THE BAR
OF IRELAND
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BARRA NA hÉIREANN
*An Leabharlann Dlí*

# SUBMISSION OF THE COUNCIL OF THE BAR OF IRELAND TO THE REVIEW GROUP ON CIVIL LEGAL AID

3 February 2023

Contents

## Introduction

*'Access to justice is fundamental because without access to justice there is no democracy.'*[1]

Mr. Justice John MacMenamin (retired)
Former Judge of the Supreme Court

The Council of The Bar of Ireland ("the Council") is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,159 practising barristers. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

On foot of the establishment of the Group to Review the Civil Legal Aid Scheme ("the Review Group") by the Minister for Justice in June of 2022, submissions have been invited from relevant stakeholders, Government agencies and Departments, and persons with unmet legal needs. Arising from this, the Council has prepared the following submission to the Review Group on behalf of its members, many of whom operate at the coalface of the system under review. In addition to assembling a core group to prepare the submission, that group has reached out to a number of practitioners to glean as broad a view and perspective from members as possible. Direct commentary from Law Library members is included throughout.

## Scope of submission

The Review Group has identified the following issues as being at the core of its review and which are to be used by stakeholders to guide their response:

1. Types of civil law cases
2. Jurisdictions covered by the scheme
3. Eligibility
4. Financial Contribution
5. Mode of delivery
6. Accessibility
7. Awareness and assessment of the current scheme
8. The future
9. General observations

[1] Carolan M. 2022. 'There 'cannot be one law for the rich and one law for others', says retiring Supreme Court judge'. *Irish Times*. 25 November 2022.

## 1. Types of civil law cases

**Question 1: Considering the current operation of the scheme and the areas of civil law that are currently covered, what areas of civil law do you think it should cover? What is your reasoning for this?**

*'Legal aid is an essential component of a fair and efficient justice system that is founded on the rule of law and, as such, it represents an important safeguard that contributes to ensuring the fairness and public trust in the administration of justice.'* [2]

Report of Gabriela Knaul, United Nations Special Rapporteur on the independence of judges and lawyers, United Nations

If the Civil Legal Aid Scheme ("the Scheme") is to protect and vindicate the rights of those most vulnerable in society, and spread the veil of protection over the greatest number of rights, it must have broad applicability. The availability of legal aid in many types of civil cases has long been recognised as an essential component of ensuring that a person's constitutional rights of access to the courts and to a fair hearing are given effect to. That litigation can (and can be seen to) operate on an "equality-of-arms" basis is an essential element in the administration of justice in a democratic society.

In order to fully vindicate the constitutional rights protected and enhanced by the courts over many years, it is necessary to have a Civil Legal Aid Scheme that applies to as many types of cases as possible. This goes as far back as the seminal case of *Ryan v. The Attorney General* [1965] I.R. 294.

In addition, the European Court of Human Rights in *Airey v. Ireland*[3] found that:-

> *'Although this difference between the facts of the two cases is certainly correct, the Court does not agree with the conclusion which the Government draw therefrom. In the first place,* ***hindrance in fact can contravene the Convention just like a legal impediment*** *(above-mentioned Golder judgment, p 13, para. 26).* ***Furthermore, fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive and "there is ... no room to distinguish between acts and omissions"*** *(see, mutatis mutandis, the above-mentioned Marckx judgment, p. 15, para. 31, and the De Wilde, Ooms and Versyp judgment of 10 March 1972, Series A no. 14, p. 10, para. 22).* ***The obligation to secure an effective right of access to the courts falls into this category of duty.'***
>
> [Emphasis added]

[2] Knaul, G. (2013). Report of the Special Rapporteur on the independence of judges and lawyers. A/HRC/23/43. *United Nations*. 15th March 2013.
[3] [1979] 2 E.H.R.R. 305

Article 6 of the European Convention on Human Rights provides for the right to a fair trial. Whether Article 6 implies a requirement to provide legal aid depends on a number of factors. As stated by the European Court of Human Rights:-

> *'…it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary.'*

It added:-

> *'The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively…'* [4]

These considerations, together with additional factors set out in the Airey judgment[5], can be summed up into five key principles borne out of seminal judgments of the European Court of Human Rights and approved by the Court of Justice of the European Union (CJEU):[6]

1) The importance of what is at stake for the applicant;
2) The vulnerability of the applicant and their capacity to represent themselves;
3) The emotional involvement of the applicant which impedes the degree of objectivity required by advocacy;
4) The complexity of the relevant law or procedure;
5) The need to establish facts through expert evidence and the examination of witnesses.

The Council strongly urges the Review Group to be guided by these principles in its review of the Scheme and in making recommendations to the types of cases, and indeed the jurisdictions, in which legal aid ought to apply.

There is manifest desirability for improvements in terms of the areas of law to which civil legal aid applies. In the event that civil legal aid was to be made more widely available this would help, not only to achieve equal access to justice and to secure effective legal representation for all, but also to address the increasing incidence of litigants in person in the courts.

The 850 calls FLAC received in 2021 from lay litigants who are endeavouring to represent themselves in complex court cases and who are desperately in need of assistance, advice and representation (which FLAC does not have the resources to provide) is indicative of this unmet

[4] Steel and Morris v The United Kingdom, (2005), European Court of Human Rights, Application no. 68416/01.
[5] [1979] 2 E.H.R.R. 305 at p. 10
[6] DEB v Bundesrepuplik Deutschland, (2010), Court of Justice of the European Union, C-279/09 ECLI:EU:C:2010:811.

legal need.[7] There are a number of reasons behind self-representation but the inability to afford legal representation and non-qualification for legal aid are predominant factors.

According to the Annual Report of the Legal Aid Board ("the Board") for 2021, the following statistics indicate the spread of applications by case type:[8]

59.6% General Family Law Matters
19.5% Divorce/Separation/Nullity
9,7% International Protection & Human Trafficking
4.7% Cases involving possible State Care of children
6.5% Other civil matters

Family Law dominates legal aid applications year on year – a reflection of the numbers seeking such assistance. However, the number of applications for other civil matters is very low by comparison and, judging by the many clients that approach free legal aid centres such as FLAC and Community Law and Mediation (CLM) seeking legal representation in relation to matters other than family law, it is clear that there is significant unmet legal need in the country.

Housing, discrimination and social welfare presented as the main areas of law in FLAC's case files for 2021,[9] whereas CLM reported Housing and Homelessness (19%), Employment (15%), Debt (12%), and Social Welfare (5%) among the top five areas of demand after Family law (21%).[10] 30% of the 2,729 consultations held by FLAC in 2021 related to employment law, with 22% of service users seeking advice in relation to dismissal, and 16% in relation to discrimination.[11] There is a clear need to expand the extent to which legal aid covers housing, debt, social welfare, equality, and employment. The absence of effective legal aid in such areas demonstrates the breadth of fundamental rights which are not being vindicated because litigation in certain areas is very difficult to mount without legal aid.

However, that is not to say that the availability of civil legal aid should be confined to the aforementioned areas (family, housing, debt, social welfare, equality, and employment) and a reimagined Civil Legal Aid Scheme should be open to all applicants who are in need of information, advice, assistance and/or representation to vindicate rights and entitlements and who have satisfied any revised means test. For example, proposals are already afoot by Government to provide legal aid in environmental cases.[12] Recent commentary also highlights the lack of legal advice and representation in respect of personal injuries claims, particularly in the Circuit and District Courts, where it is becoming increasingly unviable for solicitors to take on small claims where the awarding of damages are small:-

[7] FLAC. (2022) Towards Equal Access to Justice FLAC Annual Report 2021 at p.13
[8] Legal Aid Board. (2022) Annual Report 2021
[9] FLAC. (2022) Towards Equal Access to Justice FLAC Annual Report 2021
[10] Community Law and Mediation. (2022) Annual Report 2021 at p.8
[11] FLAC. (2022). at p.18
[12] Murray, D. (2022). 'Free legal aid for environmental cases in major planning overhaul'. *Sunday Business Post*. 7 December 2022.

*"There is a definite access-to-justice issue, it is just not economic any more for smaller solicitors to take these cases."*[13]

| **Question 2:** | **Do you have any particular views on how types of cases should be prioritised for support, advice and representation in the future under the scheme?** |
|---|---|

It can safely be assumed that for each and every litigant their case is of the utmost importance to them. However, there are certain cases that inevitably need to be dealt with more urgently than others where the facts of the case demand it. For example, where a person's liberty may be at risk, or cases concerning the safety and wellbeing of a child. In such circumstances, there ought to be a clear and transparent process to determine the need for prioritisation on a case by case basis. This process should furthermore be subject to appeal.

## 2. Jurisdictions covered by the scheme

| **Question 3:** | **Should the current exclusion of proceedings before quasi-judicial settings continue to apply? Why?/Why not?** |
|---|---|

The changing of the landscape in terms of the variety of decision making bodies now in existence means that very significant and tangible rights are being decided and arbitrated upon in fora outside of traditional court settings. The following observations are made with regard to the above-mentioned five key principles on page 5.

**Workplace Relations Commission**

The Workplace Relations Commission (WRC) was established in 2015 to replace Rights Commissioners, the Employment Appeals Tribunal and the Equality Tribunal. It was designed with the intention that it would be an accessible adjudicative body and would avoid an overly "legalistic" approach to dispute resolution.[14] The attempt to informalise the procedures through which complex statutory complaints were heard was not successful. *In Zalewski v. An Adjudication Officer*[15], the Supreme Court criticised the absence of a statutory basis upon which an oath could be administered and further held that it was not constitutional that hearings before the WRC were heard other than in public. Critically that decision found that the exercise of powers by adjudication officers of the WRC was the administration of justice within the meaning of Article 34 of the Constitution. This important decision highlights that litigation in the WRC is of the same legal character as litigation before the courts.

The WRC adjudicates on significant and fundamental rights conferred upon individuals by the Employment Equality Acts 1998-2011 and the Equal Status Acts 2000-2015 – complex areas

[13] Carolan, M. (2023) 'Sharp fall in High Court personal injuries claims sparks demands for insurers to pass on benefits'. *Irish Times.* 10 January 2023.
[14] See Submission of Mr. Richard Bruton TD, then Minister for Jobs, Enterprise and Innovation, to the Oireachtas Committee on Jobs, Enterprise and Innovation (2012). Legislating for a world-class Workplace Relations Service.
[15] *[2021] IESC 24*

of Irish and European law which increasingly require the involvement of legal experts in the adjudicative process.

