Contents

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Welcome again to 'Family Law Matters'

At the conclusion of her time with the family law reporting project Dr Carol Coulter produced a comprehensive report which was presented to the Board of the Courts Service in which she recommended that the project should continue for a further year. This recommendation was accepted and it was agreed that a further three issues of *Family Law Matters* would be published in 2008. It also decided to establish, under the chairmanship of Mr Justice Nicholas Kearns of the Supreme Court, the Family Law Reporting Project committee. Its terms of reference are:

1. To consider recommendations contained in the Report on the Family Law Reporting Project insofar as they relate to the Courts Service and to make proposals concerning their implementation.
2. To consult with the Presidents and the Judges of the courts concerning the recommendations and to make such proposals arising form the consultations as are considered appropriate.
3. To oversee the Family Law Reporting Project for the next 12 months and review it at the end of the 12 month period.

The project had at its commencement a central focus to provide information for legal practitioners, the media, researchers and the public on the working of the family law system in our courts. In starting the project it was hoped that the veil of ignorance which has surrounded the family law courts would start to be lifted by providing a valuable insight into the reality of the day-to-day operation of family law courts.

In her three issues of Family Law Matters Dr Coulter did this by providing a selection of reports on cases heard in all three jurisdictions High, Circuit and District courts. She also provided information on judgments reached and a statistical analysis on a number of circuits. Issues two and three highlighted the heavy workload the District Court carries in dealing with family law and the important matter of child care applications. Important advances being undertaken in trying to help litigants achieve closure in family law cases were also published including case progression and the role mediation can play in family law.

We will continue with this approach in 2008. In this the first issue of the second volume of Family Law Matters we report on the vexed issue of nullity and on appeals from the District Court to the Circuit Court. We also continue to report on a selection of cases from various Circuit Courts around the country. We also look in on a typical busy family law day in Naas District Court. We continue with Dr Coulter's statistical analysis with three more circuits. We conclude this issue with an interview with Michael Culloty of the Money Advice and Budgeting Service.

Welcome again to Family Law Matters.

Terence Agnew

Immaturity grounds for nullity

When considering marriage break-up, most people think of judicial separation and divorce. However, there is a third legal avenue to dissolve a marriage and this is nullity. Nullity is where a court declares a marriage to be invalid by reason of some fundamental defect relating to the form of the ceremony or to the person or state of mind of either party to the marriage ceremony. The defect must have been present at the time the marriage took place. What follows is a snapshot of such cases heard on the Midlands, Southern and South Eastern circuits

Her husband told her it was over but that he would come back for her if he felt like it

A woman in her early twenties sought an order of nullity on the Midlands Circuit. She appeared alone as her husband had not responded to her requests for consent. Her barrister described the circumstances in which the marriage took place and what happened between the parties later.

Judge Anthony Kennedy heard that both parties belonged to the Travelling community and had dated for about six months before they married. During their courtship, they spent little time alone together and had no sexual relations.

The woman said she had planned their wedding in great detail and they had both decided they would settle down and give their children a good education. After the wedding, however, her husband got very aggressive towards her and began to bully her in their home. She gave some of their weddings gifts to her father to help him pay for the wedding and when her husband discovered this he was furious and brutally attacked her. He would not allow her to go out with him socially or leave the home at all. He beat her regularly and after each beating would force himself on her. They stayed together for three months and during that time tried unsuccessfully for a child. Her husband accused her of being barren.

She said her husband told her it was over but that he would come back for her if he felt like it. Her husband told her she was only for "feeding, breeding and cleaning".

Judge Kennedy granted her a nullity on the grounds of immaturity.

Husband fails to make case

In refusing a nullity application on the Southern Circuit, Judge Sean O'Donnabhain said the husband had not made out a full case, there was no psychiatric condition involved and there was a full free and informed consent to marry. He made an order for judicial separation, a property adjustment order and mutual extinguishment of succession rights.

The couple had married in December 2003 – when the husband was 31 and the wife 30 – and had separated four months later.

The husband described it as a whirlwind romance. The wife was inundated with gifts and flowers and he proposed in June 2002 after six weeks. They announced their engagement six months later and married. "We met, it snowballed, call me romantic to a degree," said the husband.

His barrister asked him when the cracks began to appear. "Between the engagement and the marriage, after the death of my mother," he replied. "My mother died suddenly, it was very traumatic and had a huge effect on my family and me. She was the most important person in my life."

He was accused of hurting his wife in her parents' house and taking a hundred people off the wedding guest list. "There was constant arguing over everything. I had loads of doubts but it was getting closer and closer and I was in a no-win situation. It got so far and we weren't intelligent or brave enough to call a halt. Once we came back after the honeymoon we realised that this was no life. I suggested that we rent prior to moving in with her parents but she didn't want that. It was over after three months," he said.

The psychologist who interviewed the pair had produced a report and gave evidence. Both parties had stable backgrounds. "There were two contrasting types of presentation," said the psychologist. The wife felt the husband was bullying and controlling. There had been altercations from October to November 2003. She said her husband had subjected her to verbal and psychical attacks. The husband denied, saying it was mutual "shoving and pushing".

He remembered an incident in Galway where he felt his wife was policing him. He was talking to a woman and his wife accused him of inappropriate behaviour which he thought was over the top.

The husband's mother had died in March 2003 and the psychologist believed the husband was happy that his wife would be a substitute for his mother. "One should not make radical alterations after grief and there was no resolution of this grief in 2003."

The husband considered his wife's relationship with her family was far too close. It was always "Mam and I". He felt like an adjunct rather than a part of the family. The wife said she came from a close family but that they were not smothering and claustrophobic. They gave the usual support to a newly wedded daughter. She believed she and her husband were polar opposites – he was gregarious and she was less sociable.

"It was an intense relationship, they abandoned their sense of perspective, they seemed to oscillate between infatuation and hatred. They didn't pay attention to the warning signs – the serious incidents that occurred in 2003," said the psychologist.

'It was an intense relationship, they abandoned their sense of perspective [and] didn't pay attention to the warning signs'

‘No question of collusion’

‘I had a pregnant partner. I was coerced into this marriage’

Judge Sean O’Donnabhain granted a decree of nullity on the grounds that both applicant and respondent suffered from lack of maturity and this prevented them from giving a true or valid consent to the marriage.

They were married in November 2002 and separated in 2003. There was a mutual claim for nullity, with no evidence of collusion. Both were entrenched in their respective positions according to the husband’s barrister. There was one child of the marriage.

The applicant husband said they met in May 2000 and began a relationship. He was 28 and she was 23. They got on well initially and in September 2000 went abroad on holidays. It was “cloak and daggers” as the respondent’s father was unaware of the holiday and would have disapproved. The husband felt the father controlled the daughter. They got engaged. Her father said an engagement was not to be viewed as a marriage and not to take liberties.

He believed his wife was immature. She had accused his brother’s girlfriend of being a lesbian which his brother strenuously denied. She fabricated stories about getting pregnant and miscarrying. She told him she had miscarried early in their relationship, and then said she was pregnant again and miscarried. They went to the hospital but he did not believe her as three weeks later she told him she was pregnant again. His barrister asked: “Were those alarms putting the relationship under strain?” He said they were and he found the relationship difficult. The respondent would not take the contraceptive pill. He was told it was his fault she was pregnant and that if her father found out he would kill him. The pregnancy was confirmed and the wedding planned by his wife and her mother. He had no input into it.

“How did you feel about the wedding?” asked his barrister. “I had a pregnant partner. I was coerced into this marriage. The pregnancy and marriage were presented to the father as the complete deal. There was a lot of pressure.” Her father had threatened him. It was put to him that his case was one where he had an inability to enter into a sustained normal relationship and that there had been duress involved. He agreed. The respondent’s father warned him not to let his daughter down. She also threatened to go to the UK to have an abortion which he was personally against. Then that threat was dropped and the marriage ceremony went ahead. On the

honeymoon there were problems. During the marriage the husband said he had difficulties rationalising with his wife.

After the child was born she said his mother had made the child deliberately sick. She accused his parents of not giving a gift and they had given €2,000 towards the wedding and a site worth €150,000-€200,000. She constantly complained that his family provided little support. He felt her behaviour was irrational. The marriage was extremely rocky.

Under cross-examination by the wife's barrister, he said he would have waited to get married but when the respondent was pregnant he had no choice. The wife's barrister said there was no duress. The husband disagreed, saying there was the fear factor of the father and the brothers. He agreed with the wife's barrister that the father hadn't physically touched him before the marriage. He denied that the wife gave him a foetus in a box to bury. It transpired that she had miscarried a twin and that his son was a surviving twin. He had not known this previously. He said his wife's behaviour deteriorated. She threw him out numerous times. He was slapped and punched, attacked with a frying pan, saucepan and a kitchen knife. He admitted throwing her to the ground after being attacked. Once she hit him with the shower head. He moved out in December 2003 and told her father she was depressed and he assaulted him.

The judge found no question of collusion. "There was a mutual lack of maturity in almost all of the fundamentals required to make a marriage work." The parties were manifestly under the strain of the relationship, there was a lack of maturity and they didn't give a full free and informed consent to the marriage. The father was to be made a guardian. He declared both parties to be joint custodians and the principal place of residence for the child was with the mother.

'There was a lack of maturity in almost all of the fundamentals required [for] marriage'

Lack of capacity argument fails to persuade

On the South Eastern Circuit a man, who said his wife lacked the capacity to enter a marriage, failed to get a decree of nullity. A psychologist's report stated the marriage was based on duty rather than love.

The psychologist said the wife had come from an unstable family background. When she met her husband and moved in with him and his mother she found a certain stability. "She identified this stable environment with her romantic relationship and this environment lasted up to half way through their courtship." Sexual relations ended but the couple never discussed it. She had told the psychologist that she had not left before the marriage took place because she felt she had a duty to stay and because her own mother and his approved of the marriage. She later told her mother how unhappy she was. Her mother gave her blessing for her to leave. The psychologist said: "Mrs... had a childlike decision-making process."

She lacked the courage to let her husband down. The husband noticed his wife withdraw but thought it had nothing to do with the marriage. Halfway through the courtship their sex life stopped as did her dependency on her husband. The husband remained in love with her and put no pressure on her to increase physical intimacy.

Judge Olive Buttimer said: "There is nothing in this case to support a decree of nullity and nothing indicating a lack of capacity. They had been going out for seven years before they got married."

'There is nothing in this case to support a decree of nullity'

Children's welfare 'more important than costs'

Our legal system allows any party to an action the right to appeal a decision of one court to a higher court. The family law lists of all Circuit Courts include appeals from their local District Courts. Issues such as custody and access, maintenance and orders made under domestic violence legislation frequently arise as the following selection of cases illustrates. Occasionally an interesting and different case can be heard such as the lead report in this section

A refusal to award costs...could mean depriving people of access to the courts

A case came before Judge Olive Buttimer in the South Eastern Circuit which concerned whether the court could award costs against the HSE in a childcare case where the parents were legally aided. The judge made it clear throughout proceedings that she diverged from legal practitioners and considered the children's welfare, rather than costs, to be the only significant issue.

In the initial District Court case, orders had been made to take the parents' children into HSE care, along with various other orders. They had appealed those orders to the Circuit Court and were aided by the Legal Aid Board. The appeal had been heard for three weeks in the Circuit Court and an argument had developed over whether the court could award the Legal Aid Board its costs when some of the District Court orders had been upheld and others overturned. The parties had been given time to research the legal arguments and the matter was to be disposed of at this hearing.

Counsel for the HSE said some submissions had been made previously. She referred to the High Court judgment of Mr Justice John Hedigan in the *Iarnrod Eireann* case. She noted the legal queries on exercise of jurisdiction. This Circuit Court had affirmed three of the District Court orders, she said, and the respondent parents had both been legally aided. The judge said it was more like two-and-a-half orders. Counsel said what was key was that these were public law proceedings, akin to wardship proceedings, and were non-adversarial. The point of public law proceedings was to ensure vindication of legal rights. The court could be happy that the parents were not paying legal fees themselves and she noted the importance of these types of proceedings. She referred to the Childcare Act 1991 and said there was no jurisdictional basis for an award of costs in that Act. The District and Circuit Court Rules only provided for costs in civil proceedings between private parties. She referred to a Sligo case where it was found that if substantive power to award costs was lacking in the legislation, it could not be found in the rules. Therefore the court had no inherent jurisdiction to make an award of costs in this case.

These were childcare proceedings, the HSE was a public body and the Legal Aid Board was a creature of statute. As a result, they must all operate within the statute. She added that the usual course in these types of civil

proceedings was that the parties would pay their own costs.

The barrister referred to three authorities:

a) Rule 66 of the Circuit Court rules which concerned the judge's discretion on costs;
b) the case of the *Inspector of Taxes v. Arida;*
c) *Joyce v. Madden,* an Equal Status case where the decision of the Equality Officer was appealed.

In those cases the respondents had had to represent themselves out of their own funds and they were very different cases so did not apply in this instance. She said that in the Equal Status case there was a complaint to the Equality Authority and there had been an award of damages whereby the respondent hotel had to pay compensation. This was appealed to the Circuit Court but the hotel withdrew its appeal. These were private law proceedings and not public law proceedings.

Mr Justice Nicholas Kearns had jurisdiction under the Equal Status Act to award costs against the hotel. This was not so under the Childcare Act. In the second last paragraph of the decision, the judge referred to the fact that legal expenses might wipe out the compensation award and this would have been an injustice. A refusal to award costs in that type of case could mean depriving people of access to the courts.

The barrister said that here, though, the parents were legally aided and the awarding of costs in proceedings such as these did not engage the court's discretion. There was no basis for court concern that the respondents might be prejudiced over any issues on costs.

Counsel for the parents replied that the court had previously queried whether there was provision for costs in the Act. She said there was not and referred to Section 33 of the Civil Legal Aid Act, adding that Section 33(2) did not amount to a distinction between civil and public proceedings. Costs orders should be made as if the parties did not have legal aid and the court should forget such aid had been granted to the parents.

The barrister referred to a judgment of Mr Justice Henry Abbott in the High Court, *O'H v. HSE*, and another from March 13th, 2007 and handed in a transcript of it. She referred to page 31 where the judge commented that one of the parties was represented by the Legal Aid Board and that the health board could bear the hit. In that case he acknowledged that the HSE budget was far greater than that of the Legal Aid Board.

The parents' barrister noted that the court had affirmed two-and-a-half of the District Court orders but had varied the other orders substantially. The access aspect of the orders had materially changed and this had to be borne in mind. She argued that unless the power to award costs was expressly excluded by statute, then it existed. She referred to the Circuit Court rules and said the court's discretion referred to any proceedings, which was a wider discretion than in District Court rules. She said the statute would have to

'Exceptions must be, if not expressly stated, implied with clarity'

expressly provide that Circuit Court rules on costs did not apply.

