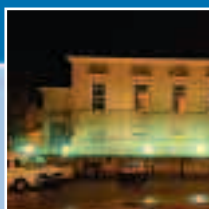


Family Law Reporting Pilot Project

Report to the Board of the
Courts Service

Dr Carol Coulter



October 2007



COURTS SERVICE
An tSeirbhís Chúirteanna

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Introduction

Until the Courts and Civil Liability Act 2004 Act was enacted, no third party could attend family law proceedings and parties to the proceedings could not (and still cannot) make public what had occurred. A litigant dissatisfied with his or her legal representation could not ask the disciplinary committees of the Law Society or the Bar Council to investigate a complaint because to do so would involve revealing to a third party what had occurred during the proceedings (*RM v DM and a Barrister, and Barristers Professional Conduct Tribunal [2000] 3 IR 373*). Academic researchers and policy-makers were equally excluded from the family courts.


Such blanket prohibition on the publication of information did not prevent complaints about the legal system with regard to family law being made and indeed many disappointed litigants were vociferous in their criticism. This led to allegations of unfairness, arbitrariness and bias, and fears were expressed that some litigants, particularly fathers, did not get a fair hearing in the family courts. In this context it was hardly surprising that the Courts Service Board, members of the judiciary and some legal practitioners, as well as members of the public, expressed the need for change to the *in camera* rule.

Organisations and groups that deal with families in crisis, and researchers and policy-makers on issues relating to the family, also sought more information on what happened in the family courts. It is ironic that, while the period running up to the referendums on divorce in 1986 and 1995 saw widespread public discussion of family breakdown and the impact of divorce on society, this discussion came to an abrupt end when divorce was introduced. No attempt was made, or could be made, to examine how it was working out in practice while the *in camera* rule remained in place. This rule had already been criticised by the Law Reform Commission in its 1996 *Report on the Family Courts* and the Working Group on a Courts Commission.

Most commentators saw a responsible media as the most effective vehicle for the opening up of the family courts, and this accorded with the constitutional principle of the administration of justice in public. In other common law jurisdictions the demand for more openness in family law led to greater access to family law courts for the media. However, this did not necessarily lead to greatly improved dissemination of information concerning family law to the public. In Australia, for example, where the family courts have been open to the media for some time, the Family Court is examining ways to encourage the media to take a greater interest in it, especially in significant cases. In Scotland, which has always permitted media access subject to certain restrictions, family law cases are very rarely reported.

Opening up the family courts to the media as of right was also initially proposed by the British Lord Chancellor in his 2006 Consultation Paper on the family courts. However, following a consultation process the Ministry of Justice in England and Wales concluded that giving the media access to the family courts as of right did not equate to providing more comprehensive information on the operation of the family law courts to the public, and the Second Consultation Paper proposed alternative mechanisms for providing this information. (See Appendix II for a summary of reporting regimes in other common law jurisdictions).

Unlike the UK, Ireland has a written Constitution which guarantees the administration of justice in public, except for such exceptional circumstances as may be prescribed by law, and this must be taken into account in dealing with the interaction



between the need to provide information on family law and access to the courts by the media.

Under the 1998 Courts Act the Courts Service has a statutory duty to provide information on the courts system to the public and this must include the family law courts. In 2002 the Courts Service established a pilot project to report family law proceedings on a limited basis. However, this had to be abandoned in the light of senior counsel's opinion that the legislative regime then in place did not permit third parties attend family law proceedings, even with the permission of the parties. As a result the Courts Service sought legislative change to allow the reporting of family law, subject to the protection of the privacy of the parties, and the Government committed itself to reform of the legislation in the 2002 Programme for Government. This commitment was met by the 2004 Act (described below) which enabled the Courts Service to establish the Pilot Project on Reporting Family Law, the subject of this report. Others were also permitted attend to prepare reports (see below).

The report on this project is in two parts. The first deals with the reporting project itself. But also, as the project evolved and I travelled to courts around the country, many of those involved in the family law system, particularly judges, practitioners and court staff, offered me their very helpful observations on how it operated and how it could be improved. In addition, I saw the system at work at first hand. Following discussions with the Chief Justice, The Honourable Mr Justice Murray, and the chief executive of the Courts Service, Mr P J Fitzpatrick, I therefore include a second section on the family law system itself, with recommendations on how it could better serve those who seek the help of the legal system in resolving their family disputes.

This report should be read in conjunction with the first three issues of *Family Law Matters*, which include reports from family law cases, judgments, and an analysis of statistics and trends based on a sample of all 2006 Circuit Court cases. As the Pilot Project was aimed at providing information on family law for the public generally as well as the legal community, this report is also intended to be accessible to the general public. It therefore contains some information that specialist readers may consider superfluous, but which I consider necessary to ensure the report is comprehensible to members of the public.

Part 1

The Family Law Reporting Pilot Project

1.1 The Legal Framework

1.1.1 The Constitution

Unlike the UK, Ireland has a written Constitution with specific provisions on the administration of justice in public. Article 34.1 of the Constitution provides: “Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and save in such special and limited cases as may be prescribed by law, shall be administered in public.” The constitutional context in which family law, as all other law, is heard is therefore that of the administration of justice in public, except where statute provides otherwise.

This was limited by Statute in the Section 45 (1) of the Courts (Supplemental Provision) Act 1961, which listed cases in which justice may be administered otherwise than in public. These were:

- (a) Applications of an urgent nature for relief by way of Habeas Corpus, Bail, Prohibition or Injunction;
- (b) Matrimonial causes and matters;
- (c) Lunacy and minor matters;
- (d) Proceedings involved in the disclosure of a secret manufacturing process;

along with “any other cases prescribed by Acts of the Oireachtas”. Later Acts specifically dealing with family law matters stipulated that the proceedings be heard otherwise than in public. In particular, Section 34 of the Judicial Separation and Family Law Reform Act 1989 provides that “proceedings under this Act shall be heard otherwise than in public” and this limitation was continued in the Family Law (Divorce) Act 1996.

The courts have extensively examined the constitutional imperative that justice be administered in public and the limitations that can be imposed on it. In *The Irish Times Limited and Ors v His Honour Judge Anthony G Murphy and RTE v Ireland and Ors* ([1998] 1 IR 359, [1998] 2 ILRM 161) the Supreme Court examined the matter at length, albeit in the context of a criminal trial, where it unanimously ruled against a restriction on contemporaneous reporting imposed by Judge Murphy. The comments made by the court here have an application to civil law, including family law.

In his judgment Mr Justice Ronan Keane stated: “Justice must be administered in

public, not in order to satisfy the merely prurient or mindlessly inquisitive, but because if it were not an essential feature of a truly democratic society would be missing. Such a society could not tolerate the huge void that would be left if the public had to rely on what might be seen or heard by casual observers, rather than on a detailed daily commentary by press, radio and television. The most benign climate for the growth of corruption and abuse of powers, whether by the judiciary or members of the legal profession, is one of secrecy." He added: "In modern conditions, the media are the eyes and ears of the public and the ordinary citizen is almost entirely dependent on them for his knowledge of what goes on in court."

Mrs Justice Susan Denham stated: "We live in a modern democracy in the age of information technology. It is entirely impractical for all people to attend all courts. Nor is that required. What is required is that information of the hearings in court are in the public domain. In a modern democracy this information is brought into public domain by many routes, but in reality most people learn of matters before the courts from the press."

In the High Court Mr Justice John MacMenamin stated: "It is a fundamental principle of Irish law that justice should be administered in public and that the administration of justice in public is an essential feature of a truly democratic society. As a constitutional and legal principle, even if cases are heard in private there may be issues which are of public concern and where the interest of justice requires that after the hearing in private the judgment made therein should so far as possible be made public." (*In re Dowse [2005] High Court, No 64 M*)

In the latest edition of *Kelly: The Irish Constitution*, Hogan and Whyte argue that the *in camera* rule, as operated prior to the 2004 Act, was probably unconstitutional (6.1.233-235), and they advocate a reporting regime similar to that operating in relation to rape and sexual assault cases, where the press can attend and report on the proceedings, but nothing can be published that could lead to the identification of the victim.

In relation to the publication of reports on family law, the *Irish Times v Murphy* judgment has to be read in conjunction with the McGee judgment (*McGee v the Attorney General [1974] IR 284, [1975] 109 ILTR 29*), which discovered marital privacy as an unenumerated constitutional right. Mr Justice Gardiner Budd stated: "Whilst the 'personal rights' are not described specifically, it is scarcely to be debated in our society that the right to privacy is universally recognised and accepted with possibly the rarest of exceptions, and that the matter of marital relations must rank as one of the most important of matters in the realms of privacy." The European Court of Human Rights has also upheld the right to privacy in relation to the reporting of family law matters (*ECHR: B and P v United Kingdom, [2001], 34 EHRR 529*). Thus any reporting of family law in Ireland will be bound by two constitutional imperatives – the requirement that justice be administered in public, and the existence of a constitutional right to marital privacy, which can be extended to include family affairs more generally, particularly with regard to children.

It is likely therefore that the family law reporting regime operating in Scotland, where the family courts are open to the public, and judgments (though not evidence) which include the identities of the parties, can be published, would be constitutionally impermissible in Ireland. (see Appendix II)

International law also favours the publication of at least the outcomes of family law proceedings. Article 6 of the European Convention on Human Rights states: "In the

determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ... Judgment shall be pronounced publicly, but the press and public may be excluded from all or part of the proceedings ... where the interests of juveniles or the protection of the private life of the parties so requires."

In June 1985 the European Court of Human Rights ruled, in *Campbell and Fell v United Kingdom* (7 EHRR 165), that, while the court did not feel bound to adopt a literal interpretation of the words "pronounced publicly", "the object pursued by Article 6, Par 1, namely to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial" should be upheld in whatever form publication took. Thus withholding the publication of judgments in some form would seem not to be an option.

Various forms of publication of family law decisions have been found acceptable by the European Court of Human Rights. These include depositing the judgment in the court registry for the public to read (*Pretto and Ors v Italy* [1984] 6 EHRR 182) and the routine publication of judgments of both the Court of Appeal and first instance courts in cases of special interest (*P and B v United Kingdom*[2001]). This judgment found that it was not necessary to make public each and every family law judgment or decision if the decision was of a routine nature. The court commented that anyone who could establish an interest could obtain a copy of the judgment or order.

In Ireland High Court family law judgments are published in the various law reporting series. However, Circuit Court and District Court decisions are not, and both could include cases of "special interest", especially in view of the wide jurisdiction of the Circuit Court in family law. It is possible that the lack, to date, of publication of the decisions of these courts could mean Ireland has been in breach of Article 6 of the Convention.

The tension between the right to freedom of expression and the right of an individual to privacy was explored by the Canadian Supreme Court in *Edmonton Journal v Alberta (Attorney General)* [1989] (2SCR 1326), where the court found, by a majority of three to two, that a law restricting media reporting of family law to the facts of the case and the judgment, disallowing reporting of evidence or judicial comment, contravened the Canadian Charter of Rights and Freedoms.

Reporting the outcome of a family law case was not considered sufficient by the Canadian Supreme Court, as this did not fully comply with the fundamental principle that justice be administered openly. Supporting the majority judgment, Mr Justice Cory stated: "The comments of counsel and the presiding judge are excluded from publication. How then is the community to know if judges conduct themselves properly? How will it know whether remarks might have been made, for example, that a wife should submit to acts of violence from her husband, or that a wife should endure the verbal abuse or blows of her husband? The community has a right to know if such remarks are made, yet if there is no right to publish, the judge's comments may be hidden from public view." (See Appendix II)

1.1.2. The Civil Liability and Courts Act 2004

In 2004 the Minister for Justice included, in Section 40 of the Civil Liability and Courts Act, provisions for modifying the *in camera* rule in relation to family law. Apart from the

reference to barristers and solicitors, the legislation left the details on who was to have access to family law courts to regulations to be made later by the Minister. In the Dail and Seanad debates on the matter it appeared that the availability of information on family law, rather than the exercise of the principle that justice be administered in public, was uppermost in the mind of the legislature.

Having listed the Acts to which the proposed modification of the rule relates, the Act continues:

“Nothing contained in a relevant enactment shall operate to prohibit –

- a) the preparation by a barrister at law or a solicitor or a person falling within any other class of persons specified in regulations made by the Minister and publication of a report of proceedings to which the relevant enactment relates, or
- b) the publication of the decision of the court in such proceedings,

in accordance with rules of court, provided that the report or decision does not contain any information which would enable the parties to the proceedings or any child to which the proceedings relate to be identified and, accordingly, unless in the special circumstances of the matter the court, for reasons which shall be specified in the direction, otherwise directs, a person referred to in paragraph (a) may, for the purposes of preparing such a report, attend the proceedings subject to any direction the court may give in that behalf.”

Thus the only class of person specifically permitted by the legislation (as distinct from the regulations) attend family law proceedings and prepare reports is “a barrister-at-law or a solicitor”. The type of report a barrister or solicitor might prepare, or for whom, is not specified in the legislation. It therefore seems that there is a lacuna in the legislation, unintended by the Oireachtas, whereby a barrister or a solicitor working for the media could prepare reports that would be published in the media. The only protection against this, if such protection is required, is the stipulation that the publication of a report be “in accordance with rules of court”. For the purposes of the Courts Service Pilot Project, those working for it are covered by the reference to “any other class of persons specified in regulations made by the Minister”, referred to below.

It can be seen also that the Act itself draws a very clear distinction between “a report of proceedings” and “the decision of the court in such proceedings”, a distinction subsequently reflected in the requirements of the Courts Service that its Pilot Project should publish both “reports” and “judgments” of family law proceedings.

1.1.3. Regulations

The implementation of Section 40(3), therefore, depended on the adoption by the relevant jurisdictions of Rules of Court and involved the Minister outlining the classes of persons allowed attend family law proceedings through regulations.

The regulations referred to in the Act were made by the Minister in Statutory Instrument 337 of 2005. Under them, three classes of person other than lawyers could attend family law cases “in order to draw up and publish reports”. These included family mediators, persons engaged in family law research and accredited to a number of reputable academic and research institutions specified in the regulations, and “persons

engaged by the Courts Service to prepare court reports of proceedings". According to the Courts Act 1998, one of the functions of the Courts Service is to provide information on the courts system to the public. The reference to the Courts Service in the regulations would seem to flow from this function.

In his press release announcing these regulations the Minister said: "I feel confident that allowing access to family law court cases in order to facilitate the placing of judgments in the public domain will give us new insights into the operation of family law and will assist the courts, the legal professions, policy-makers and, of course, people going to court in family law issues." The emphasis in the Irish legislation is on allowing for more information on the operation of the family courts to be made available to interested bodies and the public, the latter through academic research and the work of the Courts Service. There is little emphasis on the public scrutiny aspect of the administration of justice in public, though, taking the Act and the Regulations together, it would appear that it was the intention of the legislature to leave the class of person to be permitted attend family law proceedings to the discretion of the Minister, perhaps allowing the classes of person be expanded over time.

If there is a public demand for media access to the family courts, and if it appears from this Pilot Project, and any further development of the project that may be undertaken by the Courts Service, that broader media reporting of family law is possible without jeopardising the privacy of the family, it is open to the Minister to expand the classes of person who attend such proceedings to include *bona fide* members of the media, provided they agree to abide by Rules of Court and any direction the court may give. Such directions could include detailed instructions on the nature of the information that should be excluded in reports in order to ensure the anonymity of the parties. The fact that a Protocol already exists restricting the information that can be given about parties may provide reassurance in this regard.

1.1.4. Rules of Court

The Rules Committees of the three jurisdictions of the courts (District, Circuit and Superior) drew up Rules of Court that would apply to a person presenting themselves in order to prepare a report. While slightly varying in detail, all of them provided that the person should "prior to or at the commencement of the hearing of the proceedings, identify him or herself to the Court and apply for such directions as the Court may give under Section 40(3) of the said Act." If the court is satisfied that this person is someone to whom the Section applies, "having heard any submission made by or on behalf of any party to the proceedings, it may allow the applicant to attend the proceedings subject to such directions as the Court may give in that regard."

Were these rules to be strictly and sequentially followed, it could mean that each family law application would see the reporter identify him or herself to the court at the outset and apply for directions. The court would then seek submissions by or on behalf of either party to the proceedings and, in the light of these submissions, give directions to the reporter, potentially relating to the conduct of the reporter during the proceedings, or to the content of the report. This would have taken up a great deal of court time. However, following the circulation of the Protocol on Reporting Family Law, the problems anticipated by these rules were averted.

Together the 2004 Act, the 2005 Regulations and the Rules of Court provide the

statutory and regulatory framework under which the Courts Service established a pilot project to report on family law, which included not only reports of family law cases and judgments, but also the preparation of statistics and trends on family law. These statutory provisions are sketchy, and left many issues unaddressed. They contrast with the provision for family law reporting in other jurisdictions where this has been opened up to the media, generally subject to detailed restrictions on the identification of the parties.

For example, the term “report” is not defined in either the legislation or the regulations, which presented a challenge to the Courts Service Pilot Project. The term “proceedings” is not defined either, and one must look to caselaw to see whether or not it includes pleadings and other documents related to the case (see *RM v DM and a Barrister* below).

The 2004 Act provides for those entitled to attend to report family law proceedings, but also gives the court discretion to exclude them in “the special circumstances of the matter” and for “reasons that shall be stated in the direction”. The “special circumstances of the matter” that might lead to a reporter being excluded from proceedings are also nowhere defined, and this probably remains a task for the judiciary itself to clarify through caselaw.

The Rules of Court allow for submissions to be made by or on behalf of parties to the proceedings concerning the presence in a court of a reporter. However, this does not give the parties a veto on the presence of such a reporter. The reporter is not a party to the proceedings, so therefore the rules cannot allow him or her to respond to any submissions about his or her presence that might be made. While it is clear why someone not a party to the case cannot be heard, this is unsatisfactory as it allows for a situation where a party could make objections on spurious grounds and the judge might rule against the reporter’s presence in good faith without the reporter having a chance to challenge the basis for the exclusion, thereby creating a precedent for reporting in general.

The 2004 Act is an attempt to provide information to the public on family law through the work of the Courts Service and academic researchers. But the legislation does not indicate the manner in which this might be effected. It therefore fell to the Courts Service Pilot Project itself to attempt to define its role and function within this statutory and regulatory framework, in the absence of any more detailed guidelines from the legislature.

1.2. Setting up the Pilot Project

At the outset the Courts Service sought a person or persons to provide “reports, judgments, trends and statistics” from the High, Circuit and District courts, to be published for the use of the judiciary, legal practitioners and the general public. I was engaged to do this on a pilot basis, based on the proposed work I had outlined in my proposal (see Appendix I). While aspects of this proposal were modified in the light of experience, its essential features were followed during the project.

1.2.1. The Proposal

My proposal undertook to prepare reports of family law proceedings by attendance at a representative selection of courts across the three jurisdictions, with the major emphasis on the Circuit Court as this is where the vast majority of judicial separation, divorce and nullity proceedings are heard. Furthermore, as many of the cases that go to full hearing in the High Court or on appeal to the Supreme Court result in a written judgment, which becomes available to the public, reporting from this jurisdiction was less urgent.

While a great deal of family law is processed in the District Court, on such matters as maintenance, domestic violence, guardianship, custody of and access to children, and care orders sought by the Health Service Executive (HSE), it was not envisaged that the Pilot Project would be able to report comprehensively on family law in the District Court, though some reporting would be carried out in this jurisdiction.

According to the proposal, reports should incorporate the following:

1. A comprehensive account of the hearing, incorporating exchanges between the judge, solicitors and barristers and witnesses, in order to give as full a picture as possible of what transpires in a family law case;
2. The conclusions of the case, including the decision and any ancillary orders, along with any explanation or comment offered by the judge;
3. If there is more than one case heard, statistics on the numbers heard, the outcomes, the nature of the legal representation and any other relevant information.

The proposal also includes suggested guidelines for the protection of the anonymity of the parties to the litigation and any children to whom the proceedings related. It stated that the collection and publication of judgments could only be done with the help of the judiciary and staff of the Courts Service, and with the technological assistance already referred to in Courts Service documentation.

In relation to statistics, the proposal listed information that should be collected by the Courts Service itself in the preparation of its statistics, including information on ancillary orders. If the production of comprehensive statistics proved impossible it envisaged a statistical report based on a sample of cases.