The Charter of Fundamental Rights of the European Union ("the Charter") applies where Ireland is implementing European Union law and thus covers a significant proportion of Irish employment law. In *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*,[16] a German reference, the CJEU was asked to consider whether a grant of legal aid was mandated by Article 47 of the Charter. The Court noted that it was apparent from established case law on the principle of effectiveness that detailed procedural rules governing actions for safeguarding an individual's rights under EU law must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law. The question referred thus concerned the right of a legal person to effective access to justice and, accordingly, in the context of EU law, concerns the principle of effective judicial protection. It held, setting out the governing principles, that:

> *"The first paragraph of Article 47 of the Charter provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. Under the second paragraph of Article 47, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone is to have the possibility of being advised, defended and represented. The third paragraph of Article 47 of the Charter provides specifically that legal aid is to be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."*

It is noteworthy that a recent directive of the EU in respect of the protection of persons who report breaches of Union law[17] recommends that reporting persons, working in the private or public sector who acquired information on breaches in a work-related context, have access to support measures including legal aid. Regrettably, Ireland opted out of this provision when transposing the directive into national law. [18]

The absence of legal aid in quasi-judicial settings has resulted in increased self-representation before adjudication officers. In the context of proceedings before the WRC, an individual may be pitted against vastly better-resourced entities such as a bank, a multinational company, or the State, undermining a person's constitutional right to a fair hearing on an equality-of-arms basis. Instituting proceedings before the WRC can be a complex process subject to strict procedural rules, forms and timeframes, and without experience may leave unrepresented individuals at a significant disadvantage.

> *"In the WRC, an employer can have a team of lawyers, while an employee may have nobody"* - Employment Law Barrister

[16] DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, (2010), Court of Justice of the European Union, Case C- 279/09 [2010] ECR I-13849
[17] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019
[18] Protected Disclosures (Amendment) Act 2022

While the law is clear that any litigant in criminal or civil proceedings is entitled to exercise their right of self-representation, the dangers of self-representation are manifold. Without the benefit of access to skilled advocacy, knowledge of litigation strategy, and indeed administrative support, lay litigants (and all parties involved) are faced with a myriad of challenges:-

- Without legal representation a person cannot be advised on what to expect from litigation and due to inexperience navigating court rules and procedures, the ensuing proceedings will invariably be longer and take up more court time.
- Further, where a party is unrepresented, the prospects of a case settling are much lower as that party will not know the relative strengths and weaknesses of his/her case and will not be in a position to consider whether or not it is in his or her best interests to settle.
- In addition, the legal representatives on the other side will be less willing, for proper professional reasons, to engage in detailed negotiations directly with the unrepresented individual. The result of this is that cases which would, in other circumstances probably settle, end up running, taking up court time and thereby unnecessarily delaying other litigants in having their cases heard.

The consequences of this for the smooth, efficient and economical administration of justice are well known. In the event that civil legal aid was to be made more widely available this would undoubtedly lead to the smoother and more efficient administration of justice in the civil courts and quasi-judicial fora.

In *C. v. Legal Aid Board*[19], Gannon J. observed:-

> *'By adopting the scheme for funding legal aid and advice to impecunious litigants the State provides resources to enable such persons to obtain the services of skills adequate to that of an adversary in civil litigation.'*

As in other areas of the law, expert and appropriate legal representation at an earlier stage contributes to the efficient disposal of matters and it is therefore less likely that matters will disproportionately and needlessly detain finite court and quasi-judicial resources. It is illogical that an individual can avail of legal aid where a decision of the WRC is being appealed or subject to judicial review proceedings in the civil courts, but legal aid is not available to them on application to the WRC in the first instance. Providing access to legal aid and the benefit of expert legal advice from the outset is likely to circumvent, or at the very least reduce, the need for subsequent appeals and judicial review. In fact, a study conducted by Cathal McGreal BL on employment equality cases before the WRC found that representation significantly increases a claimant's chance of success:-

> *'85% of successful complainants were represented and 75% of these had legal representation specifically'.*[20]

[19] [1990 No. 177 J.R.]

[20]McGreal, C BL. (2022). Assessing Award Quantum in Published Employment Equality Decisions. *Legal Island*.

**The Labour Court**

The Labour Court, established under the Industrial Relations Act, 1946, and its functions amended by subsequent legislation including the Workplace Relations Act 2015, hears all appeals of Adjudication Officers' decisions of the WRC in all disputes arising under industrial relations and employment rights enactments. As in the WRC, the Labour Court deals in complex areas of Irish and European law which increasingly require the involvement of legal experts in the adjudicative process. The Labour Court setting is very formal in nature with cases heard before a panel of three judges and parties may be represented by a solicitor or counsel. The Labour Court has its own procedural rules made pursuant to Section 20(5) of the Industrial Relations Act 1946 which require, not later than three weeks from the date on which the notice of appeal is delivered to the Court, a written submission setting out the details of the claim and the factual and legal arguments upon which a party intends to rely in the appeal (See Rule 6 of the Labour Court)[21]. It is a further complicating feature of this Court that appeals are from the WRC and accordingly a party may be doubly hindered in failing to have legal representation to navigate these complex matters at first instance and on appeal.

Without the necessary funds to procure legal representation and without access to legal aid, the same problems associated with self-representation (as outlined on page 9 above) arise, and further contribute to the serious risk of undermining a person's constitutional right to a fair hearing on an equality-of-arms basis.

It is furthermore of note, in accordance with Order 105 of the Superior Court Rules[22], statutory appeals against the Labour Court to the High Court are immune from Costs Orders. It is understood that while legal aid may be available for statutory appeals to the High Court, it is very rare, and appellants are further disadvantaged in that barristers, who frequently take on cases on a "no foal no fee" basis, are unlikely to be able to afford to take on a case where no costs will be awarded to cover their fees in a successful appeal.

A recent commentary by Mr. Justice David Barniville, President of the High Court, highlighted the importance of "no foal no fee", while qualifying that the tradition is no substitute for appropriately addressing unmet legal need:-

> *"People who don't have money have been able to litigate because lawyers will take on their cases for nothing in the hope that they might win. That's both branches of the profession and this should not be denigrated as it sometimes is. It should be praised because a lot of people who wouldn't get civil legal aid for the cases involved would not get near a courtroom if they didn't have solicitors or barristers willing to take a case on that basis. It creates a very unfair burden for the lawyers involved. They shouldn't have to subsidise a legal aid system that doesn't meet the needs of the community."*[23]

[21] Labour Court Rules 2022

[22] Order 105 Appeals and references from the Labour Court

[23] Phelan, S. (2022) '*Senior judge warns of looming crisis in Circuit Court amid anticipated surge in personal injury cases*'. *The Independent*. 16 December 2022

**Residential Tenancies Board**

The key role of the Residential Tenancies Board (RTB) is to resolve disputes between tenants and landlords – disputes which concern standards and quality of housing, security of tenure and notices of termination. The law in this area has become complex and difficult for both landlords and tenants to navigate. Many cases before the RTB are unsuccessful (both for tenants and landlords) due to an inadvertent non-compliance with statutory requirements, for example, in relation to the service of documents.

In recognition of the vulnerability of a large cohort of citizens, the Residential Tenancies (Deferment of Termination Dates of Certain Tenancies) Act 2022 came into effect on 29 October 2022. Under this temporary legislation, certain tenancies which were due to terminate between 30 October 2022 and 31 March 2023, known as the 'winter emergency period', will have the tenancy termination date deferred. However, the ongoing housing crisis and the acute supply constraints in the residential rental sector guarantees that this "emergency period" might persist long after winter. The end of this temporary protection for tenants may leave a significant number of people in very precarious circumstances. Without access to legal aid and by extension appropriate legal advice and representation, many will be unable to sufficiently assert their legal rights and, in extreme circumstances, rendered homeless. These are fundamental human rights issues which speak directly to the aforementioned principles espoused by the European Court of Human Rights (see page 5 above). There is nothing more at stake for an applicant than the loss of one's home.

Equally, impecunious so-called "accidental landlords" may be unable to assert their rights properly in the absence of appropriate legal aid and legal advice and representation in circumstances where there may be non-payment of rent and overholding by tenants, due to the increasing complexity of the statutory framework dealing with residential tenancies.

According to the latest Annual Report of Threshold – an independent advice and advocacy service for people experiencing housing problems – over 50% of private tenants who contacted the organisation in 2021 were at risk of homelessness. Tenancy terminations remains the largest issue facing private tenants for the fifth consecutive year, with 29% of queries concerning termination of tenancy. In 2021, Threshold advisors represented 255 households at the RTB – a substantial volume indicating the significant need for wider access to legal advice and representation on housing matters.[24]

Furthermore, it must be borne in mind that, as is often the case in the WRC, an individual may be pitted against vastly better-resourced entities in proceedings before the RTB. A recent CBRE report estimates that, while institutional ownership in the rental market is still limited, more than 15,550 residential units fall under this category in Ireland.[25] Institutional landlords undoubtedly have the benefit of entire legal departments, resources and expertise, thus calling into question whether landlord/tenant disputes before the RTB satisfy a citizen's right to a fair hearing on an equality-of-arms basis.

[24] McCafferty, J.M. (2022). Over 50% of private tenants who contacted Threshold at risk of homelessness – Annual Report launch. *Threshold*. 7 December 2022

[25] Department of Finance (2019), Institutional Investment in the Housing Market

**International Protection Appeals Tribunal**

In immigration law, legal aid is only available for international protection matters before the International Protection Appeals Tribunal (IPAT). No legal aid is available to persons seeking to challenge a wide range of decisions of the Minister for Justice and the State which engage fundamental rights. These include the decision to issue a deportation order, a refusal of an application for family reunification, a refusal of an application for naturalisation and decisions revoking refugee status or otherwise ending protection status. This excludes vast swathes of people from access to appropriate legal advice and perpetuates an unfair 'two tier 'system of those who have money and those that do not. It goes without saying that many immigrants may not have the right to work at all or be in receipt of a very modest income by reference to their legal status. The very *raison d'être* for a properly functioning Civil Legal Aid Scheme should be to remove tiers, not re-enforce them.

It should furthermore be noted that for the purposes of family reunification under Directive 2004/38/EC[26], access to judicial review has been specifically recognised as a necessary aspect of vindicating the right to effective remedy in the context of European Union law - see Balc v Minister for Justice and Equality. [27]

**Social Welfare Appeals Office**

The Social Welfare Appeals Office holds oral hearings. Similarly, oral hearings can be held by Disability Complaints and Appeals Officers under the Disability Act 2005. These appeals mechanisms apply very complex codes, and their decisions can have very significant implications for the poorest and most vulnerable people. Extension of legal aid to such fora should also be considered.

