



THE BAR  
OF IRELAND

*The Law Library*

Submission by Council of The Bar of  
Ireland to the Joint Oireachtas Committee  
on Justice and Equality

REFORM OF THE FAMILY LAW SYSTEM

4 March 2019

## **INTRODUCTION**

The Council of the Bar of Ireland is the accredited representative body of the independent referral Bar in Ireland. The independent referral bar are members of the Law Library and has a current membership of approximately 2,200 practising barristers.

The Council of the Bar of Ireland ('the **Council**') has prepared this submission at the request of the Joint Committee on Justice and Equality for the purposes of its consideration of the topic of the Reform of the Family Law System having regard to the discussion questions provided with the invitation to appear before the Committee.

The Council makes this brief submission as a preliminary to what needs to be a full and comprehensive discussion of the issues arising and the proposed solutions to embark on a reform of the family law system. The Council will consult fully with its members on any detailed proposals for change that may emerge in due course.

## **NECESSITY FOR REFORM**

Family law proceedings are conducted as part of the existing court structure in Ireland. The present system allows the Circuit Court deal with the vast majority of private family law litigation. The High Court is available to deal with more complex or urgent matters, or where it is thought appropriate that the High Court hear the case. It is submitted that this division of jurisdiction works well and reflects the ability of differing courts to administer justice within their spheres.

Rules of procedures exist to filter cases brought in the High Court which are more suited to determination in a lower court. For example, a custody application brought in the High Court is automatically listed to allow the Applicant make arguments why the High Court should deal with the case and why the matter should not be remitted to the District or Circuit Court. In any case commenced in the High Court a party may apply to have it remitted down to the Circuit Court for hearing. It is submitted that there is appropriate balance in allocation of cases in differing jurisdictions at present.

## COURT STRUCTURE

The following table identifies the various jurisdiction of the court which deal with family law proceedings:

<b>District Court</b>	<ul style="list-style-type: none"> <li>• Childcare (including emergency care orders, care orders, interim care orders, and supervision orders)</li> <li>• Custody and access</li> <li>• Domestic violence applications (including barring orders, protections orders, safety orders)</li> <li>• Maintenance</li> </ul>
<b>Circuit Court</b>	<ul style="list-style-type: none"> <li>• Appeals from the District Court</li> <li>• Dissolution of Civil Partnership</li> <li>• Cohabitation</li> <li>• Divorce</li> <li>• Domestic violence</li> <li>• Judicial Separation</li> <li>• Nullity</li> </ul>
<b>High Court</b>	<ul style="list-style-type: none"> <li>• Appeals from the Circuit Court</li> <li>• Case Stated from the District Court</li> <li>• Habeas Corpus</li> <li>• Judicial Review</li> <li>• Adoption</li> <li>• Child Abduction</li> <li>• Dissolution of Civil Partnership</li> <li>• Cohabitation</li> <li>• Divorce</li> <li>• Judicial Separation</li> <li>• Nullity</li> </ul>

As evidenced from the above table, applications which arise in the context of relationship and marital breakdown are heard and determined in different jurisdictions within the existing

court structure. While an application for dissolution of civil partnership, divorce or judicial separation may only be heard in the Circuit Court or the High Court, many applications for custody, access and maintenance, particularly in relationship breakdown in non-marital situations, are heard before the District Court.

In Dublin, there are up to seven dedicated family law District Courts and there are three Circuit Courts sitting five days a week hearing family law cases. There are one to two High Courts allocated to hearing such cases. Outside of Dublin, much depends on the practice on each District and Circuit.

### **VOLUME OF FAMILY LAW APPLICATIONS**

The following is an indicative table of family law applications, the jurisdiction of the court in respect of which that application came before, and the 2017 statistics in respect of those applications:<sup>1</sup>

		<b>Incoming</b>	<b>Resolved</b>
Adoption	High Court	37	44
Child Abduction	High Court	36	44
Childcare	District Court	11,931	10,635
	High Court	32	21
Divorce	Circuit Court	3,964	3,389
	High Court	31	46
Domestic violence	District Court	15,962	16,314
	Circuit Court	n/a	51
Guardianship, custody and access	District Court	12,442	13,728
Judicial Separation	Circuit Court	1, 271	735
	High Court	23	53
Maintenance	District Court	9,234	11,936
Nullity	Circuit Court	23	19
	High Court	1	3

<sup>1</sup> The Courts Service Annual Report

As appears from the above table, the District Court is experiencing a high volume of family law applications. This places a significant burden on the existing court system. Since the introduction of the Children and Family Relationships Act 2015, cases involving custody, guardianship and access applications require the Court to hear the voice of the child. While welcomed, this now requires a number of listings before the Court whereas previously such applications would have been heard for the most part in one sitting.