In setting up the Pilot Project, the Courts Service ensured that it would be entirely independent of the Courts Service Board, its staff, the judiciary and the legal profession. It was seen as vitally important to ensure public confidence in the project that courts

and cases be selected for reporting on an independent basis, and that the contents of the reports be free from any external editorial interference. This principle was enthusiastically embraced by the Courts Service, judges and staff.

The first task of the Pilot Project was the drawing up of guidelines for the protection of the anonymity of parties, and these were circulated to the judiciary, family lawyers and key Courts Service staff. Following a number of helpful suggestions which led to minor amendments, a Draft Protocol for Family Law Reporting was published in the first issue of *Family Law Matters*. It applies to all those preparing reports from the family courts for the Courts Service.

The next task was to collect information on the organisation of the family courts and the hearing of family law cases in the various jurisdictions in order to prepare the collection of statistics and to plan attendance at a representative selection of courts. It was also important to ensure, as far as possible, that all those involved in processing family law understood the purpose of the project and were engaged in it. To this end I had extensive discussions with Courts Service staff, members of the judiciary, representatives of family lawyers and individual practitioners.

Some individuals and lobby groups sought meetings with me to express their views on what the project should involve. As my proposal had been accepted by the Courts Service, and my contract was to implement that proposal, I did not consider it appropriate to seek the views of third parties on what the project should entail. Accepting any such input would alter the contract and compromise the independence of the project.

Furthermore, the primary purpose of the project was to prepare empirical, descriptive court reports of family law proceedings, not to research the outcomes of such proceedings, to investigate the experience of litigants or to test any particular thesis about the workings of the family law system. Research in all these areas is necessary and important but it must fall to other researchers, perhaps supported by an academic institution, to carry it out. The Pilot Project was essentially a court-based exercise, looking at what happened in court, including cases that settled and whose terms were made a rule of the court.

At the outset of the project some concerns were expressed by members of the legal profession that their clients might fear any publicity about their cases, and I sought to allay these concerns through addressing them at conferences and through meetings with the Family Lawyers Association (FLA). Any such fears that individual litigants might have could only be dealt with on a case-by-case basis, or through their legal representatives. Above all, I hoped that by publishing reports as early as practically possible I would reassure the public, especially potential litigants, about what they contained and did not contain, particularly with regard to identifying the parties.

Certain legal and practical difficulties quickly emerged in setting up the project. The Rules of Court seemed to indicate that the court should seek submissions on behalf of parties at the beginning of each and every hearing, of which there could be dozens on any one family law day in a Circuit Court, for example. If availed of, this could clog up the family law lists. However, in the event judges made reference to the presence of a reporter either at the initial call-over of cases, or at the beginning of a day's proceedings and did so in a relatively informal manner so this did not arise.

The question of whether "proceedings" covered only what took place in court, or if it included pleadings, orders and other documents, was raised by the Family Lawyers Association. This was not clear from the legislation.

However, Mr Justice Roderick Murphy, in *RM v DM and a Barrister, and Barristers Professional Conduct Tribunal* (cited above), observed that “proceedings are what goes on in relation to litigation. It covers all pleadings, evidence, whether oral or on Affidavit, and all Orders and Judgments in relation to that litigation.” While this judgment provided solid authority for a reporter consulting such documents when necessary, the Courts Service nonetheless sought to have the matter clarified in legislation, and it is understood that this will be done in the Civil Law (Miscellaneous Provisions) Bill 2006, which has been restored to the Order Paper of the new Dail and is now at Committee stage. The issue of whether the reports of family law proceedings would be covered by privilege, as they are not proceedings heard in public, was also raised by the FLA, and this was addressed by the then Minister in Committee Stage amendments to the Defamation Bill, which is awaiting reintroduction in the Oireachtas.

1.2.2. Methodology

The question of the selection of cases to cover was raised early in the project. A number of individuals and groups contacted me with suggestions as to which courts and individual cases I should attend or offering me documents from individual cases. I did not consider it appropriate to accede to these requests and using the documents would breach the *in camera* rule. In addition, in my proposal I had stated the need to prepare reports from “a representative selection of courts”. For such reports to be reflective of the general nature of family law proceedings nationally, both the courts and the cases had to be selected on a basis that was as random and as representative as possible. Attending cases that specific litigants, their legal representatives or family members considered would be of interest would distort the random and representative nature of the reports and undermine the independence of the project.

Individual litigants also contacted me to recount their individual experience of the family courts and offered me documents from them. While I could not use such accounts as the basis for writing reports of cases as they were not among the cases I attended myself, I took careful note of them and these conversations and documents, along with conversations with court staff, judges and practitioners, as well as my own observations inform Part 2 of this report.

The Circuit Courts hear approximately 98 per cent of all divorces and judicial separations. They were therefore identified as a priority for the Pilot Project, while not ignoring the importance of the District Court in dealing with matters relating to custody, access, maintenance and domestic violence.

I selected the courts I visited on the basis of a combination of criteria as detailed below, drawing on the statistics published in the 2005 Courts Service Annual Report, which listed the applications granted in the various circuit courts.

1.2.3. Attendance at Courts

While the High Court only hears less than 2 per cent of all family law cases, I considered it important that some insight be given into its workings, in addition to the reserved judgments that are handed down and made available to the public on the Courts Service website. In the first quarter I spent a week in the High Court and this was reported on in the first issue of *Family Law Matters*.

Among the Circuit Courts, the greatest volume of family law cases is, predictably, heard in the major cities. In 2005 Dublin heard 33 per cent of all Circuit Court family law proceedings, Cork 12 per cent, Limerick 5.2 per cent and Galway 3.85 per cent. Provincial towns on the east coast, Dundalk and Wicklow, come next, having 3.7 and 3.4 per cent of all Circuit Court family law cases respectively. Tralee, Ennis, Naas and Clonmel heard approximately 3 per cent each, closely followed by Wexford with 2.85 per cent, Letterkenny with 2.63 per cent and Waterford with 2.5 per cent.


However, I considered it necessary to take factors other than mere volume into account. I felt it was essential to attend family law proceedings in all eight circuits, six of which contain a number of counties, each having a Circuit Court in its county town. The Midland Circuit contains Laois, Longford, Offaly, Roscommon, Sligo and Westmeath, while Donegal, Cavan and Monaghan make up the Northern Circuit. No town from these counties featured as major venues for family law in 2005 yet as towns with large rural hinterlands which were likely to have to deal with issues relating to land it was essential that some centres from these circuits be included. Accordingly I attended family law sittings in Birr, Portlaoise and Sligo in the Midland Circuit. On the Northern Circuit Letterkenny heard 2.63 per cent of all family law, while Cavan heard approximately 1.6 per cent. I attended hearings in both towns.

I attended court for 76 days of the 2006/2007 legal year, starting in November. As the year progressed it became clear that I would not be able to amass a fully representative selection of courts on my own, especially if the District Court was to receive adequate attention. Accordingly it was agreed with the Courts Service that a panel of additional reporters would be drawn up, using recently qualified lawyers who would already be permitted to attend family law proceedings under the Act. These additional reporters began to be deployed shortly before the Easter holidays.

If I was to relate my attendance strictly to the volume of family law cases heard by the different centres, I would have to deal in fractions of days, and would also be inhibited from hearing cases through to the end if they were adjourned. Therefore for practical reasons there is not a strict mathematical relationship between the days spent in specific courts and the volume of family law cases heard there, though there is an approximate relationship. Further, the same judge tends to hear family law cases in the different centres in each circuit, so it was of secondary importance which town was selected in each circuit. Taking into account the need to ensure that each circuit was adequately represented in the project, the need to ensure a balance between major urban centres and more rural towns, the need to follow certain cases through to their conclusion, and the problems posed by the coincidence of family law hearings in a number of different venues on the same days, the overall spread of attendance roughly corresponds to the amount of family law dealt with in that centre or in the circuit it belonged to.

Four of the 76 days was spent in the High Court in Dublin, and 10 in Dublin District Court, including six in Court 20, which deals exclusively with child care cases. This meant I spent 62 days in Circuit Courts, and I also spent two days in Limerick with the County Registrar attending case conferences at which cases were progressed for hearing.

I spent 13 days in Dublin Circuit Family Court. This is less than the third merited by its proportion of all family law heard in 2005, but it made it possible to give adequate coverage to all seven other circuits. I also allocated some additional reporters to attend cases in Dublin Circuit Court in the last term.



Cork clearly was the second priority as it deals with 12 per cent of all family law and constitutes a circuit in itself. I spent a week there in December 2006 and again in March 2007, a total of eight days, which is approximately 12 per cent of the total.

Limerick, the next busiest family court, and I attended for a total of five days there in May and in July, about 8 per cent of the total, having spent two days with the county registrar in case conferences in June, at which the parties and/or their solicitors met to isolate the issues in dispute, and agree what could be agreed. Two other towns on the South-Western Circuit, Tralee and Ennis, each have approximately a 3 per cent share of the Circuit Court family law. As it was not possible to visit both towns on the circuit, I attended Ennis in May for two days.

Dundalk and Wicklow are both on the Eastern Circuit, and between them account for 7.5 per cent of all Circuit Court family law cases. I visited them both for three and four days respectively, about 11 per cent of the total altogether.

On the Western Circuit, Galway heard 3.85 per cent of all family law cases, followed by Castlebar which hears 2.27 per cent. I spent two days in each, amounting to almost 7 per cent of the total.

On the South-Eastern Circuit, the busiest family court is Clonmel, which hears 3 per cent, followed by Wexford with 2.85 per cent and Waterford with 2.5 per cent. Because of clashes with other family law hearings, I was unable to attend family law hearings in Clonmel, but I attended for a day in Nenagh, also in Co Tipperary. I spent one day in Carlow and five in Wexford, about 10 per cent of the total.

On the Northern Circuit, I attended family law sittings in Letterkenny for two days and Cavan for one, and on the Midland Circuit I attended Sligo for three days (including returning for a case that was adjourned), Portlaoise for three and Birr for one day.

While by the end of the project I had visited all the major centres dealing with family law, it will be noted that some towns dealing with 3 per cent or less have been omitted in favour of others with even lower volumes. This is to ensure that all circuits have been represented in the project. I attended other towns for more than the strict percentage of family law they represented, usually because it would be artificial and impractical to break up a family law week.

My method of selecting courts did not take account of where any particular judge was sitting. Nor did I tailor my attendance to any advance notice I had of any particular case. Where I was present in court during a case where a significant issue was at stake, and where the case was adjourned, I returned to hear the rest of the case though this could inflate the time spent in this particular court. This random, statistics-based selection of courts, though modified by other considerations, meant that some of the days' hearings I attended were devoted to very routine matters and yielded very little either of legal interest or of interest to the general public. However, I consider that this experience reflected the reality of the totality of family law hearings.

While the District Court was somewhat neglected at the beginning of the project so that the Circuit Court could be adequately covered, this was rectified as the year continued by the deployment of additional reporters (see below).

1.2.4. Preparation of Reports, Judgments, Trends and Statistics

1.2.4.1. Reports

As stated above, the Act does not define “reports”, the regulations did not define “court reports of proceedings”, and the Courts Service did not elaborate on what it required in the publication of reports.

The term was open to the interpretation that it meant the kind of legal reports produced either officially in the *Law Reports* or commercially in the *Irish Legal Reports Monthly*, where the judgments of the higher courts are published for the use of legal practitioners. These reports follow a strict format, presenting the legal arguments, the statute law and precedent involved and the judicial decision, and they are identifiable for future reference. Inevitably, they use legal language. They do not include verbatim accounts of exchanges between judges, practitioners and witnesses. Matters extraneous to the proceedings, but which nonetheless can occur in court, like one of the parties breaking down or interrupting the proceedings, receive no mention.

The Courts Service sought a reporting project that would serve the public as well as the judiciary and legal practitioners. The constitutional imperative that justice be administered in public, and the Supreme Court’s interpretation of this imperative, suggested that reports should be produced that were as accessible as possible to the public.

The publication of reports of family law proceedings, separate from judgments and decisions, gives an insight into the manner in which such proceedings are conducted, the dynamics of family law proceedings, and allows part-heard cases to be reported, which could not happen if only decisions were recorded and reported. It allows the public a glimpse of the manner in which family law cases are conducted, as well as information on their outcome.

As a function of the project was to inform the public, I considered that the style of the reports should be that of newspaper reports of court cases. Legal language should be kept to a minimum. As many direct quotes as possible should be included. Exchanges between the judge and the other participants in the case should be reported. The public should receive as full an account as possible of what happened in a case, subject only to the protection of the anonymity of the parties. The reports should be presented in an accessible style.

I also considered that the project should produce reports as quickly as possible. When it was first announced in October 2006 there was considerable interest in the prospect of family law being reported for the first time. There was also some apprehension, especially among practitioners who feared that already nervous clients would be made even more fearful of bringing their case to court if they thought it might be reported in the media. The best way both to respond to the public demand for information on family law and to reassure practitioners and potential litigants was to publish reports and show what the project involved.

Therefore I decided to produce reports, judgments and statistics from the Michaelmas term (October to December inclusive) of 2006 in a first report, to be published early in 2007. This took the form of the first issue of *Family Law Matters*, produced in a magazine format that would be accessible to members of the general

public in design and style as well as content. The first issue was launched on February 19th, 2007. It was followed by second and third issues, published in July and October respectively. To date I am not aware of any repercussions for litigants with regard to violations of their privacy.

1.2.4.2. Judgments

As outlined above, the publication of judgments in family law is seen as imperative by the European Court of Human Rights, and was given special emphasis in the 2004 Act. The Act distinguished between “report” and “decision of the court”, suggesting that two distinct types of document be produced by those attending family law proceedings. The Courts Service also stressed the importance of the collection and publication of judgments, separately from the preparation of reports.

However, a number of practical problems was posed by this requirement. How would a reporter know when a judgment was going to be given? Judgments in the Circuit Courts are usually *ex tempore* and there is no way anyone, including the judge, can predict when a hearing will lead to a judgment or a judicial decision as most cases settle, many on the morning of the case. Quite often they settle even when they have opened and some evidence has been given.

Further, how would the reporter know in advance when a significant judgment would be given? Normally it is only when the case is heard that the significance of the issues being raised emerges. It is also not clear what a significant judgment would be as an issue considered of significance to lawyers may not be perceived as significant by members of the public.

Indeed, some Circuit Court judges do not consider they deliver judgments at all, rather they hold that they make decisions. Their decisions do not provide precedents for other judges to follow. Nonetheless it is very important that they are reported so that both the public and practitioners know what happens in the family courts, and indeed other judges know what their colleagues are doing. It is not practical to have reporters sitting every day in every Circuit family court in the country on the off-chance that the court may yield a judicial decision. In the longer term, some other way of recording decisions in the Circuit Court will have to be found. The imminent introduction of a nationwide digital recording system in the courts will facilitate this.

In the meantime it was an essential part of the Pilot Project that judgments be collected and written up, and I sought to do so whenever I was present at a case that resulted in a significant judicial decision. Therefore, when I was present in court and where the judge outlined the facts of the case and the factors he or she took into account in making the decision, I considered it as a judgment and published it under this rubric in *Family Law Matters*. I also published here synopses of two High Court judgments handed down in the 2006/2007 legal year.

1.2.4.3. Trends and Statistics

The production of statistics on family law formed an important part of the project, and was identified by the Courts Service as essential in its tender proposal. Statistics on the numbers seeking the assistance of the courts in solving their family disputes, who initiate the actions, the numbers settled without going to trial, the orders given by the courts and how they relate to each other, are all essential to understanding how family law works in Ireland. Establishing how these statistics changed over time would identify trends for the Courts Service itself, therefore assisting it to plan and recommend

reforms in procedures, and for policy-makers and the general public.

This need was identified by the Law Reform Commission as far back as 1996, when it stated: "It is essential that the gathering, collation and interpretation of statistics and the conducting of empirical research into very many aspects of the Irish family law system is accorded the appropriate priority ... We wish to stress the necessity of research and of accurate statistical and other empirical data as a basis for rational decision-making." (*Report on Family Courts, 1996*, LRC 52-1996, pp 123-125)

However, the production of trends and statistics posed a number of challenges. The extent of computerisation in the courts was very limited prior to the setting up of the Courts Service eight years ago. Computers have been present in most courts for five years or less. Family law decisions in the District Court are not yet computerised. Pending the development of a purpose-designed system for the civil courts, similar to that which has been introduced in the criminal courts, an interim system was introduced. The interim computer system was designed to organise the listing of cases, not as a research tool for family law, or for anything else. There is as yet no integration between the computer systems of the different jurisdictions or, indeed, the different circuits, though plans are well advanced for the introduction of a civil case management system which will include family law. When family law orders are recorded, they are recorded as orders, not necessarily linked to cases. Therefore some statistics can be misleading. For example, there are global figures each year for barring orders, maintenance orders, access orders etc in the District Court, but there is no way of knowing how many of these relate to repeat orders in the same case.

Getting meaningful statistics on family law out of the present interim Courts Service computer system, therefore, was a challenge. This is despite the enthusiastic help and support I have had from Courts Service staff in this project.

My experience of the Courts Service computer system and the difficulty in obtaining meaningful statistics from it has not been unique. The CSO is at present engaged in a review of the collection of statistics in a number of Government departments, and I have had the benefit of consulting with a senior CSO official involved in this, Ger Healy, to whom I owe the following points.

Across all Government departments the State interacts with citizens and businesses on a regular basis and collects (or should collect) some information on those interactions. It became clear to the National Statistics Board, which has published a Strategy for Statistics, that the data so collected is not being used efficiently (mainly because that type of data collection was set up to support a particular scheme or initiative and there was no glancing in the direction of other users in the department/agency, not to mind the wider public sector). Therefore the whole issue of the collection and analysis of statistics by State agencies, and their use in policy-formation, is at present under examination.

The *Strategy for Statistics* (published in 2003) set out a more inclusive vision for statistics than had previously been the case. In the past the NSB had focused on the CSO almost exclusively as a means of fulfilling its strategic role in the development of the Irish statistical system. However, it became obvious to the NSB that demand for statistics was increasing and becoming more sophisticated. The NSB pointed towards a "whole-system approach" where data would be used to support policy making and evaluation (of actual outcomes in the public service, as well as outputs). According to Mr Healy, there was a renewed interest in "evidence-based" policy making.

He said that the CSO had been supporting this strategy quite actively. In two

sweeps, small CSO teams have worked with individual Government departments to look at the data sources within the organisations as well as the data needs from those organisations (and, crucially, examining if these were in any way aligned). Two working reports were published on its internet site, with chapters for each department covered. Both reports made recommendations.

Mr Healy also explained that as part of the wider strategy, the Government decided a number of years ago that each department would have to produce a data/statistics strategy and include it in their statement of strategy. This means that the Department of Justice, Equality and Law Reform will need to devise a data/statistics strategy for the justice sector. The CSO has been contacted to give some advice. Ideally, needs around the justice area generally should be captured in this data strategy, he said. The CSO is also in touch with the Courts Service in relation to statistics in the criminal justice area. There is a clear need to extend this to the civil area, especially in relation to family law.

It was clear to me that the existing system for collecting statistics in family law within the Courts Service would yield little qualitative information. It was also clear that I lacked the expertise to advise on a total overhaul of the Courts Service statistics-gathering system, and that this should be left to appropriate experts, in the overall context of a review of statistics-gathering in the public service in general and in the Department of Justice and associated agencies in particular, and also of the Courts Service's own planned Civil Case Management System. The question of trends and statistics, therefore, had to be tackled by the Pilot Project in a different way, and this was possible because of this enthusiasm and support of the Courts Service staff for the project.

Through the help of Emer Darcy in the Dublin Family Law Office it was possible to identify which cases had concluded in one month in the Dublin Circuit Court. Where the only order was the extinction of succession rights in the case of a decree of divorce, this was noted on the computer record. Where the case was disposed of with a decree of divorce or judicial separation and additional orders were made, either by consent where the agreement was made a rule of court, or on a determination of the dispute by the court, these were attached to the paper file. Armed with their case numbers, it was then possible to manually locate the files, which contain the written orders, both those made by the judge in the course of a judicial ruling, and those contained in the negotiated settlements known as consents.

I was able to analyse these and produce statistics on the outcome of cases in Dublin in October 2006, indicating some trends in family law. I described this as a "snapshot" rather than a sample, as the cases were not randomly selected, rather based on a unit of time. The October cases in Dublin represented close to 4 per cent of all the family law cases for a year which given that opinion pollsters rely on 1,200 as representative of the whole electorate, is a statistically significant sample.