She referred to the case of Inspector of *Taxes v. Arida Ltd* and said that here it had been said that an Act would have to expressly exclude the power of the Circuit Court to award costs. She said that the decision in *Joyce v. Madden*, the Equal Status case, had been based on the *Arida* decision and in it the judge had said: "Exceptions must be, if not expressly stated, implied with clarity."

A third barrister, who had acted for the parents in the original District Court proceedings before they had obtained legal aid, said there had been an application for costs in the District Court and that neither the solicitor or barrister who appeared were motivated by costs. The parents had paid a sum but if costs were ordered then these would be returned. This would be a nice windfall to be returned to the respondents. He said he was following the argument of the parents' barrister and that there was a long history of making orders for costs where not provided for by statutes. There was no express statutorial basis for costs in hundreds, maybe thousands, of cases.

He queried whether the decision by Mr Justice Hedigan in the *Iarnrod Eireann* case had effected a sea-change or whether it should be restricted to its facts. He favoured the latter. Mr Justice Hedigan was not considering these types of cases when he made his decision or that his decision could be used like this. There was a difference between the ratio and obiter in the decision and the court was bound only by the ratio. He referred to Order 66, rule 1 of the Circuit Court rules, saying it would be extraordinary if it were rendered useless by a decision not directed towards it and not envisaged by Mr Justice Hedigan He further referred to Order 51 of the District Court rules and noted that Part III related to civil proceedings and dealt with everything else that was not a criminal

proceeding. Order 51 was within Part III and was significant because it purported to indicate that costs could be awarded in all civil proceedings. It did not, however, deal expressly with childcare proceedings.

A fourth barrister then made submissions for the parents. She noted there was a threshold of €18,000 income to qualify for legal aid and it was entirely conceivable that a person on an average industrial wage in a case like this could face large costs. One would have to be able to tell a solicitor that they could get costs if they won the cases. The constitutional rights of married persons would not be vindicated if having successfully challenged a District Court decision they could not get costs. The parents had had to make a contribution to the Legal Aid Board. She noted that the case concerned a matter of fundamental importance to Irish society and that people had huge difficulty obtaining legal aid in cases of this nature. This would be even more difficult if the Legal Aid Board could not recover costs.

Counsel for the HSE asked for permission to reply but the judge refused. She wished to deal with the more important matter of the children's welfare. The hearing proceeded and it was clear that relations between the HSE and the parents were extremely fraught. Judge Buttimer was critical of the HSE's handling of the matter. She asked that an independent person from a reputable agency be found who could act as a go-between for both parties. She also directed that family therapy be set up.

Finally, the judge came back to costs, saying it was the most unimportant issue in the case. She was not convinced that the Circuit Court did not have jurisdiction to award costs but that in the instant it was not an appropriate case in which to award costs. She said there were no clear winners or losers. The HSE had almost been obliged to bring the case in the first place. She was highly critical of how the HSE had behaved towards the family and in particular the way in which it had treated a breastfeeding mother. Bridges needed to be built between the HSE and the parents. It was therefore appropriate that the HSE would provide funds to mend the situation that had arisen and the HSE should fund the therapies.

Judge Buttimer then adjourned the case to the next sitting so that costings for the therapy and independent mediator could be obtained and a written agreement reached for funding them.

[The judge] was highly critical of how the HSE had behaved... Bridges needed to be built between the HSE and the parents

Father appeals order and gets access to children

On the Eastern Circuit, Judge Terence O'Sullivan heard from a husband home from England for 10 days. The man wanted to appeal a District Court order in which access rights to his children had been discharged in his absence. He lived in England and he and his wife, who represented herself, had begun judicial separation proceedings.

The couple had three children aged 11, eight and seven years. The husband suggested that while he was home for Christmas, he would pick them up every second day at 11am and return them at 4pm. He proposed that access should be from December 22nd to January 9th and that he would give two weeks' notice by text message when returning from England. Also on weekends he was home, he would take them from 6pm-8pm on Friday and on Saturday and Sunday from 11pm-4pm.

The barrister said relations between

'There is nothing perfect when a family breaks up'

the pair were acrimonious and as a result communications would be via text. The venue proposed was neutral and accessible as the husband had no private transport. The wife wanted to know why the parties were before the court on the day. She said the access order had been discharged in the District Court and the matter before the court concerned an appeal of that order. Because of the order her husband had access only on a Sunday and it had been discharged because he never saw his children. She thought the venue was inappropriate and asked: "Are the children to be used at Christmas time?"

She believed two weeks' notice was insufficient and wanted to know when her husband was visiting, to have some consistency. The judge responded: "There is nothing perfect when a family breaks up. One party resides in England and we have to deal with the position as it is."

The wife said her own father collected the children, cared for or fed them when needed and that this was what a parent should do. She found it unhelpful for a father to bring his children gifts and then not see them for weeks. She had no problem with him seeing them for one day but did not want them going to the proposed venue every second day over Christmas.

The barrister interjected, saying that the venue was suggested as other arrangements had not worked out. It was not intended that they would stay there, although that might happen, but it was to be used as a springboard to go to other places.

The wife asked: "Where does the father's role fit into day trips?" The judge replied: "I can't answer that, it's not helpful to use words like that." The wife interrupted: "The children are being used. I propose that he lives in Ireland. There is no reason for him to live in England. He should come home. It's not right to do this to the children. He wants to have his own way and treat them like pups. My children are being used in a fight against me. I have no problem with access on the terms for which my own father is currently responsible. This is the second time my husband has done this. He has another family in the UK."

Judge O'Sullivan believed the parents should be involved and asked why the husband was living in England. He heard the husband was a builder and could not get work in Ireland. He said that if the husband wanted to be involved with the children, the best way was on a day-to-day basis. If the husband was deliberately absenting himself from Ireland and then getting involved, it would be disruptive for the children.

The barrister said her solicitor could give evidence of the husband's business debts. Her instructions were that if he could come home and get work he would. He wanted daily telephone access but his wife had been difficult about it.

The wife interjected, saying that her husband drank and as a result the business went into debt and that he had abandoned his mortgages and two rental properties. As for telephone access, her husband was to ring on Monday and Thursdays at 6pm and he had complained when one child was not there. This did not always fit in with the children's activities. The judge responded: "The activities have to fit in place with access and not access with activities."

The husband's solicitor gave evidence on the husband's debts. He said: "The level of debt is frightening. There are three houses and three sets of repossession proceedings. Two of the houses are in the process of being sold." The judge asked if the debts stemmed from his lifestyle and the solicitor said: "I couldn't comment on his lifestyle."

He said the debt went well beyond the husband's earnings and that the house sales would help matters. He couldn't understand how the husband had bought three properties or how he had got the mortgages for them.

The judge asked if the husband could come home once the sales went through. The solicitor said he intended getting two jobs in England and a contract when he returned to Ireland. The judge then put it to the husband that his wife believed he was avoiding access by living in the UK. He was asked if there was any reason why he could not come home.

The man answered that he lived in the UK because of his debts. He could come home "as soon as the properties are sold". He hoped it would be sorted out in six months, adding: "She [the wife] hoped I would go back to her and because I haven't she is being difficult about access."

The judge made an order providing weekend access on a limited basis of six months. He granted access over Christmas on the terms the husband sought. He said to the husband: "I am taking you on trust that you have the right motivations. I don't think necessarily that your wife has malicious motivations. I accept it is disruptive but it is the price that has to be paid."

The wife asked the judge: "It is the price we always have to pay. Would you accept your wife texting you with two weeks' notice for access? What about the children's activities?" The judge replied: "Access is more important." The wife then asked: "What do I tell my children after January10th?"

The judge said he would give her a copy of the order. She asked: "When will they see their father after the 10th? Can you not give them dates? That's very unfair. They are children."

'The [children's] activities have to fit in place with access and not access with activities'

Ex-husband has maintenance order varied

Judge Terence O'Sullivan on the Eastern Circuit heard an appeal of a maintenance order by a couple who separated in 1997, divorced in 2004 and were both in new marriages. They had two children – a 19-year-old in third level education and a 16-year-old in transition year. The wife had received no maintenance either for herself or her children since 1999.

She said she had earned a considerable income before having children and that afterwards, her former husband had been a high earner. They had properties abroad and money had not been a problem. She now

had custody and there was an access order in place. The judge asked her what she had done to date about lack of maintenance and she said nothing.

She initially supported the children on the proceeds of the house sale and later her current husband supported them. She said their cash flow was now low as her husband had started a new business. She had asked her former husband over the years for maintenance but it was not forthcoming.

She had obtained a maintenance order in the District Court two years previously for €200, €100 per child. This was later reduced to €130 for both children as her former husband said he wasn't well. It was her understanding that he was making more money than he admitted. This opinion was based on knowledge of his lifestyle, his car, rent and holidays. She had also asked him to fill out a grant application form for their son which applied to incomes of less than €39,000. He said his salary exceeded the amount and he was not eligible.

The husband's barrister asked about his ill health and the wife said she was aware that he had diabetes, arthritis and a heart condition and was on disability benefit. She also knew he was banned from acting as a company director for five years and that this had previously happened in Luxembourg and was the reason for moving to Ireland.

Counsel said she had a letter stating that the company of which the husband was a consultant was not profitable. When asked if she accepted this position she replied: "No, it is easy to make it look like that on paper." The judge, who had been studying the husband's affidavit of means, noted that it made no reference to consultancy fees.

The wife was then asked if she accepted that her husband honoured his access duties. She replied: "Yes, but he has not honoured his maintenance duties." She said her husband had given money to their older son recently but had not contributed to the maintenance of their younger son. He paid the older son €30 a week and she and her current husband paid him €50 weekly. The judge asked if the son worked while in college and heard he had a part-time job which paid him €73 a week.

The husband told the court he was on disability benefit and that the health service paid a large percentage of his rent. He was involved in risk management and incorporated his own company for which he worked as a consultant but there was no written agreement to this effect.

When asked if he was earning money, he said: "No, not at this stage. It is not profitable at the moment." He told the court that his assets disappeared in 1996 during the separation.

The judge asked him about his bank accounts and his inheritance from his late mother. He then asked about an enforcement order of €20,000. He noted that €3,500 had been paid either on or after April 30th, 2004 but it did not appear in any of the bank accounts before the court.

The judge said: "The position concerning the husband's income is very far from clear and I am not happy about certain aspects of it. I believe his income is greater than he said but I wouldn't think it is very high by any stretch of the imagination."

The judge varied the District Court order and directed the husband to pay €100 weekly, €25 a week for the older son and €75 a week for the younger. The husband was to continue to pay €30 a week directly to the older son.

Too early to reverse foster care arrangement

A single mother appealed a District Court care order which placed her special needs daughter temporarily under the care of the HSE. Judge Anthony Kennedy on the Midland Circuit was informed that the woman had returned from the UK some years ago with her two children, the younger daughter had Downs Syndrome.

Her barrister said his client started to have difficulty coping with the children on her own and her mental health began to suffer. Social services were engaged but the child was eventually taken into foster care and had been there for the past year.

The woman's GP said she was depressed and anxious and had previously attempted self harm and threatened suicide. He had monitored her for the past year and had seen a vast improvement in her mental health and coping abilities and considered her capable of resuming care of her daughter.

The court heard that before the child was taken into care she was very disruptive and her speech, mobility and toilet training were not developing at the expected rate. Social services believed the child's mother was unable to cope and was not amenable to help or advice which meant the girl spent most of her time watching videos. Since she had been taken into care she had made significant progress with her foster family who were especially equipped to deal with children with special needs. Judge Kennedy heard she was allowed weekly access of one hour to her mother and sister and that this had been successful most of the time.

The mother said she had had difficulty coping but she had not found the HSE's intervention helpful. She felt they treated her like a robot, expecting her daughter and herself to perform whenever they came to visit. She always felt like the "bad guy" in the situation and that she could do nothing right where the HSE was concerned.

She told Judge Kennedy that the previous nine months had been the hardest of her life and she had become a stronger person as a result. She had a bond with her daughter that no one else could break. Nobody could give her daughter what she needed except her. She said: "If my daughter could speak I am sure she would say that she wanted to come home."

'If my daughter could speak I am sure she would say that she wanted to come home'

Judge Kennedy said that because both parties were benefiting from the current arrangement and that their health had improved as a result, it was far too early to reverse the District Court order.

He added: "I fear a relapse by mother and child separately; the doctor says that the mother has improved since the separation so I accept the cause and effect theory. I think the mother feels that all HSE intervention has been adversarial. Contact visits are plainly reviewable and it's not for me to tell the experts but there should obviously be sensitivity with Christmas coming up."

Judge Kennedy concluded by saying that access should be reviewed every six months and that he believed the situation had improved because of the child's placement with the foster family.

Wife returns to seek interest in family business

'€158 per week is a lot when you haven't got it. Some people have to live on it'

On the Eastern Circuit, an appeal of a maintenance order took up a great deal of time. A couple separated in 1995, had two children no longer dependent, and divorced in 2005. The wife was claiming an interest in the family business, which was in the husband's name, as well as a maintenance increase. The wife's claim was on the basis that her aunt had given money to set up the business and that she had worked in it and helped to build it.

At the outset, Judge Terence O'Sullivan was concerned that the wife had no beneficial interest in the business and that she had not availed of an opportunity to claim an interest at the judicial separation stage. The judicial separation agreement was by consent and he asked about this. He was told that 50 per cent interest of the family home went to the wife and the rest was divided equally between the two children. The judge noted that the husband got nothing and this would not have been fair unless it was understood he would get the business.

The husband's barrister said he understood the agreement meant the husband would continue with the business and maintenance would be paid out of it. The wife told the court that they had married in 1975 and lived separate and apart since 1994. They separated because her husband had had an affair and it was not his first. She said he used to beat her and she had got a barring order against him. She now worked as a part-time cleaner and could not work full time because of ill health. She handed in a doctor's report. Her son lived with her and her pregnant daughter was moving back.

She said her aunt had loaned them €7,000 in cash for the business site, which cost €11,000. The judge said her husband put the cost at €44,000 with a mortgage of €28,000 but that some money was borrowed from her aunt. The wife said she couldn't remember. She told Judge O'Sullivan she had worked in the business up to the date of separation. The judge reminded her that the judicial separation agreement was on consent and that there was no order reserving her position on the business.

She was asked if she was involved in another relationship after the separation. She said: "Yes, for about nine years but he became difficult towards the end, I couldn't get him to leave the house." She said he did not run a business but had serviced cars and he had contributed to household expenses.

The wife received weekly maintenance of €158.87, a sum that had not been varied since the separation. There had not been any vacation for the children who were now independent. The family home was valued at €335,000 but it showed signs of water leakage and repairs were needed. The judge believed there were two others with a beneficial interest in the family home and they should contribute to repair costs.

He then considered the husband's affidavit of means and noted that, on the face of it, he had a very substantial income, €10,000-€11,000 a month. The judge was told he had debts and the Revenue had secured an income tax and VAT order for €143,000. Suppliers had secured a judgment mortgage. The business was valued at €1.3 million. The husband had three other dependent children.

