facts

The applicant husband said he had been born and brought up in a small rural village in a happy and sheltered family. When he was nine or 10 he had been the subject of an attempted abduction. This left him very fearful during the rest of his childhood and teens. His parents were more protective as a result.

His third level education took place in a local third-level college, rather than Dublin, which he visited but never stayed in, living at home all the time. In 1999 he met the respondent, who was living in an apartment in Dublin. He began a relationship with her and stayed with her in the apartment about one night a week.

He discovered she had a lot of problems in her life. Her parents had separated and she had lived alone from the age of 16. She used

alcohol and drugs from an early age and had a boyfriend who was a drug addict. She had been sexually abused by male relatives and had worked as an escort.

He became emotionally involved with her and thought he could help her. She became dependent on him. She continued to abuse alcohol and drugs, and showed mood swings, erratic behaviour and aggression. She was admitted to psychiatric hospital for substance abuse for five or six weeks but resumed her old habits on her release. There were times when she went missing and could not be contacted, and would then ring him crying and he would have to drive around keeping her on the phone as he tried to find her.

One night when she was in "highest" form she asked him to get engaged, and he felt he should "go with the flow". He had hopes of helping her and steering her to a more normal life. When she was low she spoke of suicide and said repeatedly that he was all she had. He said he felt under threat that she would harm herself or commit suicide if he did not agree to marry her.

She drank on their wedding day and he suspected she also took cocaine, as he recognised her behaviour. She drank heavily on their honeymoon and obtained cocaine from a barman. About seven months after the wedding he came home and found the house in darkness and the woman in bed drunk. He went out. Later she followed him to a bar and hit him over the head with a glass. She was then admitted to the Rutland Centre. This was the first time experts enlightened him about the state she was in and that there was little likelihood of a future relationship.

After her release from the Rutland Centre she spent a lot of time with the friends she had made there and told him he did not understand. He left in 2005.

Dr Gerard Byrne, the court's medical examiner, said he had examined both parties. He repeated the man's account of the relationship and added: "He was a man with very little insight into the extent of [his wife's] illness. He took on a role as an emotional support to her. She played this role. There was no objectivity about the quality of the relationship."

He confirmed the husband's account of her addiction and treatment. When asked if her state would have affected his capacity to consent, Dr Byrne said: "His motivation was taking care of her and looking after her." Asked if duress was involved, he said: "He was very affected by her threats to kill herself."

"Would this have affected his capacity to say no to the suggestion of marriage?" he asked.

He answered: "Yes. It was a marriage that ought not to have taken place, at least not then. Were they to have married it should have been after a substantial period after she ceased using drugs and understood the nature of the relationship." He said she suffered from "polysubstance abuse" which was more severe than normal substance abuse.

He was satisfied that there were sufficient grounds to deem the marriage null and void, adding that it was a very disturbed relationship.

There was no evidence given on behalf of the woman.

The ruling

Judge O'Sullivan drew on a decision in the case *O'S and O'S*, where a condition known as "emotional bondage" was described.

He said that if either ground for nullity – an absence of full, free and informed consent, or an inability on the part of either party or both to enter into and sustain a normal marital relationship – was present, then the marriage could be voided.

He summarised, saying: "One must draw the conclusion that there was not a full, free and informed consent." He was supported in that view by *O'S and O'S*. It was not necessary to consider whether the parties could sustain a marriage as the consent ground was sufficient.

He had also heard a good deal of the wife's medical detail which indicated that she could not give a full, free and informed consent to the marriage. He was therefore granting a nullity on the grounds of absence of consent on the part of either party. He made no order as to costs.

Pensions? No need to panic

When things go wrong with pension adjustment orders, the results can be catastrophic for the beneficiary. Pensions Ombudsman **Paul Kenny** explains how to avoid the pitfalls

Pension adjustment orders (PAOs) are a variation of the property adjustment orders used to distribute family property in divorce or separation proceedings. In separation cases, the orders are made under section 12 of the Family Law Act, 1995, a provision replicated in section 17 of the Family Law (Divorce) Act 1996.