Subsequently, and again with the enthusiastic assistance of court staff who extracted the relevant files for me, I carried out the same exercise for the decisions and orders in the Cork and the South-Western Circuits, Limerick and Tralee being the centres where family law was heard in the latter circuit in October. As Limerick is the third busiest family law centre in the State, this meant that all the orders made in October 2006 in the three busiest family law centres were analysed and compared, and the results were published in the first three issues of *Family Law Matters*. With the agreement of the chief executive of the Courts Service, it was decided to carry out the same exercise for all the other circuits, so that by the end of the project data will have

been collected on all Circuit Court family law cases finalised in October 2006 for publication in due course. Again, this would not be possible without the assistance of the Courts Service staff in those circuits.

1.3. Family Law Matters

In my Proposal it was envisaged I would produce an interim report on the project, but, following discussion with the Courts Service chief executive, it was decided that the publication of the first issue of *Family Law Matters* met the need for an interim report.

The format of *Family Law Matters*, consisting of reports, judgments, trends and statistics, was devised. As some of those directly involved in the delivery of the family law service, either directly or indirectly, had views on how it worked or could be improved, I decided to include some of these. Consequently the first three issues carried contributions from Pat Meghen, County Registrar in Limerick, who had embarked on a pilot project on case progression in family law; Judge Conal Gibbons, who had carried out a study of children being taken into care through the courts; Paul Kenny, Pensions Ombudsman, who saw at first hand how some pensions adjustment orders made as a result of family law proceedings subsequently caused difficulties for the intended beneficiaries; and Karen Erwin, president of the Mediators Institute of Ireland, who outlined ways to increase the use of mediation in family law.

I also decided that *Family Law Matters* should have its own design and style so that it could be distinguished from other publications by the Courts Service. I obtained sub-editing assistance, and commissioned an illustrator to design the cover and provide a couple of illustrations per issue. Reader-friendly design features, like the lifting out of quotations, the mixing of long and short reports and the use of graphics, were incorporated into the overall design.

The first issue, based essentially on reports from the first law term, was published on February 19th, 2007. The second issue, containing mainly reports and decisions from the Easter term, was published on July 9th. The third, containing reports from the two summer terms and including a number of reports from the District Court compiled by members of the reporting panel, was published at the end of October 2007.

1.3.1 Reporting Panel

As mentioned above, it was clear that additional reporters were required to ensure that a representative selection of courts was covered and especially to ensure that there were reports from the District Court. After discussions with a number of recently qualified lawyers who expressed an interest in the project a panel was drawn up and some of its members started attending family courts at the end of April, with most members who were available attending courts, mainly in the District Court, in the summer terms.

As this exercise developed it emerged that some training would be necessary to ensure clarity in all the reports and uniformity of style. Training sessions with panel members took place in October.

1.4. Other Information

The Pilot Project has sought to fill the gap in information about what happens in family law cases. Whatever decisions are made about its future, a need will continue to exist for members of the public and, more urgently, those seeking the assistance of the courts in resolving their family disputes, to know what to expect from the family law courts. As outlined below, different levels of information and assistance are already available from different courts, with some helping in the filling in of forms. There is a need for consistency in the information and assistance given out by court staff across the country and across the different jurisdictions. People are also unaware of what to expect from the courts. While each judge decides each case on its merits, and this principle cannot be compromised, it should be possible to indicate the broad parameters on which family law issues are decided so that people may avoid pursuing an action on the basis of unrealistic expectations.

1.5. Other Matters

1.5.1. Academic Research

Following the enactment of the 2004 Act, academic research into how the family law system works became possible for the first time. A number of such projects have already begun. As they are published, they are likely to meet some of the public demand for information on family law, dispel some of the fears and myths that exist surrounding this area of law, and promote informed debate on legal reform. The Courts Service has an important role to play in facilitating such research.

1.5.2. Child Care (Amendment) Act 2007

Under this Act a new Children Acts Advisory Board (formerly the Special Residential Services Board) is empowered to nominate people to report on cases heard under the Child Care Acts. Categories of people permitted to attend cases and report on them will also be listed in Regulations to be made by the Minister. This Section of the Act mirrors in many respects Section 40 of the 2004 Civil Liability and Courts Act.

The experience of the Courts Service in developing a family law reporting service could be very helpful to the Children Acts Advisory Board in setting up a system for reporting child care law. Collaboration between the two could also help avoid duplication of resources, especially as outside of Dublin the hearing of cases under the Child Care Acts takes place alongside the hearing of family law cases.

1.6. The Options

As outlined above, the Courts Service can decide that it has fulfilled the role given to it by the 2005 Regulations in establishing a pilot project which has shown how family law reporting might be done and discontinue it forthwith. It can also decide to continue this project as it is for a further specified time, or to continue it subject to certain modifications also for a specified time.

In my opinion, the Courts Service should continue with the project for at least another year, publishing reports, judgments and trends and statistics in *Family Law Matters* in hard copy form. The existing panel of reporters should be used to prepare reports and judgments. Analyses of the October decisions of the remainder of the Circuit Courts will be available for inclusion in the next three issues.

At the end of 2008 the Courts Service should consider progress in other areas, and re-evaluate the future of the project in the light of any possible changes in Government policy and the development of information-gathering within the Courts Service. Other forms of continuing the project are considered below.

1.7. Summary and Recommendations

The 2004 Act, while permitting a qualified opening up of the family courts to some public scrutiny, contains lacunae that need to be addressed. As it operates at present it also may not be sufficient to meet the constitutional requirement that justice is administered in public, subject to the obligation to protect the privacy of those involved in family law proceedings and their children. The view persists in certain quarters that a regime closer to that used in Canada, Australia and New Zealand, and similar to that which operates in relation to rape cases in Ireland, may ultimately be preferable to, and more practical than, the regime introduced by the regulations appended to the 2004 Act.

1.7.1. Legislation

Two issues are dealt with in the 2004 Act – permitting certain categories of people attend family law proceedings and prepare reports for publication, and ensuring that such reports do not violate the anonymity of the parties or a child of the parties. But it is unclear on a number of matters and should be clarified.

Section 40 of the 2004 Civil Liability and Courts Act states that nothing shall prohibit “the preparation by a barrister at law or a solicitor, or a person falling within any other class of persons specified in regulations made by the Minister, and publication, of a report of proceedings to which the relevant enactment relates”. Under the regulations a person other than one nominated by the Courts Service to prepare reports must have the approval of the Minister to attend family law proceedings. No such restriction applies to a barrister or a solicitor, as referred to in the legislation.

It would appear, therefore, that there is nothing in the legislation to prevent a barrister or solicitor, either employed by a media organisation or freelance, from preparing a report for publication in the media, though this does not appear to be the intention of the legislation. Clarity should be obtained on this, as it could affect how

family law is reported in the future.

The Law Reform Commission has also identified a gap in the legislation with regard to the Guardianship of Infants Act. In its Consultation Paper on the Consolidation of the Courts Acts it queries whether proceedings under the Guardianship of Infants Act 1964 fall within the categories of proceedings to which Section 40 of the 2004 Act applies. (*LRC CP 46-2007, p 139*)

1.7.2. Regulations

The regime introduced by the 2004 Act, and, more specifically, by the 2005 regulations – where the courts' administration provides essentially a reporting, rather than a purely information service for family law – seems to be unique as I could find no other similar regime. If it is to be comprehensive as a reporting mechanism, it must also be very resources-intensive. Other jurisdictions have found other ways of ensuring that justice in the area of family law is administered in public, while protecting the family privacy of the parties and their children. (See Appendix II)

Other common law jurisdictions, including those with a similar population to Ireland's, have found it possible to allow the family law courts to be open to the media while protecting the privacy of the parties. This has meant the courts impose restrictions on the kind of information about the parties that can be published with heavy penalties for those who breach those restrictions. In an Irish context, such restrictions could include prohibiting the publication of not only names and addresses of parties, but initials, the court where the action was heard (outside of Dublin and Cork) the area where the parties live, details of their professions, etc as outlined in the Draft Protocol for Reporting Family Law and already implemented by the Courts Service Family Law Reporting Pilot Project.

Even if such a decision is made, opening up the family courts to the media may not adequately meet the need for the dissemination of information on the operation of the family courts. Some of the media may only wish to focus on high profile and high asset cases, which are atypical. If prevented from covering such cases by restrictions protecting parties' anonymity, they may not cover family law issues at all. Other elements of the media may cover family law in an issues-based manner, but sporadically. Further measures will still be necessary to ensure that objective and balanced information about the operation of the family courts and the reasons decisions are made became available to the public.

1.7.3. Rules of Court

The Rules of Court relating to family law reporters have not in fact been operated literally by the judges of the Circuit and District Court and there appears to be widespread acceptance of the presence of reporters working on behalf of the Courts Service, on the understanding that they are bound by a Protocol protecting the anonymity of the parties. Judges are informed in advance that a reporter will be present and neither practitioners nor lay litigants have raised any objections to my presence or that of any member of the reporting panel. The presence of a reporter in court now appears to be seen in the same light by litigants as that of the registrar or clerk, the

judge's crier and the Garda. The Rules of Court should be amended to reflect the experience of the project.

1.7.4. The Pilot Project

There is likely to be public interest in family law for some time to come. The interest in the outcomes of family law proceedings could be met by a systematic system for the publication of judgments and decisions, while the interest in the process whereby the decisions were arrived at would have to be met by some form of reporting of cases by the Courts Service or a ministerial decision on allowing greater openness and transparency in the family courts, via the media.

Should the Courts Service decide to meet the need for continued reporting of family law proceedings, at least in the medium term, it will need to adopt a plan and a template for doing so. This is further discussed under *Family Law Matters* below.

In time such reports are likely to become repetitive as the issues aired flow along predictable tracks – the disposal of the family home; the allocation of assets, if there are any; declarations of parentage and guardianship; custody of and access to children; maintenance of children and, occasionally, spouses; and, in the District Court, the issuing of safety, protection and barring orders, as well as also dealing with custody and access and maintenance disputes. Public interest in such reports may then wane, especially if judgments are published on the one hand and in-depth academic studies of specific issues are carried out on the other.

The Pilot Project was asked to compile and publish judgments and decisions from the three court jurisdictions and has attempted to do so on an anonymous basis. Under both Irish and international law, the publication of family law judgments and decisions would appear to be an imperative.

While the Pilot Project has attempted to provide this, the allocation of reporters to courts is not an efficient way of seeking to publish decisions of significance or special interest. Other means will have to be found for the publication of important decisions of the courts of first instance, as is the case in a number of other jurisdictions, including Australia and Northern Ireland, and as is proposed for England and Wales. (see Appendix II) The recording of judgments and decisions, their selection for publication, and their editing, particularly with regard to the requirements of anonymity, will all require the investment of serious resources and the acquisition of appropriate expertise. The digital recording of court proceedings and judgments is already planned. However, this will not in itself answer the need for the publication of decisions, as those which are of legal or public interest will have to be selected and transcribed. The judiciary itself will have an important role in suggesting decisions and judgments that should be published, and this can commence even before the introduction of digital recording, with judges sending in audio files for transcription and publication.

The introduction of digital audio recording technology will permit the selection of transcripts that can be collated and edited for publication, which can be done on the Courts Service website. These will require identifiers for reference purposes, which poses a challenge for the maintenance of anonymity. The Australian practice, where cases are given commonly-used fictitious names for reference purposes, is worth serious consideration.

The importance of statistics has been stressed by the Law Reform Commission,

among others, and due note should be taken of its 1996 recommendation that a comprehensive national data base on family law be established. "In compiling this data base, and in addition to the information currently recorded, account should be taken of, *inter alia*, multiple applications, any history of litigation by the family, the assets and income level of the family (to enable a determination of how the family assets were divided by the court), as well as issues relating to the enforcement of court orders." (LRC 52-1996, p126)

The existing Courts Service computer system was never intended as a research tool. Consequently the information it contains does not reveal very meaningful data on family law, as the applications and orders recorded do not relate to individuals or cases. The manual exercise undertaken by the Pilot Project produced information that can be used as a baseline, but other measures are necessary to obtain meaningful statistics on family law. These should include seeking the assistance of the CSO, and integrating the advice of the appropriate professionals into ongoing initiatives like the proposed Civil Case Management System.

1.7.5. Family Law Matters

Family Law Matters has been successful in fulfilling the objective set out by the Courts Service of disseminating information on family law and how it is practised in the High, Circuit and District Courts to the judiciary, legal practitioners and the general public. However, as stated above, the material covered is likely to become repetitive after a number of issues, and public interest is likely to wane as a result, though it will be necessary to provide information on how family law operates on an ongoing basis. In addition, the volume of reports generated by the family law reporting panel is too great to be easily accommodated in a bound, hard copy format. Additional material from this panel could be published on the Courts Service website.

Other measures, as outlined above, will be necessary to fulfil the need for producing information on family law. The reasons for publishing a hard copy of *Family Law Matters* in magazine format will become less compelling as other initiatives already in train are realised, and the material on the website expands with the publication of judgments and more detailed statistics.

As other measures – the preparation of more detailed statistics in the light of professional advice, the publication of judgments and decisions, based on digital recording, possible expansion of those permitted to report on family law under the Regulations – come on stream, the need for publishing *Family Law Matters* at all will be open to question. Much of the material covered by it can be published in another format on the website. Furthermore, the Courts Service needs to consider its own role in the publication of reports on family law proceedings.

Various options for continuing the project in some form, fulfilling the Courts Service mandate to provide information on the courts to the public, are outlined below.

1.7.6. Other Information

The Pilot Project has sought to fill the gap in information about what happens in family law cases. Whatever decisions are made about its future, a need will continue to exist

for members of the public and, more urgently, those seeking the assistance of the courts in resolving their family disputes, to know what to expect from the family law courts.

As outlined below, different levels of information and assistance are already available from different courts, with some helping in the filling in of forms. There is a need for consistency in the information and assistance given out by court staff across the country and across the different jurisdictions. People are also unaware of what to expect from the courts. While each judge decides each case on its merits, and this principle cannot be compromised, it should be possible to indicate the broad parameters on which family law issues are decided, so that people may avoid pursuing an action on the basis of unrealistic expectations.

1.7.7. The Options

The Courts Service can decide that it has fulfilled the role given to it by the 2005 regulations in establishing a pilot project which has shown how family law reporting might be done and discontinue it forthwith. It can also decide to continue this project as it is for a further specified time, or to continue it, subject to certain modifications, also for a specified time.

In my opinion, the Courts Service should continue with the project for at least another year, publishing reports, judgments and trends and statistics in *Family Law Matters*. The existing panel of reporters should be used to prepare reports and judgments. Analyses of the October decisions of the remainder of the Circuit Courts will be available for inclusion in the next three issues. At the end of 2008 the Courts Service should consider progress in other areas, and re-evaluate the future of the project.

1.7.8. Other Matters

Following the enactment of the 2004 Act, academic research into how the family law system works became possible for the first time. A number of such projects have already begun. As they are published, they are likely to meet some of the public demand for information on family law, dispel some of the fears and myths that exist surrounding this area of law, and promote informed debate on legal reform. The Courts Service has an important role to play in facilitating such research.


Under the Child Care (Amendment) Act 2007 a new Children Acts Advisory Board (formerly the Special Residential Services Board) is empowered to nominate people to report on cases heard under the Child Care Acts. Categories of people permitted to attend cases and report on them will also be listed in regulations to be made by the Minister. This Section of the Act mirrors in many respects Section 40 of the 2004 Civil Liability and Courts Act.

The experience of the Courts Service in developing a family law reporting service could be very helpful to the Children Acts Advisory Board in setting up a system for reporting child care law. Collaboration between the two could also help avoid duplication of resources, especially as outside of Dublin the hearing of cases under the Child Care Acts takes place alongside the hearing of family law cases.

1.7.9. Recommendations

- Recommendation 1:** The Courts Service should obtain clarification of the legislation on whether any barrister or solicitor can prepare reports on family law for the media.
- Recommendation 2:** The Courts Service should obtain clarification on whether proceedings under the Guardianship of Infants Act 1964 are covered by the 2004 Act and, if they are not, seek amendment of the Act to encompass such proceedings.
- Recommendation 3:** The Courts Service should consider whether it is appropriate for it to provide a family law reporting service, as opposed to information on procedures and decisions, on an ongoing basis indefinitely. If so, it needs to define what such a service should consist of, whether it should be on an interim or permanent basis, and identify and source the resources required. If it decides such a service cannot be provided indefinitely, the Courts Service should consider various interim options, and how else to fulfil its mandate to provide information to the public about the operation of the courts. The Courts Service therefore needs to consider the following options:
- a) discontinuing the project immediately;
 - b) continuing it as it is indefinitely;
 - c) continuing it as it is for a defined period;
 - d) continuing it in modified form, either indefinitely or for a defined period;
 - e) providing information on the family courts in another way.
- Recommendation 4:** If it accepts Recommendation 3c and/or 3d, the Courts Service should continue the project as it is for a further year, while also progressing the digital recording of proceedings and the collection of statistics. At the end of the year it should evaluate the future of the project in the light of other developments and the mandate of the Courts Service to provide information to the public, and consider how best this can be met in the area of family law.
- Recommendation 5:** The Minister should consider whether, in the light of the experience of the Pilot Project and international experience, it is appropriate to amend the 2005 regulations to expand the classes of person authorised to attend family law proceedings to include bona fide members of the press, subject to restrictions aimed at protecting the anonymity of the parties, which could include adherence to a specified Code of Practice or Protocol. This would bring family law into line with rape trials and the Minor List in the High Court.

- Recommendation 6:** The Rules Committee should consider including in the Rules of Court a provision that the judge may give directions about how the anonymity of the parties should be protected by anyone attending the court in order to prepare a report, for example by the person signing up to a Protocol for the Protection of the Anonymity of Parties in Family Law Proceedings, similar to the Protocol observed at the moment. This should give all necessary assurances to litigants and their legal representatives.
- Recommendation 7:** The Rules Committee should consider amending the Rules of Court relating to family law reporting to allow judges seek submissions only if the need arises. The default position should be that the reporter, having notified the judge of his or her intention to attend, should then present him/herself in court without further ceremony, while giving the judge discretion to notify the parties of his/her presence and seek submissions. If submissions are made, some provision should be made for the reporter to have an opportunity to respond to the submissions.
- Recommendation 8:** The Courts Service should establish a committee of judges and appropriate Courts Service staff, in the context of digital recording, to implement the selection of family law judgments and decisions from the different jurisdictions for publication on a regular basis on the Courts Service website. This measure should include the nomination of a person or persons with responsibility for ensuring they do not contain any detail that could lead to the identification of the parties or any child to whom the proceedings relate, while developing a system for identifying the case for reference purposes. This could include the use of common fictitious names.
- Recommendation 9:** In the meantime, if the Courts Service accepts Recommendation 3c and/or 3d, and decides to continue *Family Law Matters* at least on an interim basis, decisions from the Circuit and District Court as they arise in the presence of a Courts Service family law reporter should be written up and published in *Family Law Matters* under the judgments/decisions rubric.
- Recommendation 10:** The Civil Case Management System should be designed to capture information on the outcomes of family law, based on the best technical and professional advice.
- Recommendation 11:** The CSO should be asked to extend its examination of statistics in the Courts Service to family law, examining the data needs of the Courts Service, other Government departments and policy-makers, the sources and collection of data, its recording, its classification, and asking the CSO to recommend a system that would link the information collected to people interacting with the family law system.

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- Recommendation 12:** The Courts Service should give consideration to the commissioning or production of a publication drawing together information on all remedies available in family law disputes, including alternative dispute resolution
- Recommendation 13:** If *Family Law Matters* does not continue in its present form indefinitely, and if there is no ministerial decision on expanding the categories of people permitted to attend family law cases and report on them, the Courts Service should publish sample cases on its website. Consideration should be given to the production of an information booklet on the considerations taken into account by the courts in deciding on family law remedies.
- Recommendation 14:** If it decides to continue the project for a further defined period, the Courts Service should continue publishing three issues a year of *Family Law Matters* until the end of 2008, containing reports, judgments and trends and statistics, according to the outline and template provided to the chief executive. The principles outlined in this report for the selection of courts to be attended and cases to be reported on should continue so that the independence of the project can be assured.
- Recommendation 15:** From 2009, or earlier if practicable, the Courts Service should publish judgments, decisions, statistics and some reports or sample cases on the Courts Service website.
- Recommendation 16:** Consideration should be given by the Courts Service to the nomination or recruitment of a person with overall responsibility for the various aspects of the dissemination of information on family law, for example: selection of digitally-recorded decisions for publication on the website; editing such decisions to ensure that they do not contain any identifying information; liaison with the supervisor of the panel of reporters; liaison with the editor of *Family Law Matters* for so long as it is published; liaison with the Children Acts Supervisory Board concerning reports on the Child Care Acts. (see below)
- Recommendation 17:** Consideration should be given to the nomination of a representative of the Courts Service to liaise with academic institutions engaged in family law research in order to assist with accessing information and help avoid duplication.
- Recommendation 18:** Consideration should be given to the establishment of a liaison group with the Children Acts Advisory Board to help co-ordinate the production of reports and decisions from child care cases as well as family law cases.