On comments about the business made on the day of the separation, the judge was told there was nothing in the agreement clarifying the position. The wife had believed the business would be dealt with at a later stage. She had not given up or preserved her rights to the business in the agreement.

In cross-examination she said her son was

32 and engaged. It was put to the wife that her husband would pay her €30,000 (three years' maintenance) within three months and that maintenance would continue until then. The barrister said the husband wanted to finalise maintenance because of ill health and asked if she had any view on this. The wife said €30,000 was nothing and she was then asked if she had any view she wished to put to the court.

Her barrister interjected, saying her client was put in a difficult situation and that they were straying into similar but not exact terms as were discussed outside of the courtroom. The judge then said to the husband: "This lady earns on the very low side. She works part-time and the report of the doctor shows she should not work full time. The amount she earns is insufficient to keep herself which creates a difficulty and an obligation to provide some maintenance. You want finality – to buy out her maintenance rights. What realistically can you afford? She is 51 years old and needs maintenance into the future. What I'm trying to get to, is do you have any figures? That's what I'm thinking. What you suggested – €30,000 – is three years' maintenance, she clearly will need more than that. He does not have to pay by way of lump sum, it could be ongoing maintenance. If he wants finality, he will have to have regard to that, she can only work part time."

The barristers wanted to speak with their clients without the judge present. Later, the father's barrister said he could offer to continue to pay the current maintenance into the future. The husband said the site from which the business was run was bought in 1986 and he had obtained a bank loan and €1,000 from his wife's aunt. When asked if the sum received was in fact €7,000, he said: "No, there was no reason to be given €7,000."

He was then asked how his debts became so huge when the turnover was good. He said: "The money vanished, should have been €3,000-€3,500 per week. The money went, don't know how, I put in cameras." He admitted that every morning he rang the bank to see how much was owed and lodged a cheque for that amount but that he paid suppliers in cash and kept a lot of cash at home.

The judge said an enormous amount of money had gone through his bank account in the last year. He had a valuable site and was not paying his wife much maintenance. The man said: "€158 per week is a lot when you haven't got it. Some people have to live on it."

The judge noted that the wife could not rectify serious damage to her house on her present income to which the husband's barrister responded: "He came up with the payments for the last 13 years even though she had another partner."

The judge said the parties' current circumstances along with consideration of the debts had to be acknowledged but that he would also have to do what was just and proper. He found the husband was more likely to be correct on detail – that the wife would have half of the house and a right of residence and that the business would be his.

He added: "It seems to be the case to me. At no stage did the wife maintain succession rights or postpone her beneficial interest in the business. It is only now because the business is a valuable asset that the wife is coming to it. Parties should be entitled to commercial certainty."

Judge O'Sullivan reiterated that people should have commercial certainty in judicial separation proceedings and it should be dealt with in the agreement. People might enter into a second relationship – as happened here – and that it was "grossly unfair and

'[It is] grossly unfair and improper to come back many years later seeking an interest [in the business]'

improper to come back many years later seeking an interest" in the business.

He believed the husband had dealt with his wife reasonably and fairly. There were some "glitches" but he continued to pay maintenance when they were both in other relationships and even though the children were no longer dependent. The judge said: "There is no doubt that the wife is not in a very strong financial position. Having said that, neither is he although it is better than hers. It's not for me to achieve some form of equity after 12 years of separation. The husband may have a more valuable asset because of planning permission but that's life."

He made an order directing the husband to continue to pay maintenance at €688.44 a month and directed that there be no order as to costs. He added: "If her position was not so unfavourable, I would have been of the view to award costs against her."

Section 47 report held until paternity test results arrive

'...where somebody has gone to the brink of disaster, and a threat of imprisonment by the District Court is not lightly made, the court needs a report'

On the South Eastern Circuit, Judge Olive Buttimer heard an appeal against a paternity test ordered some six months previously by the District Court on consent.

The father's barrister said the matter concerned DNA testing to ascertain the paternity of the couple's two children. Previously, the court had directed them to find out who had initiated the paternity testing. The barrister said the mother (who represtented herself) had alluded to paternity in phone texts. The father wanted to order the testing kit which was expensive but he wanted to make sure they would be using it.

The District Court had ordered the father to pay maintenance of €50 per child but he was not to start this until the paternity test was complete. Notwithstanding that the barrister said the father had already started paying maintenance of €50 per child even though he had not had access to the children for more than six months.

A District Court judge had already imposed a one-month prison sentence on the mother for breach of court orders over the father's access but a stay was put on that until this appeal was heard in the Circuit Court. The barrister said they were also asking that the court would direct a Section 47 report and that the father would make an application for custody in the Circuit Court in due course. In the meantime he wanted the agreed access implemented. But that agreement extended only to the present month and would have to be amended. The agreement provided for access by the father every second Saturday. The barrister noted that in the longer term the father would be seeking overnight access and concluded that

today he wanted a direction that the mother should conduct the paternity test.

The judge asked if the access would be supervised. The barrister suggested they would ask for "accompanied" access instead, meaning not to be absent during access and suggested some of the father's family members could do this. The mother then asked if the access could be in the presence of a social worker. The judge said the shortage of social workers ruled this out. The mother asked if it could be a female then. The father's barrister agreed it could be. The mother then asked if they could do away with the telephone access as her daughter was only four and could not use the phone and she had to answer it for her. The judge said: "Are you telling me that a four-year-old is not able to use the phone?" The mother said it was a mobile, she had no landline.

The judge said "What difficulty can there be with pressing a button?"

The mother replied: "It is interfering with my life. It interferes with getting her ready for bed. I don't agree with it. I have to deal with my daughter afterward if she is upset." The judge said: "You have given me several reasons. What is the real one?" The mother said she would prefer the phone contact to be once a week instead of three times a week. The judge said there was no reason why it should not be every day as this would be less traumatic than three times a week at 6pm.

The father's family doctor gave evidence that the father had been upset after the separation because he had not seen the children. The break-up had been acrimonious and attempts to see the children were thwarted and frustrated. He had sent the mother a rash text referring to suicidal intentions and the doctor had advised him to apologise. He had referred him to a psychologist whom he had seen on a few occasions. He noted an unsubstantiated HSE investigation but still the father had not been allowed to see the children. It would be good for the father and the children to have access. The doctor added that in general the psychologist's profile stated that the father was kind, cared for his children and was mentally sound.

The doctor said the DNA testing would take "two to three weeks. It can be done in Dublin now". The judge said access accompanied by the father's mother or sister was to start from the following Saturday and the DNA testing was to be done as soon as possible. The mother said: "It is on his side to get the test."

The father's barrister said the father would finance the kit but the mother would have to comply as all four would need to be tested.

The judge said she had no difficulty in ordering a Section 47 report. In reply to the mother, the judge said: "[This] is … an external professional expert's report to advise the court what is in the best interests of the welfare of the children." The mother asked if it was really necessary. The judge said: "Yes, where somebody has gone to the brink of disaster, and a threat of imprisonment by the District Court is not lightly made, the court needs a report to help the court see their relationship with the children. However there is quite a delay with them."

The court then noted that the report might be premature and could be rendered offensive if the DNA test came back negative. The father's barrister agreed. The court said the matter could be listed again at a future sitting to allow the DNA test to be done and the report could be dealt with at that time. The judge then sought a Section 47 report but put a stay on it until the DNA results were in.

'You need somebody, this will be a difficult month for you'

The mother said: "I hope I'm not being considered a bad mother." The judge replied: "Not at all." The father's barrister asked who was to pay for the report, noting that the father was paying for the DNA test and paying maintenance and could not afford it. The judge asked the mother if she could pay for half of the report. The mother wanted to know how much it would cost. The barrister said she could get an estimate.

The mother was waiting for legal aid and while she understood some things she did not want to make any rash decisions. The judge noted that legal representation for the mother would be in ease of everyone. The father's barrister asked for liberty to bring the matter back before Christmas if necessary in case there was need to bring a motion to attach and commit the mother. The judge asked about the District Court warrant. The barrister said it had been issued but would not be executed if the father did nothing about it.

The judge asked if one could legally have two orders for attachment and committal. The barrister replied that what was before the court was a simple criminal offence under the Courts No. 2 Act 1986, which was a defined offence and differed from attachment and committal.

The barrister said they would like to return to court if the orders were breached. They did not want to have to use the District Court option and if the mother was imprisoned the father would seek custody of the children. The judge gave the father leave to seek attachment and committal at the next hearing if court orders were breached.

The judge then explained the orders to the mother, who was visibly distressed. She said: "This is a very difficult position for you. You are walking on thin ice in the District Court. You need more support than maybe you have at the moment. Go and talk to your GP. See if he can give you some support. It will be difficult coming up to Christmas. I want you to have professional support. I hope that you will go along with the spirit of these orders." The mother said she was just being protective of the children. The judge said: "You need somebody. This will be a difficult month for you."

In Brief

Stay on maintenance until claim settled

A husband, divorced in 2002, had fallen into child maintenance arrears and since March 2007 had paid nothing. He said he had had an injury at work and was on disability benefit and had a claim before the Personal Injuries Assessment Board for his injury. The applicant wife wanted the proceeds of the award frozen pending a final maintenance order and the original order to remain in place and accumulate, but with the court's acknowledgement that the payments could not currently be made. The husband was also to be ordered to pay less maintenance.

Counsel for the husband said his client intended returning to work and would make the payments when he did. The husband also asked the court not to order the missed payments to accumulate because if his loss of earnings claim fell he would be unable to repay his wife. Mr Justice Esmond Smyth reinstated the original maintenance but put a stay on it until the claim was finalised. He said the matter could be re-entered if the claim was unsuccessful. The husband was ordered not to dissipate any personal injury award he may receive.

In the thick of it: A day in Naas District Court

In early December, Judge Murrough Connellan in Naas District Court processed a family law list of 59 applications. Of these, 47 were separate cases, seven of which were adjourned to future dates and four were struck out because nobody appeared to deal with them. Of the 36 remaining, three involved applications under domestic violence laws, 10 concerned maintenance, four were arrears of maintenance, 11 dealt with access, five related to Christmas access, four were applications for social workers' reports (20 reports) and one involved an application for sole custody.

One ex-parte matter was brought by a mother of two children, aged five and three, under domestic violence legislation. She wanted a protection order against their father to whom she was not married. They had not lived together for four months. She said he was violent and abusive, spat at and hit her when he called to the house in the middle of the night. The judge granted the protection order.

Another such case was brought by an unmarried woman seeking a protection order against her former boyfriend. She claimed he had attempted to drive her off the road and threatened to kill her if she brought another man into the house they both owned. In the third a married mother wanted a barring order lifted against her husband. She told the judge her husband was no longer drinking, the violence had stopped and "the kids miss him". The order was lifted and Judge Connellan told her the court was always there should she need it.

Four cases were applications by the Health Service Executive for the continuation of care orders. Three were brought against the mother only and the fourth was brought against both parents. In all cases the parents consented to the care orders being continued. One mother was not present but a social worker said she agreed to the continuation.

In another case a father and grandmother had brought applications against the mother of a 13-year-old girl to vary access. The grandmother had a previous access order but the child no longer attended. The mother said the girl was 13 and she couldn't force her to go if she didn't want to. The judge

'The difficulty here is that the parents aren't getting along… I'm not going to disturb the child's learning and homework'

'She turns him against me. He speaks terribly to me'

asked the grandmother if she wanted him to jail the mother for not complying with the access order. He said: "The grandmother must be aware where she is pushing this." The grandmother said she wanted the original order to remain and her application struck out. The father wanted access over Christmas but the mother had brought an application for a Section 20 report (a social worker's report) as she claimed access had been taking place in a pub. At this, the father laughed. The judge ordered the report. The father wished to dispute vouchers for back-to-school expenses but the judge said this should be done in a civil case not a family law application.

Another case involved an application to vary access between a married couple where the mother wanted to collect the son after school on the weekends she had him, instead of at 6pm. The mother said it was a two-hour round trip and if she collected her son earlier she would avoid traffic and have the child back earlier to her house. The father said the child always did his homework directly after school and didn't want to upset his routine. Judge Connellan said: "The difficulty here is that the parents aren't getting along… I'm not going to disturb the child's learning and homework." He refused the mother's application.

In a similar case between an unmarried couple the father sought an order for access to his two-year-old daughter. The mother now lived in the west and wanted access to take place there as she considered the child too young to travel that far. The judge decided it was in both parties' interest that they be allowed to move on with things and the father was permitted to bring the child to Kildare every second weekend.

Another case involved an unmarried couple who wished to have the father appointed legal guardian of their son. Both parents gave evidence that he was the boy's father and that they all lived together. The judge made the order.

An unmarried father applied to vary access to his son – who lived with him – but had access every second weekend with his mother. She had a drink problem and had locked the child out of her apartment during the last visit. She didn't appear in court and the judge reduced her access to nil. He said: "Ms… doesn't have a legal right to access with… [the child]. If it is possible to facilitate access by agreement, then it should be done."

A man sought access to his son. The mother was not in court and the father said of her: "She turns him against me. He speaks terribly to me." The judge granted weekend access. When he heard the father hadn't paid maintenance because he hadn't seen his child he said: "You are to immediately go to the bank and reinstate that order."

A 20-year-old father of two had gone to jail for non-payment of maintenance and Judge Connellan said: "I was told Mr… couldn't come to court because your dog had pups." The man expressed remorse and said he was only 20 and was learning. The judge agreed to give him access and asked the mother to keep a diary of it. The young father had six months to prove himself.

After a long day in Naas, Judge Connellan processed all 36 cases for hearing, three of which were settled between the parties.

Making history with collaborative law

A couple, who were also business partners and in the process of divorce, used a new procedure to sort out their complex finances

What is collaborative law?

Collaborative law is a new model of dispute resolution developed in the United States, England and Wales which allows professionals with various disciplines to assist families in crisis to reach a settlement. Its most significant feature is the concept of the "four-way meeting". This is where the parties, along with their lawyers, meet in a controlled environment with a pre-arranged agenda. Initial meetings focus on issues that need resolution and allow the parties to engage in preparatory work. At the second stage the parties explore possible resolutions to outstanding issues. This process is sometimes referred to as brain-storming.

After this, the bargaining process begins and the parties engage in "interest" bargaining rather than positional. They try to agree in a manner that accommodates both their interests to a greater or lesser degree. When this concludes and agreement is reached, there is a period of reflection during which the parties satisfy themselves that the agreement is acceptable. The agreement is then formalised in court in a manner the parties have decided. Key to the collaborative law approach is the acknowledgment by lawyers and other professionals involved that they will not become involved in contested court proceedings.

The first collaborative law case in Ireland was ruled in Cork in the High Court recently. The parties involved were business people who married in 1987, had three children and separated in 2003. They signed a deed of separation which was a 50/50 split but never implemented it and their finances remained interwoven. To resolve their financial arrangements in the context of divorce proceedings the pair engaged in the collaborative law process and entered into a participation agreement.