**Criminal Injuries Compensation Tribunal**

Efforts to rebalance the criminal justice system have been afoot for some years now.[28] Giving victims their voice in the context of criminal proceedings has been embraced by the judiciary,

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[26] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004

[27] Balc v Minister for Justice and Equality [2018] IECA 76

[28] See Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime. This sets out at Article 9 as follows:

*"Crime is a wrong against society as well as a violation of the individual rights of victims. As such, victims of crime should be recognised and treated in a respectful, sensitive and professional manner without discrimination of any kind based on any ground such as race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, gender, gender expression, gender identity, sexual orientation, residence status or health. In all contacts with a competent authority operating within the context of criminal proceedings, and any service coming into contact with victims, such as victim support or restorative justice services, the personal situation and immediate needs, age, gender, possible disability and maturity of victims of crime should be taken into account while fully respecting their physical, mental and moral integrity. Victims of crime should be protected from secondary and repeat victimisation, from intimidation and from retaliation, should receive appropriate support to facilitate their recovery* ***and should be provided with sufficient access to justice****."* [Emphasis added]

legal profession, Gardaí and society as a whole. In spirit of this, the lack of availability of legal aid to those engaging with the Criminal Injuries Compensation Tribunal (CICT) is no longer tenable. Comprehensive legal representation pursuant to the Civil Legal Aid Scheme needs to be extended to this if efforts to enhance the rights of victims of crime are to be vindicated.

It must be borne in mind that claimants before the CICT are often in a very vulnerable position by reason of the injuries perpetrated upon them and they may not be best placed to prosecute their claim without legal assistance/representation. This is all the more so where the claimant has suffered an acquired brain injury or some other life changing injury and access to legal advice and representation is crucial so that the best possible outcome may be achieved for such claimant.

Of further note is the finding of the European Court of Human Rights in *Gustafsson v. Sweden*[29] that an application for compensation under a criminal compensation scheme fell within Article 6 of the European Convention on Human Rights. Accordingly the procedural rights and guarantees of Article 6 apply to proceedings in this forum.

**Inquests**

Limited legal aid is provided in respect of inquests in certain kinds of deaths, e.g. deaths in Garda custody. However, this is limited and does not make general provision for the retention of counsel – only in exceptional circumstances. On a very basic level, this again propagates a two tier system, where those of means can retain counsel to robustly challenge the evidence at an inquest, whereas those who cannot afford to will be at a significant disadvantage. At a very fundamental level, the need to know how one's loved one died and the circumstances surrounding it is vitally important. In a more general sense, the benefits of a comprehensive death investigation process are dependent upon proper legal representation at an inquest. Society as a whole benefits from this as it gives an opportunity to make people safer and to learn from the mistakes of the past.

## 3. Eligibility

**Question 4: How appropriate are the current eligibility thresholds?**

**i. How should the financial eligibility threshold be determined to access the scheme or any successor in the future?**
**ii. Is there a particular figure which you would set?**
**iii. What is your rationale for that figure?**

Financial eligibility thresholds and setting precise figures is not, in general terms, an area upon which the experience of the Bar would enable us to offer very detailed consideration. Evidently, there is a clear need to make legal aid more accessible and to increase the scope of legal aid eligibility by raising capital and income thresholds. A review is currently underway

[29] Application no. 23196/94, 1 July 1997

in the UK, and the Review Group may glean insight from some of the proposals under consideration by the Ministry of Justice.[30]

The Review Group might also have regard to recently published guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law. Here, the Council of Europe stated that Member States should reduce the number of documents applicants are required to provide in order to prove eligibility.[31] For people in poverty, proving their income is a bureaucratic burden in itself, and one which they may be unable to bear.

Whatever eligibility thresholds are ultimately recommended, they should not be absolute and discretion should be retained (perhaps by way of an independent review panel) to afford legal aid to an applicant who may exceed the eligibility thresholds but who, for other good reason, makes out a case for entitlement to legal aid.

Lack of eligibility on the part of one party can often have a detrimental impact on the other party who qualifies for legal aid, for example in terms of delays being encountered whilst the non-eligible party must source and resource private representation. Thus, eligibility should be seen in the round and not just centred on the party seeking legal aid.

**Question 5: Are there other allowances or considerations, which should be made in determining eligibility (financial or otherwise) for the scheme?**

There is no mechanism at present to link eligibility thresholds to increases in the cost of living, and to reflect the increasing volatility of economic cycles. This is particularly pertinent in a cost of living crisis which is exacerbated by the ongoing housing and energy crisis. According to a recent report of the ESRI, average private rents are almost double their 2012 level.[32] In the context of rising costs, the disposable income threshold and the accommodation cost allowance in particular must be urgently reviewed.

Observations made by FLAC at a hearing before the Joint Oireachtas Committee on Justice and Equality on the Reform of the Family Law System in 2019 should be taken into consideration:-

> *'…Childcare expenses of up to €6,000 per annum may be discounted but the average childcare costs can be well over €1,000 per month in some areas. The means test needs to be poverty proofed on an ongoing basis and discretion must be available where someone fails to meet the means test in exceptional cases.'*[33]

[30] UK Ministry of Justice. (2022). Legal Aid Means Test Review
[31] Council of Europe. (2021) The Efficiency and the Effectiveness of Legal Aid Schemes in the areas of Civil and Administrative Law
[32] ESRI. (2022). Poverty, Income Inequality and Living Standards In Ireland: Second Annual Report
[33] FLAC. (2019). Submission to the Joint Oireachtas Committee on Justice and Equality on Reform of the Family Law System

Furthermore, certain persons can be said to be 'asset rich and cash poor' and it can be very difficult for such persons to procure legal representation. Allowances must be made in such circumstances.

There appears to be a lack of transparency regarding reasons for refusal of an application for legal aid. While an appeal mechanism already exists in relation to decisions around legal aid, the view of the Council is that it needs to be significantly enhanced and consideration should be given to an appeal mechanism independent of the Legal Aid Board. In enhancing it, its effect and powers need to be more meaningful to allow for a fair appeal with access to justice being at its core, rather than simply considering whether an applicant meets the strict eligibility criteria. The European Court of Human Rights stated in *Santambrogio v. Italy*[34] that the existence of an appeals procedure is an important factor in preventing arbitrariness in the decision not to grant legal aid.

| **Question 6:** | **Are there certain types of cases that are so fundamental to the rights of an individual that legal aid should be provided without a financial eligibility test? If so, what types of cases do you believe fall into this category?** |
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Legal aid should automatically be granted to parents of children who are the subject of care applications and respondents in child abduction cases. These cases can have a hugely significant impact on the lives of parents and children and this, of itself, merits the full legal representation and advice that parties generally have before the courts.

Legal aid should also be automatically available in circumstances where an applicant's liberty may be at risk and insofar as such deprivation of liberty occurs in a non-criminal setting.

The Council is furthermore of the view that in circumstances where an individual does not qualify for legal aid because they do not pass a means test, the Legal Aid Board and/or judges should be provided with discretion to direct that legal aid be granted by the Board (similarly to the approach adopted in criminal cases) and they should be obligated to exercise that discretion in line with a number of factors set out in legislation and bearing in mind the 5 key principles set out on page 5 above.

| **Question 7:** | **Should some form of merits test apply to the cases above? If so, what should that look like?** |
|---|---|

Whilst legal aid is automatically available to applicants in child abduction cases, it is not always available to respondents. It appears that when an application for legal aid is initially made by a respondent, the Legal Aid Board assesses that application on a merits' based criteria and if the view is taken that the respondent has no real defence, the application is refused and the respondents then appear in court stating that they have been refused legal aid. These respondents then go on to represent themselves or seek the assistance of McKenzie Friends (who are unqualified persons permitted to assist at a hearing, but not permitted to provide representation). Such cases are, and are acknowledged by the courts to be, legally complex

[34] No. 61945/00, 21 September 2004

and a party who does not have legal representation is placed in a significantly disadvantaged position.

As regards child abduction cases, due to the complexities involved, it is in most cases impossible to conclude at the initial stage of a case whether or not a respondent does have a stateable defence. This is because not only of the complexities of Hague Convention cases[35] but also because, at that stage, the child's views will not be known and, in many cases, this is a substantial ground of defence where the child is of a sufficient age and degree of maturity for the court to take account of his or her views (generally 7 years and upwards). Therefore, any assessment of the merits of the defence which is conducted before the child's wishes are ascertained (which can only take place during the course of the proceedings) is based on incomplete information. Accordingly, a respondent may well have a good defence even if it initially appears that he/she has no real defence. Consequently, the Legal Aid Board should be provided with discretion to grant legal aid without the need to satisfy a merits test in such cases.

Likewise, in any case where an applicant's liberty is at risk, including the parents/guardian of a child whose liberty is at risk (for example in cases concerning the involuntary admission of children under Section 25 of the Mental Health Act 2001), legal aid should be available without a merits test (separate to and in addition to the child).

**Question 8: Do you agree with how merit is defined and what matters should be included in the merits test?'**

As the Council understands it, the 'merits test' involves a consideration of

1) whether an average person (not a wealthy person) would be willing to go to court if they were paying for it with their own money; and
2) if a solicitor or a barrister acting reasonably would recommend that such person goes to court, knowing that such person was paying for it themselves and based upon the facts of the case.

In addition, the Council understands that other factors may be examined in establishing merit, including

- whether there are grounds for taking the case, or defending the case
- whether the case is the best way of solving the dispute in question
- whether winning the case is likely
- the cost to the taxpayer against the benefit to the legal aid applicant.

Merit should not be framed simply in terms of success or failure. Cases which appear at first instance to be unwinnable often throw up novel points of law which may ultimately result in

[35] *'Hague Convention on the Civil Aspects of International Child Abduction'* (1980) is an agreement made between various countries which aims to ensure the return of an abducted child to the country where he or she normally lives, so that issues of residence (custody) and contact (access) can be decided upon by the Courts of that country.

success or, if not successful, assist in the evolution of legal principles which is to the benefit of the civil justice system as a whole.

If a case is stateable, it should be eligible for legal aid and again, regard should be had to the 5 key principles set out on page 5 above.

It should also be borne in mind that litigants who are represented by lawyers provide a more efficient service which benefits society as has been set out above regarding the use of scarce judicial and court time.

## 4. Financial Contribution

**Question 9: How appropriate are the current levels of financial contributions?**

> *"I have had clients who were granted a Legal Aid Certificate but simply could not take it up because they could not pay the contribution; they are already at the margins of society"* - General Practice Barrister

It is the view of the Council that all compulsory contributions should be eradicated in respect of all individuals that qualify for civil legal aid.

It is appropriate that the Legal Aid Board currently waives all financial contributions in respect of cases concerning parents of children who are the subject of care applications, and those taking or defending proceedings in the District Court for a barring order, safety order, protection order, or interim barring order. These proceedings, by their very nature, can have a serious impact upon families and family life. The grounds upon which a Care Order is sought for example will generally involve serious allegations of physical, sexual, emotional and psychological abuse and of neglect.