The Council is strongly of the view that the expedient and efficient resolution of family law proceedings arising from relationship and marital breakdown is in the interests of children and the parties to the proceedings. The delays currently experienced in family law proceedings increases difficulties and complications which arise in the context of relationship breakdown.

The Courts have adopted Practice Directions and Rules in an effort to reduce the delays experienced in family law proceedings.

The existing court structure means that family law proceedings are often listed alongside criminal and civil matters. This is particularly the case outside of Dublin. In Dublin, there are dedicated family law courts and while delays remain in the system, there are not the chronic delays that can be experienced in other parts of the country. Outside of Dublin, the number of days allocated to family law sittings can be quite limited which results in system clogging and long gaps between the institution of proceedings and their determination. Practically, this can mean that clients attend court on numerous dates only for the case not to be heard with the inevitable frustration and anxiety this can cause as a result. It can increase legal costs for the parties where there is no certainty as to whether a case will proceed or not on a given date.

It is likely that family law cases would be dealt with more efficiently if a specialist division of family law courts and Judges were created. This would ensure that the same Judges would deal with family law lists on an ongoing basis which would not only ensure greater efficiency but also greater consistency. It is not envisaged that specialist Judges would be confined to family law but would be assigned to family law from the pool of general Judges. Such a family

law division exists de facto in Dublin and can operate within existing structures. However, such a division is meaningless unless adequate resources are allocated to it.

### **JUDICIAL TRAINING**

The existing court structure has resulted in judges determining family law applications without necessarily having detailed training or practical experience of family law proceedings. The Committee for Judicial Studies was established pursuant to the Court and Court Officers Act 1995 to organise training and seminars for members of the judiciary. Due to the absence of designated family law judges, the training provided to the judiciary is of a general nature. Furthermore, on the basis that Judicial Assistants are assigned to specific members of the judiciary as opposed to specific lists such as family law, relevant expertise is not utilised as effectively as it could be.

### **INADEQUATE FACILITIES**

The Council notes that the lack of adequate facilities generally for the conduct of family law proceedings has given rise to significant safety issues for members of the public, legal practitioners and the judiciary. Recently, a very serious security incident occurred in the context of a family law application being heard in Phoenix House where a litigant produced an imitation firearm and a suspect device and held a member of the judiciary, a legal practitioner and a litigant hostage. There have been other serious incidents in recent years.

In the absence of a purpose-built family law complex in Dublin, applications are heard and determined in various locations which are unfit for use. Current locations include child care cases being dealt with in the District Court sitting at the Bridewell, a nineteenth century court venue, Dolphin House, a nineteenth century hotel, and Phoenix House.

Outside of Dublin, family law applications are heard in existing District Court and Circuit Court locations on appointed days, as are Circuit Court Appeals. Due to the fact that family law proceedings outside of Dublin are generally heard on specially fixed days, the applications will necessarily take place in courtrooms constructed for multiple purposes; both civil and criminal. In such venues, it is not feasible to have designated or purpose designed resources

for family law cases, which represent only a portion of the business conducted in the courtroom.

### **IMPACT OF CONSTRUCTION AND DESIGN OF COURT HOUSES**

The construction and design of courtrooms has a direct impact on the way in which family law proceedings are conducted. Certain designs can encourage or foster an adversarial approach to litigation. Similarly, a lack of informed courtroom construction, whereby parties are forced to conduct themselves in close proximity, can increase anxiety, tension and has given rise to significant safety issues. The inconsistent resources in court venues and lack of adequate consultation rooms directly impacts on the manner in which family law proceedings are conducted. The failure to provide separate waiting areas or family friendly spaces in court venues can significantly increase avoidable stress and anxiety prior to participating with a family law application. Situations of increased stress and anxiety can result in volatility in the course of family law litigation.