Part 2

Observations and Recommendations on the Family Law System

Introduction

The Family Law Reporting Pilot Project did not include in its terms of reference an evaluation of the family law system as such. Rather it was given the task of reporting on cases and outcomes. However, while reporting on cases and examining records, it was impossible not to observe how the family law system operated. In addition, a number of judges, practitioners and court staff were eager to share with me their experiences of the system, their awareness of its shortcomings and their views on how it could be improved. Following discussions with the chairperson of the Courts Service, the Chief Justice, The Honourable Mr Justice John Murray, and its chief executive, Mr P J Fitzpatrick, I decided to include in this report my observations on the family law system.

I am also grateful to the Family Mediation Service and various other organisations for sharing their experiences with me. A number of individual litigants, some linked to lobby groups, some not, also contacted me with their experiences and suggestions. I am grateful to all those who took the time to discuss the family law system with me and enrich my understanding of it. While their views and experiences have informed the points made below, I am solely responsible for them.

Some of those who spoke to me were happy to have their contributions acknowledged, others spoke to me “off the record”. In order to avoid an invidious situation where some individuals are quoted and others are not, I am adopting the practice of not identifying any of those who offered me their views, apart from indicating the perspective from which they spoke.

I have also had the benefit of meeting representatives of the Family Court of Australia, and reading their report on the reform of this court, *Finding a Better Way*, published in April 2007; of meeting judges and practitioners in Scotland and Northern Ireland; and of studying the family court system in Canada, all of which have informed the views outlined below. (See Appendix III)

As I devoted most of my time to the Circuit Court, which deals with separation and divorce, many of the observations and recommendations outlined below relate to this jurisdiction. At the outset I must emphasise that many of my observations echo those made by the Law Reform Commission in its 1996 *Report on the Family Courts* (LRC 52-1996), and the Sixth Report of the Working Group on a Courts Commission (1999) which I commend to all readers. Had their recommendations been implemented, much of this project and this report would be redundant.

2.1. The Irish Family Law System

For clarity, especially for members of the public, and to set the context for my observations below, I will first outline how the family law system works, insofar as it relates to judicial separation, divorce, domestic violence and parenting issues.

2.1.1. Divorce and Separation in the High and Circuit Courts

When a couple finds their relationship has broken down and conclude they wish to lead separate lives, they are faced with a number of practical as well as emotional issues. If there are still dependent children, who will they live with and how will they be supported? How will the parties be supported? What will happen to the house? If the family has assets outside the family home, how will they be divided?

Some couples manage to resolve these issues between themselves without involving any third party. Or they may be resolved informally, with one party moving away, perhaps to another country, leaving the other behind in the house, rearing the children.

2.1.1.1 Consent Divorce

If this happens, once the parties have lived apart for four years, the situation can be formalised through applying for a divorce and any orders relating to property and children issues as have been agreed. If there are no matters in dispute, this can be done by seeking the appropriate forms from one of the parties' local Circuit Court office or on the Courts Service website, filling them in and bringing an application for a divorce to the Circuit Court. It will be necessary to make a number of attempts to contact the other party to inform him or her of the application and seek their input into the proceedings. However, if these attempts fail the applicant spouse can go ahead with the application and a divorce can be granted on an uncontested basis provided the court is satisfied that the couple have been apart for four years, there is no reasonable prospect of a reconciliation and proper provision in the circumstances, has been made for the parties and other dependent members of the family.

Where a divorce is uncontested, and an individual does not see the need for legal assistance but feels unable to process the form-filling him or herself, he or she may seek the help of one of the "DIY Divorce" businesses that exist around the country. These are run by non-lawyers who will talk a person through the formalities necessary to obtain an uncontested divorce, and help them acquire the necessary documentation (normally the marriage certificate) and fill in the forms. This costs in the region of €600-€1,000.

Some concerns have been expressed about divorce applications coming through such agencies, as sometimes they do not alert people to issues such as pension adjustment orders, one of the ancillary orders that can be made in situations of judicial separation or divorce where one of the parties has a pension, and which are quite complex. However, I have also heard reports of properly drafted applications coming via such agencies seeking pension adjustment orders, normally for a nominal pensionable period. Nonetheless, a question arises as to whether such agencies are bonded or have professional indemnity insurance against liability for the consequences of improperly drafted orders.

2.1.1.2 Mediation

Where the couple are in dispute about the break-up of the relationship and arrangements for the future, one option available to resolve these issues is mediation. This involves the couple seeking the services of a trained mediator who will help them define what they want and steer them to a mediated agreement. That can then become a civil agreement or can be made binding through being brought before a court. This can be done either with or without legal advice. The mediator may work for the state Family Mediation Service or be an independent practitioner. Mediators with the Family Mediation Service must be registered with the Mediators Institute of Ireland. But there is nothing to stop anyone calling themselves a family mediator and setting up in private practice as the profession is unregulated. Some mediators have a legal background, some do not. There is no regulation of the mediators' profession, and no national system of accreditation.

For a couple who remain unaware of how mediation may help them, or do not see mediation as an option, or who try it without reaching a settlement, the next step is to seek legal assistance, either to negotiate a separation or to pursue the disputed issues through the courts. For people of limited means, this can be done through the Legal Aid Board.

2.1.1.3 Legal Aid

Eligibility for aid through the Legal Aid Board is quite restricted. Only those with a disposable income of less than €18,000 qualify. While disposable income is calculated after specified allowances are given for a dependent spouse, children, child care costs, accommodation, income tax and PRSI, an earning applicant with a dependent spouse and two children, earning just above the average industrial wage of €31,000, would be unlikely to qualify. Ironically, the dependent spouse, if he or she had only a part-time income or social welfare payments, probably would qualify for legal aid. If the earning spouse was unable to afford a private solicitor (as would be very likely for a person on or just above the average industrial wage) this would lead to an inequality of arms before the court.

If a person does not qualify for legal aid, he or she must either seek the assistance of a private solicitor or attempt to represent him or herself. If the issue goes to court, a barrister will normally also be retained by the solicitor (a personal litigant is not allowed by the rules of the Bar to brief a barrister directly). This method of resolving family disputes can be very costly indeed if court proceedings are involved.

2.1.1.4 Collaborative Law

Recently a method of resolving family disputes without going to court, while protecting the legal rights of both parties, has been developed by some family law solicitors in Ireland. Called collaborative law, it involves both parties, along with their solicitors, agreeing to enter a process where they will all seek the best outcome for all concerned, especially the children. If and when this leads to a settlement, the settlement is brought to court and made a rule of court, and thereby is legally binding. This system removes the adversarial element and should be much less stressful for all concerned and less damaging for children.

However, it only works if both parties are wholeheartedly committed to an amicable and forward-looking solution to the breakdown of their relationship. If the collaborative effort breaks down the parties must engage new solicitors and start on the contested

process from scratch, as the traditional methods of the adversarial system, where no weakness is revealed to the other side, will have been given up in the collaborative process.

2.1.1.5 In Court


Once a person embarks on family law proceedings, the application document, a Family Law Civil Bill, is issued. This was drawn up by the court Rules Committees, and outlines the basis for the action and the reliefs being sought by the person making the application. It may include pleadings, that is, the arguments on which the application for a judicial separation or divorce is grounded. The reliefs sought will normally relate to property, maintenance and children, as well as a decree of judicial separation or divorce. Where financial reliefs are being sought, it will also be accompanied by an Affidavit of Means (setting out the person's income and expenditure) and, if there are children, an Affidavit of Welfare, outlining where they live, any special requirements, how they are being cared for and whether this is likely to change. The Civil Bill will be sent to the other party, who will have a period of time in which to respond with a Defence and Counter-claim. The other party will be warned that failure to respond can be taken, ultimately, as an admission of the claim, so sometimes divorces are granted in the absence of the other party, particularly if the other party is living abroad and cannot be contacted.

The language in which the Family Law Civil Bill is couched is very adversarial, and can include a very long list of proposed reliefs, including sole custody of dependent children, highly restricted access to them for the other parent, sole occupancy of the family home and its transfer into the name of the applicant, maintenance for both the children and the applicant spouse, a pension adjustment order, other financial orders, including a lump sum, and, if there has been any suggestion of domestic violence, barring or safety orders. In this they mirror the type of claims made in other actions, like personal injury actions. Cases are often pleaded at 100 per cent of the possible reliefs when there is no real basis for such a claim. Often most of these reliefs do not ultimately form part of an agreed settlement or are not granted by the court. However, the very fact that they are sought as one of the opening salvos in the family law action is not conducive to an amicable outcome.

The other party is likely to contest some or all of the pleadings made by the initiating party, especially if he or she does not agree to the reliefs being sought, and wishes to put forward other solutions to the issues at stake. A Defence is then filed. If the other party cannot or does not wish to proceed quickly to resolve the issues, he or she can seek an adjournment in order to prepare a Defence. This process can drag on for a considerable time.

At this stage other issues may arise, for example, disputes about the financial affairs of either or both parties. This can lead to a process called Discovery, where the county registrar or the court can order that documentary evidence be produced concerning the earnings, assets and liabilities of the parties. Even after Discovery, there may be disputes about the completeness of the documentation produced, and professionals such as forensic accountants may be engaged. There may also be disputes about the value of property, requiring evidence from valuers.

Alternatively, or in addition, there may be a dispute concerning the welfare and future of the children. One or other party may ask the court for an independent report on the children, usually carried out by the HSE or a psychologist or psychiatrist who



interviews the children and the parents, writes a report and is prepared to give evidence to the court on it. Obtaining such a report may take many months, and can cause further delays and expense.

Eventually, in such a contested case, the application for judicial separation or divorce will get to court. In many instances this will be the first time since the process began that the parties and their legal representatives are in the same building. This provides an opportunity for a discussion of the issues and negotiations often take place in the vicinity of the court on the day the case is due to proceed. During the “call-over”, when the listed cases are called out and the parties or their legal representatives tell the judge whether they are ready for the case to proceed, it is not uncommon for them to tell the court that talks are going on, but ask for the case to be left in the list in case the talks do not succeed. Even when a case begins, and evidence is heard, talks can go on during lunchtime or at the end of a day’s hearing, which can lead to an announcement, when it is due to resume, that it has been settled. Some judges suggest an adjournment during the case for the purpose of allowing discussions to take place. It is clear that an opportunity for negotiations often occurs only very late in what is already a very adversarial process.

2.1.1.6 The Trial

If a trial is fully heard, the applicant first gives evidence, starting with the date of the marriage and the names and ages of the children, if any. Prompted by his or her counsel, he or she explains when the marriage broke down, outlining the background to the breakdown if this is one of the issues in contention between the parties, and how he or she now wishes to see all the issues resolved. For example, the applicant may, at this stage, explain to the judge why he or she thinks that they should be allowed live in the family home, have custody of the children, and receive a substantial amount of money to maintain themselves and the children. The barrister for the other party, known as the respondent, will cross-examine the applicant on those parts of his or her evidence that are in dispute. The barrister will then call his or her own client, who will give their side of the argument, and outline what they want as an outcome to the case. The applicant’s barrister may cross-examine the respondent.

Further evidence may be called, normally in relation to property matters, or issues relating to children. Such evidence could be either in documentary form or expert witnesses may be called. When all the evidence has been heard the judge will give his or her decision. Normally the judicial separation or divorce is granted if the conditions concerning the length of the separation outlined in the legislation have been met. This is usually accompanied by the extinguishing of the parties’ mutual succession rights, though occasionally, if the judge feels that one party has not been adequately provided for during the marriage or will not be following its dissolution, the succession rights of that party may be preserved. The judge will also grant what are known as ancillary orders, relating to the family home, children, maintenance and other property issues. If there has been a history of family violence, barring orders may be included with the ancillary orders.

Matters relating to custody of and access to children and to the maintenance of spouses and children can be brought to court independently of applications for separation or divorce. Both the District and the Circuit Courts have jurisdiction to hear such applications. Usually if a case is already before the Circuit Court as a divorce or judicial separation application, and interim custody or access or maintenance are

required, this is dealt with by that court. If a divorce or a judicial separation has been granted, matters relating to maintenance, custody and access can be referred to the District Court.

Decisions of the District Court, on these issues, or on domestic violence orders, can be appealed to the Circuit Court, where they are heard afresh. Decisions of the Circuit Court on all family law matters (other than District Court appeals) can be appealed to the High Court, which will then hear the case or that portion of it that relates to the matter under appeal, afresh. Obviously, preparing a case for a Circuit Court hearing where there is a full dispute and expert witnesses, followed by an appeal to the High Court with the same evidence, depending on the extent of the dispute, will be very costly. The High Court has concurrent jurisdiction with the Circuit Court to grant judicial separations and divorces. Cases involving substantial assets often go there.

Both the High Court and the Circuit Court also have jurisdiction to hear applications for nullity. This is relatively rare, with 25 granted in the Circuit Court last year, and none in the High Court. It did not form a major part of the project, so I did not consider it necessary to describe this procedure.

2.1.2 Maintenance, Custody and Access and Domestic Violence in the District Court

If a person who has been separated or divorced, or who is the unmarried parent of a child, has a dispute with a former partner about custody or access, or maintenance, he or she will normally process it in the District Court. If a spouse, former spouse, cohabitee or the parent of an adult abusing child is the victim of violence or the threat of violence he or she can also apply to the District Court for either a barring order or a safety order. If the application is urgent, he or she can apply for a protection order or an interim barring order without the presence of the person complained against. When a barring order or a safety order is sought, the alleged perpetrator will receive a summons and will be asked to appear in court.

In many of these applications the applicant and the respondent are unrepresented, at least at the initial stage. However, many of the applicants to the District Court are in receipt of social welfare or on low earnings and are eligible for legal aid though they may have to wait some weeks to get it. Therefore a high proportion of those appearing before the District Courts represent themselves. They often need the assistance of court staff in filling in forms, though the staff cannot offer legal advice.

In matters relating to children, the court can ask for "Section 20 reports" from the HSE on the situation of the child to assist the court in making a decision on the child's welfare. This is likely to happen where there is a dispute about custody or access involving allegations against one or other parent. However, in most areas there is a considerable waiting period for such reports and this can delay the court coming to a decision.

The District Court also has jurisdiction to deal with cases under child care (public) law where the HSE is empowered to take children into care either on an interim basis or permanently, or can place the child's family under its supervision to ensure that the child or children are properly cared for at home. Such cases are heard in Court 20, Dolphin House, Dublin, by a judge sitting there for a period, and as they arise in District Courts outside Dublin.

2.2. Deficiencies in the Family Law System

2.2.1. General

There are various points where inefficiencies and anomalies in the family law system can be identified and tackled and where opportunities for exacerbating the conflict and increasing the costs can be seen. There are places where there are opportunities in the existing system to improve it without major legislative or organisational change. Other changes that could improve it will require either legislative change or changes in practices and procedures. Ideally, however, a total reorganisation of the family courts is required (see 2.6 below).

There is no single place for an individual to seek information about how to deal with a family dispute. Citizens' Advice Bureaux can offer some information, so can both voluntary and statutory organisations, and the courts can explain to people what options are available to them through the courts. But this information is patchy, and there is no one-stop-shop where all the options, including counselling and mediation, how to apply for reliefs as a personal litigant, access to Legal Aid, collaborative law, negotiating with the assistance of solicitors, and a full fight in court, are all outlined and explained. It would be extremely useful if the Family Support Agency and the Courts Service could collaborate on the production of a comprehensive booklet on all the options available in resolving family law disputes.

Within the Courts Service, there are different practices within different circuits concerning the assistance given in filling in divorce and judicial separation applications by personal litigants where these are uncontested. Some circuits are reluctant to hand out the forms at all fearing that this may amount to giving legal advice, which court staff cannot do. In the District Court court staff often find themselves assisting litigants in filling in applications for reliefs relating to maintenance and domestic violence matters.

If the court staff state that they cannot and do not give legal advice, there would appear to be no reason to be fearful of giving out the forms and offering assistance on filling them in. Such a practice should become uniform through all circuits and districts. To assist in this, the Courts Service should publish an explanatory booklet explaining how they should be filled in and what documents should accompany an application. In general this would be suitable for uncontested divorce applications. Uncontested judicial separations, where all the issues are agreed, are rarer but could be the outcome of mediated agreements if mediation were more widely used. The forms could then be filled in by the parties with the assistance of the mediator. In the District Court, as well as the forms being available, there should be a consistent Legal Aid Board presence for those who need legal advice in addition to assistance in filling in forms.

2.2.2. Alternative Dispute Resolution Mediation and Collaborative Law

Sections 5 and 6 of the Judicial Separation Reform Act 1989 and Sections 6 and 7 of the Family Law (Divorce) Act 1996 require that a solicitor draws a client's attention to the options of counselling and mediation, and must provide a certificate saying that he or she has discussed this option with the client before the practitioner processes the case through the courts. However, in practice this legislation appears to have little bearing on the use of mediation by those whose relationships have broken down and some judges express scepticism as to whether the option of mediation is seriously discussed by many solicitors with their clients.

In 2006 1,494 couples sought the assistance of the Family Mediation Service, of whom 875 participated in the mediation process. Of these, 488 (56 per cent) reached agreement, 51 (6 per cent) returned to their marriages, and 319 (38 per cent) did not complete the mediation process. However, according to the FMS, many of these couples said that the mediation process, though ultimately unsuccessful, helped them to clarify the issues they needed to resolve in another way.

Mediation can be used in coming to an agreement about legal separation or divorce, which are normally finalised by the Circuit Court (or High Court in a small number of cases). It is also sometimes used in cases involving custody of and access to children, and maintenance, matters which mainly go to the District Court. FMS does not have a breakdown of the issues that the couples using its service sought to have resolved. Therefore the 875 couples who sought its services in 2006 need to be seen in the context of the 20,900 family law applications to the District Court, the 5,835 applications to the Circuit Court and the 90 to the High Court (all these figures exclude Section 33 applications seeking permission to marry without the statutory notice) which come to a total of 26,825 court applications in the area of family law last year. Even accepting that a number of these applications, especially in the District Court, relate to the same family dispute, it shows the number who use the mediation service to be a drop in the ocean, about 3 per cent of the total seeking a resolution of their family disputes.

This may be for a number of reasons. In Ireland, unlike in many other common law jurisdictions, there is no obligation on a couple to undergo any mediation before having recourse to the courts. Some legal practitioners express concerns about the quality of mediation available in certain areas, and fear that their client's rights may not be upheld during the process, especially where there is an imbalance in power and resources between the parties. It is also a fact that a client opting for mediation can be a client lost to a solicitor, which may have a bearing on the extent to which solicitors encourage their clients to seek a mediated settlement.

Research carried out by researchers linked to the FMS also found that both the public and the legal professions lacked information about the service and what it can do, which contributes to it not being used more. Yet it is used to the fullest extent of its capacity as it only has four full-time offices and 12 that are part-time open at most a few days a week. The FMS was unable to take up offers of rooms in Phoenix House and Dolphin House in Dublin, where the Circuit and District Courts hear family law, due to lack of resources. If there was a greater demand for the service there would be a stronger case for greater resources. Lack of information, lack of enthusiasm about mediation among some lawyers, concerns about regulation and accreditation, and lack

of resources in the service all feed off each other to keep the numbers using it small.

International experience as well as common sense dictate that mediation should play an important role in the resolution of family disputes, which are particularly unsuited to the adversarial legal system. Certain issues in family law, notably those to do with the welfare of children, require co-operation between the parties where at all possible. Once a dispute about children reaches the courts, with allegations and counter-allegations flying and sometimes the assistance of experts invoked on both sides, damage to the children and to their relationship with their parents becomes very difficult to avoid. Furthermore, a solution imposed by a judge is likely to leave one or other party dissatisfied and reluctant to make it work, fuelling further conflict.