There are many other cases involving issues of a serious and sensitive nature which necessitate legal advice and representation and it is essential that impediments of any kind are not put in their way. Many of those reliant on the Civil Legal Aid Scheme are already in a vulnerable situation. To impose a contribution, which may seem nominal to some, is not always feasible for a person trying to contend with basic household expenditures such as mortgage/rent, energy bills, and childcare, particularly in a cost of living crisis. The amount of the contribution will depend on a person's disposable income and assets, but for legal advice the contribution is in the range of €30 - €150; and for legal aid, the minimum contribution is €130.[36] It is unacceptable that a person in considerable need, who cannot meet the required financial contribution, should be left on the margins.

As stated in the 2019 Report of the Joint Committee on Justice and Equality on Reform of the Family Law System:-

[36] Legal Aid Board. (2016). 'Paying for your civil legal aid and advice'

*'These costs can be prohibitive and deter people from accessing the scheme, and can also create further monetary difficulties for those applicants living on basic incomes and/or social welfare, where the minimum contribution for representation would be significant'.*[37]

An amendment to the Civil Legal Aid Act in 2008 provides that the Legal Aid Board can waive a contribution if it would cause "undue hardship" to the applicant. However, a lack of awareness of the waiver coupled with the ambiguity as to what is categorised as 'undue hardship' renders the provision largely ineffective.

It is notable that the contribution requirement may offend Article 6 of the European Convention on Human Rights. In a number of cases relating to the system in Poland, the European Court of Human Rights held that the requirement to pay court fees and the inability to recover the litigation costs of defending oneself against a civil legal action by state authorities could violate Article 6 if it meant that the litigant was unable to pursue a case because of his or her inability to pay the court fees[38]. Those findings are clearly applicable to any similar statutory or administrative requirement that creates a real obstacle to accessing justice.

It is also worth noting at this point in the submission that Ireland is among a small number of European member states in which recipients of legal aid are not automatically exempt from paying court fees.[39] This obligation should also be eradicated.

**Expert Reports on the Views of the Child**

On the topic of financial contributions, individuals who qualify for civil legal aid should not have to make any contribution whatsoever towards the engagement of a child views expert in proceedings. It makes no sense that where legal aid is granted for legal representation in general family law cases, it is not automatically available for any report which may be required under Section 32 of the Guardianship of Infants Act 1964 (as inserted by section 63 of the Children and Family Relationships Act 2015).

Section 32(9) of the 1964 Act provides that fees and expenses of an expert shall be paid by the parties in such proportions as the court may determine. Reports are usually ordered to be paid on a 50/50 basis. For those holding a legal aid certificate, the Legal Aid Board may make a contribution which is often in the region of €350. However, the amounts differ from case to case and the deciding factors which result in such variations are unclear.

It has to be clear that if a person comes under the necessary income threshold to qualify for legal aid, he/she will not be able to afford a sum, ranging between €750 - €5000, to pay for

[37] Joint Committee on Justice and Equality. (2019). Reform of the Family Law System at p.33
[38] *Kordos v Poland* [2009] ECHR 787 26397/02; *Stankiewicz v Poland*, App. No. 46917/99, judgment of 6 April 2006; and *Tabor v Poland*, App No. 12825/02, judgment of 27 June 2006. See also the UK Supreme Court judgment of R (Unison) v. Lord Chancellor [2017] UKSC 51 where a Fees Order which imposed fees in respect of proceedings in employment tribunals ("ETs") and the employment appeal tribunal ("EAT") was struck down on the basis that it rendered access to the tribunals in order to litigate rights under EU unduly difficult.
[39] European Commission. (2022). The 2022 EU Justice Scoreboard at p. 23

an independent report which is ordered by the court. If a report is ordered and if there is insufficient or no legal aid available, this will inevitably lead to a delay in the proceedings while the parties try to arrive at a solution which may involve monies being raised from third parties for the full amount, or the shortfall, or finding an assessor to do the assessment for a reduced fee. If an expert cannot be appointed this leaves open the possibility that the constitutional right of the child to be heard is not being adequately fulfilled and in many circumstances, not adhered to at all. A review in the level of fees paid to child views experts engaged in family law proceedings through the Legal Aid Board should be undertaken as a matter of urgency.

In a similar vein, if an applicant is granted legal aid, then that legal aid should extend to the provision of all services/experts/reports to prosecute (or defend) that applicant's case, irrespective of the nature of the case. The prosecution or defence of a case should not be watered down or rendered ineffective by legal aid not properly covering proofs advised by counsel.

Separately, but relating to costs, when civil legal aid is available to an applicant, that applicant should not be at a disadvantage where, when costs are recovered from the opposing party, the legal aid applicant must then repay the Legal Aid Board's costs out of a settlement figure or an award. The current system of waivers (or partial waivers) of costs being granted by the Legal Aid Board is not transparent and the recovery of costs by the Legal Aid Board from an award or settlement runs the risk of that award/settlement being unfairly diminished in the hands of the applicant.

**Question 10: Should the financial contribution be assessed differently in respect of different types of subject matter?**

For the reasons outlined above, it is the view of the Council that all compulsory contributions should be eradicated in respect of all individuals that qualify for civil legal aid.

**Question 11: If so, should an individual pay a contribution based on the complexity of the subject matter and pay that in instalments over the length of the case as the case is progressed on his/her behalf?**

It is the view of the Council that all compulsory contributions should be eradicated in respect of all individuals that qualify for civil legal aid. The payment of a contribution by a litigant should not and cannot ever act as a barrier to the progression of a case or the efforts to appropriately vindicate their rights. Furthermore, looking at financial contributions in the round, it must be remembered that the collection and management of such contributions would lead to an added administrative layer. Inherent in such a system would be a significant cost which could outweigh its benefits and overall contribution to the cost of the scheme.

## 5. Mode of delivery

**Question 12: What are your views on the current modes of delivery of civil legal aid (i.e. through family law centres and private panel of solicitors)? Are there additional modes you would suggest?**

**Private Practitioners Scheme – Legal Aid Certificates for the Retention of Counsel**

It appears to be the policy of the Legal Aid Board that, save in exceptional circumstances, counsel is not retained in District Court cases. However, many of our members are retained in cases on the instructions of solicitors who participate in the Legal Aid Board's Private Practitioners Scheme ("the PP Scheme"). Such cases include general family law matters such as custody, access, guardianship and relocation.

Whilst some litigation is conducted by solicitors alone without the involvement of barristers, the intensity and complexity of many legal aid cases in the District Court is such that the contribution of the specialist advocacy and other skills of barristers is increasingly required. The PP Scheme makes no provision for the retention of counsel in the District Court however, and the level of fees to be paid to counsel is a matter for private agreement between the individual counsel and solicitor. The total fee payable under the PP Scheme, where the case concerns access, custody or guardianship only, is €339 (excluding VAT). If the solicitor and barrister agree to split the fee on a 50/50 basis (which appears to be common practice), the barrister receives a fee of €169.50 for the application. This is wholly inadequate for the specialist input and advocacy expertise required.

The PP Scheme also extends to cases heard before the International Protection Appeals Tribunal where the complexity inherent in such cases frequently necessitates the skills and expertise of counsel. The level of fees to be paid to counsel is a matter for private agreement between the individual counsel and solicitor, and as above, the split fee arrangement, as is common practice, does not adequately reflect the work that is required. The absence of specific provision for counsel leaves many practitioners facing the unenviable personal dilemma of deprioritising work undertaken via the PP Scheme in order to complete work that will pay an appropriate fee and earn a livelihood. This points to an increasing level of unmet legal need and to a real and developing concern of a potential shortfall in manpower within this area into the future.

> *"Sometimes, it [taking on legal aid work] can end up being €200 for forty hours work. It does not make sense"* - Immigration and Asylum Barrister

> *"The [legal aid] work has become vocational, almost pro-bono"* - Immigration & Asylum Barrister

The Council understands that many private solicitors (who heretofore partook in the PP Scheme) are no longer taking on PP work by reason of the extremely low rates of remuneration and the lengthy time commitment for such work. In these circumstances, the

Council questions the suitability of the PP Scheme as it currently operates and whether it is a suitable platform for the provision of effective legal aid across the country.

That said, and in order to best utilise PP resources, the Council is of the view that the PP Scheme could be extended to expressly provide for the retention of counsel to reflect the current reality of counsel being actively involved in such cases, and to appropriately remunerate them for the work carried out. Regard should be had to the Ad-Hoc District Court (Counsel) Scheme which came into force in October 2009 following the Supreme Court judgement in the Carmody case.[40] The case in the Supreme Court found that a person charged before the District Court had a constitutional right to apply for legal aid for counsel as well as a solicitor where the court considered that the case contained a degree of gravity and complexity or other exceptional circumstances. The Scheme also provides for counsel for the preparation and conduct of an appeal to the Circuit Court.[41]

**Retention of Counsel in Child Care Cases**

In circumstances where an order is being sought to take children into State care, it appears that legal aid for the retention of counsel is not automatically available to parents (or persons in loco parentis) of children who are the subject of such proceedings. The Legal Aid Board appears to only provide certificates for counsel where the case involves significant complexities. The Board appears not to provide certificates for cases involving neglect only. This raises significant concerns.

Firstly, these cases can have a hugely significant impact on the lives of parents and children and this, of itself, merits the full legal representation and advice that parties generally have before the courts.

Secondly, such cases are invariably complex and even where factual issues may not be contested, the legal issues involved are still complex and do require the input of a person with specialist skill, knowledge and experience. Whilst a case may at first appear to be simple, the nature of litigation in general and of these cases in particular is that unexpected complexities may well arise during the course of the proceedings and in such circumstances, the parents may be prejudiced by the absence of counsel.

Thirdly, it will often be the case that other parties in such proceedings (such as the Child and Family Agency or another family member or persons in loco parentis) will be represented by counsel. Where child protection processes and proceedings are instigated, the State and its agents have access to very well resourced and expert legal firms, many of whom rank in the top ten in Ireland. While on the other hand, under-resourced yet often very dedicated Law Centres represent the parents in such proceedings. Accordingly, where a parent is not represented by counsel, there will be an inevitable perception on the parent's part that there is an "inequality of arms" in representation thereby undermining that parent's faith and confidence in the court process.

[40] Carmody v Minister for Justice Equality and Law Reform, [2009] IESC 71

[41] Department of Justice. (2019). 'Procedures Governing The Payment Of Criminal Legal Aid Fees' at p. 21

Fourthly, it is, on the face of it, anomalous that a parent who is the subject of serious allegations such as sexual or physical abuse receives legal aid for representation by counsel whereas a parent who is the subject of allegations which may not be considered as serious or urgent, does not receive such aid. This appears to be unfair from the point of view of the parent who is the subject of less serious allegations. For these reasons, the Council believes that in child care cases where legal aid is granted for parents or other parties affected, such legal aid should include provision for the retention of counsel.