The husband and the wife with their legal advisers had a series of meetings and reached agreement. They engaged two solicitors and it was agreed among the four that all information would be shared. They used a joint accountant, previously their company accountant, and both solicitors had full access to him. The solicitors instructed barristers and a senior counsel oversaw the agreement. The objective was to get the best result for both parties and secure their asset base for the children.

They owned a valuable property

'Usually parties look for a clean break, this is different. It's a clean connection'

and 100 acres that operated a hospitality service. The business was expensive to run and produced no profit. Valued at €9 million with liabilities of €3.5 million, it was always intended to provide an income for the wife. The couple were advised that if developed it would be worth €35 million.

The husband also had a separate venture capital business worth €3 million. The wife relied on and wished to continue to rely on the husband's expertise to develop the business and they wished to put in place an arm's length structure between them that was tax effective and binding.

To this end they put a joint venture agreement in place where the husband agreed to pay €1.8 million initially into the property and €500,000 a year thereafter for three years to cover the property's expenses and to fund a development. The wife would draw a yearly income of €150,000 from this which the husband would top up if needed.

The husband retained a 10 per cent interest in the property and 100 per cent of the venture capital business. He was to pay all children's expenses. Both spouses lost inheritance rights but the children retained theirs. As Mr Justice Kevin Feeney said in his ruling: "Usually parties look for a clean break, this is different. It's a clean connection."

In Brief

Parents travel distance to explain son's illness

On the Midlands Circuit a wife applied for an attachment and committal order against her husband, claiming he had failed to pay maintenance, failed to facilitate the sale of the family home and failed to return her passport and that of their son, as the court had previously directed. The wife's barrister told Judge Anthony Kennedy that the estranged husband was mentally ill and had been committed at the beginning of the marriage break-up. His family had only recently acknowledged his mental illness

He still lived in the family home and there was a court order in place directing the house sale. Judge Kennedy heard how the husband frequently removed "For Sale" signs from the front of the house and when auctioneers arrived with potential buyers, he wouldn't answer the door. The husband was absent but his elderly parents had travelled several hours that morning to convey how ill their son was. They said he had recently lost his job as a postmaster. They agreed that perhaps they hadn't noticed signs of his illness in time but that now they realised he was ill. They were unable to convince their son to come to the court but undertook to do their best to persuade him to comply with the court order. The parents were attempting to encourage their son to seek medical help but so far he refused and they weren't sure what else they could do.

Judge Kennedy said the court had no option but to order attachment and committal given the man's behaviour but he would put a stay on the order until February. He was sympathetic to the couple's situation and said mental illness was difficult for any family to deal with. But the court had to consider all parties involved and as long as this man continued to ignore the court order, his wife and son were suffering.

Judge Kennedy said he would order a copy of the penal endorsement to be served on the man's father also so that he could keep an eye on the situation.

Non-guardian may consent to medical treatment

The selection of cases in this section illustrates the minefield of issues and emotions that judges are being asked to process and decide on daily

On the South Eastern Circuit, Judge Olive Buttimer heard an interim application to allow a grandmother to give consent to medical treatment for her granddaughter. The child in question lived with the grandmother and mother in the same house but the grandmother was the day-to-day carer. The mother was the child's only lawful guardian but was suffering from unspecified mental difficulties.

Counsel for the grandmother said this was a somewhat "unorthodox application". They had begun the application before another judge who had directed them to make inquiries on the mother's medical capacity to give instructions to her solicitor before proceeding.

Counsel said the grandmother wanted to be able to consent to medical treatment for her granddaughter if it transpired that consent from the mother was unobtainable. She was making the application under Section 11 of the Guardianship of Infants Act.

The child suffered from various medical complaints and required constant medical attention. Issues had arisen where medical consent from the mother had not been obtained which had caused "family distress". The child had voluntarily been put in the care of the HSE for a short time previously but the grandmother was now her day-to-day carer.

The barrister told the court they had obtained senior counsel opinion which said it was possible for the court under Section (1) of the Guardianship of Infants Act to give directions of a wide-ranging nature but the legislation stopped short of allowing the grandmother to be appointed guardian. The grandmother, mother and child were all living in the same house. She said the grandmother did not want to persist in a wardship application but would have to if they could not sort out the legal issues this way.

The barrister noted that if a care order were to be made in the HSE's favour his client had no legal standing to challenge it. When the mother had previously put the child in voluntary care for two months, the grandmother had no legal standing to challenge that even though she was *in loco parentis*. The grandmother was seeking to prevent that from happening again and wanted

'[I'm being asked] to meddle with the rights of the respondent without any expert opinion before me'

the court to make an order under Section 4 of the Childcare Act 1991 that her consent would be necessary for any voluntary care regime. The barrister said: "This would copperfasten what is already [the grandmother's] position … [and] would provide her with comfort."

The judge said that if the child needed care she could not direct the HSE not to take her into care. The barrister said it was not emergency care that concerned her client but voluntary care. These proceedings were an effort to "keep family harmony" but that it was "unfair" that her client was "legally powerless" in respect of her grandchild. She said the mother was happy for the grandmother to give consent for medical treatment but that the doctors giving the treatment would not accept it and required a court order.

The judge said she was being asked "to meddle with the rights of the respondent without any expert opinion before me". The mother's solicitor said her client recognised and agreed that the grandmother needed to be able to give consent. She said she had a psychiatrist's report saying the mother had the necessary capacity to instruct a solicitor. She had obtained a senior counsel's opinion on the issues but had been unable to get a legal aid certificate for a barrister to represent the mother that day. She would like to instruct a barrister in due course but in the meantime the mother would like the grandmother to have the authority to consent to medical treatment for the grandchild.

The judge read the reports and said that as an interim measure she would make an order giving the grandmother authority to consent to medical treatment for the child but if there was any dispute between the mother and the grandmother on that consent, they were to abide by doctors' medical advice and one or the other to give or withhold permission in accordance with that advice. She also ordered that the grandmother be made a notice party to any HSE proceedings involving the child with a right to be heard at any proceedings.

In Brief

Husband to give notice of divorce in newspaper

A husband whose wife left Ireland 13 years ago and had not been heard of since, was given leave by Judge John O'Hagan on the Northern Circuit to advertise in a newspaper where she was thought to reside, giving notice of his divorce proceedings.

His wife is from the Far East. They had met in London and were married in December 1994.

They had separated three months later and the last time he saw her was when he said goodbye to her at Dublin Airport in 1995.

She was returning to her native city and had never been seen or heard of since. The husband's barrister said his client was now seeking a divorce and, as all attempts to trace her had failed, he was seeking directions from the court on how to proceed.

The husband said he had no address for her or any of her relatives.

She could read, write and speak English.

Judge O'Hagan directed that an advertisement be published in her native city and that they should come back to court in eight weeks.

Amended separation agreement is accepted

On the South-Eastern Circuit Judge Olive Buttimer heard a divorce application where the husband was seeking the divorce with the wife's consent. He was represented but the wife was not. The husband's counsel said the couple had a pre-existing separation agreement which they had amended and this was handed in to the judge.

The husband said the couple had married in St Lucia and the judge asked if the marriage certificate handed in was an original, as that was what was required. The barrister said it might not be but she understood that this might be all that could be obtained from the St Lucia authorities. She asked if an undertaking from the husband's legal team to confirm whether they could obtain an original from St Lucia and if a letter from the authorities there would suffice? The judge said it would.

The husband said the couple married in July 1996 and had one daughter. He had overnight access to his daughter twice a week and arrangements between the pair on access were amicable. They had separated around August 2001 and had entered into a Deed of Separation in September 2002. He had purchased his wife's interest in the family home and still lived there. They had agreed some variations to the Deed of Separation now and he was to pay weekly child maintenance of €100 and pay for her summer camp, contribute €250 school uniforms and books and half of any other school expenses which might arise. He handed in a pension adjustment order approved by the trustees of the pension scheme.

Judge Buttimer granted the parties a divorce with mutual blocking order regarding succession and a pension adjustment order. She asked if the original separation agreement was now spent. The husband's barrister replied that she would like it to be made a rule of court. The judge received the separation agreement insofar as it was not spent and made it a rule of court as amended by the couple on child maintenance. The judge asked if the matters of maintenance and access were to be remitted to the District Court. The husband's barrister agreed they should be and the judge then explained to the wife that this would mean they would go back to the District rather than the Circuit Court should an issue arise over maintenance or access.

The judge said this was "in ease of both of you" and "cheaper and more convenient" and the wife agreed. The judge made no order on costs.

'The couple had married in St Lucia and the judge asked if the marriage certificate handed in was an original, as that was what was required'

Father granted custody of teenage daughter

'A child needs stability and you're not in a position to guarantee that stability'

Judge Sean O'Donnabhain granted custody to a father on the Southern Circuit. He had adjourned a case to the afternoon to talk to a teenager aged 16, who was the subject of a dispute over custody and access.

The parents were separated and there were three children of the marriage. The eldest was in college and the youngest aged 14, lived with the father as she had discovered her mother in a relationship with a third party.

The youngest child refused to speak to her mother. The middle child, a teenager, was living with the mother who had an alcohol problem and had recently threatened suicide.

The husband's barrister said his client wanted to change the access regime to allow his daughter to live with him.

Two psychologist reports stated that the daughter was in an impossible situation, that she was unable to leave her mother herself without the decision being taken for her.

The judge met the daughter. The father's barrister illustrated the difficulties the daughter had to contend with: the mother was never at home, she was often out drinking and the daughter was left to fend for herself.

The daughter came to the father every second weekend and recently when he returned his daughter on a Sunday evening the family home was locked and they couldn't find the mother. The father believed she was in a pub somewhere. They had to get a spare key from the in-laws and she returned after midnight.

The mother's barrister said her client was still drinking but not to excess and that she had been at a choir workshop on the night in question.

The father worked long hours and the mother was in a better position to look after the daughter and that the daughter was doing well in school.

"What about your problem. How acute is it?" asked the judge." I'm starting up a relapse programme. It's not a fierce problem," replied the mother.

She had gone to a treatment centre but would still occasionally take a drink. It was put to her that she was taking more than the occasional drink.

She said she had threatened suicide recently, had been on anti-depressants and had been feeling very low.

Judge O'Donnabhain said "A child needs stability and you're not in a position to guarantee that stability. The young woman is torn between what is going on and is trying to manage a situation that no 16-year-old should have to manage and it isn't good for the parent either.

"In circumstances the child should live with the dad and have free and open access with the mother. I'd like access to be formulated and no objections to staying overnight with the mother," directed the judge.

Barristers for both parties agreed an access programme which the judge approved.

He granted custody to the father, approved a generous access programme to the mother and hoped that relations would be repaired between her and the youngest daughter.

The judge also said that the access programme would only work if the mother sorted out her drinking.

The mother's barrister was worried about her client, saying the daughter should remain with her for Christmas. The judge refused, asking why the child should be used as a crutch. She should stay with her sisters on Christmas Day.

Partner must be 'taken out of the picture entirely'

On the Southern Circuit, Judge Sean O Donabhain ordered that a wife's partner was to stay out of the family home while the children, a girl aged 6½ and a boy aged 5½, were present. The husband said they were afraid of the wife's partner, a convicted criminal who had viciously assaulted him. His wife had been told the last time that her partner was not to be in the family home and she was flagrantly disobeying this. Her partner was living in the family home and the children were afraid of him, he slept all day, was abusive towards them and they hated him. The husband's barrister said the wife would not consent to the social worker visiting the children either in the family home or at a neutral venue

It was also stated that the wife's partner was disobeying his bail conditions, he was supposed to live at a certain address which he was not doing

When asked about her husband's concerns the wife said he was no saint and used to beat her in front of the children. She denied that the children didn't like her partner. She hadn't realised he wasn't supposed to be in the house when they were present. She had hygiene and cleanliness concerns when the children stayed with her husband. They would return in the same underwear after staying with him and her daughter's hair was matted. He picked up the children in a car with no car seats.

The husband replied he had no car and got a friend to pick up the children once or twice when it was raining and he put seatbelts on the children. The wife was concerned with the company her husband was keeping and who was living in the house when he had the children. Her son saluted a scruffy-looking person one day on the street and said he was a friend of Dad's. The social worker said the children did not like his wife's partner and that she had visited the Dad's house and that it was fine and all seemed to be in order.

The judge told the wife that her partner had to be taken out of the picture permanently and entirely, that the problems emanating from him were well ventilated on the last occasion, and red flags were flown. The clear understanding was that he could not be in the house when the children were there. He directed the wife to give a sworn undertaking that that would be the case. "I'm advising you that you'll end up in jail and you'll lose the children if you don't abide by it," the judge told her. He also directed that a copy of the undertaking be given to the local sergeant and directed that the social worker could visit the children without the wife's consent.

'I'm advising you that you'll end up in jail and you'll lose the children...'

Costs of judicial separation awarded to wife

A wife whose husband had served a six-month prison sentence for breaching a barring order, and against whom over 40 maintenance warrants had been issued, was awarded the costs of her judicial separation when Judge John O'Hagan heard her evidence on the Northern Circuit. The husband was not in court and

'This is a very distressing case and I will do all I can'

the wife's barrister was seeking judgment in default of appearance.

Her barrister said they were married in 2003 and the husband now lived outside the jurisdiction in Northern Ireland. In 2004, he was served with a barring order which was renewed in 2005. He had breached the order and was sentenced to six months imprisonment. He was released in February 2006 and a further order was made two months later. She had been granted sole custody of her child. The court was told that her husband was a bricklayer and in 2006 a District Court had made a maintenance order of €100 a week which he had never paid.

Her barrister said that more than 40 warrants had been issued over his non payment of maintenance but that none had been executed. The judge was told: "He keeps doing these things because he knows he can't be caught." The wife said he had abducted their daughter once and had demanded €20,000 for her return. She lived in a two-storey three-bedroom house and was in payment arrears of more than €6,000. Her barrister said she wanted him to be arrested but that was a matter for another court. "I regret to say I have no power over that," said Judge O'Hagan. "This is a very distressing case and I will do all I can."

Judge O'Hagan granted the wife a decree of judicial separation and awarded her the costs of the proceedings. He made an order that the house be transferred to her sole name.

He granted her sole custody of the child and made no order for access by the husband. The judge also adopted the District Court barring order, to be continued indefinitely, and he made a safety order in respect of the wife and child. He also adopted the District Court maintenance order and, noting that he had been advised that no maintenance had been paid for 2½ years, he directed that the husband pay €10,500 arrears of maintenance. "If I can make an order maybe he can be extradited," he said. Judge O'Hagan also made an order preventing the husband from seeking provision out of his wife's estate but left it open for the wife to seek such provision from her husband's estate. He also made an order dispensing with the necessity of the father's consent for a passport for the child.