For these reasons, in many jurisdictions mediation on child-related matters is mandatory, and cases cannot reach the courts without at least an attempt at mediation. Some mediators question the usefulness of non-voluntary mediation and mediation cannot be guaranteed to resolve all disputes, but international experience shows that if it is combined with information to the parents on the importance of co-operation in parenting their children (again, a feature of many family law systems in other jurisdictions), agreement can be reached through mediation in a great number of cases.

Measures should be undertaken to oblige the parties in family law disputes to attempt mediation before going to the courts, especially where children are involved. This would require legislative change, an expansion of the Family Mediation Service and a national system of accreditation for mediators.

In the meantime, a concerted and co-ordinated effort should be made by the Family Mediation Service and the Courts Service to outline all the methods available to deal with family disputes, including mediation.

It should also be possible for judges, through a Practice Direction, to insist on a minimum number of mediation sessions taking place before a case could be placed on the list for hearing. Alternatively, there could be a standard preliminary hearing where the court could establish whether a case could be remitted to mediation, coupled with an order for disclosure of assets where this was an issue. The court could also take the opportunity to indicate to the litigants that unreasonable expectations would not be entertained.

Even if mediation fails, it should be possible through it to isolate what the difficult issues are, or whether one of the parties has felt disadvantaged by it. Such a case may be suitable for seeking the assistance of collaborative law. This is in use both by private practitioners and by those working with the Legal Aid Board. Mediators should inform the parties how the outstanding issues could be resolved through collaborative law and be able to inform them about available practitioners.

2.2.3. Circuit Court

Not every family dispute is suitable for either mediation or collaborative law. Further, every citizen is entitled to access to the courts to seek their assistance in resolving disputes. Inevitably, some family law issues will end up before the courts for adjudication. However, everything possible should be done to ensure that when this happens the case is as non-contentious as the practitioners and the judge can make it, and that it progresses as quickly and smoothly as possible. That does not happen at the moment.

2.2.3.1. Family Law Civil Bill

Some attention should be given to the form taken by the Family Law Civil Bill. Without compromising the rights of those who seek the assistance of the courts, the parties to a family law action should not be seen by the legal system as adversaries. Unlike other litigants, if they have children, including adult children, they are likely to need to continue some form of relationship into the future as they relate to children, grandchildren and the extended family. The welfare of other people, especially children, could depend on the nature of that relationship. While ensuring that the citizen's right to due process is upheld, the language in which his or her entitlement to reliefs is couched, the need for clarity and simplicity and the desirability of alternatives to litigation in family law matters, should be considered by the Rules Committee in drafting a new form of Family Law Civil Bill.

2.2.3.2. Delays

Delays in cases coming to court are endemic at Circuit Court level, though a distinction must be drawn between the Circuit family court in Dublin and the Circuit Courts hearing family law outside Dublin. Generally three family Circuit Courts sit in Dublin in a dedicated court on a full-time basis. As a result there is no serious problem of delays as a result of lack of court time. If a case is adjourned a date can usually be set within a relatively short time. There is less need for judges to sit long days, though individual cases sometimes require it. None of these apply to the courts outside Dublin.

This is not to say that the system in Dublin could not be improved. All cases are listed for 10.30 am, though in reality many have no hope of being heard until the afternoon, an issue that has also arisen in the District Court. Consent cases are listed on the same day as cases due to be heard so that cases only requiring a few moments of the court's time in order to be ruled can be waiting for a considerable time. This means that litigants and their representatives are crowded together in the waiting area for hours at a time.

Outside Dublin there are consistent complaints of delays, arising from too few family law days in many circuits. According to some practitioners and court staff, in places where delays are very long people can end up settling on terms they are unhappy with, just to bring an end to the proceedings. In counties outside Dublin and Cork there are only one or two weeks of family law a term consisting of, at most, four days. As a result the lists can be very long and often judges sit into the night in an attempt to hear them. Long sittings do not result in an increase in resources for family law in that circuit, so the situation continues. Despite the very best efforts of everyone concerned, the quality both of representation and of justice delivered at 8 pm or 9 pm must be questionable.

Further, even with such long days sometimes cases are not reached meaning that litigants and their legal representatives have been hanging around all day for nothing. They must then steel themselves to go through it all again at some unspecified date months hence. Sometimes such cases involve young children where time is of the essence and delays in a decision being made can affect the quality of their relationship with a non-custodial parent. The pressure on the lists forces judges to try to cram as many cases as possible into a day. In such circumstances it is impossible for written judgments to be given, or even for an outline to be given of the judge's reasons for making his or her orders. This does not accord with best international practice, and could be called into question by the jurisprudence of the European Court of Human Rights.

In other centres the court day ends promptly at 4 pm or 4.30 pm, sometimes even when a case is on the point of settling and being ruled, again meaning that the parties and their representatives must come back another day. It is desirable both that the court day ends at a reasonable time, and that some flexibility exists to allow cases to continue to the end if they are close to conclusion on one court day.

2.2.3.3. Allocation of Judges

Judges are allocated to hear family law on a term basis, so there is no guarantee that if a case is adjourned (usually to the next term) the same judge will be available to hear it when it resumes. Often it is not known when a case is adjourned what the family law dates will be the following term, leaving both litigants and practitioners in uncertainty. Family law can be listed in different counties on the same circuit on the same week, meaning that practitioners working on the same circuit have difficulty in representing all their clients.

The point has been made by some practitioners that it should be easy to build a model to predict the number of judges required to hear family law in the different circuits, and to plan family law sittings for a year accordingly. The recent recruitment of extra judges should make this easier.

In the longer term, however, there is a strong argument for a family law division of the Circuit Court, staffed by judges with a special interest in or empathy for family law, and supported by ancillary services, including mediators and child welfare specialists. This need not sit in all the major county towns, but should attend the major ones and be accessible to all of them. It should sit in permanent session, supported by one or two judges and ancillary staff (see 2.6.2 below).

Some judges are unenthusiastic about such a change, fearing that certain judges would end up doing family law all the time leading to a loss in expertise across the different legal disciplines. But this could be met by allocating judges to a family law division for a specified period of time, and rotating them. This would permit a reorganisation of the way family law lists are organised.

2.2.3.4. Family Law Lists

At the moment, a family law list will contain motions, cases that are already agreed and require ruling, and contested cases. These may not be separated in the list so a contested case could remain in the list with little or no hope of being heard. Equally, a settled case could be waiting for hours to be ruled. Some judges have expressed the view that consent cases, where all that is required is making a decree of divorce and an order extinguishing succession rights, could be ruled by the county registrar. They should certainly be separated from contested cases in the list (they are in some counties) and dealt with immediately. This would be useful even in Dublin, where there are no significant delays. Even without a family law division, the possibility of county registrars granting divorces on consent should be explored. Alternatively, under the existing system a special consent day could be set aside during every family law week.

A reluctant or obstructive litigant can give rise to multiple applications for furnishing particulars, orders for discovery, etc. The case will be adjourned to the next list which could be in the next term. This pushes up the other party's costs as well as adding to delays. Measures are needed to reduce the opportunities for such obstruction. They could include provision for making interim costs orders, immediately executable, where the court considered it appropriate.

2.2.3.5. Case Progression

Many of these delays could be tackled by a case management or case progression system. A draft set of case progression rules for family law proceedings in the Circuit Court is at present before the Circuit Court Rules Committee. It would assign the case progression function to the county registrar and provide an opportunity for that officer to make or give a range of pre-trial orders and directions to assist in preparing a case for trial.

Pending finalisation of these rules, a pilot project has begun in two counties where the county registrars arrange for the parties' solicitors to meet him or her informally on a voluntary basis one or more times before the case is listed in order to isolate the issues. Issues such as the valuation of the family home can frequently be agreed at this stage. Other issues, such as what Discovery is required, whether expert witnesses are required and can be agreed, the vouching of affidavits of means, etc. can also be resolved. If necessary, the case can come before the county registrar's court to deal with such issues, as the county registrar can make a number of orders under the 2002 Courts and Court Officers Act. When a case does then come up for hearing before the judge, the issues are limited and the time wasted on Discovery and similar matters eliminated. A statement can be prepared for the judge outlining what has been agreed and what issues remain to be resolved, which will assist the judge in making a written decision. Indeed, given that the parties and their legal representatives have an opportunity to discuss the issues in the informal forum of the county registrar's office, some cases get settled and, if children are not involved, the county registrar can make orders concerning settlements, leaving only the decree of divorce or judicial separation to the court, with the settlement ready to be made a rule of court.

If cases were taken out of the system by mediation, by the use of collaborative law, by consents being ruled in a court of limited jurisdiction, and then if the contested issues were defined through case management, delays and obstruction could be reduced and judges' time could be freed up to deal with the genuinely contentious cases. Such cases could receive full consideration and, where appropriate, written judgments could be delivered. These could then be centrally filed and edited so that judges would have access to their colleagues' thinking on the various issues that arise in family law, thus permitting more consistency to develop.

2.2.3.6. Children

No framework exists for obtaining children's views on their own future living arrangements, education and welfare. Nor is there any training for judges on how to assess the views of children in a family dispute situation. Some judges meet the children in their chambers and talk to them, either with or without the presence of the registrar. Others do not do so, suspecting that the children may be manipulated by one parent and not wishing to involve them in the parents' dispute. Some judges seek a "Section 47 report" from a child psychologist, where the psychologist assesses the child and parents and makes recommendations to the court. These are normally private practitioners and their fees may be beyond the means of some families. Alternatively, one of the parties can delay the proceedings at any stage during the case by seeking a "Section 47" report, or asking the HSE to prepare a "Section 20" report, normally undertaken by social workers when the question of the child's welfare is raised.

There are often long delays in obtaining the services of a professional to prepare a report, and they can be expensive. More delays and additional costs can thus be added

to the process. Further, there appear to be different practices in different courts about access to Section 47 reports, with them being made available to the solicitors for the parties by some judges, but held to be restricted to the court itself by others.

In the past the Probation and Welfare Service offered some service to the courts of assessing children involved in family conflict and offering guidance to the courts about their welfare. The social workers involved were able to see the children in their home, and talk to teachers and members of the Garda Síochána, if required. This service has been widely praised by court staff, judges and practitioners but, due to under-resourcing, it had to be discontinued by the Probation Service.

There is a strong argument for re-visiting this service, and for providing an independent, court-based service, staffed by experienced and appropriately trained social workers, for assessing the needs and welfare of children in a family dispute situation. This should not depend on the ability of the parties to pay; the costs could be assessed at the end of the proceedings, along with the parties' means. Such a service should be available at an early stage, so that couples opting for mediation or for settling their case through collaborative law could avail of this expertise.

The 1991 Child Care Act provided for the appointment of a *guardian ad litem* (GAL) for children in child care (public law) proceedings, who are meant to represent the child's best interests. It did not lay down the criteria for selecting a GAL, and is vague about his or her accreditation, functions and role. The 1997 Children Act extended the range of proceedings in which the GAL may act to include custody and access cases and applications for guardianship on the part of a natural father. However, the court must be satisfied that "special circumstances" exist to justify this in such proceedings.

In practice the District Court does appoint a *guardian ad litem* from time to time in child care cases, and these are usually social workers from a charitable organisation. However, there is no regulation of *guardians ad litem*, and it would appear that anyone can offer their services in this area.

It is also open to the court to seek the services of a GAL in private law cases where custody and access are an issue. However, as this must be justified by "special circumstances", it happens very rarely.

2.2.3.7. Identification of Parties

In some courts there is a practice of calling out the full names of the parties who are called into court on family law days, though in most courts they are identified by number and initial. Some litigants are embarrassed by having their names called in a public area. County registrars should consider establishing a uniform practice in relation to protecting anonymity in these circumstances.

2.2.4. District Court

In practice the District Court hears the bulk of cases involving guardianship, maintenance, custody and access where the parents are unmarried, as well as hearing applications referred to it from the Circuit Court when it has already dealt with judicial separation and divorce. It is often the first port of call for a person in a family dispute situation.

2.2.4.1. Alternative Dispute Resolution

It should be made clear to all callers to the District Court that alternative means of resolving their disputes are available. Counselling, mediation and child welfare services should be accessible through the District Court, which should reduce the numbers having recourse to the courts to resolve their disputes.

2.2.4.2. Resources

Given the volume of family law involved, it is a tribute to the judges and staff in the District Court that they manage to deal with it at all. In 2006 the District Court heard 5,027 applications for custody and/or access, 1,742 applications from non-marital fathers for guardianship, 2,652 applications for maintenance from unmarried parents, and 1,493 applications for maintenance from married parents. Almost 10,000 (9,924) applications were made under the Domestic Violence Act, bringing the total number of family law applications to 20,838. It is not uncommon to have 70 cases listed for one day. Even when some are adjourned or struck out, this does not allow enough time for all cases to be heard properly. Cases at the end of the list may have to be adjourned, even when they involve urgent matters like access to young children with implications for future family relationships.

This is an enormous volume of work carried out with little or no ancillary resources or support, and where outside of Dublin there is no dedicated family District Court. In addition, there are a growing number of foreign nationals using the District Court in family law matters. This puts an added strain on resources, as they sometimes need interpreters, and usually require legal representation, as they have little understanding of the Irish legal system.

In order to improve the service to those involved in family law disputes, which are especially traumatic for all concerned and affect vulnerable children and adults, consideration should be given to providing special support to family law at District Court level. This should include the provision of child welfare officers attached to the courts and allocating judges with a special interest in, and experience of, family law to hear family law cases outside Dublin (in Dublin judges are already allocated to Dolphin House exclusively for a period). The question of the listing of cases should also be examined, in order to minimise the time litigants are waiting for their cases to be heard, while allowing the courts flexibility in hearing cases.

2.2.4.3. Record of Proceedings

Inevitably, cases have to be disposed of quickly. The sheer pressure of numbers of litigants may inhibit the amount of evidence that is heard, compounded by the fact that many litigants are not legally represented. This can lead to some litigants or respondents not being adequately heard. There is no possibility of a written decision.

Often reasons are not given verbally for the decision made. The only record that exists is the order recorded by the court clerk.

All this is very unsatisfactory from a number of points of view and may well place Ireland in breach of Article 6 of the European Convention on Human Rights. A person seeking adjudication of his or her dispute could leave the court with a decision they do not understand and for which no reasons were given. At the least, there should be agreed summaries provided at the end of cases.

If a disappointed litigant seeks a judicial review of the court's decision, challenging the way it was arrived at, the High Court has nothing to rely on but the claims of the litigant which may or may not be supported by his or her legal representative if there was one. This is very unsatisfactory both from the point of view of the litigant and that of the judge in the original trial.

Many issues concerning the recording of decisions and the reasons for them can be dealt with through digital recording and procedures for accessing transcriptions of these recordings by the litigants and by those involved in any appeal proceedings. In the meantime it may be useful to discuss with the President of the District Court and those judges hearing most family law if a way could be found of assisting them to record or summarise decisions and reasons for them.

2.2.4.4. Social Welfare and Other Entitlements

Court orders, especially relating to maintenance, can have an impact on a person's social welfare entitlements. Orders on the custody of children can also have an impact both on social welfare entitlements and on access to housing. Social welfare recipients are sometimes told by the relevant office to go to court to seek a maintenance order. It is not always clear how this will affect entitlements, and the court is not informed. Some judges are reluctant to make orders that will have a negative impact on a party's already strained resources, especially if children are involved. There should be clear guidance from the Department of Social, Community and Family Affairs what its policy is on lone parents seeking maintenance, and from the local authorities on their policy on the housing of lone parents, both custodial and non-custodial.

2.2.4.5. Lay Litigants

There are an increasing number of lay litigants appearing before the family law courts at all levels. While they are normally treated with care and courtesy, different judges devote different amounts of time to explaining procedures and assisting them in explaining their case. Court staff also help them as best they can, but neither they nor the judge can give them legal advice.

The dangers of self-representation are manifold. Without legal representation a person cannot be advised what to expect from litigation, or what is provided for in family law litigation, and his or her expectations of the proceedings might be unrealistic. The personal litigant may not be able to define his or her requirements and rights under the legislation, or articulate them in court. If a dependent spouse has qualified for legal aid, as she or he might, this will lead to an inequality of arms and exacerbate the litigant's frustration with the system. According to the Family Court of Australia report, self-representation may also increase opportunities for delay, reduce settlement opportunities, exacerbate hostility between the parties and lead to a reluctance to comply with orders.

All lay litigants, in both the District and the Circuit Courts, should receive a standard information booklet on what to expect in court, and the question of eligibility and charges for legal aid should be reviewed (see 2.3 below).

2.3. Imbalance in the System?

The modification of the *in camera* rule by the 2004 Civil Liability and Courts Act followed years of disquiet about the operation of this rule. In some quarters this was combined with allegations of unfairness in the family courts, specifically that the system is biased against fathers.


It is true that for some years the courts operated on the basis of the “tender years” principle with regard to the custody of children, holding the view that young children, in particular, should be in the care of their mother. However, that principle no longer operates. It is also true that for many years most judges like most other professionals, were middle-aged men whose own working lives were supported by full-time home-making spouses and who were unlikely to have personal experience of caring for young children. It is likely they found it hard to imagine any man caring for children, especially young children, on a full-time or even a half-time basis, and this undoubtedly contributed to a tendency to see the mother as the natural primary carer of children. This was reflective of society at the time. However, society has changed, with the vastly increased numbers of married women, including mothers, in the workforce, and the make-up of the judiciary has changed.

The Pilot Project has only been able to attend a small selection of the many thousands of family law applications heard every year. Nonetheless, the project, including the reporting panel, has attended over 100 days in court, probably representing over 1,000 applications. Neither I nor the members of the reporting panel have seen evidence of systematic bias against fathers or anyone else in the courts, though this is not to say that some individual decisions have not been informed by the individual life experience of the judge which may have been very different from that of the person appearing before him or her.

On the other hand, marriage breakdown bears particularly heavily on men on or below the average industrial wage with young children, whose marriages break up and who are ineligible for legal aid, but cannot afford a private solicitor.

Take the following hypothetical example. A man on the average industrial wage of €30,000 a year is married to a woman who previously worked in a low-skilled job, but gave up work to care for the couple’s two children, a boy and a girl now aged six and eight. Ten years ago they bought a modest house and have a large mortgage. The marriage breaks down. She alleges violence, he alleges infidelity. They decide to separate and he moves out. They both seek legal aid. He is refused. She, because her income is only the lone parent’s allowance and some minimum maintenance, gets legal aid. Her solicitor duly draws up a Family Law Civil Bill seeking a judicial separation, stating it was unreasonable for the wife to be expected to live with the allegedly violent husband, and seeking the reliefs of sole occupancy of the family home, custody of the children and maintenance for the wife and children, along with a barring order.

When he receives this document the husband has no one to explain that it is not a personal statement aimed at him, rather it is in the standard form of Family Law Civil



Bills. He has no advice on how to enter a Defence and Counter-claim. He goes to court and attempts to state his case, without receiving any assistance in doing so. If he raises the issue of the wife's conduct he may be told it is not relevant as the courts tend to look forward towards solutions rather than backwards at recriminations. The judge is likely to explain as carefully as possible to him what his rights are, but will not be able to articulate the man's wishes and concerns.

When the case comes to be decided the judge is faced with the difficult reality that the family's resources are just not sufficient to support two households, yet two households now exist. The wife has been caring for the children and they will need care for some years to come, so her chances of earning a significant wage in the medium term are slim. If she does work, much of her income, given her skill level, is likely to be spent on child care.

No judge will want to put the children out of their home so the court is likely to order that the wife remains in the family home caring for the children with access for the husband, agreed if possible until the children are no longer dependent. The judge may order the house to be sold at that stage, and the proceeds divided between the spouses, but that is of little comfort to the husband now when he has to pay for the mortgage on a house he is not living in. He is also likely to be asked to pay maintenance at least for the children. Nor would it solve the family's problems if the husband gave up his job to care for the children, as the wife is unlikely to be able to earn enough to support two households.

So the husband is likely to end up paying the mortgage on a house he is not living in, paying maintenance for his children whom he may not see as frequently as he would like, and his access may even be restricted if he does not have suitable accommodation for them to stay with him overnight, especially as two children of different sexes grow older.

Such a scenario shows how marriage breakdown, a financial as well as emotional body-blow for any family, is especially disastrous for a family with one earner and limited resources. It will be of little comfort to the husband at the moment to be told that in 12 years' time the house will be sold and he will receive half its value, by which time he is likely to have advanced in his career through being in full-time employment. His wife will have struggled to bring up the children on a very limited income, and will be in a less favourable earning position if she has been caring for them during this time. She will therefore be in a less favourable position to raise a mortgage to buy out her husband or rehouse herself.