In addition, the amount of knowledge and the skill set required to represent clients in complex and/or long running childcare and family law proceedings in the District and Circuit Courts often requires the input of Senior Counsel and provision should be made for this as appropriate.

It should also be borne in mind that the Family Courts Bill 2022 provides for concurrent District Court and Circuit Court jurisdiction in child-care cases and a significant increase in the jurisdiction of the District Court to deal with judicial separation, divorce and cohabitation. Any new civil legal aid system should ensure that properly remunerated civil legal aid (with certificates for counsel) is provided at all jurisdictional levels.

**Community outreach and Specialised Law Centres**

It has long been proven that bringing services out into the community can have a transformative effect and impact. One example is the Aboriginal Civil Legal Aid Service in Australia.[42] This service visits Aboriginal communities in New South Wales and assists Aboriginals with financial problems, housing difficulties, police complaints and children checks. Working closely with organisations like the Aboriginal Legal Service, Local Aboriginal Land Councils, Community Legal Centres and other community organisations, people in need are connected to the services they need such as a legal aid lawyer and access to legal education on topics that are of interest to the community. The service demonstrates that the assertion of one's legal rights ought not to be just when 'people are in trouble', or enveloped in the criminal justice sphere. The law and legal aid should be promoted in its positive manifestation as a tool of empowerment in citizens' lives.

There is ample opportunity for the Civil Legal Aid Scheme to expand its reach across the many communities that live on the margins in Irish society, and as demonstrated in Australia, this concept in the provision of legal aid is not new, nor untested. It is a positive step that the Legal Aid Board commenced a project to engage with members of the Travelling Community through its Mincéir/Traveller Legal Support Service in 2021. Highlighting the initiative in the foreword of the Legal Aid Board's 2021 Annual Report, Nuala Jackson SC, Chairperson of the Board said:-

> *"The project remains at its early stages but I hope it will serve as a foundation for a deepening engagement between the Board and marginalised groups in society more widely".* [43]

[42] Legal Aid New South Wales. (2020). Civil Law Service for Aboriginal Communities
[43] Legal Aid Board (2022). Annual Report 2021

Specialised law centres such as the Refugee Legal Service are also an effective model of delivering expertise in legal representation in specific areas of law. If the Scheme were to be to be expanded to include the quasi-judicial and administrative decision-making bodies referenced in response to question 3 above, it is a model which might be considered in other areas of law, e.g. Employment Law Advice Service, Residential Tenancies Law Advice Service and so on.

A more diverse mode of delivery from that of the current Scheme will be essential to the delivery of a reimagined Civil Legal Aid Scheme and the expansion and enhancement of community based law centres, outreach programmes, and specialised law centres would go a long way to achieving this.

## 6. Accessibility

**Question 13: What are key barriers to accessing the service?**

**Lengthy Delays**

Despite the best efforts of practitioners, there are regularly lengthy delays where either or both parties are represented by the Legal Aid Board and are awaiting assessment of their eligibility, or require an extension of their legal aid certificate; all of which adds to delays and costs and leads to additional stress for clients. In turn, this has a knock on effect on the running of our courts' system where Judges have little choice but to adjourn cases pending the outcome of eligibility assessments by the Board. Where applications for legal aid are turned down, this can lead to an even further delay peppered with further adjournments and mention dates. This puts significant pressure on an already overburdened justice system.

Furthermore, it has been observed in practice that a client is only entitled to one legal aid certificate per year. It is understood that where it is a matter of an application under the Domestic Violence Acts, a second certificate in a twelve-month period may issue. However, the fact that a client must wait a full year before they can make an application in respect of other important matters which can arise in the middle of proceedings, for example, access or maintenance, places a significant delay on access to justice and is not in the public interest.

It is well recognised that the most significant demand for civil legal aid services emanates from the family law area. The very recently published Family Justice Strategy 2022 - 2025 recounts that:-

> '*depending on the area in which a family lives, the waiting times vary greatly for access to a consultation with a solicitor or a family mediator from the Legal Aid Board.*'[44]

Systemic delays throughout the system are a significant problem. At one stage, clients were waiting up to 24 months for a first appointment with a solicitor at a Law Centre in non-priority

[44] Department of Justice. (2022). Family Justice Strategy 2022-2025

cases. This was found by the High Court to amount to a breach of the constitutional entitlements of potential clients. As per Mr Justice Kelly:-

> *'it is not enough to set up a scheme for the provision of legal aid to necessitous persons and then to render it effectively meaningless for a long period of time'.*[45]

The manifestation of these delays can be seen in the table set out below[46]:-

Table 1: Waiting Times (Weeks) for Family Justice Applications and Services up to December 2021

| Service/ Application | Letterkenny | Dundalk | Dublin | Kilkenny | Limerick | Cork | Castlebar | Galway |
|---|---|---|---|---|---|---|---|---|
| **Domestic Violence (Family Law)** | Next Sitting | 8 - 12 | Same Day | 1 | 4 | Next Sitting | Next Sitting | 12 |
| **Maintenance/ Guardianship (District Court)** | 8 | 16 - 20 | 25 | 10 - 12 | 8 | 13 | 16 | 12 |
| **Contested Family Law (Circuit Court)** | 36 | 36 – 48 | 16 - 24 | 24 | 24 | 36 | 12 | 12 - 24 |
| **Family Law Appeal (Circuit Court)** | 36 | 24 - 36 | 6 | 24 | 12 | 24 - 36 | 12 | 12 - 24 |
| **1st Consult with Legal Aid Board** | 11 | 21 | 20 (Blanch) | 23 | 11 | 34 (South Mall) | 14 | 13 (Seville House) |
| **Family Mediation Service*** | 12 | 16 | 12 (Blanch) | 16 | 14 | 8 | 4 | 12 |

**As of June 2022*

*Source: Courts Service, 2021, LAB Statistics Sep 2021 & LAB website*[8]

**** "Blanch" refers to Blanchardstown***

Many litigants are waiting an inordinate amount of time for their cases to be heard and concluded. These delays serve only to exacerbate the difficulties of litigants and unduly complicate matters as time goes on. Such delays can only be rectified by increased investment in funding and resourcing for the Legal Aid Board so that eligibility assessments and initial consultations with a Law Centre can be processed in a timely and efficient manner.

**Lack of public awareness**

A second, and very different, barrier to access is knowledge on the part of potential applicants that (a) they have a right that is capable of being vindicated and (b) they are entitled to legal aid to seek to vindicate that right. There is significant unmet legal need in the community and this is a worrying barrier to access. And, as set out above, the strict application of eligibility criteria and financial contributions, together with the merits test, also constitute barriers to access.

[45] O'Donoghue -v- Legal Aid Board & ors, 2004

[46] Department of Justice. (2022). Family Justice Strategy 2022-2025 at p. 17

**Question 14: How can the administration and delivery of the service be made to work better for the individual users, NGOs and communities?**

The Council endorsed the recommendations of the 2019 Report of the Joint Committee on Justice and Equality on Reform of the Family Law System in respect of the running of a national public information campaign in order to ensure better provision and dissemination of information to the public regarding the family law process, and the supports that are available for those entering into proceedings.

The report states:-

> *'Many people are not aware of what is available in terms of supports, and there is confusion about guardianship and the limits of people's rights concerning access, custody and maintenance'.*[47]

A national public information campaign can be complemented by aforementioned community outreach initiatives. Furthermore, collaboration between the Legal Aid Board and the Courts Service to identify further opportunities for co-location to maximise awareness and access to legal aid among court users, together with other services, should be encouraged. An out of hours service operated by the Legal Aid Board should also be considered.

## 7. Awareness and assessment of the current scheme

**Question 15: What are its benefits?**

**Regional, Local and Remote Access**

The current scheme benefits from a good regional and geographic spread of Law Centres and mediation offices which ensure local access to legal aid, and which are, for the most part, well-equipped to facilitate client consultations in a confidential and professional manner. The continued use of telephone first consultations and also video consultations, maximised during the pandemic, is hugely beneficial and convenient for clients who may not be in a position to travel to a Law Centre in person. Another welcome innovation is the introduction of a Live Chat facility in 2021 offering members of the public access to information in real time from a member of staff about the Board's services and guidance on how to apply for legal aid.

**Refugee Legal Service**

As aforementioned, specialised law centres such as the Refugee Legal Service are an effective model of delivering expertise in legal representation in specific areas of law. If the Scheme were to be to be expanded to include the quasi-judicial and administrative decision-making bodies referenced in response to question 3 above, it is a model which might be considered

[47] Joint Committee on Justice and Equality. (2019). Reform of the Family Law System at p. 25

in other areas of law, e.g. Employment Law Advice Service, Residential Tenancies Law Advice Service and so on.

**Question 16: What are its challenges?**

**Under-funded and under-resourced**

Any discussion in respect of access to the current Civil Legal Aid Scheme cannot take place without reference to its chronic underfunding. As far back as 1994, this inadequacy has been highlighted, not least by the Law Reform Commission in its report of the same year:-

> *'……Legal aid and advice services, despite substantial recent investment, continue to labour under an expanding caseload, and too many litigants go 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.'*[48]

According to 2018 data collected by the European Commission for the Efficiency of Justice (CEPEJ), legal aid represented 39% of Ireland's total budget for the judicial system (which comprises the courts, legal aid, and public prosecution services) - a moderate budgetary effort given Ireland's wealth. In 2018, the implemented legal aid budget per inhabitant in Ireland was €22.95 per capita, which equated to 0.03% of the country's GDP. By contrast, our common law neighbour in England and Wales allocated a generous 41% of its judicial system budget, which equated to €31.26 per capita, the third most substantial budgetary effort of all European states in facilitating access to justice through legal aid at 0.1% of GDP.[49]

Former Chief Justice, Mr. Frank Clarke SC, made the following observations on foot of this data on the occasion of the Legal Aid Board's 40th Anniversary in 2020 and presents a cogent argument for greater investment in our legal aid system:-

> *'I have often commented that Ireland has the lowest number of judges per head of population in the developed world. It is also true that the cost of running the Irish courts system, as per the annual figures produced by the European Commission, show that the Irish taxpayer makes a significantly smaller contribution to running our justice system, when compared with population and GDP, to almost all other countries and is very significantly below most. However, the other countries towards the bottom of the scale are mainly also those operating a common law system. While there may be some difficulty in obtaining exactly parallel figures, it seems to be an almost inescapable conclusion from the published data that the taxpayer in a country which operates a common law litigation system saves a great deal of money.*
>
> *The Court itself, in a civil law system, bears a much greater burden in training judges, securing expert opinion, researching the law and the like. We recruit as our judges people who are already experienced lawyers and the State gets that training and*

[48] The Law Reform Commission. (1994). Consultation Paper on Family Courts

[49] European Commission for the Efficiency of Justice. (2020). European judicial systems CEPEJ Evaluation Report 2020 Evaluation cycle (2018 data)