Court asked to consider gross conduct in divorce

In divorce proceedings before Judge Cornelius Murphy, the wife asked the court to consider "gross conduct" by her husband when dealing with the ancillary orders to be made upon divorce. The case basically came down to the court's approach to pension adjustment orders. The family home had already been sold. The husband was a private in the army and therefore entitled to a significant pension. The wife also claimed that her husband owed her money as she had paid some of his debts.

They were married on August 16th, 1997 and were both now 36. The marriage had lasted four years with no children. The wife recounted how she met her husband, when she was 20. She said that at the time she was "very quiet" and "into herself" and "didn't have many friends." Her husband was "much more outgoing" than she was.

Her husband was very possessive and she alleged that he abused her physically, mentally and sexually. She was afraid of him. She alleged that her husband had got her to have sexual intercourse with another couple. She described how he made her have sex with another man and how her husband had threatened that if she didn't have sex with that man he would kill her.

She alleged that her husband had penetrated her with bottles and with a gun. She described how he would sometimes put live ammunition into the gun and how she would never know if there were bullets in it and described how he used to "click the trigger".

When asked to detail the frequency of intercourse she stated it would be at least once a day. If they were watching a video: "It could be before, during and after the video." He wanted her to watch pornography and she felt uncomfortable with it. She recalled how he had urinated on her. In relation to physical violence she alleged that he used to shove her face, kick her, and push her down the stairs.

She left the family home in 2002, applied for and got a five-year barring order. The husband did not fight against it.

She also claimed she was owed money for the household bills which she paid for a period when her husband was living in the family home and she had moved out. She paid them because they were in her name and she didn't want a bad credit rating. The husband admitted that he never paid those household bills. The wife wished to claim back her share of the proceeds of the house sale which had been applied to a credit union loan which had been in the husband's sole name. She also asked for compensation because she did not get half the house contents. She made two further claims that her husband owed her money she had lent him for a holiday and that he had removed all goods of value from the house.

The husband admitted that they had sexual intercourse with other people but said it was

'[It is] impossible to say what way both parties will be in 20 years – [one might be a] multi-millionaire, [the other] impoverished'

the wife who instigated this. They watched pornography. He accepted that he hadn't paid the bills for the family home. He denied that his wife had given him money for the holiday.

The husband had joined the army when he was 19. He would be entitled to leave the army after 21 years – at the time of the hearing he had two years left to serve. Upon retirement he would receive a pension consisting of a "gratuity" (a lump sum payment) and an "annuity", a smaller annual payment.

The husband could retire after 21 years or after 31 years, if he stayed in the army for the latter period he would receive an increased gratuity and annuity payment.

The judge found the issue really came down to that of the pension. The court said the problem that it encountered was that both parties were very young and that it was "impossible to say what way both parties will be in 20 years". One party might be a "multi-millionaire" and the other party might be "impoverished". The court took into account the length of the marriage.

The judge made the following ancillary orders:

1. That the wife was entitled to the husband's widows and orphans pension from August 16th, 1997 (date of marriage) to December 5th, 2007 (date of divorce).
2. That if the husband died in service she was entitled to half the death-in-service gratuity.
3. That if the husband retires she is entitled to half of four years of both the gratuity and the annuity.

He thought such orders provided for the wife's long-term security and compensated her for any figures due to her on the proper division of the proceeds of sale of the house and any egregious behaviour of the husband during the marriage.

Child's disorder causes difficulties with family home

A judicial separation case came before Judge Cornelius Murphy on the Southern Circuit in which one of two children of the marriage had an autistic spectrum disorder. The child's disorder caused difficulties in dealing with the family home. The mother and child's psychologist thought a move from the house could be very disruptive for the child. The wife's counsel said if it were not for the child's problem the house would simply be sold.

The parties married on July 28th, 1990 and hadn't lived together since 2005. One child was 15 years old and the child with autism 13. The wife lived in the family home with the children and worked part-time.

She had difficulty working all year round due to the children's school holidays. The husband lived in the UK with a new partner. The wife wanted €3,000 a month in maintenance from him.

The parties had had another house which had been sold and the wife had €80,000 in the bank from that sale. The family home was valued at €775,000.

The wife was worried that it was difficult to predict the 13-year-old's reaction to a new house. The current family home was large and that space was thought to be good for the child. The wife considered it might be better to delay the sale until the child was 18. Counsel for the wife said the child's psychologist could be called and he would say the child was going through "regular

teenage issues" and that at 18 those issues might have resolved themselves and he would then have to deal solely with the realm of adult autistic issues.

Counsel for the husband said there were smaller but still significant houses available in the locality of the family home, which the wife could move to. The judge asked the husband what was "his bottom line", how much money he would accept from the wife to give up the family home. The husband indicated he would take €100,000. The wife was not happy with this as it would leave her with no security other than the house. If it was to be sold the wife wanted the proceeds to be divided 70:30 in her favour. Judge Murphy said there was "morally at least a lot of merit on your side".

He said the best solution was that the wife give "what she can down to the extent that it hurts" in return for the house and maintenance. He believed that this way the wife had a very valuable house and was clear of her husband.

The parties adjourned and reached a settlement the nub of which provided that the house be sold but not until a said date to give the 13-year-old time.

The wife would get two-thirds of the net proceeds of house sale and the husband one third.

She would also get a lump sum of €52,000, representing half the transfer value of the husband's pension after which she was no longer entitled to any claim to it. She would also get €1,500 child maintenance.

'Morally at least [there is] a lot of merit on your side'

In Brief

Husband put on notice of injunction

A case before Judge Raymond Groarke on the Western Circuit concerned a mother represented by a barrister in an ex parte application.

She and her husband had been separated since June 2006. She rented a property in the west and her children lived with her. She said she had received a letter from her husband saying he intended to move beside her. The family were in debt and the husband wanted to leave the family home where he was currently living. This would create tax implications for the mother. If her husband sold the family home, as he intended, she would lose her first time buyer's grant.

There was a further difficulty, she said. Her husband had moved all the furniture from the family home and, as a result, the house had become a second-hand house.

Her barrister said there was "an urgency to get the case on" and that the application would be for an interlocutory injunction, a court order by which an individual must perform, or is restrained from performing, a particular act.

In this case the mother wanted to stop the husband selling the family home. An interlocutory injunction is an extraordinary remedy, reserved for special circumstances.

Judge Groarke said: "This particular case is a difficult type of situation." He granted the injunction and ordered that the husband be put "on notice". This meant that he would have to be made aware that the matter was going to be in court on the next occasion. He said: "There may be very good reason for him [the husband] doing what he's doing."

Child access altered as wife seeks second bite

'Since the separation, difficulties had arisen between the child and his mother and the child chose to live with his father'

A wife who had entered a separation agreement with her husband applied for a divorce. She now sought spousal maintenance from her husband, which had not been provided for in the separation agreement. The wife wanted what is sometimes referred to as a "second bite at the cherry". The husband sought to rely on the separation agreement. He claimed the full extent of his wife's income had not been disclosed to the court. Access issues also arose.

The parties were married in 1983 and had two children now aged 23 and 14. The older was no longer dependent. The parties entered a separation agreement on March 15th, 2002. Under the separation agreement the family home was transferred into the wife's name and she received a lump sum of €35,000 from her husband. The wife was to receive monthly child maintenance of €500 for the now 14-year-old boy who was to live with her. Since the separation agreement difficulties had arisen between the child and his mother and the child chose to live with his father who had stopped paying maintenance as a result.

The separation agreement provided that it was a "full and final settlement". Judge Cornelius Murphy said of the separation agreement that the law provided he "have due regard to it but it's in no way determinative".

The husband owned a business and upon separation the wife released her interest in it. His declared income worked out at €4,300 a month, which consisted of money from his business and also rent from a building which he owned with his brother. He did not own his own house.

The court had to examine the wife's financial means. Her most recent affidavit of means set out that she received an invalid benefit, child benefit and money earned from renting rooms in her house to students. The husband maintained that she was also running a business but no such income had been declared to the court or such information provided to him upon discovery. He said he had seen her in operation four months previously and produced photos of this. Judge Murphy said: "It looks to be her alright." Numerous advertisements for her business giving her name and contact details were handed into the court.

The wife admitted that she had run a business but had since sold it. She retained some equipment from the venture which was rented out occasionally.

A doctor gave evidence for the wife and said she had chronic asthma and a condition in one hand which made the fingers curl and meant she would be unable to do heavy work.

The judge accepted the evidence and made an order giving the wife €75 maintenance a month, "given that her husband earns €1,000 a week, net, from business and rents and taking into account that he has no family home".

The husband's counsel asked for his costs in circumstances where there had been "obvious non-disclosure". The judge refused that application.

On child access, the judge made an order giving the mother access at her home from 4pm on a schoolday until his father picked him up and access on Sundays.

The husband's counsel was concerned with that order and its potential consequences given that the child might not want to go to his mother, and the husband could do nothing about that. The judge then added a note to the order for access noting that the child was 14 years old, it was made without his presence in court and it, "obviously relies on his co-operation".

Christmas Day access not in breach of court order

Judge Olive Buttimer heard an uncontested divorce application where the couple had two children but maintenance had already been dealt with in the District Court and they did not wish to revisit the issue.

The councel for the applicant wife explained that maintenance had previously been set at €100 for the two children but this had since been reduced to €75 as the husband was unemployed.

The wife then explained that the couple had two children who lived with her in the former family home. The marriage had broken down in June 2002 and they had made a separation agreement in 2004 in which she had bought out the husband's interest in the family home. She was now working as a factory operative and had a pension. He was paying €37.50 per child per week through the District Court. She wanted mutual blocking orders to prevent either inheriting anything from each other's estates in the event of death.

The husband interrupted and told the court he would like access to his children on Christmas Day. The wife's barrister then asked the wife about current access arrangements. She explained that one daughter would go to him overnight every weekend but that the other daughter would not go.

The husband interrupted the wife's evidence again at this point asking about Christmas access and the wife then said to the judge that all she was doing was abiding by the District Court orders that had been made the previous year. She implied that she was not giving him extra access on Christmas Day because it was not in the court order and she did not want to breach the court order.

The husband interrupted and said: "We could sort it out between us." The wife said: "She refuses to go." The husband again said that he would like more time on Christmas Day. The wife responded that she had "no difficulties with him having an extra hour".

The judge then explained that increasing access on Christmas Day would not breach the previous court orders and said: "If it [access] is agreed between the parties it is not in breach [of the court order]. Go outside and set down what you have agreed. The court is not here to inhibit access. Put something in writing regarding increased access."

The husband and wife then left the court to do that and came back later to the court with written arrangements for Christmas access. The judge asked the husband to keep to the hours agreed as it would help for the children to know the times. The judge then granted a decree of divorce and the other orders requested by the parties.

'The court is not here to inhibit access. Put something in writing regarding increased access'

Wife wants to buy out husband's interest in family home

'Both parents made the children. Both have to support them'

A couple who had married in 1988 and had four children – now between 11 and 18 years old – sought a divorce. They had separated in 2001 and were in new relationships. The applicant wife had two further children with her new partner.

The parties had obtained a judicial separation in 2004 in which both had obtained a 50 per cent interest in the family home. The wife was to live there with the children until the youngest child reached 18 years at which time the property would be sold and the proceeds divided. The husband was to pay the mortgage until that time. He was also to pay maintenance of €300 (or €75 per child) to the wife and was to pay for medical treatment for the children.

The wife's counsel said his client now wanted to buy out the husband's interest in the family home and the maximum she could raise was €82,000. The property was worth about €255,000 and there was a mortgage of €33,000 remaining on it. The wife proposed that she would use the €82,000 first to discharge the mortgage and then give the remainder to the husband. She wanted a clean break. She also wanted an increase in maintenance. Judge Olive Buttimer asked what the wife's partner did and counsel said he was a labourer. He said the husband had failed to comply with the court's previous orders for discovery as he had not given them any documentation on his credit cards, partnership accounts or his joint account with his new partner. When asked if the husband had the required documentation in court, his counsel said they had provided all documentation requested. In contrast, they had looked for documentation on the wife's joint loan application with her partner as she was going to move to another county.

The judge asked if the wife intended to sell the family home. Counsel said she could not afford to but as there were two adults and five children living in the home they might move in the future. The judge said that if the intention was to sell the family home, then whatever money was made from the sale should go in the kitty. Counsel said the wife no longer intended to sell but it could not be ruled out in future. When she and her partner had looked for a loan of about €220,000 they could have met the repayments so nothing progressed.

The husband's barrister said that after the husband left the family home in 2001 he had rented accommodation. He had been paying €300 per week maintenance since 2001. Since the judicial separation he had been paying the mortgage on the family home of €87.54 per week. Between all he was paying €421 per week plus medical bills for the family. He had bought a house for himself and it was valued at €210,000 with a mortgage of €154,000. She noted that his business was not doing as well as it had been and he had had to let some employees go. He worked five days and had the children at the weekends or worked six days and had the children for one day. The children also came on Wednesdays and the older children came more. The husband was satisfied to continue paying the mortgage if he could not realise his 50 per cent share. The barrister noted that the wife's partner had had the benefit of the property since 2002 and paid no rent or mortgage. The husband put the value of his interest in the property at around €100,000.

The wife explained the marital break up, adding that the husband and the eldest son, who was in college, did not get on. There had been delays in paying medical bills and

the husband was not paying anything extra towards the children's education nor giving anything extra for Christmas. When the wife said he could pay extra maintenance, she was asked what she based that on: "He doesn't seem to be financially short like I am. He has his own business and employees. His lifestyle and social life suggest he has money. He has done work on his own home, he takes holidays. He went to Italy this year."

She said the family home was a three-bed, one bath semi-detached house and she and her partner had spent about €10,000 on it. She wanted to buy him out and build an extension to get a fourth bedroom and another bathroom. This would cost €15,000 to €20,000. She had previously considered moving but her husband did not like the idea. She now wanted to keep the children together as well.

In cross examination, the husband's barrister asked if she had written to the husband saying that she would let the children live with him. The wife said it was taken out of context and that she had only said it to get a response to her moving plans. The barrister said her new partner was separated as well and had sold his own family home and divided the proceeds in 2005. She wondered why the wife said she was struggling financially when she had no mortgage and neither did her partner. As recently as nine months ago the wife had planned to move. The wife said the husband had refused to sell so she could not move. The wife was questioned further on her affidavits of means and the new partner's contribution.

The husband said his business was slowing down. He had paid €185,000 for his current house and had got the €15,000 deposit from his parents. It was "stomach wrenching" to pay the mortgage on the family home when his wife's new partner was living there. His income was €800 a week and his girlfriend paid €75 per week for household expenses. He still had a loan for the costs of the judicial separation. He would be happy for the wife to sell the family home as long as there was a 50/50 split of the proceeds. He would be happy to continue paying the mortgage if the children were still living there.