Special conditions are needed to treat pensions as family property. Pensions legally belong to the scheme trustees, not to a family member. Legislation is needed to allow – or compel – trustees to pay pension scheme benefits to persons not entitled to them under scheme rules; and often, to override trustees' discretionary powers of distribution under a trust instrument. The Acts also relieve trustees of liability for non-compliance with scheme rules or with the Pensions Act, 1990, resulting from implementation of PAOs.

Some family law practitioners and judges regard pension adjustment orders as the bane of their lives. These sentiments are shared by pension managers, trustees and scheme administrators. Although the relevant sections of the Acts themselves are drafted in a reasonably straightforward way, when it comes to drafting and actually implementing PAOs, the provisions of Murphy's Law seem to apply with greater force than those of either of the above-mentioned Acts.

I find this mysterious and distressing: mysterious, because it shouldn't be that difficult; distressing, because the results of error can be catastrophic for the intended beneficiary. I believe that some difficulties arise just because the word "pension" is involved, a word that seems to generate panic in otherwise sane and sober individuals.

In order to understand what goes wrong, it might be useful to consider what is supposed to happen.

What should happen

The objective of the various reliefs available to the courts under the Family Law Acts is to enable the court, insofar as is practicable, to provide for the financial support of both parties to an application for separation or divorce. Pension rights form part of family property, distributable in the same way as other assets. In terms of monetary value, they can be important – sometimes more valuable than the family home. Occasionally they may be the only significant asset available for distribution.

Generally speaking, however, PAOs are not as common as the importance of the assets

Quite often, pension assets, once their value has been ascertained, may be traded-off against other assets

PAOs over contingent benefits must be applied for within a year of the decree of divorce or separation and, once made, cannot change

concerned would imply. This may be because of fear of pensions generally, or because practitioners might not fully understand how pension schemes work. However, I feel that, quite often, pension assets, once their value has been ascertained, may be traded-off against other assets – "You keep the house and I'll keep the pension" – so to speak.

PAOs can affect two different kinds of entitlement – retirement benefits and "contingent benefits". Retirement benefits, for this purpose, include anything payable on or after retirement – pensions, lump sums and dependents' benefits on death after retirement. "Contingent benefits" are those payable on death before retirement, whether lump sums or dependents' pensions. PAOs affecting pensions may be made at any time and, unless restricted by another order of the court, may be changed at any time during the scheme member's lifetime. PAOs over contingent benefits must be applied for within a year of the decree of divorce or separation and, once made, cannot change.

The wording of PAOs is important. Those affecting retirement benefits must stipulate a "designated benefit", calculated by reference to a specified period and a specified percentage. The specified period may be any period ending not later than the date of the decree – so it could be the whole period of scheme membership, or the duration of the marriage, or whatever. The specified percentage may be anything up to 100 per cent.

So a typical order might instruct the scheme trustees to pay to the applicant, say, 50 per cent of the benefits accrued during the 10 years ending with the date of the divorce. An order affecting contingent benefits is expressed as a percentage of the benefit payable on death.

The beneficiary of a PAO covering retirement benefits may apply to transfer their value to another pension arrangement of their own. In a defined contribution scheme, the trustees can transfer the benefits without the beneficiary's consent. Benefits not transferred continue to participate in investment gains. In defined benefit schemes, they also continue to participate in increases resulting from changes in pensionable salary; but not from future service or improvements to the terms of the scheme.

The first pitfall

So, what happens in practice, and where does it all go wrong?

The first pitfall comes when the scheme trustees are asked for information about pension entitlements. This must be provided in line with Guidelines under the Pensions Act 1990, with which some practitioners may not be familiar. Sometimes the information furnished is inaccurate or incomplete. Trustees can misunderstand what is requested. (The Disclosure of Information Regulations gives members and others a right to certain specified information. If it is not clear that the request concerns a family law action, what is furnished may be incomplete or irrelevant.)