*experience for nothing. We require the parties to provide the legal research to inform the judge on any relevant legal materials necessary to answer the case, whether it be complex or simple, and we impose an obligation on those lawyers to inform the Court of any relevant legal materials even if unfavourable.*

*That analysis seems to me to lead to a number of conclusions. The first, which goes right back to where we started with the Airey case, is that by placing a significantly larger burden on the parties to run civil litigation, we inevitably create a situation where legal representation is, in the sense in which it was used in Airey, necessary in a wider range of cases than might be the situation in civil law countries. When that is taken in conjunction with the right now enshrined in the charter of the European Union to have legal aid provided in any case where it is necessary to vindicate rights guaranteed under European Union law, there is at least scope for suggesting that, just as was the case at the time of Airey, there is a need for legal aid in a wider range of cases than might previously have been considered.*

*But a second consequence of the economic analysis suggests that it provides a powerful moral case for enhanced legal aid. If it is correct that the Irish taxpayer benefits very considerably by having a common law litigation system and does so by passing the burden to a significant extent onto the parties, then no-one may shed too many tears if those parties are significant corporations fighting over millions of euro in the Commercial Court. But where that extra burden is placed on people who are unable adequately to bring or defend civil proceedings then there is, in my view, a strong moral argument that the State should use some of the monies saved by the very system which places that burden on such persons by providing them with an enhanced system of civil legal aid.'*

**Budget forecasting**

In preparing the annual budget for legal aid, a number of pertinent indicators ought to be taken into account such as the number of cases progressing though the system; the number of applications pending approval; and an anticipation of the demand that is likely to be placed on the service due to crises presenting in areas such as migration, housing, inflation, the pandemic etc. In addition, regard should furthermore be had to any changes to legislation or changes to court processes which may increase caseload or add to the complexity of cases.

**Barristers' ability to undertake legal aid work under substantial pressure and strain**

Whilst the Civil Legal Aid Scheme does, in general terms, provide a very good service to its clients in very challenging circumstances, our members have, over the years, observed and experienced a number of difficulties across the operation of the Scheme which, in the opinion of the Council are hindering its capacity to provide meaningful legal aid to the most vulnerable sectors of society on a long term and sustainable basis.

The long term sustainability is closely linked to the ability of practitioners to be able to earn a livelihood from doing work under the Scheme. Given the increasingly complex, demanding and underfunded practise of family and childcare law in particular, the Council is concerned

with the potential impact on manpower within this area as a result of the untenable terms and conditions attaching to work for the Legal Aid Board. The Board's Terms and Conditions for the Retention of Counsel, introduced in 2012, are wholly inadequate and constitute a severe undervaluation of legal aid work. The Council made representations to the Legal Aid Board in a submission (appended) in 2018 highlighting, among other things, the need for a fundamental review of the fees. [50] It is vital that any such review ensures fair and reasonable payment for barristers engaged by the Board, and which properly reflects the professional nature of the work carried out and the expertise, commitment and skill that is required.

Anecdotally, some junior counsel who previously took first year devils/pupils on an annual basis are now not in a position to take on pupils. Decreasing numbers of pupil barristers is particularly problematic in the area of family law. Should a barrister not choose to devil in the area of family law, due to the *'in camera'* rule, they will be unable to attend family law courts and observe a case. It is therefore very unlikely that they would undertake these cases in the future, potentially resulting in a future shortage of expertise within family and childcare law.

The Council is alive to the reality that the provision of legal aid does not enjoy infinite resourcing and is another competing area of Government expenditure. Notwithstanding this, the reality remains that the ability of barristers to provide a proper service in the manner that is required to represent some of the most vulnerable members of our society is now under substantial pressure and strain. The increasing demands coupled with terms and conditions that are not fit for purpose is impacting on the morale of existing members of the profession. The long-term effect of these issues will be corrosive and most certainly not in the public interest.

This same argument applies to the solicitors that work for the Legal Aid Board. If the Board wishes to retain and attract talent, it must offer competitive remuneration packages akin to those offered in the private market. The Council understands that the Legal Aid Board has a difficulty in resourcing and retaining qualified and experienced solicitors by reason of the inadequacy of remuneration offered when compared with other state or semi-state employers. This leads to, in at least some cases, an excessive turnover of staff and legal aid clients and barristers bear the brunt of the disarray brought about by this under-resourcing, with barristers filling the gap and becoming over-involved in many cases without additional remuneration. Regard should also be had to the earlier comments regarding the PP Scheme.

> *"The Law Centres I've worked with are absolutely excellent, they don't get paid enough. The fees paid to counsel are wholly inadequate"* - Family Law Barrister

[50] The Bar of Ireland. (2018). Submission by the Council of The Bar of Ireland to the Legal Aid Board on the Operation of the Civil Legal Aid System and appended to this submission

**Question 17: What are its advantages?**

**Preventing problems from escalating**

While it is clear that the current scheme requires additional funding and resourcing in order to provide a more effective and efficient service, the existing service nonetheless serves to maximise positive outcomes for clients and alleviate the knock-on effects of unresolved legal problems which can perpetuate cycles of disadvantage. It stands to reason that, not unlike the advent of primary care in medicine, early and effective intervention ultimately leads to better results down the line.

A report from the UK's Justice Committee notes:-

> *"Early legal advice is absolutely key as it can stop problems escalating and if they do escalate, they [individuals with legal problems] can be better informed as to what to focus on".*[51]

The Civil Legal Aid Scheme's ability to address the legal needs of individuals, families and communities influences the wellbeing of society as a whole. A recent Report of the World Bank, in collaboration with the International Bar Association Access to Justice and Legal Aid Committee notes that:-

> *"Unaddressed legal needs affect individuals, their families, the justice system, the economy and the society. As this report outlines, impacts include not only monetary losses, such as stolen or damaged property, medical expenses, the loss of employment, income or productivity, but also socioeconomic costs that are real but harder to quantify. Often referred to as victimization costs, these may include pain, suffering, trauma, fear, reduced quality of life, damaged reputation, lost dignity, and reduced life chances. Children in families unable to assert their rights may be harmed by the effects of avoidable family breakdown, homelessness, and disrupted schooling, which may limit their ability to become productive and well-integrated members of society and may increase the likelihood of them requiring state support or intervention. Unaddressed legal needs may also incur a cost to communities. Foreclosure, for example, can lead to reduced business investment, lower property values, reduced economic output, and misappropriated financial resources (e.g., the potentially avoidable provision of emergency housing)."*[52]

**Value for Money**

Another advantage of the current scheme is its value for money. It has long been submitted by the Council that services provided by its members undoubtedly represent good value for money and the independent referral Bar is more economical and efficient than any other model that might be countenanced by the State. However, this is not to accept that the current level of counsels' remuneration is sufficient, and reference is made to the *Submission*

[51] UK Parliament Justice Committee. (2021). The Future of Legal Aid

[52] World Bank, IBA. (2019). 'A Tool for Justice: The Cost Benefit Analysis of Legal Aid'

*by the Council of The Bar of Ireland to the Legal Aid Board on the Operation of the Civil Legal Aid System* (2018) appended to this submission.[53]

The Civil Legal Aid Scheme would be far more costly if the State were to bring the provision of legal services in-house. If this were the case, the State would need to make provision for all of the costs and the risks that are associated with the appointment of employees, for example pension contributions, the cost of office space and the maintenance of premises, provision of law libraries and other research tools and materials, maternity leave, sick leave and holiday entitlements, secretarial, administrative and support staff, continuing professional development and other training needs. However, by contracting the services of the independent Bar, these costs and associated risks are avoided as they are absorbed by the barristers who participate in the Scheme. The income barristers earn is not profit. It is gross earnings from which the normal deductions of running a business apply, i.e., VAT, income tax, secretarial support, professional indemnity insurance, Law Library fees, office rental, etc.

The independent Bar therefore results in significant cost savings for the State year on year, giving effect to citizens' constitutional right of access to justice in the most cost-effective and efficient manner possible. This was recognised by the Department of Justice in respect of a 2018 Spending Review of the Criminal Legal Aid Scheme wherein it acknowledged that Ireland's cost effective and robust criminal legal aid system facilitates a high standard but low cost representation of defendants through skilled advocates engaged by the State.[54]

**Question 18: What are its disadvantages?**

**Lack of Funding**

In a cost of living crisis, more and more people will become eligible for legal aid, and access to justice will become even more pertinent. As detailed in response to question 16 above, without adequate funding, the Civil Legal Aid Scheme will leave countless people at the margins unable to assert, protect and vindicate their rights. Without addressing the Scheme's chronic underfunding, the Legal Aid Board will never realise the very mission upon which it was established which is to deliver timely, effective, inclusive and just resolution of family and civil disputes to those most in need of assistance. Increased funding and resources must be central to any recommendations which emanate from this Review.

**Staff turnover**

As previously mentioned, the Council understands that the Legal Aid Board has a difficulty in resourcing and retaining qualified and experienced solicitors by reason of the inadequacy of remuneration offered when compared with other state or semi-state employers. This leads to, in at least some cases, an excessive turnover of staff and legal aid clients and barristers bear the brunt of the disarray brought about by this under-resourcing. A reimagined legal aid

[53] The Bar of Ireland. (2018). Submission by the Council of The Bar of Ireland to the Legal Aid Board on the Operation of the Civil Legal Aid System and appended to this submission

[54] Department of Justice and Equality IGEES Unit. (2018). Spending Review 2018: Criminal Legal Aid: Overview of current system and potential lessons from an international comparison at p. 35

scheme should be properly resourced so that staff turnover, (a) is limited insofar as it can be and, (b) does not adversely impact on the provision of services.

**Lengthy and complicated application process**

The bureaucratic burden on those applying for legal aid is another major disadvantage of the scheme and a significant barrier to access. As aforementioned, regard ought to be had to the Guidelines of the Committee of Ministers of the Council of Europe wherein Member States are urged to reduce the number of documents applicants are required to provide in order to prove eligibility for legal aid.[55]

## 8. The future

**Question 19: How can an individual's awareness and understanding about justiciable problems or legal disputes be raised?**

As aforementioned, the Council endorsed the recommendations of the 2019 Report of the Joint Committee on Justice and Equality on Reform of the Family Law System in respect of the running of a national public information campaign in order to ensure better provision and dissemination of information to the public regarding the family law process, and the supports that are available for those entering into proceedings. Awareness and accessibility of legal aid can also be maximised through aforementioned community outreach initiatives and efforts to co-locate the services of the Legal Aid Board with the Courts Service.