The wife's barrister asked him about his new house and he admitted he had no documentation on it but reiterated that the

'He doesn't seem to be financially short like I am. He has his own business and employees'

parents had helped him to buy it. He was questioned further on his expense and he said he had only gone to Italy for a friend's wedding and that his partner had paid for some of the holiday and they had gone to Egypt the year before for his birthday. When it was noted that the business accounts looked healthy he said it would be difficult to pay preliminary tax this year. He now had a €200,000 mortgage and no health insurance because of a medical condition which terrified him.

The judge said his figures on the house did not add up. He put his interest at €100,000 but €191,000 divided by two was €95,682. The husband said he only wanted a fair deal. The judge said he was a hard-working man who could afford to pay more maintenance, particularly if he had no more mortgage to pay. The husband agreed that if the mortgage was paid off he would happily pay €50 extra. The judge then noted that the mortgage should come off the valuation of the house and that would put his interest at €78,865.

The judge said the wife clearly wanted to purchase the house and build an extension. She said she would divide between the wife's figures and the husband's figures and measured his interest at €87,000. The wife was to pay that to the husband to buy out his interest. The maintenance should be increased by €20 per child to begin the week after the sum of €87,000 was paid to him. The wife would then take on the mortgage. The parties were asked to draw up a timetable. When they returned the wife's barrister said the wife now wanted the court to allow the status quo to continue as the wife could not raise the money. The judge said the orders under the judicial separation could continue in that case, adding that there should still be an increase in maintenance. The husband's counsel said he would still have to pay the mortgage now by the wife's choice. The judge said: "Both parents made the children. Both have to support them." The judge gave an increase of €12.50 per child per week.

Pension not mentioned in civil bill

Wife told to send the husband a notice of motion on the pension and to come back next term

Judge Olive Buttimer heard an uncontested divorce application in which the applicant wife was not legally represented and the husband was not present in court. The wife had a letter from him explaining that he would not appear and consented to the divorce application.

The judge asked the wife about the marriage and she replied that they had married in 1990 and had two children, aged 15 and 12. They had separated in March 1998 and had made a Deed of Separation in June 1999 which dealt with all their assets. The family home had been sold at the time and the proceeds divided. Her husband was paying maintenance of €63 per week for both children which was paid into her bank account. She lived with a new partner who paid for her outgoings and she required no further financial assistance from her husband.

The court granted the wife an order for divorce and mutual blocking orders so that neither could inherit from the other's estate. The judge queried whether the wife had a pension and the wife said she had just started a new job and a new pension but the husband had no pension. The judge said it would be advisable to adjourn the issue of her pension to the next term as it was not mentioned in the civil bill and the court could not make orders on the pension as the husband was not on notice that she had one. The wife was told to send the husband a notice of motion on the pension and to come back next term.

Over quarter of cases go to full hearing on Western Circuit

Carol Coulter continues her statistical analysis with cases heard this time on the Western, Eastern and Northern Circuits. During October 2006, Judge Raymond Groarke processed 34 cases in Castlebar, 22 of which were settled

The family law week in October 2006 in the Western Circuit took place in Castlebar, where more than a quarter of the cases went to a full hearing.

Thirty-four cases were heard by Judge Raymond Groarke in Castlebar in October 2006, of which 22, less than three-quarters, were settled.

Four did not fall under the heading of either judicial separation or divorce: one concerned a HSE application for access to a house to check on the children; another concerned an engaged and cohabiting couple whose house was in their joint names, and who were now separated; another was a case where a divorce was granted but the financial orders were yet to be made; and the final one was a case where a divorce had been granted but one party was seeking compliance with orders.

Of the remaining cases, six were judicial separations and 24 were divorces. Two of the judicial separations were settled on the basis of consent, and four went to a full hearing. In contrast, 20 of the divorces were settled on a consent basis, on which 13 had been preceded by either a Deed of Separation or a judicial separation. Four went to a full hearing.

Therefore, 22 of the 30 divorce and judicial separation cases that came before Judge Groarke were settled, a settlement rate of just under 75 per cent. This compares with 90 per cent in Dublin in the same month, about 86 per cent in the South-Western Circuit, and in

Figure 1 Children - Custody

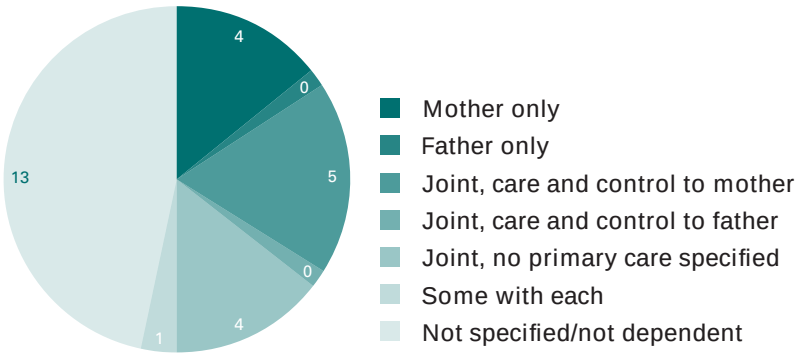


Figure 2 Children - Access

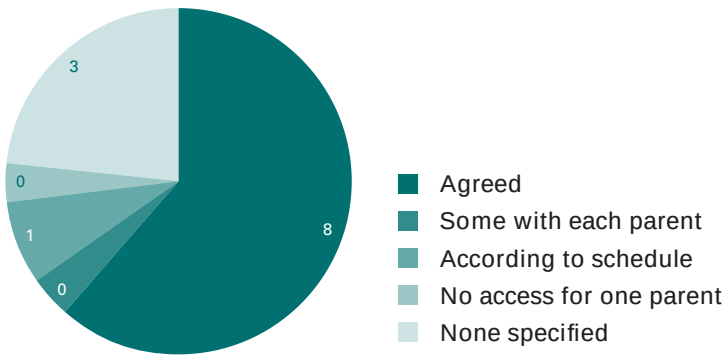


Figure 3 Maintenance

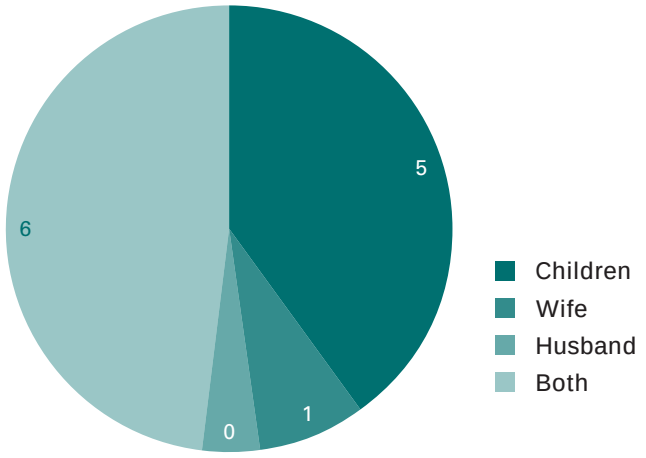
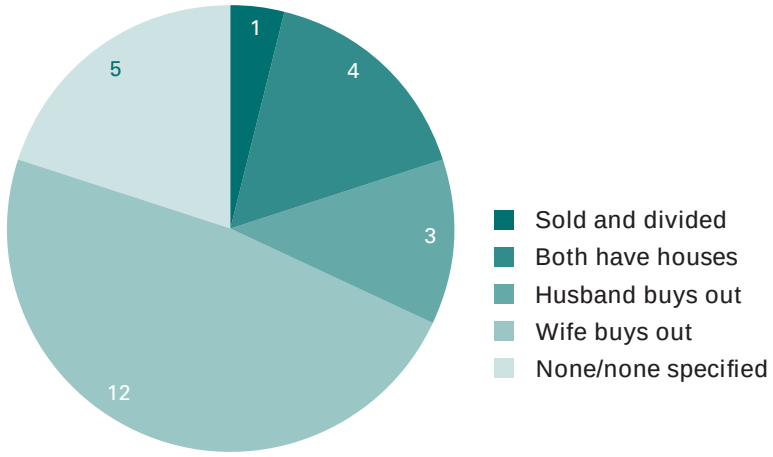


Figure 4 Family Home



contrast with the same month in Cork, when all were settled. However, by isolating one month's cases I am taking a snapshot of family law cases for that period, rather than a random, scientific sample. There may be reasons for clusters of difficult cases in certain months in different circuits, and no conclusions can be drawn from regional variations without a more extensive sampling process.

Children again emerged as a contentious issue. In six of the eight contested cases there were dependent children, compared with only 11 cases among the 22 that were settled. In two of the contested cases the court ruled that they lived with the mother. In the remaining four joint custody was ordered, but in three the primary residence was with the mother. The file does not show whether the father had sought sole or shared residency with him. In one of the six there was joint custody and residency.

In the 11 cases involving dependent children that were settled, the mother had sole custody in two, there was joint custody with primary care and control with the mother in three, and joint custody in three more cases. In one case custody was not specified (probably meaning the child, while dependent, was in third-level education and living away from home) and in another some members of the family lived with each parent. In one case the children were all in care.

Maintenance was ordered in five of the eight contested cases. In two cases maintenance was ordered for the children only, and in three for both mother and children. In the settled cases maintenance was agreed for the children in three cases, for the wife in one case, and for both mother and children in three. Therefore maintenance was not an issue in five of the 11 settled cases involving children.

The other major issue dealt with in these cases was the family home. In the 13 cases where there were orders or an agreement following the formalisation of a separation, matters like the family home had usually been dealt with. Therefore it does not always show up in the figures relating to the outcome of the subsequent divorce cases, so there is not a total correspondence between the references to the family home and the total number of cases concluded.

Yet in the majority of cases the wife ends up in the family home, usually buying out the husband's share. This was the outcome in eight of the settled divorces, one of the judicial separations, and in three of the judicial separations that went to a full hearing. In the fourth judicial separation case heard there was no family home.

The husband bought out the wife in three of the settled divorce cases, and the house was sold and divided in one case. In three settled divorce cases and one contested one both parties already had houses. In four more the couple had lived in rented accommodation.

The issue of pensions arose quite rarely, being specifically mentioned in only three cases. In one there was a nominal pension

adjustment order, in another arrangements were made for the wife to have a share in the husband's pension, and in the third she retained the right to his death-in-service benefit.

Other assets were involved in six of the 30 divorce and judicial separations. In one of the contested divorces, where other matters had been resolved, a further financial settlement was the only issue heard, and the wife was awarded a further small lump sum. In the other cases money, land and property abroad all featured in the final resolution of the case.

As in other areas, marriage breakdown was seen to spread across all age-groups, with a bulge among those married between 21 and 25 years. However, some of this is accounted for by the fact that people in this age-group are now returning to court to obtain a divorce, having had a judicial separation or a separation agreement for years, and now wishing to formally end their marriage.

Seven of those who divorced by consent had been married between 21 and 25 years, and three couples fell into each of the categories of five to 10 years, 11 to 15, and 16 to 20. Two couples had been married between 26 and 30 years, and two between 31 and 35 years. When the divorces were contested, the picture was somewhat different, with two couples married less than 10 years, one married between 16 and 20 and one over 30 years. The latter case concerned a dispute about property following a lengthy separation.

Predictably, the couples seeking a judicial separation were, on average, married a shorter length of time. Three were married less than ten years, one less than 15 years, and two less than 20 years. The picture of family law that emerges from the October 2006 cases in the Western Circuit is that, as elsewhere, the majority of cases are agreed, either by consent following an earlier formalised separation, or where one party has effectively abandoned the marriage and plays no part in the proceedings. Those that are contested usually involve children or property, but many of these are eventually resolved. However, based on the files, a few of which date from two, three or more years earlier, there can be a few intractable cases that drag on for years.

Figure 5 Pension and Other Assets

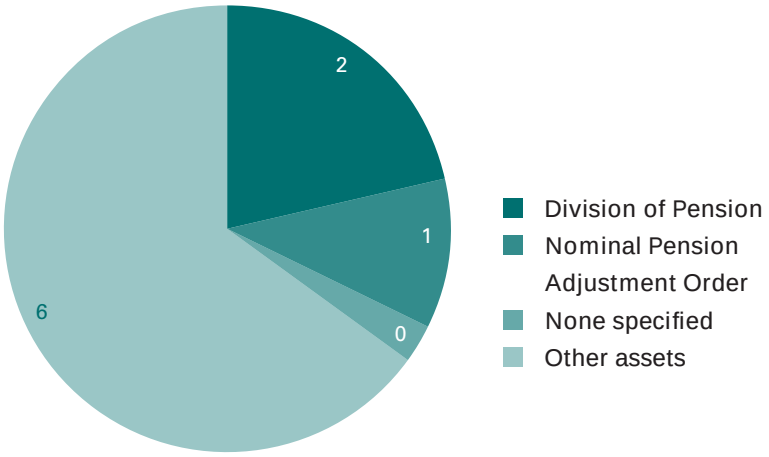
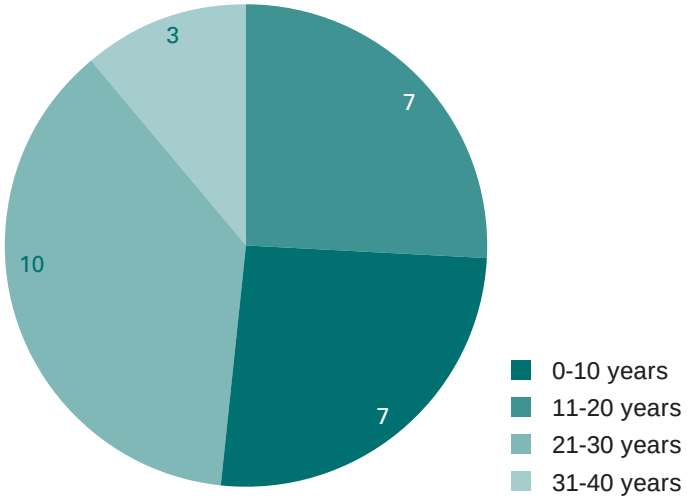


Figure 6 Length of Marriage Ending in Divorce / Judicial Separation



Settlement rate of 95% on Eastern Circuit

The Eastern Circuit is one of the busiest outside Dublin, and over 70 cases were finalised there in October 2006, writes **Carol Coulter**

The Eastern Circuit includes the counties of Louth, Meath, Wicklow and Kildare, all of which have greatly expanded their population in recent years and contain a large commuter population. This is reflected in the volume of family law passing through the courts. There were two family law sittings in the Eastern Circuit in October 2006, in Wicklow and Naas, and between them they finalised 71 cases.

In four of these cases the files were incomplete, and so have been omitted from the analysis. Two more were appeals from the District Court, one concerning a successful appeal on application for guardianship of an infant, and the other an appeal on access that was settled on the day of the appeal. This left 65 cases, 17 judicial separations and 48 divorces, of which two were fully contested in court. One of these cases involved children, the other purely financial matters.