Trustees, and others, can lie or prevaricate. I have seen a case where information given by the trustee (a relative of the now-deceased scheme member) stated that he was not "getting any benefits" except salary. The member swore two affidavits to the same effect. In this case there appears to be a substantial entitlement. There is also a "wishes letter" purportedly signed by the member, which may well be spurious. In another case, information carelessly compiled by pension consultants seriously understated a member's entitlement.

Drafting the order is another problem area. Often, this takes place on the back of an envelope following negotiations between counsel. One complainant was devastated by the failure of an order to cover the contingency of her (now deceased) ex-husband's death before retirement – even though her Notice of Motion had specifically requested an order to cover this.

Another complainant sent me two draft orders prepared by her husband's solicitors. She complained that she was receiving no payment. It transpired that the orders covered the death of her ex-husband, before and after retirement, but not the contingency of his survival to collect his pension! At least she may still apply to have one of the orders modified.

Another court order was not actually a PAO, though the sum to which it referred was supposed to come from a pension entitlement. It was not addressed to the scheme trustees (though it was served on them). It referred to the payment of €10,000 out of an unidentified entitlement of €24,000. On investigation, it emerged that it was intended to be a PAO – and that the member spouse's entitlement under the rules was not €24,000, but €36,000 (or €52,000 if he retired in ill health, as was the case here). Both parties were on free legal aid, and had to go to the end of that queue before they could seek leave to re-enter. Meantime the trustee, understandably, refused to pay anything to anyone.

Another order over retirement benefits was perfectly drafted, based on a specified period and a specified percentage. However, a shortcut was taken and similar wording used in the order covering contingent benefits, which requires no restriction to a specified period. The death benefit in this, as in most schemes, is based on future as well as on past service, so the trustees had to interpret the intent of the order as best they could, following the member's death.

Orders designed to protect pension entitlements are another problem. There appears to be a consensus that a "NIL" order is not effective under the legislation. The practice is to draw up orders specifying minuscule amounts – such as .0001 per cent of the benefit accrued in a single day – and then prohibiting any future alteration of the order. This is a clumsy device, which increases the scope for error, and the legislation could do with amendment.

'Drafting the order often takes place on the back of an envelope'

Public sector pensions

I received a complaint of failure to serve the PAO at all. The scheme is in the public sector, and the government department concerned is seeking legal advice as the order was not uncovered until after the scheme member's death. The beneficiary knew that the order had been made, but could not get her solicitor to serve it; it was eventually served following my intervention.

Great care is needed with public sector pensions, as there may be more than one scheme involved. Typically, there are two –

a superannuation scheme, covering personal pension and retirement gratuity, and the death gratuity – and a spouse's and children's scheme, covering pensions payable to dependants, both on death in service and on death after retirement. Dates of entry to different schemes may differ.

In the local government area, which also covers most HSE employees, one scheme provides all benefits. There may be other public sector schemes from which benefits may, or may not, have been transferred, and there could also be a scheme for additional voluntary contributions with separate trustees/administrators. While most public sector schemes follow the same broad pattern, there are some exceptions, such as the Defence Forces.

Problems routinely encountered in the public sector include attempts to pay spouses' pensions to children, and vice-versa – the latter an (unsuccessful) attempt to limit benefits available for children of a subsequent union. The schemes treat all children equally.

The Department of Finance has a detailed and useful paper on PAOs and public service pensions – no practitioner should approach these schemes without it.

PAOs in general should be approached with caution. They are a specialised subject. The cost of specialist advice may be money well spent. Because of the high value of benefits, they can cause major problems if things go wrong – problems which may literally last a lifetime.

(Contact the Pensions Ombudsman at 36 Mount Street Upr, Dublin 2 or email info@pensionsombudsman.ie)

Courts Service
Phoenix House
15-24 Phoenix Street North
Smithfield
Dublin 7
www.courts.ie