The Legal Aid Board's own website is a primary vehicle for education and proactive steps ought to be taken to advertise and market legal aid services through national broadcasting on television and radio. The Personal Injuries Assessment Board (PIAB) is an example of a public service that has been very proactive in promoting its service. The Legal Aid Board should furthermore have a presence at national events such as the Ploughing Championships where it can enhance the visibility of its services and engage directly with citizens. Educating TDs and Councillors about the scheme through information sessions run by the Legal Aid Board is also another way of expanding its reach of citizens as local representatives would be equipped with useful knowledge they can in turn impart to their constituents.

**Question 20: How should individuals on low incomes and other marginalised groups be supported to access justice in the future?**

**Community Outreach**

Bringing services out into the community can have a transformative effect and impact. As mentioned earlier in the submission, asserting of one's legal rights ought not to be just when 'people are in trouble', or enveloped in the criminal justice sphere. The law and legal aid should be promoted in its positive manifestation as a tool of empowerment in citizens' lives.

[55] Council of Europe. (2021). The Efficiency and the Effectiveness of Legal Aid Schemes in the areas of Civil and Administrative Law

As demonstrated by the Aboriginal Civil Legal Aid Service in Australia, there is ample opportunity for the Civil Legal Aid Scheme to expand its reach across the many communities that live on the margins in Irish society. The Legal Aid Board's Mincéir/Traveller Legal Support Service is a step in the right direction.

**Lessen the bureaucratic burden on applicants and co-location**

As previously highlighted in the submission, efforts should be made to lessen the bureaucratic burden on those applying for legal aid, and greater collaboration between the Legal Aid Board and the Courts Service to identify further opportunities for co-location in order to maximise the accessibility and awareness of legal aid for court users. The development of new courthouses, such as the soon-to-be constructed Family Law complex on Hammond Lane, are ripe opportunities for the creation of "one-stop shops" where citizens can be apprised of their legal rights and given access to legal advice and representation where they are entitled.

**Question 21: What should the aim of a civil legal aid scheme be?**

In line with the Legal Aid Board's mission, the aim should be to deliver timely, effective, inclusive and just resolution of family and civil disputes to those most in need of assistance, through high quality legal representation and advice. Ultimately the Scheme must aspire to give meaningful effect to a person's constitutional rights of access to the courts and to a fair hearing. The Legal Aid Board should furthermore play an enhanced role in educating citizens about their rights and entitlements to legal aid, akin to the advice and information provided by Citizens Information. Public education should form a core objective of the Board, and this should be reflected in its mission.

**Question 22: What values should underpin it?**

Values of a properly functioning Civil Legal Aid Scheme should espouse values of professionalism, accountability, efficiency, equality, effectiveness and transparency.

**Question 23: How can the service best be targeted or prioritised for recipients in the future?**

As outlined above, targeting and prioritising those in need starts with awareness. It is vital that people are aware of the circumstances in which they have a right that is capable of being vindicated and that they are entitled to legal aid to seek to vindicate that right. This can be achieved through the aforementioned national information campaign, proactive advertising, broadcasting and community outreach initiatives.

**Question 24: What should the scheme's relationship be to other forms of publicly-funded/part publicly-funded legal assistance initiatives?**

It is important to remember that legal assistance initiatives such as FLAC and Community Law and Mediation exist to address the legal aid gap and to support and empower people who may not otherwise have the means to access justice. In an ideal world, a properly functioning

Civil Legal Aid Scheme would render these services unnecessary, however we do not live in an ideal world. Societal issues and the problems citizens encounter are constantly evolving and organisations such as FLAC are well positioned in terms of identifying and understanding where the Civil Legal Aid Scheme falls short of meeting legal need. Formal lines of communication ought to be established wherein bodies such as FLAC could help to inform continuous review and improvement of the Civil Legal Aid Scheme. The Scheme would need to have the capacity (i.e. resources and flexibility) to be able to respond to new and growing areas of unmet legal need in a timely fashion. Perhaps the Scheme ought to be subject to periodic reviews, every 5 years for example, to ensure it is reflective of societal needs. It cannot continue to rely on the pro bono community to address unmet demand.

Further, the capacity of existing pro bono vehicles (such as FLAC, CLM and The Bar of Ireland's Voluntary Assistance Scheme) should be available to provide information, advice, assistance and representation to those who continue to be on the fringes of a restructured system of legal aid and in educating members of the public about their legal rights (in areas that are not likely to come within the parameters of any Civil Legal Aid Scheme) rather than being used to supplement a scheme that is inadequate to begin with.

**Question 25: What additional roles should or could the Legal Aid Board have, if any, in relation to public legal assistance?**

As above, the Legal Aid Board should engage with public legal assistance bodies to inform continuous review and improvement of the Civil Legal Aid Scheme. The Board should furthermore collaborate with such bodies on local and national public education campaigns and initiatives to enhance its reach of citizens.

**Question 26: Is there a role for mediation and/or other alternative dispute resolution processes as part of a civil legal aid scheme or similar support system in the future? If not, why not? If so, what should the role be?**

Access to information meetings about Alternative Dispute Resolution (ADR) processes should be encouraged early in the litigation process and should be funded by the Legal Aid Board where at least one of the affected parties qualifies for legal aid. Legal aid should furthermore be made available to ensure eligible parties have access to an appropriate level of advice and/or representation in any alternative dispute resolution process they may enter into.

Mediation can present an efficient and cost-effective means of resolving family law matters in particular situations, however greater investment in mediation facilities is needed across the courts. The much-needed construction of a purpose-built family law court venue at Hammond Lane is an opportunity to adequately resource and enhance the provision of ADR services in a family law setting but this venue will not advantage the many non-Dublin based litigants whose plight must not be forgotten. The provision of appropriate resources must be nationwide.

Given the particular dynamics at play in family law proceedings, there will be some family law cases, for example, which are simply not suitable for the application of alternative dispute resolution processes (e.g., matters involving domestic, sexual and gender-based violence, or

where there is a reluctance to provide full financial disclosure). Furthermore, public child care cases should be deemed, in general, unsuitable for mediation. However, mediation should be left open as an option (with the benefit of properly resourced legal advice) in areas around voluntary care, access, decisions in respect of children's education or holidays, or medical assessments and treatment.

## 9. General Observations

It is clear that the legal aid system in Ireland is chronically under-resourced. The Legal Aid Board requires significant additional resources if a timely, efficient and effective civil legal aid system is to be provided. The benefits of a properly functioning Legal Aid Scheme are manifold. Greater investment in civil legal aid and the provision of expert and appropriate legal representation at an early stage would help not only to prevent clients' problems from escalating and resulting costs shifting to other areas of government expenditure, but would ensure the smoother, more efficient and more economical administration of justice in the civil courts as a whole.

In order to properly assess what the impact of a fully functioning system of civil legal aid could be, one has to take a holistic view of the entire system and see each of its constituent elements as being absolutely fundamental. For example, a state of the art court building together with cutting edge technology and highly trained staff will have limited impact where it exists alongside a system of legal aid that has limited eligibility or is under resourced. Habitual adjournments and lack of progress will continue unbated.

We stand on the cusp of a new dawn in the area of family law, which has been largely neglected for many years. A welcome and ambitious strategy has been published by Government[56], its efficacy will depend on all of the other key elements of the system being fit for purpose, not least our Civil Legal Aid Scheme. As a result, the outlook and commitment in respect of the provision of civil legal aid needs to be similarly ambitious.

**Economic Value of Legal Aid**

There is a strong and cogent economic argument for a well-resourced Civil Legal Aid Scheme. The aforementioned Report of the World Bank, in collaboration with the International Bar Association Access to Justice and Legal Aid Committee[57] notes that:-

> *'Legal aid has long been viewed as an expression of society's values. The primary arguments for supporting legal aid have rested on the inherent value to society of protecting the most vulnerable, and of ensuring access to justice for those who cannot afford a lawyer. By leaning heavily on constitutional, human rights and ideological principles underpinning the concepts of "access to justice" and "rule of law," proponents highlight how legal aid is intrinsically tied to the concept of the state and its duty to guarantee equality of arms as an element of equality under the law. Legal aid can help to ensure that people have access to information about their rights,*

[56] Department of Justice. (2022). *Family Justice Strategy 2022-2025*
[57] World Bank, IBA. (2019). 'A Tool for Justice: The Cost Benefit Analysis of Legal Aid'

*entitlements, and obligations. It is also essential for the protection and promotion of all other civil, cultural, economic, political and social rights. Without it, people who are living in poverty or otherwise vulnerable are denied the opportunity to claim their rights, resolve disputes, or challenge crimes, abuses or human rights violations committed against them.'*

The Report goes on to state:-

*'There are also economic arguments that support investment in justice and legal aid in particular. The price of failing to address the global justice gap is high. Not providing legal aid can be a false economy, as the costs of unresolved problems shift to other areas of government spending such as health care, housing, child protection, and incarceration.'*

*'Investments in legal aid can lead to significant government savings through avoided cost of arrest, conviction, incarceration, probation, and post-prison supervision. In addition, public investments in legal aid are also found to generate net savings in terms of avoided shelter/housing costs. Studies find significant net economic benefits, even in the short term, including immediate benefits to clients and cost-savings to governments.'*

The report demonstrates that the provision of an efficient, well-resourced legal aid service can help to maximise positive outcomes for clients and decrease cycles of disadvantage, while alleviating pressures on other areas of public expenditure and contributing to the wider economy. At times of budgetary constraints and fiscal emergency, with policymakers under increasing pressure to justify public expenditure and demonstrate evidenced-based decision-making, the Council submits that a cost–benefit analysis of legal aid is a prudent approach.

As the report rightly points out:-

*"Access to justice is no less important to equitable and sustainable economic development than good schools, functioning hospitals, and passable roads".*

## Summary of Recommendations

1) The Civil Legal Aid Scheme must have broad applicability. There is a clear need to expand the extent to which legal aid covers housing, debt, social welfare, equality, and employment, and in emerging areas such as environmental law.

2) A clear and transparent process to determine the need for prioritisation on a case by case basis ought to be established, with an entitlement to appeal.

3) It is essential that legal aid be extended to cover legal representation in quasi-judicial settings where very significant rights are being engaged and arbitrated upon including the Workplace Relations Commission (WRC), the Labour Court, the Residential Tenancies Board (RTB), the Social Welfare Appeals Office, the Disability Complaints and Appeals Office, and the Criminal Injuries Compensation Tribunal. The absence of advice and representation in such settings perpetuates an unfair 'two tier' system of those who have money and those that do not.

4) There is a clear need to make legal aid more accessible and to increase the scope of legal aid eligibility by raising capital and income thresholds. The means test needs to be poverty proofed on an ongoing basis and discretion must be available where someone fails to meet the means test in exceptional cases or in cases where the rights of a legally aided client are adversely affected by the non-availability of legal aid to the opposing party.