This gave a settlement rate of over 95 per cent, though it is clear from the files that some of the settlements came at the very last minute, on the eve of the planned court hearing.

Deeds of separation of judicial separations existed in only seven cases, less than in other circuits on the same month. Given that a couple must have lived apart for four out of the five preceding years before seeking a divorce, this might indicate that a higher proportion of people were content with informal separation arrangements before making a divorce application.

In 32 of the cases there were no dependent children, including both cases of couples who had never had children (the minority), and those whose children had grown up. In a few cases there was no reference on the file to children at all.

In 19 of the 29 cases where children were referred to in the court documents the outcome was joint custody between the parents with primary care and control resting with the mother. In all but one case this was agreed between the parents.

In one case the mother had sole custody, and in two sole custody rested with the father. In one case joint custody involved shared residence

Figure 7 Children - Custody

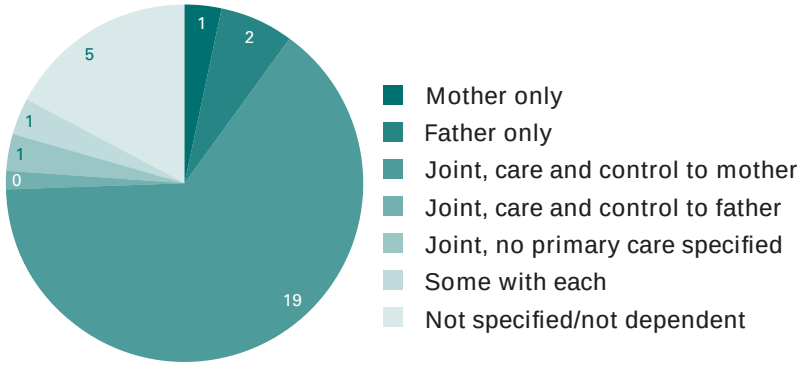
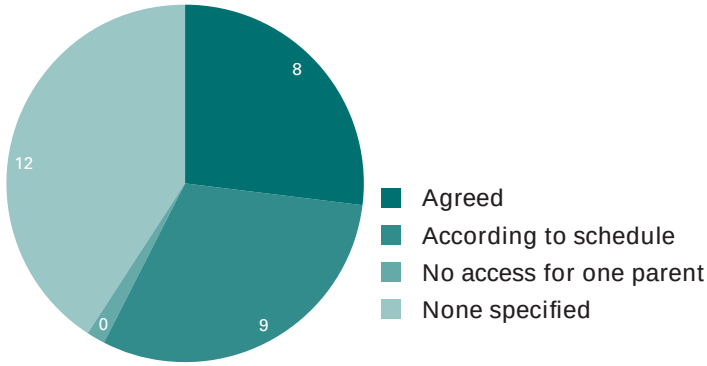


Figure 8 Children - Access



with both parents, and in one some of the children lived with each parent. In five cases no order was made as to the custody of the children. This usually involved older children who were still dependent, often in third level education.

Access was agreed in eight cases, and regulated by an agreed schedule in a further eight. In the one fought case where children were an issue, the schedule formed part of the final order. Access was not specified in 12.

Maintenance for children was made an order of the Circuit Court in only half these cases, in nine of the divorces and six of the judicial separations. In two judicial separations maintenance for both wife and children was agreed and made an order of the court. In some of them matters relating to maintenance was referred to the District Court. In others it was not mentioned, suggesting that informal arrangements existed to the satisfaction of the parties. There were three cases, two divorces and one judicial separation and all involving older couples, where maintenance for the wife was made an order as part of the consent.

The family home was the other major issue resolved in the finalised cases. In a number of the divorces this had already been disposed of before the divorce application was made. Where the court order makes a consent a rule of court, and this includes formalising the disposal of the family home, this is recorded, even if the disposal took place a year or two previously. In other cases this occurred some years earlier, both parties are now independently housed, and this is recorded either as both having their own homes, or the outcome for the family home not being specified.

In seven of the divorces and four of the judicial separations the family home was sold and the proceeds divided between the parties. In some instances the proportions were specified, in others not. In a few instances one party, usually the wife, received more than half the family home in lieu of future maintenance.

In three of the divorce cases it was recorded that both parties now had their own homes. In 10 of the divorces the wife bought out the husband's share, including a few instances where she received it in lieu of future maintenance. This also occurred in five judicial separations. In six divorces, including the two contested ones, the

Figure 10 Family Home

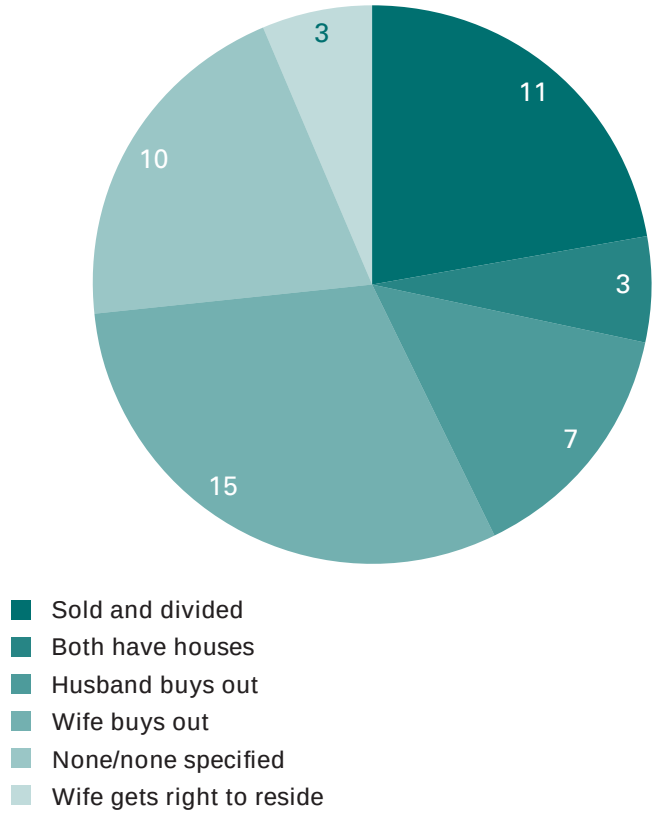


Figure 9 Maintenance

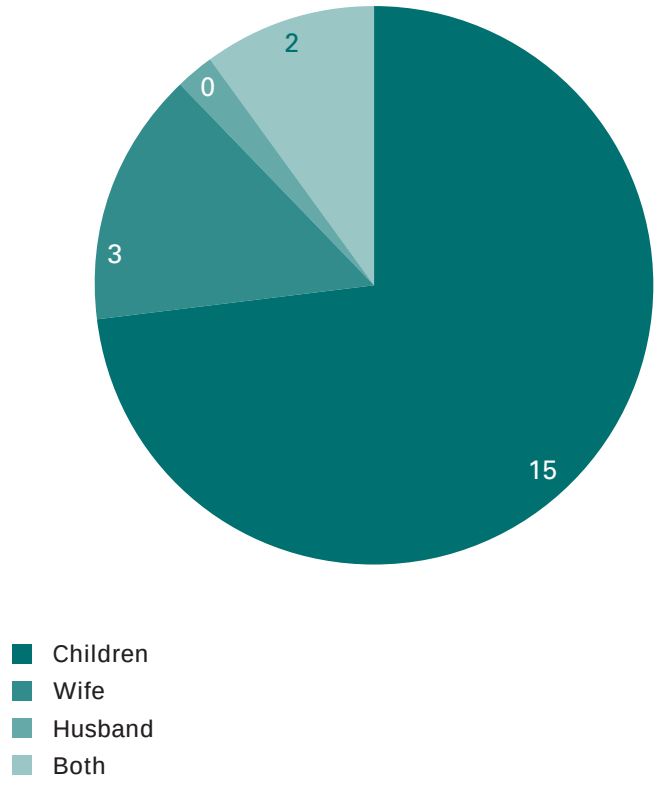


Figure 11 Pension and Other Assets

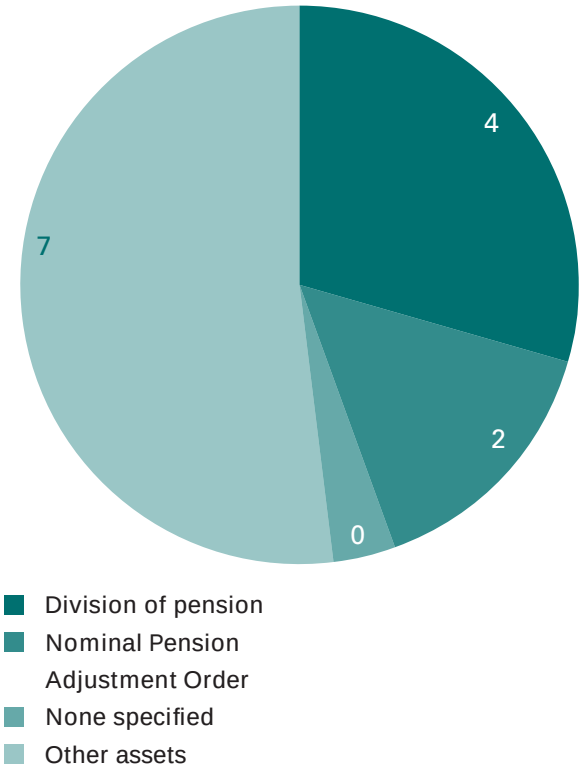
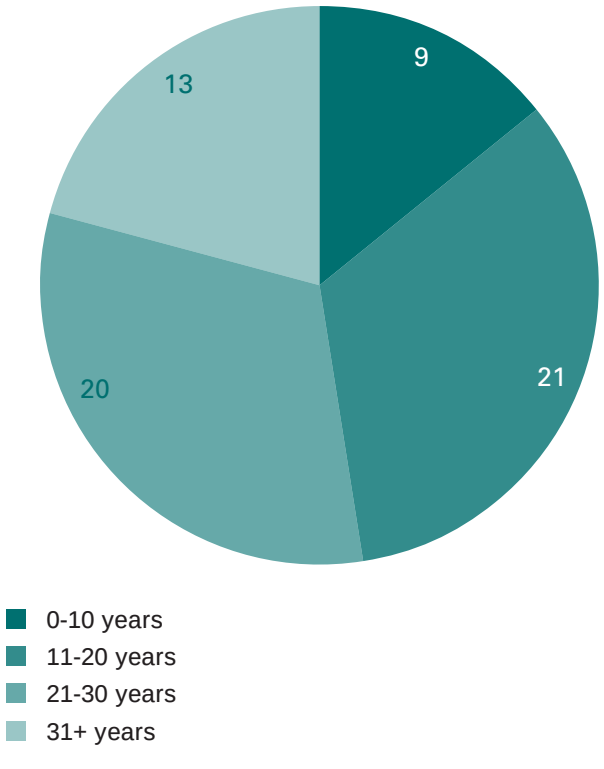


Figure 12 Length of Marriage Ending in Divorce / Judicial Separation



husband bought out the wife's share in the family home. This occurred in one judicial separation. In three divorces and three judicial separations the family home was rented. In eight divorces there was no family home, presumably because the parties had moved on and it had previously been disposed of. In all other cases there was no reference to the fate of the family home.

Pension adjustment and other financial orders were relatively rare. There were two nominal pension adjustment orders, and four involving the division of the pension or the maintenance of the contingent benefit (death in service benefit) by the wife. There were seven other financial orders, including one in the contested divorce, involving cash sums, land or other property.

Once again, those with marriages of more than 25 years' duration formed the largest group among those divorcing. Fourteen of the divorces involved people who had married between 26 and 30 years previously, followed by nine who had married between 11 and 15 years previously. Seven had been married more than 36 years, seven between 16 and 20 years, five fell into the age-group of those married between 21 and 25 years and three between 31 and 35 years, and three had been married less than 10 years. Again, it must be understood that, given the need for four years' separation and the existence of the remedies of judicial separation and deeds of separation, many of those divorcing have already ended their marriages in all but name, and have resolved most of the issues.

Among those seeking judicial separations, often the first formalised end to a marriage, the age-profile was predictably different. One couple had been married less than five years, and four between five and 10. Three fell into each of the 10 to 15 and 16 to 20 years' duration of marriage. One couple had been married for between 26 and 30 years, two between 31 and 35 and one over 36 years before seeking judicial separations.

One contested case on Northern Circuit

Most of the cases heard in October 2006 on the Northern Circuit were consent divorces, writes **Carol Coulter**

The Northern Circuit encompasses Donegal, Leitrim and Cavan, and in October 2006 24 family law cases were heard in Donegal and Leitrim, of which only five were completed in Leitrim.

Only one case went to a full hearing, although three more were due for hearing and were settled on the day of the trial. All of these were in Donegal. This represents a settlement rate of over 95 per cent. However, this may be reflective of the type of cases listed that month rather than of the overall trend in this circuit.

Two cases – one in each county – concerned declarations of parentage. The remaining 22 contained 19 divorce applications and three applications for judicial separation.

The one contested case was a divorce application heard in Donegal, involving a couple married between 26 and 30 years, whose family included some still dependent children. In this case custody was awarded to the mother, and maintenance was also ordered. The family home was not an issue.

The three judicial separation cases were spread over the age groups, ranging from one marriage which broke up after less than five years, to one which lasted between 11 and 15 years and one which lasted between 21 and 25 years. All three judicial separations were eventually agreed, and all had dependent children. In one case it was agreed that the mother have sole custody, in another that custody be shared, but with the child or children living with the mother, and in the third that there be joint custody without any such stipulation. In all cases access was agreed.

In only one of these cases was the family home an issue, and here it was transferred to the wife in lieu of maintenance.