The lack of consultation rooms or adequate consultation rooms results in delays in the hearing of family law applications. In the absence of private spaces, legal practitioners and their clients face difficulties in discussing important matters prior to entering the courtroom. This has the consequence that legal practitioners may not always be afforded time to be properly apprised of developing or changing facts from the client prior to the commencement of a hearing with the result that the hearing is delayed or frustrated in its progression. This directly informs the conduct of family law proceedings, is unavoidable and contrary to the policy of dealing with family matters otherwise than in public.

As family law applications are held *in camera*, it is inappropriate for consultations to take place between legal practitioners and parties to proceedings, including children, in public areas such as corridors adjacent to a courtroom. The failure to provide consultation rooms or an adequate number of consultation rooms has resulted in parties being required to discuss sensitive family matters in public contrary to the legislative and public policy purpose behind the *in camera* nature of family law proceedings.

There is generally no special provision made to accommodate parties and children involved in family law proceedings other than that ordinarily available to parties attending a court venue for other matters.

### **URGENT NEED FOR PURPOSE-BUILT FAMILY LAW COURT**

The intention to construct a purpose-built family law court venue at Hammond Lane is welcome but has not progressed. The Office of Public Works purchased the site for £4 million in 1999<sup>2</sup>. It has remained vacant since that time, twenty years ago. It has been expressly indicated that the development of a purpose-built family law court venue at Hammond Lane will address the several deficiencies in the family law court venues. The failure to construct this site in conjunction with inadequate facilities gives rise to a significant and serious risk that the existing system cannot adequately protect the rights of individuals participating in family law proceedings or children.

It is the view of the Council that the construction of dedicated family law facilities at Hammond Lane is absolutely necessary and will go a long way towards addressing deficiencies in the current family law system.

### **PROCEEDINGS OTHERWISE THAN IN PUBLIC**

The Courts (Supplemental Provisions) Act 1961 provides that matters of a matrimonial nature or involving a child should be heard otherwise than in public. Pursuant to section 40 of the Civil Liability and Courts Act 2004, the category of persons entitled to attend family law proceedings and publish reports therefrom was extended. Part 2 of the Courts and Civil Liability (Miscellaneous Provisions) Act 2013 allows *bona fide* members of the press to attend family law proceedings and to publish reports subject to certain conditions designed to ensure the anonymity of parties to family law proceedings.

The *in camera* rule is due to the sensitive nature of the proceedings. While the administration of justice in public necessarily involves a loss of privacy, the public interest is not served in requiring family issues and issues involving a child to be heard in public.

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<sup>2</sup> Irish Times: <https://www.irishtimes.com/news/environment/opw-targeted-for-criticism-over-vacant-sites-1.1485093>



The Council welcomes the entitlement of *bone fide* members of the press to attend family law proceedings and report and is of the view that the present regime adequately balances the rights of the public to monitor the consistency and conduct of family law proceedings and the rights of parties to have their family affairs regulated in private.

## **ROLE OF CHILDREN**

There are considerable difficulties in practice in attempting to give effect to the voice of the child in the context of various proceedings, including guardianship, custody and access, where the views of a child are to be ascertained and given due weight. Section 31(2) of the Guardianship of Infants Act 1964, as inserted by the Children and Family Relationships Act, 2015 sets out 11 factors to be taken into account by a court in determining what is in the best interest of a child.

Pursuant to the Child and Family Relationship Act 2015, the court may give directions for the purpose of procuring an expert report arising from questions affecting the welfare of a child and appoint an expert to determine and convey the views of the child. The court has considerable discretion regarding the circumstances in which such a report or determination should be required. The recent Guardianship of Infants Act 1964 (Child's Views Expert) Regulations are problematic in a number of respects, not least on account of the maximum fee set for the expert who are to provide such reports.

Among current difficulties are the following:

- (i) Absence of child friendly or suitable waiting facilities
  - the absence of child friendly or suitable waiting facilities may result in children attending court venues which are simultaneously hearing criminal and civil matters
  - the absence of child friendly or suitable waiting facilities may cause stress and anxiety to children where they come into contact with criminal and civil matters outside of designated family law facilities

- (ii) Lack of consistency in the manner in which the child is heard
  - while placing children in the witness box may assist judge or court personnel in hearing their views, such situations may have a stressful effect for children where they are placed in a situation of enhanced exposure
  - while some members of the judiciary come down to the body of a courtroom to sit with children while they give their views, such a method is not widespread and is restricted by venue and also the pressures and case load of the individual judge
  - while hearing the views of children in chambers may be a more informal method, there is no consistency in who may attend in chambers with the judge and how such a practice should be conducted.
  