While such an outcome appears to bear particularly heavily on the man in this situation, this is not due to bias on the part of the court. Rather it demonstrates the fact that marriage breakdown, a body-blow for any family, is a disaster for a family on a low or modest income. It remains a fact in modern Ireland that in most families where there are young children the man is the main bread-winner, and the wife's income, if there is one, either is likely to derive from part-time work or is gobbled up by the cost of child-care. Housing has become crippling expensive. The children must be the court's first priority, and it will always seek to ensure that they have a secure home and stability in their schooling and care. The legal aid scheme is overly restrictive and this impacts especially heavily on a partner on the average industrial wage with a lower-earning spouse (see 2.3 below).

The answers to this problem lie, not primarily in the legal system, but in the supports available, in the areas of housing and income supports, to single parent families and separated parents.

2.4. Consistency and Judicial Training

Again and again judges expressed to me their own frustration at the lack of education and training for judges, and at the difficulty in discovering what their colleagues' understanding and practice of family law is. They were acutely aware that this could lead to inconsistencies in how various issues were dealt with. While judicial independence and autonomy, combined with individual judicial discretion, is a cornerstone of our constitutional system, there is a need for a framework to exist which would permit judges to develop a common approach to the main issues.

No formula exists according to which ancillary orders are granted. Each case is different, and each judge also brings a distinct perspective to bear on the cases heard, and this is fundamental to our system of justice. It was clear from the Pilot Project that there were differences among the judges, not only in their style of dealing with family law, but also in their approaches to certain matters as they arose in court. The following examples by no means constitute a comprehensive list, but are indicative of the need for additional resources being made available for further judicial education and training in relation to family law issues.

2.4.1. "Proper Provision" and Consents

Some judges feel that if parties have both received legal advice and are happy with the terms they have come to in relation to a divorce there is no need for the court to examine it further. Others feel that there is a statutory obligation on the court to be satisfied that "proper provision" is made, including in situations where a consent has been signed. In some instances I was present where the judge told the parties the consent did not amount to "proper provision" and asked them to renegotiate it which they duly did.

2.4.2. Conduct

Litigants often consider that the conduct of the other party should have a major bearing on the outcome of the case. The High Court has ruled otherwise, except in the most exceptional circumstances. Judges may only take account of conduct that is "gross and obvious", but there is no unanimity on what this might be. Some judges take a dim view of certain types of conduct, like adultery, and such a view may be reflected in the orders they eventually make. Others do not. Other judges may penalise the party who has dragged out the proceedings unnecessarily, or who has been violent in the marriage. Generally the emphasis is on looking forward, and finding a way for the family to live as well as possible, and as harmoniously as possible, within the available resources.

2.4.3. Guardianship, Custody and Access

There are differences also among judges concerning how they deal with the issues of guardianship, custody of and access to children. Some consider the granting of guardianship to unmarried fathers to be virtually automatic, unless there are compelling reasons why it should not be granted. Equally they consider access to both parents to be the right of the child, even if in some circumstances such access should be supervised. Others do not consider automatic guardianship and access for fathers to be

the default position, and the burden of proof that these should be granted passes to the applicant.

The recent High Court judgment by Mr Justice Liam McKechnie in the Mr G case may provide some illumination on this issue, but the case was distinguished by its own facts.

In relation to custody, joint custody is now usually granted in most courts when it is sought, unless one or other parent has demonstrated (usually through addiction, mental illness, desertion, imprisonment or disinterest) that he or she is incapable of exercising it. In most cases it is also agreed between the parties that the children live most of the time with their mother. In a minority of cases where there is joint custody the father seeks the equal sharing of day-to-day care. In most courts this is granted when the case for it is made. However, some judges consider it best that children spend their school nights in the same bed, and are disinclined, for example, to require them to spend an equal number of nights with each parent during the school week. Others will accept such a solution if it is canvassed by one or both of the parties.

2.4.4. The Views of the Children

There is a growing international trend, fortified by international conventions, to consider the views of children in making decisions concerning their future, especially in family disputes. However, no adequate framework exists for doing so in Ireland, and judges have to deal with this as best they can, exercising their discretion in the circumstances of the case.

Some will hear the children in their chambers concerning their preferences especially if the children are older. Others feel it may be inappropriate to hear a child, considering that the child could be manipulated by one or other parent and fearing this will involve children in their parents' disputes thereby further damaging familial relationships. They prefer to ask an expert to examine the child and the parents and report back to the court on what is likely to be the best outcome for the child. The provision in the 1997 Act for the appointment of a *guardian ad litem* to represent the best interests of the child in private law proceedings can only be invoked in exceptional circumstances.

Different judges give different weight to the opinion of experts. Such experts can either be social workers with the HSE or child psychologists or psychiatrists engaged by the parties. There are no child welfare specialists available to the courts. There can be delays in obtaining reports either through the HSE or from private practitioners, which can delay the proceedings.

2.4.5. Affidavits of Means

Different standards can apply relating to affidavits of means with some judges requiring them to be vouched. Others do not regard them as influential documents in helping to decide financial orders, and of doubtful reliability anyway. Some judges require affidavits of means to be filed in all divorce applications, others only require them when financial orders are sought.

2.5. Costs

There is widespread concern about the cost of family law proceedings, especially those concerning divorce and judicial separation. It is outside the remit of the Family Law Pilot Project to report on legal costs, but it is an issue that has been raised frequently with the Pilot Project both by judges and by court staff. One county registrar stated that he and his colleagues had experience of some cases where the *raison d'être* of the case was fees. A senior member of the judiciary described how a routine procedure cost five times more in Dublin than in a court of the same jurisdiction 20 miles away. Similar views have been expressed in relation to Cork compared with courts in other towns. The Pilot Project has been told that a consent divorce can cost a few thousand euro in a Circuit Court outside Dublin, but many times more than in Dublin or Cork.

It is difficult to establish what the actual level of costs is in family law. A rare insight was granted by the case *BD v JD* (Supreme Court 185/04), whose ancillary orders were appealed from the High Court to the Supreme Court. One of the orders was for a contribution of €100,000 to the wife's legal costs. Setting aside this order on the grounds that there was no cogent reason why either side should contribute to the other's legal costs, Mr Justice Adrian Hardiman commented: "In the course of the hearing the Court heard of an estimate given to the High Court of one side's costs in this action (far in excess of the contribution to the wife's costs ordered) which caused me surprise and dismay."


While not commenting on the costs in this particular case, described as being one "of some, but not extreme complexity", Mr Justice Hardiman went on to state: "The cost figures mentioned or deposed in affidavits of means in family law actions are sometimes very high, out of proportion it would appear to what is involved even in ample resources cases. They can be very burdensome, especially but not exclusively in less prosperous circumstances. Those charging instruction fees or brief fees must bear in mind that they are to be related to the work done and not directly to the asset value of a case."

When *BD v JD* went back to the High Court it emerged in evidence concerning the affairs of the company at the heart of the case that the husband had already obtained €600,000 from the company to pay his solicitor's fees.

According to the Law Society of Ireland's handbook, *Family Law*, (Blackstone, London, 2001) costs in family law are calculated on the basis of the following:

- (a) whether the matter is contentious or non-contentious;
- (b) the time spent on the case;
- (c) the complexity of the issues involved and the degree of skill needed;
- (d) the number of documents prepared or reviewed;
- (e) where money or property is involved, its amount or value; and the urgency of the matter.

Considerations (a) to (d) are self-evident. However, while there may be a reason in commercial cases to include the value of the property in assessing the costs of an action (this on top of considerations of time, complexity and skill), it is difficult to see how this is justifiable in family law cases. Given the dramatic rise in house prices in the past 15 years, especially in Dublin, the practical effect of this is that relatively simple cases, involving, say, two public servants who have had a house in a mature Dublin



suburb for about 20 years, and whose marriage has broken down could, if this formula was followed, face astronomical legal fees. The fees could greatly exceed those in a similar case in a rural town, even though the legal issues and remedies – and the time spent on the case – were the same. Yet both families would face the same issue of providing homes for both parties and their children out of the available resources, which could face severe depletion by pegging the level of fees to the value of the house. Solicitors will point out that the inclusion of the value of the assets as a basis for estimating costs is linked to the fact that a solicitor's risk in negligence, and therefore his or her insurance, is related to the value of the case. This could be addressed by legislation to limit solicitors' liability.

Equally, the resolution of the issues involved in family law are likely to be urgent for most litigants, especially if there are children involved or if one of the parties is in poor health. Again, it seems difficult to justify imposing additional costs on a family in need of an urgent resolution of its problems because of the vulnerability of some of its members.

Reducing the cost of family litigation is a many-faceted subject, and, as stated above, falls outside the scope of this project. However, progress could be made by increasing the use of mediation; simplifying forms and making all forms and information on filling them in, readily available to the public; increasing the eligibility limits for legal aid; judicial intervention in the area of costs when making financial orders; improving court procedures; taxation by county registrars; and by the professional organisations giving special consideration to the basis for assessing fees in family law cases and to the need for greater transparency in fees in this area.

2.5.1. Avoiding Legal Costs: Access to Information and Forms

Many of those who apply for a divorce have resolved issues that may have been in dispute when the marriage broke down, and have an agreement in place and only want a decree of divorce and the extinction of succession rights. Other divorce applicants, and some applicants for judicial separation, have resolved matters between them and may wish to pursue the application themselves. This should be facilitated.

All the forms for personal applications (Family Law Civil Bill, Questionnaire for Affidavits of Means and Affidavits of Welfare, etc) are available in Circuit Court offices and on the Courts Service website. In some offices it is the practice to give these out to personal callers at the office in others it is not. Similarly, in some offices the staff assist people in filling them in, while making clear they cannot offer legal advice. At the moment this is haphazard and practice varies from county to county.

All counties should have a consistent policy on making forms available to callers wishing to apply for judicial separation and divorce. Consideration should also be given to the preparation of an information booklet on how the forms should be filled in, what should accompany them, and the issues which, if unresolved, indicate the person should seek legal advice.

2.5.2. Legal Aid

Where there is an issue in dispute between the parties, they need legal representation. However, this may be beyond the means of some litigants. If the processing of a fairly

uncomplicated judicial separation or a divorce costs €5,000-€15,000, a person earning the average industrial wage of €31,000 a year, for example, or the average salary of a public servant of €45,000, would find it very difficult to afford legal representation. They are also likely to be above the threshold for legal aid, currently set at €18,000. While allowances for accommodation, dependent spouses and children and child care could bring that up to about €37,000, many people do not qualify for the full allowances, and if they do they have very little disposable income. They have no alternative but to seek to represent themselves.

There is a strong argument for removing the income limit or increasing the eligibility limit for legal aid, while asking those who become eligible and who have higher incomes to make a realistic contribution to its cost. At the moment those obtaining legal aid can be asked to make contributions which can run to some hundreds of euros. If the eligibility limit was removed or increased to, say, €50,000 a year after deductions and allowances, along with a graduated level of contribution, legal representation would become affordable to many of those at present excluded. The cost could be met by charging those at the top level of eligibility €4,000-€5,000, depending on the complexity of the case. This is what the Legal Aid Board pays to the solicitor and barrister taking a legal aid case on the private practitioners' scheme.

This could only be done, of course, if the resources to the Legal Aid Board, in the form of full-time staff, were increased. But the increased fees would make the change cost effective. In addition, the reduction in lay litigants would mean more efficient use of court time, and thus of public resources.

2.5.3 Practice Direction on Fees

Some judges have sought an indication of what the fees are going to be from the solicitors in cases before making financial orders. This at least brings some transparency to the issue. The Presidents of the two jurisdictions should consider whether it would be helpful to make this a Practice Direction.

2.5.3. Taxation

Costs could also be reduced by increasing the use of taxation of costs by county registrars. This could be done either by all judges making an order in family law proceedings that solicitor and client costs would be taxed in default of agreement or by amending the court rules to enable county registrars tax costs routinely. This would mean that parties would not have to go to the High Court for taxation, and would not need a separate application in the Circuit Court. If county registrars were routinely taxing costs locally, including the publication of the results, it would build up benchmarks locally on the cost of various types of family law proceedings which could be published.

2.5.4. Professional Bodies

The professional bodies, the Law Society and the Bar Council, have a role in helping to contain costs in family law. One measure that might assist would be mandatory interim itemised statements of account, to be sent to clients at regular intervals so that they could see what the case was costing as it progressed.

2.6. The Future

2.6.1. Law Reform Commission Report

“The courts are buckling under the pressure of business. Long family law lists, delays, brief hearings, inadequate facilities, and over-hasty settlements are too often the order of the day. At the same time too many cases are coming before the courts which are unripe for hearing, or in which earlier non-legal intervention might have led to agreement and the avoidance of courtroom conflict. Judges dealing with family disputes do not always have the necessary experience or aptitude. There is no proper system of case management ... The courts lack adequate support services, in particular the independent diagnostic services so important in resolving child-related issues. The burden placed on those who operate the system, especially judges and court officials, has become intolerable. Legal aid and advice services, despite substantial recent investment, continue to labour under an expanding caseload, and too many litigants go to court unrepresented. An unhealthy two-tier system of family justice is developing in which poorer often unrepresented litigants seek summary justice in the District Court while their wealthier neighbours apply for the more sophisticated Circuit Court remedies.” (*LRC 52-1996*)

These words were written by the Law Reform Commission 11 years ago, yet, with a few caveats, they could equally be written today. Meanwhile the demand for family law remedies has greatly increased. The latest figures available to the LRC were those for the legal year ending July 31st, 1994, when there were 14,274 family law applications in the District Court. In 2006 there were almost 21,000. There were 2,806 applications for judicial separation in the Circuit Court in 1994/1995, of which only a third were granted, leaving long waiting lists. While applications for judicial separation were fewer in 2006 (1,789), and the number granted had gone up to about two-thirds, the 3,986 divorce applications brought the total number of Circuit Court family law applications to 5,775, twice the volume being dealt with at the time of the LRC report.

Since then there have been some improvements: the physical environment where family law is heard has dramatically improved with the building of new court-houses and the refurbishment of old ones; the proportion of cases processed has increased, reducing the waiting lists somewhat; the legal aid system has expanded, though so too has the demand; but the problems of long lists, delays, lack of case management, unprepared cases coming to court, lack of alternative dispute resolution, lack of independent diagnostic services, all remain endemic in the family law system. Above all, the emergence of a two-tier system identified by the LRC has become entrenched.

2.6.2 Working Group on a Courts Commission

Two years later the Working Group on a Courts Commission, under the chairmanship of Mrs Justice Susan Denham, said in its Sixth Report: “The criticisms made by the Law Reform Commission were echoed by many of the groups dealing with the family law system who made both written and oral submissions to the Working Group.” (*Working Group on a Courts Commission, Sixth Report, 1999*, p 28)

The report added: “In all cases coming before the Courts, if justice is to be done the parties must be given an adequate opportunity to put their case and be heard by the

Court. This is crucially important in Family Law matters, when not just one issue but the whole shape of the family's future is being decided. Frequently, misunderstanding and bitterness has built up and both husband and wife have a psychological as well as a legal need to be heard in evidence. Failure to give adequate time to the hearing often means that the parties leave the Court deeply dissatisfied and this can result in reluctance to carry out the orders made by the Court, leading to yet more litigation." (Op. cit. p 28)

The working group outlined three possible models: regional family courts, along the lines recommended by the Law Reform Commission; a dedicated family court structure, similar to the system in Australia; and an improvement on the current system by the creation of a family law division in each of the three jurisdictions, with better facilities, ancillary staff, improved resources and judges who had a special interest and experience in family law.

It recommended the third option to be implemented in the short term, along with the selection of certain centrally located court venues for family law at Circuit and District Court level. It recommended that in the longer term there should be planned progress towards the system of regional family courts recommended by the Law Reform Commission.

The working group also recommended a full system of case management in relation to family law, and appropriate support services especially in the area of child and family assessments, provided by a family law section of the Probation and Welfare Service.


2.6.3. Family Law Division

Just as the analyses put forward by the Law Reform Commission and the Working Group on a Courts Commission deserve revisiting, so too do their remedies – the establishment of a specialist family law division, especially at Circuit Court level. This was described by the Law Reform Commission as “a system of Regional Family courts, located in approximately eight to ten regional centres, functioning as a division of the Circuit Court, and operating in the context of a range of family support and advice services... Each Regional Family Court would be presided over by a Circuit Judge, nominated to serve for a period of at least one year and assigned on the basis of his or her suitability to deal with family law matters. Attached to each Regional Family court, and operating under the aegis of the Court, would be a family court advice centre.” (LRC 52-1996, p 22)

The LRC also proposed expanding the jurisdiction of this court, taking over many of the applications currently made by the District Court. While the District Court processes an enormous volume of family law applications at the moment, and needs a more specialist panel of judges, along with ready access to mediation and support services to improve the delivery of its service to the public, there does not seem to be a compelling reason for removing the family law applications it currently processes from its jurisdiction. The jurisdiction of the District Court for applications like custody and access, maintenance and protection from domestic violence has the great benefit of accessibility, and this would be lost by sending such applications to a regional court.

Since the LRC proposal was put forward, a regime along these lines has been put in place by the majority of other common law jurisdictions, notably Australia and Canada (see Appendix III). It is a model that works.

There are eight circuits in the State, including Dublin and Cork. Some of these have



a very wide geographical spread, for example, the South-Eastern Circuit encompasses the towns of Nenagh and Waterford, while the Midland Circuit stretches from Portlaoise to Sligo, so it may not be appropriate to have just one family court for each Circuit. Following a consultation process, the LRC ended up with a proposed figure of 15 regional family courts. The number is a matter for future consideration, taking into account population density, accessibility and existing demand. It may be suitable to locate some of these courts in lesser-used circuit courthouses, in order not to conflict with the demands of other court work, and to assist in maintaining the confidentiality of family law litigants. It would appear reasonable that the number should be somewhere between 10 and 15.

It is essential that such courts have a range of support services attached to them. Foremost among these should be information on the services available, including alternatives to litigation, information on the implications of separation and divorce, and where to go for counselling and advice. Mediation services should be available on site, along with legal aid and child assessment services.

Case management should be built into the system at the outset. No case should proceed to a hearing without a minimum number of mediation sessions, focusing initially on the need to solve child-related issues, and case management meetings to isolate the issues in contention that needed to be tried. The county registrars in these courts should be empowered to make orders in consented cases, leaving the courts to hear and decide on contested cases. Court procedures should include provision for adjournments to allow settlement discussions at any stage.

2.7. Summary and Recommendations

The family law system has grown in a haphazard way in response to the growth in demand, some of it generated by the legalisation of divorce following the 1995 divorce referendum. No overall system of dealing with family law was devised to meet the growth in demand, and the majority of the recommendations of the 1996 Law Reform Commission on the Family Courts, which did put forward detailed proposals for the reform of the family law system, remained unimplemented. With some exceptions, notably the establishment of a special family Circuit Court in Dublin where three judges sit permanently on a rotating basis, and the hearing of District Court family law applications in the special family District Court in Dolphin House, again with judges allocated there for a period, family law competes for resources with other areas of law in District and Circuit Courts around the country. The case for a separate family law division of the Circuit Court, along with an enhanced family law service in the District Court, is compelling.

The unplanned development of the family law system has led to a situation where, despite the best efforts of court staff and judges to provide a service to the public, lists are overcrowded; cases, including urgent cases involving matters on the welfare of children, are adjourned for weeks or months at a time; courts often sit late into the night; and litigants cannot be sure that, if their case is adjourned, it will be heard by the same judge when it resumes. Practices and procedures can vary from district to district and circuit to circuit, compounding a general lack of information about how the family law system works.


The information available to the public about family law and the procedures involved is patchy and varies from court to court and jurisdiction to jurisdiction. Leaflets exist on individual remedies, but there is no single source of information on all the available remedies including alternatives to court-based solutions and on where to go to receive professional help. There is a wide variation among the different districts and circuits in the amount of assistance given by court staff to those seeking forms and information on court procedures, some of which can be downloaded from the internet.

In terms of alternative dispute resolution, family mediators are not regulated and knowledge of and access to the Family Mediation Service is limited. The legislative provision that those seeking legal advice should be informed of the alternatives of counselling and mediation appears to be often treated as a formality, with no incentive or compulsion on potential litigants to attempt mediation before having recourse to the courts. The Family Mediation Service does not have facilities at or near most courts.

Collaborative law as an alternative to litigation is, as yet, in its infancy.