Figure 13 Children - Custody

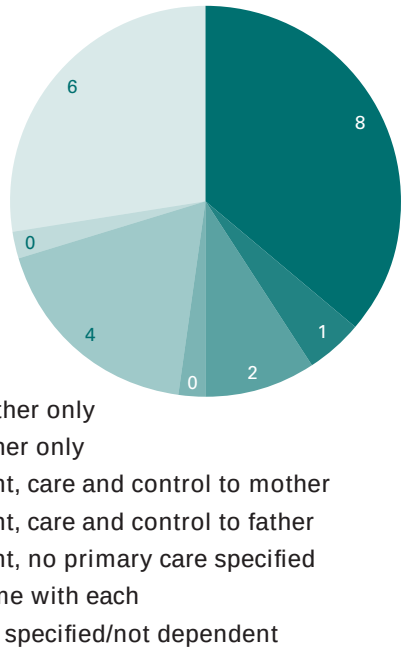


Figure 14 Children - Access

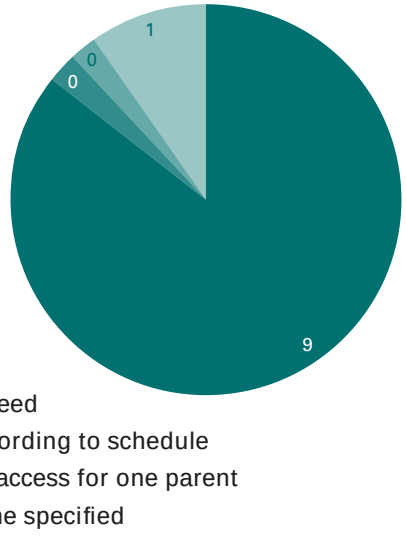


Figure 15 Family Home

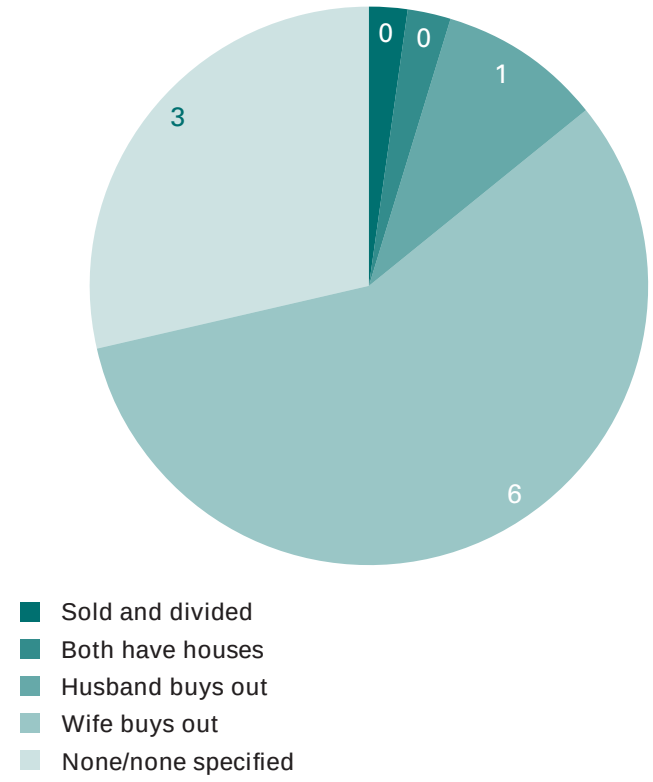
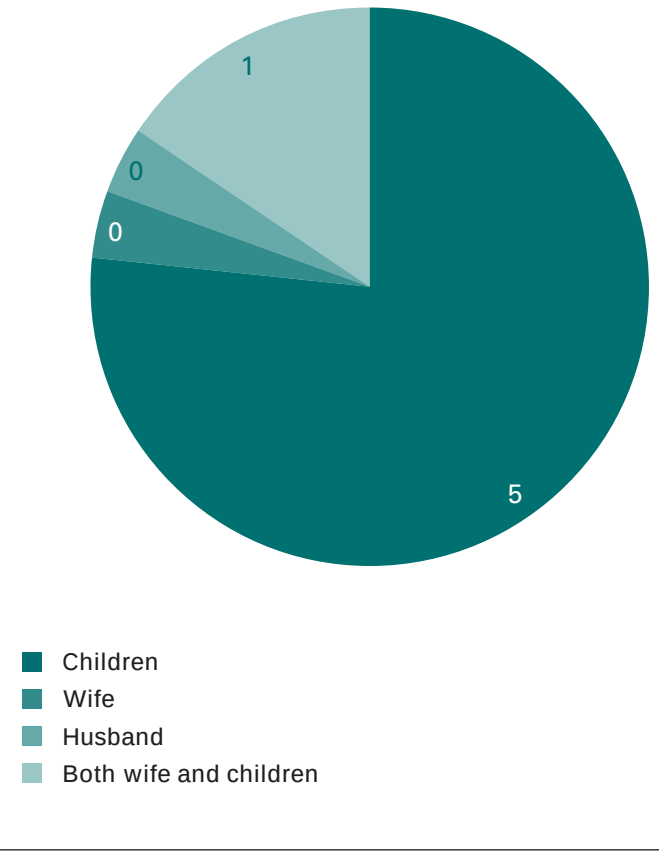


Figure 16 Maintenance



There were 12 divorces granted by consent, and 12 of them had been preceded by a pre-existing judicial separation or separation agreement, the terms of which were made a rule of court in the divorce.

Twelve of these cases involved dependent children. It was agreed that the mother have custody in six of them, in another joint custody was agreed with the children living with the mother, joint custody was agreed with no such specification in three, and the father had sole custody in one. No arrangements were specified in one case. In most cases access was as agreed, or not specified.

The disposal of the family home only featured in nine cases, probably reflecting the fact that this had been resolved earlier in the course of the separation proceedings. Where it was referred to in the consent divorces it was to confirm an earlier agreement.

In four of the nine cases the family home was transferred to the wife on payment of a sum, in one case it was transferred without payment, in one case it was transferred to the husband on his payment of a sum to the wife, and in three cases there was no family home.

Maintenance for the children was agreed in three of the consent divorce cases. There was a nominal pension adjustment order in one, and two other financial adjustment orders, reflecting interests in land or other property.

Those seeking divorces and judicial separations were spread fairly evenly across all age groups. Four sought divorces after between six and 10 years of marriage, three after 11 or more years, four between 16 and 20, three between 21 and 25 and two couples married between 26 and 30 years. Three couples had been married over 35 years before seeking a divorce. These figures are likely to disguise the fact that many couples, especially those with judicial separations or deeds of separations, may have been living totally separate lives for many years before seeking a divorce.

Among the three couples who sought judicial separations by agreement, one had been married less than five years, one less than 10, and the third between 21 and 25 years.

Figure 17 Pension and Other Assets

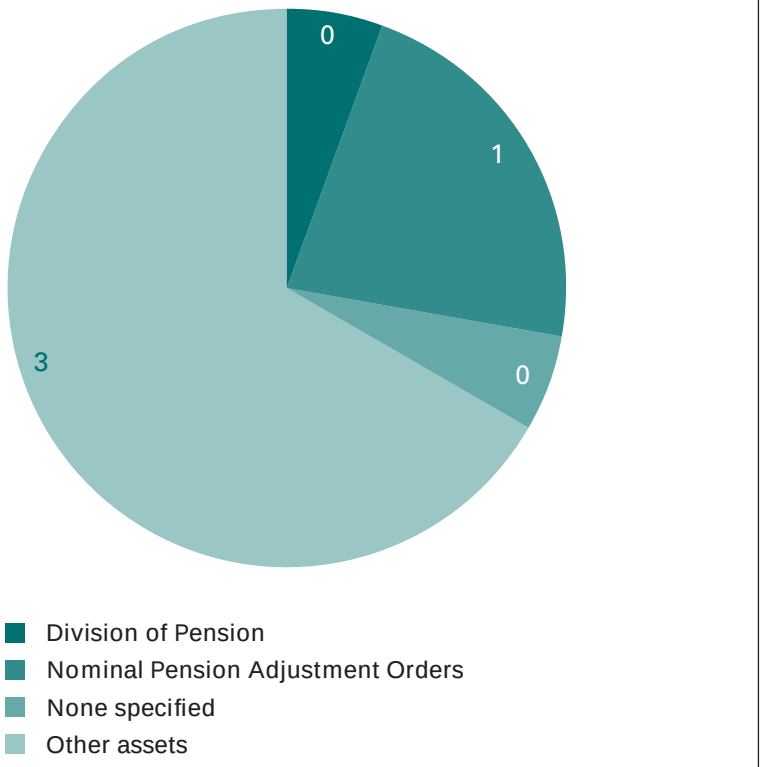
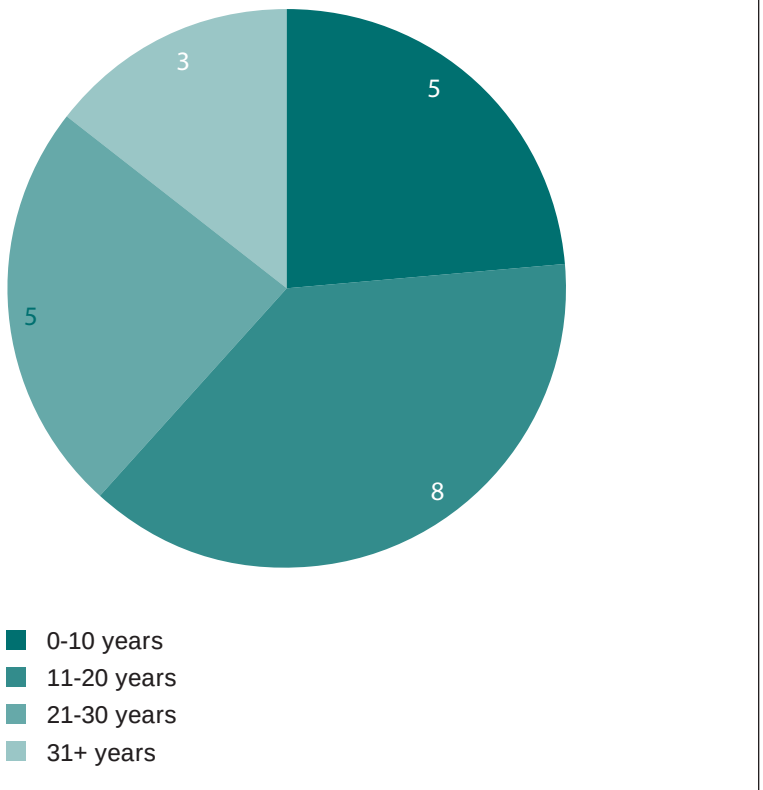


Figure 18 Length of Marriage Ending in Divorce/ Judicial Separation



Out-of-court maintenance deals are best, says MABS

Michael Culloty of the Money Advice and Budgeting Service (MABS) tells Luke O'Neill how family law cases can cause particular difficulties for those with money troubles

'Very often we [find] some creditors, particularly in the area of sub-prime mortgages, do not take enough care in ascertaining the [borrower's] ability to repay'

Family law cases provide particular difficulties for those in financial trouble. Michael Culloty of the Money Advice and Budgeting Service explains: "It's difficult to look forward to what the situation is going to be in terms of outcome in a family law case. Because first of all you don't know what the outcome is until the case takes place, you don't know what the settlement terms and conditions are going to be. So it is very important for people to, either alone or with the support of an outside agency, re-examine their finances in the light of a new situation."

MABS, set up in 1992 as a result of research conducted by the Combat Poverty Agency into those on low incomes, helps people to do this. Those with nowhere else to go often turn to money lenders. To release them from that trap, MABS was set up on a pilot basis. The four initial pilot centres were evaluated and found to be positive and effective. So MABS was expanded nationally and today there are over 60 centres throughout the country.

"We see about 15,000 new clients a year. Some come for information only. Many come because they are in serious difficulty with their finances," Michael Culloty says. "Over 70 per cent of the clients are people on low-income and social welfare, the other 30 per cent are what we would regard as people on reasonable income who experience difficulties because of changing life circumstances, be it relationship breakdown or unemployment. And because they have heavily borrowed they don't have an awful lot of savings and get into difficulty quite quickly."

Michael Culloty says: "We sit down with all our clients and try to maximise their income, be it through tax – they may not be saving all their credits – or social welfare, where they may not be applying for all the supports available to them. And once we have done that we look at their outgoings and prioritise those. If they own a property, what loans are secured on that property? We see what other expenses they have, like unsecured credit, and we help them agree to negotiate affordable and sustainable agreements with creditors."

He believes that out-of-court agreements regarding maintenance and cost are often the best option for couples whose relationship has ended. "We always think that an out-of-court agreement serves both parties better. Where that process is going on people are very often referred to MABS to look at their finances going forward and what their budget

might look like. In different places around the country a mediator may refer the parties to MABS."

It can be tough to face the reality of the situation, especially when the ability to handle money is tied up in who you are and your own self-confidence. "People might come to us and say 'now, I can't even handle my money' so they can be very reluctant. If you're not able to manage your money, you can't really talk to your friends and sometimes your family, so it's a very lonely place to be. An isolated place to be. People are slow to talk. That's why we have actually set up a helpline where people can speak in confidence and in a non-judgmental atmosphere to an adviser. And by talking things out, a solution can appear."

One option is the special budget account, an arrangement that MABS has in place with financial institutions and creditors. Low income earners and social welfare recipients can pay for mortgage, rent and utility bills on a weekly basis through the MABS computer system. Subsequently, MABS distributes money from this fund to creditors on a monthly basis.

With money so scarce for some couples, planning for their children's future can seem almost impossible. Michael Culloty says parents sometimes cannot think about this when they are worried about putting bread and butter on the table.

"The great majority of people that come to us are women. They are the people who realise that they can't put bread on the table or that there is a disconnection or eviction notice. They can carry the burden of household debt."

"Very often, people have a low income because they have an educational deficit or even a cultural, social-milieu deficit so I think it's a multi-layered approach towards poverty. They only receive enough money for today and can't afford to put enough money away – helping people out of poverty is a multi-layered job."

While MABS can always help at some stage, more can be done if clients ask for help sooner, according to Michael Culloty. Problems arise where clients delay in asking for help and where the legal proceedings are far down the line. On such occasions, it can be difficult for creditors to pull back and allow time for MABS to devise a budget or seek an out-of-court settlement.

"It's not the courts' fault, it's a structural fault," he says. A simple change in life

'We sit down with all our clients and try to maximise their income'

circumstances can have a domino effect. He gives the example of a person who defaults on payments to six creditors after a relationship breakdown or loss of a job.

"Those six creditors can take you to court independently and the court may not be aware of the other five, yet makes its judgment. You may not turn up, you may be intimidated by the process, and you cannot afford legal representation because you are in financial difficulty. So the judge is dependent on the creditors' representatives to speak in the court regarding your financial situation and your ability to repay.

"A judgment can be reached on that basis. And because of the lack of holistic information before the court it can be hugely unrealistic as far as the debtor is concerned. We would favour an out-of-court process where a person's full financial situation can be evaluated and affordable and sustainable agreement proposals can be put to not one but all the creditors involved."

A few years ago, MABS and the Irish Banking Federation undertook a pilot project for an out-of-court debt settlement process based on full-disclosure and an early start principle in the hope that such a process would eventually become part of the legal process.

"We have a real concern," Michael Culloty says. "The court looks at what's owed and how it can be repaid. We would like if the courts looked at the possible irresponsibility of the lending agency in supplying the loan to the customer in the first place. Because very often we are finding that some creditors, particularly in the area of sub-prime mortgages, do not take enough care in ascertaining the ability of the borrower to repay. We would feel that there is irresponsible lending there."

He says that in some cases MABS advisers accompany clients to court. They don't act as McKenzie friends – people who can take notes or make quiet suggestions to or of assistance to a lay litigant – but act as a moral support for the client. This is particularly important for people with depression, literacy or numeracy problems and for clients who may have experienced a psychological trauma at some time.

Access the MABS Helpline at: 1890 283 438. Email: helpline@mabs.ie

For more information about MABS including details of your nearest MABS office log onto www.mabs.ie