- (iii) Child protection
  - the failure to provide guidance regarding the proper way to ascertain the views of children may give rise to child protection concerns

## **RIGHTS OF FATHERS**

The Council notes an absence of data regarding the outcome for fathers involved in family law proceedings. While custody may be granted jointly, it is still largely the practice to order that the child reside with one parent and have access with the other.

The Children and Relationship Act 2015 also provided new powers for the court to enforce custody and access rights. This includes the grant of enforcement orders to allow further access to a child to a parent who has been denied access in order to mitigate against any adverse effects which estrangement may have on the child. An unmarried father can seek a declaration from the Court that he is automatically entitled to be a guardian where he has lived with the child's mother for 12 consecutive months after 18<sup>th</sup> January 2016, including at least 3 months with the mother and the child following the child's birth. Furthermore, the court can order that either or both parents attend a parenting programme, family counselling or receive information on mediation. The Council notes that custody and access issues should

not be viewed as competing rights between parents of children but rather from the perspective of the child's right to the society and involvement of both of its parents where appropriate. This legislative protection for custody and access is welcomed by the Council as it further gives effect to the child's right to have the involvement of both parents, where appropriate.

The Court is required to conduct a balancing of rights when making custody and access arrangements following marital and relationship breakdown and this balancing of rights frequently results in access being afforded to a child's father. It is recommended that the collation of data regarding the outcome of custody and access applications would assist in understanding how the rights of fathers are presently balanced in family law proceedings.

#### **ALTERNATIVE DISPUTE RESOLUTION**

The Mediation Act 2017 imposes new obligations on the providers of legal services to advise their clients about the advantages of resolving disputes through alternative dispute resolution methods including mediation.

This obligation has existed in the context of relationship and marital breakdown since its infancy and the passing of the Judicial Separation and Family Law Reform Act 1989 where safeguards were put in place to ensure a party's awareness to alternatives to legal proceedings and to ensure that legal practitioners discussed with their clients the possibility of engaging in mediation to effect a separation on an agreed basis. This was also provided for in the context of divorce pursuant to the Family Law (Divorce) Act 1996.

Alternative Dispute Resolution should be encouraged in suitable cases. This can be done not only by legal practitioners but also, when litigation is in being, by Courts in the context of case management. Given the particular dynamics at play in family law proceedings, there will be some family law cases that are simply not suitable for the application of alternative dispute resolution processes.

## **COST OF FAMILY LAW CASES**

A properly functioning civil legal aid system is essential in providing access to justice. It is clear that the Legal Aid Board requires significant additional resources if a properly functioning civil legal aid system is to be provided. Despite the best efforts of practitioners employed by the Legal Aid Board, there are regularly lengthy delays in the running of litigation where either or both parties are represented by the Legal Aid Board. This adds to delays in Court and to litigation costs, especially where one party is privately represented.

At first sight the general civil law provision that “costs follow the event” seems attractive. However, in family law cases a significant number of litigants are legally aided by the Legal Aid Board. In most other cases, the reality is that costs, whether legal or in relation to expert witnesses, are coming from the one pot. These factors complicate the manner in which Courts deal with costs.

There are undoubtedly cases in which parties should be sanctioned and Judges are quite willing and capable of doing so. In the context of a specialist division of family courts and Judges, with the same Judge dealing with a particular list for some time, there is a realistic prospect of greater consistency in respect of all matters dealt with by the Court, including costs.

In addition, there are cases where litigants conduct the litigation in such a manner, such as causing undue delay and bringing multiple and perhaps unnecessary applications, that the Court should impose a financial sanction. This does occur but, as noted above, in most cases there is little reality to the Costs Order. While it is arguably best to leave the discretion in respect of costs to Judges on a case by case basis, the need for consistency, specialist Judges and an adequately resourced civil legal aid system is fundamental.

Other approaches to minimise costs include increased early judicial case management and an emphasis on early settlement negotiations. Some of the areas touched upon throughout this submission demonstrate how administrative organisation of the court structure and improvement in court facilities can each have a positive impact on the management of family law applications and lead to reductions in cost.



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