The documentation grounding applications for legal separation and divorce is unduly confrontational and can inflame a dispute further. While the Law Society Code of Conduct in family law directs that the welfare of all family members, particularly children, should be to the fore in processing family law applications, it is not certain that this always happens, and it is not clear that the Code of Conduct is policed in a proactive fashion.

Delays and overcrowded lists are endemic, especially outside Dublin. In the District Court this can lead to cases being dealt with in a perfunctory fashion, or adjourned, even in cases where urgent matters like access to young children are involved. In the Circuit Court it can lead to very long court days, as well as adjournments. However, in



some courts the day ends promptly at 4 pm or 4.30 pm, even when some flexibility could allow settled cases to be ruled and therefore finalised in a short time. Family law days are allocated on a term basis, so there is no certainty that an adjourned case will be heard by the same judge. The pressure of work makes it extremely difficult for judges to give decisions and the reasons for them in written form.

Support services, like child welfare specialists, counsellors and mediators, are absent from the courts. They are especially urgent at District Court level, but all courts would benefit from access to a court-based mediation and child welfare service.

Judges are not allocated to family law in accordance with aptitude and experience. While few judges would welcome being assigned to family law on a permanent basis, it is desirable that judges with an interest in and an aptitude for this area of law are assigned to it for a period of time in all jurisdictions. As well as developing expertise, this would enable better organisation of the lists, permitting family law lists to be planned for a year in advance.

The length of the lists is further complicated by the fact that matters which are being dealt with on consent are not always separated from contested matters. In addition, motions which can be dealt with briefly are often on the same list as lengthy contentious matters. If consent matters, especially in the Circuit Court, were placed on a separate list, and motions were also dealt with separately, it would ease the pressure on the contested cases.


As yet there is no case management system in family law, though plans are well advanced for county registrars to progress cases so that they reach the court ready for hearing, with the contentious matters isolated and issues such as Discovery dealt with. The piloting of this on a voluntary basis in a few Circuit Courts provides a valuable insight into how this could assist in reducing the court time wasted in some cases with consequent additional costs for the parties.

Practice relating to children in family law disputes is seriously underdeveloped. No framework exists for obtaining the views of children even though this is becoming best practice internationally. Judges do not receive any training on how to obtain or assess the views of children, and no other court-based professionals are available to do so.

Sometimes reports are prepared by either social workers (usually for the HSE when child welfare issues are involved) or child psychologists (often in protracted disputes between the parents about the children) for the court. The HSE reports are usually funded publicly, while those commissioned by one or other of the parties are usually paid for privately. Neither vehicle for assessing the children in a family law dispute is ideal. While it is open to the court to appoint a *guardian ad litem* (GAL) to represent the interests of the child in family law proceedings involving custody and access or guardianship applications by a natural father, this must be justified by the “special circumstances” of the case and happens very rarely.

There are many areas where other aspects of public policy, relating to social welfare, housing and family support, interact with family law. However, knowledge of precisely how they interact is patchy, and the courts often have to make decisions unaware of how this will affect a party's entitlements. Research is needed on the impact of family breakdown on the living standards and well-being of all members of the family, so that policy on ameliorating their situation is evidence-based.

Outside of the High Court written decisions or judgments, along with the reasons for the decisions made, are rare. It will be possible to correct this with the assistance of digital recording of court proceedings, which is imminent, but an interim mechanism for



recording decisions and reasons is desirable. This will also assist the judiciary in building its own body of experience and in developing a level of consistency. In addition, more resources are needed for judicial training in the area of family law.

Lay litigants are common in family law, especially at District Court, but also at Circuit Court level. They also sometimes appear in the High Court. This leads to an increased use of court time as procedures have to be explained and a lay litigant may have unrealistic expectations of the court. International experience shows that self-representation can mean more opportunities for delay, reduced settlement opportunities, exacerbated conflict between the parties and can lead to a reluctance to comply with orders. The number of lay litigants could be reduced by measures to tackle the problem of the cost of family law to most litigants, and the time taken up by those who do decide to represent themselves could be reduced by the provision of comprehensive information on what to expect from the court procedure.

The level of costs in family law is a cause of concern to the judiciary, court staff and politicians. It has been commented on by the Supreme Court. Costs for very similar motions would seem to vary widely from practitioner to practitioner and according to which part of the country they are brought in.

Family law differs from most other forms of litigation in that the parties frequently need to have a future relationship which is as amicable as possible. The outcome of the case is related primarily to the needs of the parties and dependent members of the family, rather than on allocating responsibility for the breakdown of the relationship. In addition, the welfare of both parties, and of vulnerable and dependent members of the family, depends on the resources of the family. The main asset is usually the family home and all members of the family will require housing in the future. The family home is not comparable, for example, to a business in a commercial dispute. Yet costs are often related to its value.

The income limits for civil legal aid make those earning anything over the average industrial age ineligible, except in the most exceptional circumstances. While the civil legal aid scheme includes payment on the part of the client, the level of payment reflects the fact that most of its clients have extremely limited resources. An expansion of the legal aid scheme to make it accessible to those on moderate incomes, with a commensurate increase in the level of payments made by those who could afford it, would make legal representation available to many of those who need it and cannot at present afford it. Reducing the number of lay litigants would also help make more efficient use of court time, and thus be a cost-effective measure.


Other measures like a rule change to encourage greater use of taxation at Circuit Court level and the proactive involvement of the professional representative bodies in this issue, would also reduce costs in family law.


The major issue in family law, however, is the lack of a specialist family law division of the Circuit Court, as recommended by the Law Reform Commission in 1996.

Recommendations

Recommendations 1-4 will require Government action. However, recommendations 5-26 can be acted upon in a short timeframe without legislation.

- Recommendation 1:** The Government should legislate to set up a family court division of the Circuit Court, based on a network of regional family courts in 10-15 centres which would hear family law on a full-time basis, each presided over by a Circuit Court judge who would be allocated to the family court for a minimum period of one year.
- Recommendation 2:** Each regional family court should have an information office providing information on all options available for the resolution of family law disputes; mediation facilities; an office of the Legal Aid Board; family support and child assessment services.
- Recommendation 3:** Before a case can go forward for litigation, each applicant should undergo a minimum number of mediation sessions, where arrangements concerning the welfare of children are a priority. If the parties agreed, mediated settlements could be brought forward for ruling by the court, thereby making them binding.
- Recommendation 4:** Cases that ended in a mediated or negotiated settlement should be separately listed and ruled. Consideration should be given to establishing a court of limited jurisdiction, presided over by the county registrar, who could rule such consents.
- Recommendation 5:** Case management should be built into the system, so that no case could be listed without all issues concerning vouching of affidavits of means, Discovery, valuation of property etc. being dealt with. This should be done regardless of whether or not a family law division is established.
- Recommendation 6:** In the meantime, a panel of judges, at Circuit and District Court level, with a special interest in and aptitude for family law, supported by training as necessary, should be established, and they should be deployed on a rotating basis to hear family law in both jurisdictions.

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- Recommendation 7:** The Courts Service should commission or prepare comprehensive information booklets on the various options available for the resolution of family law disputes, including the option of alternative dispute resolution, and the reliefs available in the District and Circuit Court and how to apply for them. There should be a uniform policy throughout the Courts Service on the assistance court staff can give to litigants in filling in family law forms.
- Recommendation 8:** The President of the Circuit Court should consider drawing up a Practice Direction requiring parties to undertake a given number of mediation sessions before a case is listed for hearing. Alternatively, a preliminary hearing before the county registrar or a judge could establish whether a case could be remitted for mediation, coupled with an order for disclosure of assets where this was an issue. No case should be listed for hearing until some form of mediation or negotiation has taken place.
- Recommendation 9:** The Family Mediation Service should be expanded and all family mediators subject to regulation with a national system of accreditation. The service should be linked more closely to the courts and linked in to collaborative law where appropriate.
- Recommendation 10:** Mediators should inform clients who do not resolve all their differences in mediation of collaborative law as an alternative to litigation.
- Recommendation 11:** The Rules Committee should consider the redrafting of the template for the Family Law Civil Bill, simplifying it and minimising its adversarial content, while ensuring that the legal rights of litigants are not compromised.
- Recommendation 12:** The Courts Service centrally should obtain information on the length of the family law lists in each county and additional judges should be allocated to hear family law in accordance with established need.
- Recommendation 13:** The family law list should be planned for a year ahead, and the judges allocated so that the same judge would hear adjourned cases
- Recommendation 14:** Consent cases and motions should be listed separately so that days allocated to contested cases are devoted to such cases exclusively.



Recommendation 15: County registrars should consider establishing a uniform policy concerning the length of the court day, with flexibility built in so that cases ready to be ruled can be finalised without the parties having to return for a second day

Recommendation 16: Case progression by county registrars should be put in place as soon as the draft rules have been agreed by the Circuit Court Rules Committee. In the meantime, information on the experience of the piloting of case progression should be circulated widely among county registrars, practitioners and judges, so that further pilots can develop.

Recommendation 17: The case progression system should conclude with a written agreed statement for the judge, outlining what has been agreed and remains to be decided by the court. This would facilitate the production of written judgments, which could be collated and centrally filed.


Recommendation 18: Consideration should be given to reducing the opportunities for delay and obstruction, including the front-loading of the costs of applications and the making of interim costs orders immediately executable.

Recommendation 19: The Department of Justice, Equality and Law Reform and the Courts Service should give urgent consideration to setting up a court-based service which could provide expert and impartial advice to the courts on both the views and the welfare of children in family law disputes. Consideration should be given to expanding the role of the Probation Service to provide such a service.

Recommendation 20: The Courts Service should consider the publication of an information booklet for lay litigants in family law outlining what to expect in court and explaining both how to make applications and how to respond to them.

Recommendation 21: The Courts Service should initiate discussions with agencies such as MABS, the Legal Aid Board and the Family Mediation Service to consider increasing access to appropriate ancillary services for those coming to the District Court with family law disputes.

Recommendation 22: The Courts Service should establish a committee of judges and appropriate Courts Service staff to consider mechanisms for the recording and compiling of the reasons for District Court decisions.



Recommendation 23: The Government should consider making more resources available for judicial conferences and training, especially in the area of family law, to ensure that expertise can be developed in areas such as international law relating to children, and family and child welfare, and so that a judicial consensus can grow on the interpretation of Irish family law.

Recommendation 24: In relation to the costs of family law, the Law Society and the Bar Council should consider whether their guidance on fees is appropriate for family law, particularly in relation to the premiums on the value of the family home and the urgency of the matter.

Recommendation 25: The practice of some judges of requiring an indication of what the fees in a case will be before making final financial orders should be considered as appropriate for a Practice Direction.

Recommendation 26: The Rules Committee should consider changing the rules to permit solicitor and client costs to be taxed by the county registrar; alternatively, the Presidents should consider a Practice Direction that would include a routine order in family law actions providing for solicitor and client costs to be taxed in default of agreement.

Recommendation 27: The Government should consider abolishing or expanding the income limits for civil legal aid, combined with increasing the amount payable by clients to the amount normally paid to solicitors dealing with family law for the Legal Aid Board in the Private Practitioners Scheme. This should be combined with an expansion of the Legal Aid Scheme, rather than expanding the Private Practitioners Scheme, as the most cost-effective way of providing an enhanced service.

Appendix I

Proposal to Courts Service for Family Law Reporting Project from Dr Carol Coulter, 2006

1. Introduction

Over the past two decades the area of family law has grown significantly within the Irish legal system. This has been accelerated by the introduction of divorce by constitutional amendment in 1995. In 2004, the last year for which figures are available, the number of divorce applications in the Circuit Court stood at 3,880. Meanwhile, people continue to apply for judicial separation, usually because their marriages have broken down but they have not lived apart for the requisite four years. There were 1,654 such applications in the Circuit Court in 2004. The High Court had 34 divorce applications and 48 applications for judicial separation that year, mainly cases involving ample resources. Thousands of other applications, relating to domestic violence, maintenance and property orders, are made annually in the District Court. Therefore many thousands of citizens are affected, directly and indirectly, by these proceedings. Yet little is known about them.

The *in camera* rule in relation to the reporting of family law cases has long been the subject of debate. It constitutes a restriction on the constitutional imperative that justice should be administered in public, but one that is justified on the grounds of the right of citizens to privacy concerning their family affairs.

The *in camera* rule was relaxed in the recently enacted Civil Liability and Courts Act 2004, allowing a range of people, including *bona fide* researchers and people appointed by the Courts Service, to attend and report on family law proceedings. While these changes did not extend to opening up the family courts to the media, the media will be able to have access to academic work on the family courts and reports produced by the Courts Service. This will permit the beginning of a public debate on the operation of the family courts.

Such debate should include reference to the family court reporting regime in other common law jurisdictions. It would be useful to examine the experience of Australia, where the media are permitted to report on family law but with severe restrictions on identifying parties or their relatives; Scotland, which also permits reporting while preserving parties' anonymity; and England and Wales, which is currently discussing radical reform of its arrangements.

In fulfilment of its statutory obligation under the 2004 Act, the Courts Service is now seeking a person or persons to co-ordinate all aspects of the reporting and release of information on family law cases. Specifically, it is seeking a person or

persons to provide family law reports, judgments, trends and other statistical information to the judiciary, legal practitioners and to the public generally, and implement as many as possible of the recommendations in its report on its first pilot project. This new project is to be undertaken initially on a pilot basis.

The legislation and report of the 2002 Courts Service project stress the importance of anonymity. It is important that the person who carries out this work is experienced in writing reports that not only do not name individuals, but exclude anything that could lead to their identification, like the address or area in which they live, profession or physical description.

2. Material to be Provided during the Project

The Courts Service advertisement asks for the pilot project to produce family law reports, judgments, trends and other statistical information. It is likely to prove difficult for one individual to produce all this material in a comprehensive way without substantial input of resources from the Courts Service. It will be necessary to establish the priorities among these different elements.

Family Law Reports

Reports of family law proceedings in the High Court, Circuit Court and District Court should be produced by attendance at a representative selection of these courts, both in Dublin and in other major centres. As the High Court hears only a small minority of the total number of cases and publishes its decisions, the other courts are a priority.

The greatest volume of divorce and judicial separation cases is heard in the Circuit Court in Dublin, Cork and Limerick. However in order to ensure a representative geographical spread, reports should also be made of family law hearings in the Western Circuit. According to the 2004 figures, Castlebar hears the greatest number of family law cases in Connaught, and therefore should be the other centre.

There is also a possibility that courts hearing a small number of cases may diverge from the pattern of rulings in courts where the volume is greater, so consideration should be given to sampling reports from courts that hear few cases.

The reports should incorporate the following:

1. A comprehensive account of the hearing, incorporating exchanges between the judge, solicitors and barristers and witnesses, in order to give as full a picture as possible of what transpires in a family law case;
2. the conclusions of the case, including the decision and any ancillary orders, along with any explanation or comment offered by the judge;
3. if there is more than one case heard, statistics on the numbers heard, the outcomes, the nature of the legal representation, and any other relevant information.

It is imperative that such reports be written in a way that provides comprehensive information on what takes place in family law courts without including any information that could lead to the identification of individuals.

Anonymity

I would suggest the following guidelines for the protection of the anonymity of the parties:

- a. There should be no use of the initials used in identifying the case for the courts themselves and their staff. Instead reports should refer to, for example, “the applicant husband” at first reference and “the husband” subsequently, and “the respondent wife” and “the wife.” Where unmarried parents of children are involved, they should be referred to as “the father” and “the mother”.
- b. There should be no reference to the city or town where the parties live, other than Dublin. Instead a general term like “a provincial city” or “a midland town” should be used.
- c. Property should be described in general terms, e.g. “a substantial farm” rather than a farm of x acres.
- d. There should be no specific reference to the person’s trade or profession, unless such reference is made in a pertinent way by the judge, or it is an essential part of the judgment or ruling.
- e. There should be no identification of the children’s school, even if the fact that they are attending a fee-paying school is relevant. It would be sufficient to refer only to “a fee-paying school”, or “a boarding school abroad”.
- f. Particular sensitivity should be shown in dealing with psychological and welfare reports on children. Again, there may be circumstances when specific details of physical or sexual abuse should be mentioned as they would be relevant in the context of custody and access disputes. The practice of the reporting of rape and sexual abuse cases by the responsible media offers useful experience here.

Judgments

The collection and publication of judgments can only be done with the help of the judiciary and the staff of the Courts Service, and with the technological assistance already referred to in Courts Service documentation.

While awaiting the final rolling out of recording mechanisms in the courts, consideration should be given to seeking the assistance of the judiciary in drawing up a short standard form that could be used by judges to record their judgments. That might include the nature of the decree sought and the decision, the nature of the orders sought and granted, interim arrangements, if any, and other elements to be decided in consultation with the judiciary. Such forms would form a useful record for the court, and copies could be collated and analysed by the person in charge of the reporting project.

Once fuller judgments are collected, the presentation of the judgments should be standardised, with all judgments stating the basic facts of the case (the nature of the application and reliefs sought, the length of the marriage, the existence of children and their ages, if relevant, the assets and earnings of both spouses, other relevant information); the areas of contention; the judge’s ruling, including ancillary orders, and his or her reasons in law.

Statistics

The collection of statistics has already been started by the Courts Service, and will be enhanced when the use of the form drawn up with the help of the Law Society comes on stream. This work should continue in consultation with the person engaged in the reporting project, and prepared for publication.

The published statistical information should include the following:

1. The number of family law applications made in each court jurisdiction, under the various headings (divorce, judicial separation, custody of children, barring orders, etc.), (This is already done by the Courts Service);
2. The number granted, refused or withdrawn;
3. The sex of the person making the application;
4. The number of cases settled without a court hearing;
5. The number that go to a full hearing;
6. The number that settle after the hearing commences.

While it may be difficult, at least initially, to compile comprehensive statistics on ancillary orders, it would be desirable to compile some statistics on the following orders:

- a. the proportion of cases where joint custody of children is awarded, and where custody is awarded to one parent, or joint custody is ordered;
- b. the proportion of cases where access orders are made;
- c. the proportion of cases where the sale of the family home is ordered;
- d. the proportion of cases where maintenance is ordered against one spouse;
- e. the proportion of cases where property adjustment orders are made;
- f. the proportion of cases where pension orders are made.

Failing the production of comprehensive statistics on the above, a report should be produced based on a sample of cases, drawn up on a scientific basis that would seek to eliminate geographical or socio-economic bias.

Trends

It will not be possible to establish trends in a pilot project, but a baseline can be established from which it will be possible to establish trends into the future. These should show the volume of family law litigation, the proportion that is contested, the amount initiated by men or women, the custody arrangements concerning children and the impact of family litigation on the parties' property and income.

3. Outline Proposal

Structure of Project

The project needs to be structured to encompass three distinct elements: reports of family law proceedings; decisions and judgments; and statistics and trends. They will need to be compiled in different ways.

It will only be realistic to produce sample *reports of proceedings*, based on reporting a representative selection of hearings from a number of the busiest family courts across the jurisdictions.

Depending on the resources available, the speed with which technical recording of cases can be implemented and the degree to which members of the judiciary will be able to offer assistance, decisions and detailed *judgments* can be compiled and made available. As outlined above, these will need to be standardised and prepared for

publication in a manner that is clear and comprehensible and specifies the law involved, while preserving the anonymity of the parties.

The production of *statistics* will depend on the further development of the statistic-gathering function of the Courts Service IT system. Once collected, the statistics will have to be collated and comparisons made with previous years and other benchmarks, and analysed in order to reveal trends. Statistics can be presented as part of the Courts Service Annual Report. However, they should also be presented as part of a discrete publication dealing with its family law reports.

Such a publication can take the form of a once-off report from the pilot project, or a regular journal-type publication. It should contain sample reports of proceedings, judgments and decisions, and statistics and trends. I would envisage editing such a publication as a central part of the project.

Target Audiences

The material proposed for such a publication should be made available to the judiciary in the first instance. It would not be intended to involve them in an editorial role, but rather to engage them in the project as a primary stakeholder. The Judicial Studies Institute may be interested in having initial findings from the project presented at one of its seminars.

Other legal professionals could receive material from the project through specialist journals like the *Journal of Family Law*. I would envisage elements of the work, like the judgments and the statistics and trends, forming the basis of articles that could be contributed to this journal and to other professional journals like the Bar Council's *Review* and the Law Society's *Gazette*.

The publication should be made available to the general public through the Courts Service publication proposed above, which should be launched publicly by the Courts Service and made available to the media. The media should be allowed use it freely, in order to disseminate its contents as widely as possible. This should be backed up by media interviews.

Engagement with Stakeholders

The main stakeholders in this project, as well as the Courts Service itself, are the judiciary and the two branches of the legal profession, whose fullest co-operation is essential for the success of the project. I would envisage working closely with an advisory committee representative of these stakeholders, and also involving, if possible, the Law Reform Commission. The other major stakeholder is, of course, the court-user, and consideration should be given to eliciting their experience of the process through a simple questionnaire to be filled in when they come to court.

At the outset, the person in charge of the project should outline its objectives and how it will be progressed in articles that could be published in the professional journals of the different branches of the legal profession.

Through my work as legal affairs correspondent with *The Irish Times* I have developed excellent relations with members of the judiciary, the Bar Council, the Law Society and the Law Reform Commission, as well as people working in the Courts Service, and would look forward to continuing to work closely with them.

Proposed Timetable

The start date of the project could be critical. It would be important that the project be established quickly, so that the work of reporting is started as soon as possible after the beginning of the legal year.

First Quarter

1. Establish parameters of project with stakeholders;
2. Identify courts to be the subject of reports;
3. Set up collaboration with others working on the project and identify tasks;
4. Discuss the statistical aspect of the project with Courts Service staff;
5. Discuss and, if agreed, draft forms for use by members of the judiciary for the recording of decisions;
6. Start reporting on proceedings in a specified location (eg Dublin).

Second Quarter

1. Continue collecting above material;
2. Report from other venues (eg Cork, Limerick etc);
3. Evaluate material already collected and the need, if any, to redefine tasks;
4. Prepare an interim report;
5. Prepare a template for the use of others reporting from family courts;
6. Consider whether, on the basis of the work so far, the recruitment of additional reporters for the family courts is necessary;
7. Arrange a seminar with stakeholders to discuss the interim report.

Third Quarter

1. Continue with reporting from courts (eg Castlebar, more Dublin courts)
2. Prepare report on judgments received for the judiciary;
3. Prepare presentation of statistics for first six months;
4. Prepare articles based on above for specialist legal journals;
5. Prepare a Family Law Report publication incorporating sample reports of proceedings, judgments, and trends as identified by statistics collated so far;
6. Produce and launch this publication, with follow-up interviews, discussions with stakeholders, interest groups, etc

Fourth Quarter

1. Collate all the material collected in the first nine months of the project;
2. Prepare report on pilot project with conclusions, recommendations, plans for extension of the project and suggestions for legislative reform, if appropriate.

Appendix II

Family Law Reporting Regimes in Other Jurisdictions

International Experience

In most common law countries family law proceedings are open to the media and sometimes to the public, subject to certain restrictions. The matter is currently undergoing discussion and reform in England and Wales (see below). In Scotland there are minimal restrictions on the reporting of family law cases. In Canada, Australia and New Zealand family law cases can be reported, subject to anonymity restrictions. Judgments are either published or lodged in court in most European countries. The experience has been that this has not led to wholesale breaches of parties' privacy.

England and Wales

The Department of Constitutional Affairs, now the Ministry of Justice, has been carrying out a consultation process on opening up the family courts to the media for the past two years. Its initial consultation paper, published in 2006, proposed that the media be allowed to attend family law proceedings as of right. However, following an extensive consultation process, which included consulting with children and young people who had themselves been the subject of family court proceedings, Lord Falconer, the Lord Chancellor and Secretary of State for Constitutional Affairs, and his team concluded that this was not the appropriate way to deal with the issue of more openness in the family courts. Accordingly a second consultation paper was published in June 2007, and is now out for further consultation.

This consultation paper (*CP 10/07*) made a number of proposals which focused on increasing and improving the information coming out of the family courts, rather than on the people who should be allowed in. It proposed a new online information source, to provide better information to the public; such information would include judgments in important or significant cases, which are defined in the paper; family members involved in family law proceedings would have access to a record of those proceedings, and the reasons for the decisions made, which could be accessed by the children when they were adults; anonymous sample cases would also be on the website to inform the public about what typically went on in the family courts.

In addition, the consultation paper proposed that the courts provide general information to the public and potential litigants about family law and how decisions are reached; allow media organisations and others to apply to attend family law cases, with their attendance at the discretion of the judge; and amend the law so that there was

consistency across the various jurisdictions about media access to the family courts (at the moment there is access at Magistrates Court level, and the decisions of the House of Lords are published with full identifying details).

The paper acknowledged that these changes would be very resource-intensive, and proposed that they start on a pilot basis and be carefully costed.

Scotland

In Scotland, a country with a similar population to Ireland and therefore a similarly intimate society, there are no restrictions on access to family courts by either the public or the media. The identity of the parties can be published, though the court can prohibit the naming of children involved in proceedings, which obviously restricts the publication of some cases. Also there is a law dating back to the 1920s prohibiting the publication of the evidence in family law proceedings, presumably to protect people from lurid details of adultery. However, the evidence is usually summarised in judgments, and these can be published.

In reality, very few are. According to the senior court reporter with the *Scotsman* newspaper, the newspapers are only interested in cases involving big businessmen who have to share their property with estranged spouses, or tear-jerking child abduction cases. The most recent family law cases written up in this newspaper were in 2003 and 2000. In both these cases the children were named, so the stories could be accompanied by photographs of the children. According to the court reporter, this contributed to the attraction of the story for his newsdesk.

In Scotland, the law is very clear on the division of matrimonial property, child support issues are dealt with by the Child Support Agency, and custody and access issues are dealt with separately before a case gets to court, so there is very little to fight about. Therefore about 99 per cent of cases are settled anyway, so relatively few go to a full hearing.


Australia

Australia, like New Zealand, removed restrictions on the reporting of family law proceedings, subject to prohibiting the identification of parties, children, and even witnesses. There are heavy penalties for breaching these regulations.

Despite the opening up of the family courts to the media, according to the chief justice of the Family Court of Australia, there has been little interest in family law from the media, and the court has had to proactively seek publicity for its judgments, with some success in the serious media. Again, it appears that the media, especially the popular media, is only interested in publishing details of the family affairs of big businessmen and celebrities. As this is prevented by the anonymity rule, they largely ignore family law.

Canada

In Canada, prohibitions on reporting evidence in matrimonial cases, and comments by the presiding judge, were challenged in 1989 in the Supreme Court in *Edmonton Journal v Alberta (Attorney General) (1989)*. The challenge was made despite the



fact that the names, addresses and occupations of the parties, along with the charges, counter-charges, legal submissions and the summing-up and judgment of the judge could be published. The court decided by a majority of four to three that Section 30 (1) of the State of Alberta's Judicature Act, containing the prohibitions, contravened the Canadian Charter of Rights and Freedoms. The court found that, while the protection of the privacy of the parties in matrimonial proceedings was a legitimate objective of the legislature, the restrictions were too extensive and interfered excessively with the fundamental right of freedom of expression guaranteed by the charter.

Northern Ireland

Family law in Northern Ireland, and the law relating to the reporting of family law, closely follows the law in England and Wales. The Courts Service in Northern Ireland, therefore, is following the consultation process on this matter in England and Wales with great interest.

However, access to various types of family law proceedings is more open than in Ireland prior to the 2004 Act, and indeed more open than exists under the present regime. Magistrates courts, when dealing with any domestic proceedings, are open to the media and "other persons who appear to the court to have adequate grounds for attendance", but the court may, if taking evidence of "an indecent character" exclude persons not officers of the court or parties to the proceedings. In the county courts and the High Court, when dealing with adoption proceedings, matrimonial proceedings, domestic violence proceedings and children order proceedings, the matters must be heard "in chambers". However, this term does not mean that they are heard in secret, both members of the public and the press can request permission to attend, and it is not prohibited to publish what occurs.

There are restrictions on reporting what takes place in family law proceedings. In general, it is prohibited to publish matters other than the names, addresses and occupations of the parties and witnesses; the grounds of the application; a concise statement of the charges; defences and counter-charges; submissions on points of law; and the decision of the court. It is also prohibited to publish anything that could identify any child who is the subject of care proceedings (public law) or family law proceedings (private law) or their schools.

As in other jurisdictions, this has not resulted in great media interest in family law. Nor has Northern Ireland experienced a great demand for more access for the public or the media to the family courts.

Conclusion

There is more access to the media in family law in other common law jurisdictions than there is in Ireland, though a number of restrictions do apply. However, this does not appear to have increased public awareness of how family law works in these jurisdictions to a significant degree. Nor has it led to a significant decrease in the allegations of bias in the family courts. It appears that the media do not report routine family law cases, and are primarily concerned with cases involving celebrities or the very rich, or cases brought to their attention by an aggrieved party. Other methods of increasing public awareness of family law are being examined in a number of jurisdictions.

Appendix III

Aspects of the Family Law System in Other Common Law Jurisdictions

Introduction

Over the past number of years, most other common law jurisdictions have come to the conclusion that the adversarial system is not best suited to family law, and have been exploring alternatives. In particular, they have been investigating ways to ensure that family law is focused on the needs of the children in the future, and on ways of minimising the conflict between the parents in order to facilitate joint parenting. In many common law jurisdictions, this has meant moving towards specialisation in the family law area, with alternative forms of dispute resolution as part of the system, and, for intractable cases, specialised family courts with specialist judges, supported by trained specialists from other disciplines. A brief description of some of the systems in other jurisdictions is outlined below.

Australia

The Australian family law system has undergone a major overhaul over the past 30 years, culminating in amending legislation in 2006, entitled Division 12A, part VII of the Family Law Act. The essential characteristic of this system is to unite under a single federal court all family law cases involving children, and eliminate, insofar as possible, the adversarial element in these cases. The interests of the children are seen as paramount and the judges are given a special responsibility to ensure that their interests are placed at the centre of all family law proceedings. The system also sought to unite the best characteristics of the common law system, usually described as adversarial, and those of the civil law system of most of Europe, normally described as inquisitorial, leading to judges playing a greater role in cases.

A network of special family courts has been established at federal level. Judges in these courts were chosen “for their experience and understanding of family problems” and they underwent special training in both associated disciplines and in different, less adversarial legal procedures, which drew on the civil law tradition of Europe, with special reference to the German system for dealing with family law.

An in-house counselling service is an integral part of the Family Court. This encourages parents to resolve disputes about children without resorting to litigation, and with the assistance of court staff qualified in either social work or psychology.

The court also has the power to appoint a children’s lawyer to represent the interests of the child. This lawyer does not take instructions from the child, but represents his or her interests, and can be asked to act by the child him or herself, by a

child's welfare organisation or, most commonly, the court itself.

Responding to the significant increase in the number of lay litigants in family law, information packs and other resources were developed to assist lay litigants. However, the report on the Australian Family Courts, *Finding a Better Way*, stresses the importance of legal representation for all who need it, and the courts have been pursuing the expansion of the legal aid scheme.

There is a mediation unit attached to the Family Court, which seeks to find mediated solutions to family disputes. Only cases which cannot be resolved through counselling and mediation, amounting to between 5 and 6 per cent of all cases, are then litigated.

Active case management, by either the court registrar or the judge, is an essential feature of the Family Court. The judge seeks to identify what the issues are, and what evidence needs to be brought forward to help decide the issues. Judges were also trained in mediation, and use mediation skills in advancing the case.

Several methods are used for obtaining the views of the children in family law cases. These include the judge interviewing the child, usually in the presence of a family consultant (a trained professional from a social work or allied discipline) attached to the court, the preparation of a report on the child by the family law consultant, based on interviews with the child and family members.

Family consultants, attached to the family courts, have been involved in cases on a pilot basis in a number of states and territories. Their functions include providing a mediation input and social science perspective, supporting a less adversarial dynamic and promoting a collaborative approach, and providing a neutral and evidence-based commentary on the issues raised by the parties and their legal representatives. They also refer families to community-based services where necessary.

The Australian system therefore unites all forms of dispute resolution – counselling, mediation and litigation – under the one regime, and uses a broad range of experts to reach solutions in family law disputes. It recognises the special character of family law, and the judges and courts dealing with it are specialists, designed to deal with the complex emotional as well as legal and social problems that it throws up.

Finding a Better Way also describes the debt the Family Court of Australia owes to a study of the German system for dealing with family law disputes, especially insofar as they relate to children. In Germany when a family law petition is filed the other parent and the Youth Office receive a copy simultaneously. The judge summons the parents and children to a meeting, and speaks to the child or children both alone and with the parents, seeking to find a solution. A social worker from the Youth Office can also be involved. There is a capacity to appoint a guardian for the child for the proceedings, to represent his or her interests, and experts or teachers can also be asked for their views. At all times the focus is on the future care of the child rather than on events in the past.

The German system is of relevance to Ireland, not only because of its influence on the Australian system, but because of our mutual membership of the EU and the inevitable tendency towards some convergence of family law across Europe.

The regime now operating in Australia bears a striking resemblance to the proposals contained in the Law Reform Commission's 1996 *Report on the Family Courts* (LRC 52-1996).

Canada

Canada, like Australia, is a federal system. Unlike Australia, it has not established a federal family law court, though the federal government is encouraging the development of specialist family courts at provincial and territorial level. Federal, provincial and territorial governments share responsibility for family law matters, including the law itself, the appointment and payment of judges and the structure and processes of the courts. The Canadian Department of Justice oversees of the work of the provinces and territories in family law, and put forward a child-centred Family Justice Strategy in 2005. (Department of Justice of Canada, *Status Report 2004-2005*)

Its measures included the establishment of a Family Justice Fund to assist provinces and territories develop a child-centred family justice system. The fund supports parent education courses, mediation and other court-related services, and programmes aimed at developing ways to increase compliance with parenting arrangements and child support obligations. The government also legislated for the creation of United Family Courts in the various provinces and territories, and recently introduced legislation to expand these courts with the appointment to them of 27 additional judges, bringing the total number of specialist family judges across the different provinces and territories to 89.

The United Family Courts unite jurisdiction over all family law matters at superior court level in each jurisdiction, and exist in seven of Canada's 13 provinces and territories. They provide for a single court with jurisdiction to hear all issues raised in each family matter, easy access to a full range of family justice services, specialised judges who are expert in family law, and a user-friendly environment with simplified procedures.

The government also amended the Divorce Act to list specific criteria for parents, legal professionals and judges to use when considering the best interests of the child; to eliminate the terms "custody and access", replacing them with a new framework centred on parental responsibilities, including access to a counsellor or mediator, and providing for a judge to make a parenting order where the issue went to trial; and measures aimed at compliance with child support orders.

The province of British Columbia, which at the moment is not one of those with a United Family Court, embarked on a programme of family justice reform in 1994. This included the establishment of four pilot Family Justice Centres staffed by family justice counsellors, trained to help families with child custody, guardianship, access and support issues, and including a supervised access centre where the non-custodial parent could spend time with the child; a Parenting After Separation educational programme for parents; improved co-ordination between related services; and improving the enforcement of court orders. This programme has now been extended across the province.

The Family Justice Registry Project, established in British Columbia in 1998, provides that anyone who applies for child custody, guardianship, access or support order must meet with a family justice counsellor and may have to attend a Parenting After Separation session before they can continue with the court process. In addition, where issues of child support are involved, a child support officer linked to the court works with the parents to negotiate a child support amount. Thus counselling and mediation are an inbuilt part of the system.

Across Canada, therefore, there has been a move towards focusing on the needs of children in family disputes and seeking to minimise the role of the courts, integrating into the family justice system counsellors and mediators and other methods of dispute resolution, while developing a network of specialist family courts.

Scotland

Scotland has a similar population to Ireland, with much of that population concentrated in two urban centres. While part of the common law system, it has its own distinct laws and legal history. In relation to family law, it differs from the system in the rest of the United Kingdom to a significant degree.

In Scotland no order can be made in a family law case unless the judge is satisfied that adequate arrangements have been made for the welfare of the children. In relation to the children, the courts frequently do not make orders at all, preferring a non-interventionist principle, unless the parties require them to adjudicate. Orders relating to the children are only made in cases where the court considers this is better for the child than that no order be made. Financial support for children is no longer dealt with by the courts, but by the Child Support Agency, a body that has attracted widespread criticism since it was set up.

Where there are disputed issues concerning children, the court will arrange a child welfare hearing and a reporter (normally a lawyer who specialised in child law) is appointed. He or she will visit the child in his home and prepare a report for the sheriff (equivalent to a Circuit Court judge) who can make orders on accommodation, schooling etc. This hearing must take place within 21 days of the case being filed.

Child welfare hearings are heard in private, separately from all other issues relating to the divorce. Other family law actions are heard in public in Scotland, though in practice very few of them take place at all, as about 99 per cent of cases are settled without going to court.

Obtaining the views of the child is seen as of critical importance. The child him or herself can be present at the hearing, depending on age and maturity. Children under the age of 10 are normally not present. Children can also write in to the court, and may instruct their own legal representatives from as young as 10. Such representation is publicly funded. Parents, their legal representatives, the court clerk and sometimes a social worker may also be present at the child welfare hearing.

Terms such as “custody” and “access” have been removed from child-related proceedings, with the terms “residence” and “contact” substituted. Contact can be physical, supervised, or by phone, letter or email.

Only when matters involving the children are resolved can the parties proceed to a divorce. From filing the initial papers they have 10 weeks to adjust their pleadings. As a child welfare hearing must be held within 21 days, this means that pleadings can be adjusted after the child welfare hearing. Interim orders can be made as the cases proceed.

The requirement in Scotland that no divorce can be dealt with until issues relating to the welfare of the children are resolved puts children at the centre of the family law system, and prevents the mingling of these issues with, for example, issues relating to the family home and financial matters. Child support is no longer the responsibility of the courts at all. This removes any tendency for children to be used as a bargaining tool in multifaceted disputes.

England and Wales

In England and Wales, there is also a move away from the adversarial system and towards a greater use of mediation in settling family disputes. In March this year Family Justice Minister Rt Hon Harriet Harman MP QC told the 4Children charity annual conference: "The Government wants to ensure that early intervention, along with better engagement of parents and children in the process, is the norm. Where it is safe and appropriate to do so, cases should be resolved without needing to come to court."

To this end, she said, the UK government would do more to provide information and guidance and to support mediation, including getting parents early access to information and advice. People applying for contact with a child after the break up of a relationship will be told of the need to consider mediation and will be told that the court will consider whether parents have tried mediation.

A pilot on Family Group Conferencing, where families are encouraged to decide who children will live with and what the contact arrangements should be following divorce or separation, will be examined further.

If and when parents do come to court, the Children and Family Court Advice and Support Service (CAFCASS) will provide an in-court conciliation service. Ms Harman added that research shows that three-quarters of parents using in-court conciliation resolve some or all of their disagreements.

Meanwhile, the UK government is also drawing all family law together in Family Court Centres, where proceedings before any of four tiers of the judiciary involved in family law (Family Proceedings Court justices, district judges, recorders and circuit judges) take place on the same site, enabling cases to transfer easily between jurisdictions, and allowing for judges to develop their expertise by working together. This initiative is at present at a pilot stage, with pilots being conducted in Barnet, London, Birmingham and Ipswich.

Northern Ireland

The Northern Ireland family law system closely reflects that of England and Wales. There is concurrent jurisdiction across the District, County and High Court in most family law matters. In practice most child care applications are heard by the Magistrates Courts. Matters relating to residence and contact (custody and access) are also usually heard there. Court welfare officers, social workers attached to the court, are present in family proceedings and can assist the parties in coming to agreement.

Divorces (there are no judicial separations) are heard in the County and High Court. Unlike in this jurisdiction, a large proportion of divorce applications are heard in the High Court, and what the judges consider to be significant judgments, made anonymous, are usually published on the courts website. While one of two judges normally hear all High Court family law cases, there is no separate family court in Northern Ireland.



Conclusion

A common feature of all these systems, therefore, is the prioritising of the welfare of the child or children, and the efforts being made by the courts to resolve issues relating to children first. Various forms of counselling and mediation are employed before a case gets to court. Attempts are made to ascertain the views of the child, in an age-appropriate way. Non-legal professionals, trained in psychology, social work or child welfare, are also involved.

Of course, according to the Pilot Project study of the October 2006 decisions of the Circuit Court, only a minority of divorces and judicial separations, though a significant minority, involved dependent children. The vast majority of these cases were settled without going to court. However, these statistics also show that among the cases that went to a full hearing, a high proportion involved dependent children. In addition, the District Court received 6,769 child-related applications in 2006. Clearly, therefore, issues relating to custody of and access to children are among the most contentious in family law cases. This is a strong argument for putting in place measures to tackle issues involving children separately from the other issues that may arise in a family law case.

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