5) Regard should be had to the guidelines of the Committee of Ministers of the Council of Europe wherein Member States are urged to reduce the number of documents applicants are required to provide in order to prove eligibility for legal aid.

6) The appeal mechanism in relation to decisions around the granting of legal aid needs to be significantly enhanced.

7) Legal aid should automatically be granted to parents of children who are the subject of care applications and respondents in child abduction cases and in cases where an individual's right to liberty is in question.

8) In circumstances where an individual does not qualify for legal aid because they do not pass a means test, the Legal Aid Board and/or judges should be provided with discretion to direct that legal aid be granted by the Legal Aid Board (similarly to the approach adopted in criminal cases) and they should be obligated to exercise that discretion in line with a number of factors set out in legislation.

9) The Legal Aid Board should be provided with discretion to grant legal aid to respondents in child abduction cases without the need to satisfy a merits test.

10) All compulsory contributions should be eradicated in respect of all individuals that qualify for civil legal aid.

11) Individuals who qualify for civil legal aid should not have to make any contribution whatsoever towards the engagement of a child views expert in proceedings.

12) A review in the level of fees paid to child views experts engaged in family law proceedings through the Legal Aid Board should be undertaken as a matter of urgency.

13) The Private Practitioners Scheme should be extended to expressly provide for the retention of counsel to reflect the current reality of counsel being actively involved in such cases, and to appropriately remunerate them for the work carried out.

14) In circumstances where an order is being sought to take children into State care and where legal aid is granted for parents or other parties affected, such legal aid should include provision for the retention of counsel.

15) Access to information meetings about Alternative Dispute Resolution (ADR) processes should be encouraged early in the litigation process and should be funded by the Legal Aid Board where at least one of the affected parties qualifies for legal aid. Legal aid should furthermore be made available to ensure eligible parties have access to an appropriate level of advice and/or representation in any alternative dispute resolution process they may enter into.

16) Collaboration between the Legal Aid Board and the Courts Service to identify further opportunities for co-location and to maximise the accessibility of legal aid and information in respect of legal aid for court users, together with other services, should be encouraged.

17) An out of hours service operated by the Legal Aid Board should be considered.

18) The Legal Aid Board should expand its reach across the many communities that live on the margins in Irish society through community outreach initiatives, as demonstrated in Australia. The Board should continue to build upon current efforts to engage the Travelling Community through its Mincéir/Traveller Legal Support Service and expand its engagement with other marginalised groups in society more widely.

19) A national public information campaign should be implemented to enhance awareness of the supports that are available.

20) Public education should form a core objective of the Legal Aid Board, and this should be reflected in its mission. Proactive steps ought to be taken to advertise and market legal aid services through national broadcasting on television and radio. The Legal Aid Board should furthermore have a presence at national events such as the Ploughing Championships where it can enhance the visibility of its services and engage directly with citizens.

21) Increased investment in funding and resourcing for the Legal Aid Board is essential to facilitate the determination of eligibility assessments and the holding of initial consultations with clients in a more timely and efficient manner.

22) A cost–benefit analysis of a well-resourced legal aid system would be beneficial to understand the cost of failing to adequately address the justice gap. Not providing legal aid can be a false economy, as the costs of unresolved problems shift to other areas of government spending such as health care, housing, child protection, and incarceration.

23) Given the increasingly complex, demanding and underfunded practise of family and childcare law in particular, the Council is concerned with the potential impact on manpower within this area as a result of the untenable terms and conditions attaching to work for the Legal Aid Board. A fundamental review of the 2012 Terms and Conditions for the Retention of Counsel is urgently required to ensure fair and reasonable payment for the work done which properly reflects the professional nature of the work carried out and the expertise, commitment and skill that is required.

## Closing Remarks

The Council thanks the Review Group for the opportunity to contribute to this consultation process and remains available to discuss and answer any questions members of the Review Group might have in respect of any of the above.

## Appended: 2018 Submission by the Council of The Bar of Ireland to the Legal Aid Board on the Operation of the Civil Legal Aid System

THE BAR OF IRELAND

*The Law Library*

# *Submission by Council of The Bar of Ireland to the Legal Aid Board on the Operation of the Civil Legal Aid System*

6th February 2018

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## EXECUTIVE SUMMARY

Members of The Bar of Ireland have, in representing clients who have been granted legal aid by the Legal Aid Board (the "Board"), always been actively involved in the provision of civil legal aid. In this capacity, they have experienced and observed the operation of the Legal Aid Scheme (the "Scheme") at close quarters. Whilst the Scheme clearly provides very valuable and necessary assistance to persons in need of legal advice and representation in civil litigation, the Council of The Bar of Ireland (the "Council") is concerned, on the basis of the experience of our members, that the operation of the Scheme is encountering significant difficulties that may undermine its capacity to provide meaningful legal aid to the most vulnerable sectors of society on a long term and sustainable basis.

This is an issue of real concern given that, in many types of civil cases, the availability of legal aid to those who cannot afford legal representation is an essential element in the administration of justice. It helps to ensure that a person's constitutional rights of access to the courts and to a fair trial are given effect to and that litigation can and (can be seen to) operate on an "equality of arms" basis.

This submission identifies these difficulties by summarising the work done by our members in different types of cases in the courts of the three principal jurisdictions (District, Circuit and High) and referring to those difficulties in the context of that work. A significant (but not the only) difficulty is the Terms and Conditions on which barristers are retained by the Board, which came into effect on 1 August 2012 (hereafter referred to as the "2012 Terms"). For a number of reasons, the 2012 Terms are not "fit for purpose" and require a fundamental review so as to provide a fair and sustainable basis on which our members can be retained to work on legal aid cases into the future. An opinion from an independent firm of legal cost accountants, Peter Fitzpatrick & Co., (which is attached at Appendix 2 of these submissions) states that, amongst other matters, the 2012 Terms point to unfair remuneration for barristers and that the existing framework does not capture nor reflect work of counsel that typically prevails in 2018. Other difficulties in the Scheme identified in this submission include the non-availability of legal aid in certain types of cases and day to day operational issues such as the practice in relation to breach applications.

The Submissions conclude with the following recommendations:

(a) A fundamental review of the 2012 Terms as they operate across all courts to include:

   (i) a restructuring of the basis on which fees are calculated so that fees are paid for work which is actually done and in particular for interlocutory applications, individual court appearances, consultations and significant additional drafting such as court orders,
   (ii) a recalibration of fees payable so that the fees which are paid constitute a fair and reasonable payment for the work done which properly reflects the professional nature of the work carried out and the expertise, commitment and skill which is required,
   (iii) incorporation of provisions providing for the payment of fees on an interim basis.

(b) An extension of the operation of the Board's Private Practitioner Scheme (the "PPS") in the District Court to provide for retention of counsel so as to reflect the current reality of counsel being actively involved in such cases.

(c) An extension/enhancement of the availability of legal aid for reports on the wishes of the child so that proceedings are not delayed by a difficulty in seeking to obtain funds for such a report or in

seeking to identify an appropriate expert who is willing to carry out the assessment and the report for the amounts paid by the Board. It is clear from the Annual Reports of the Board that the number of other professionals engaged to undertake supporting work has significantly declined with spending on other professional fees reducing by 40% from 2006 – 2015.

(d) An amendment to the Scheme so that legal aid is automatically granted to parents of children who are the subject of care applications and to respondents in child abduction cases.

(e) The steps to be taken to address day to day operational difficulties such as the claim form, non-payment of fees due, the lack of transparency in respect of payment and the absence of any proper formal efficient structure to query payments received.

## INTRODUCTION

The Council of The Bar of Ireland (the "Council") is the accredited representative body of The Bar of Ireland which is an independent referral bar consisting of approximately 2,300 practising barristers. Many of these represent clients in courts at all levels throughout the country on the instructions of solicitors from the Legal Aid Board (the "Board") and on the instructions of private solicitors who receive payment from the Board in respect of particular clients in civil matters. This submission is confined to the operation of the Legal Aid Scheme insofar as it relates to civil matters only and will refer to the said Scheme as the "Scheme". The Council has made a separate submission in relation to the Criminal Legal Aid Scheme and this submission does not address any aspect of that Scheme.

## BACKGROUND TO THIS SUBMISSION

A significant number of our members work on a consistent basis on cases which are funded by the Board under the Scheme. These cases generally cover all types of matters in civil litigation but for the most part are made up of cases in the family law and childcare area.

Barristers who are retained by Law Centres operated by the Board are retained on the basis of the Board's "Terms and Conditions" which came into effect on 1 August 2012 (hereafter referred to as the "2012 Terms"). These replaced the agreement headed "Revised Arrangements" dated 30 September 1998 between the Board and the General Council of the Bar of Ireland.

In this capacity, our members have participated in the operation of the Scheme on a day to day basis over a long period of time and are thus in a unique position to observe its day to day workings and its effectiveness for the clients whom it serves. Whilst the Scheme does, in general terms, provide a very good service to its clients in very challenging circumstances, our members have, over the years, observed and experienced a number of difficulties across the operation of the Scheme which, in the opinion of the Council are hindering its capacity to provide effective legal aid to persons who have no alternative means of obtaining legal representation before the courts. There can be little doubt that developments in the law itself, practice and procedure and technology have added significantly to the day to day demands of litigation and therefore to the demands on the Scheme. Put simply, litigation in courts at all levels has become increasingly complex and more involved. For this reason, the Council decided to commence preparing a submission which would review work done by our members under the Scheme in courts at all levels with a view to highlighting those issues which the Council believe need to be addressed to assist the Scheme in reaching its objectives of providing effective legal aid to persons who cannot afford legal representation.

A significant (but not the only) element to this review was the question of how "fit for purpose" the 2012 Terms were in the current environment. At a meeting between representatives of the Council and the Board on 7 November 2017, the Board acknowledged the need to comprehensively review the 2012 Terms particularly in light of the increased complexity in the area of childcare arising from legislative changes in practice directions and requested that this submission be furnished in early course to assist it in a root and branch analysis of its current arrangements. (A note of this meeting is set out at **Appendix 1** of this submission).

Whilst this submission is made to the Board, it is hoped that it will provide a basis for a meaningful engagement between interested parties including the Council, the Board, the Minister for Justice and Equality, the Minister for Finance and the Minister for Public Expenditure and Reform with a view to

addressing the issues raised in the submission so as to ensure that the objectives of the Scheme in providing meaningful and effective legal aid in the public interest can be achieved.

**STRUCTURE OF THIS SUBMISISON**

This submission will address the following matters under separate headings.

- The requirement for Civil Legal Aid.
- The participation of barristers in the provision of civil legal aid.
- The operation of the Scheme in the District Court.
- The operation of the Scheme in the Circuit Court.
- The operation of the Scheme in the High Court.
- Day to day Operational Issues.
- The 2012 Terms and Expenditure on Civil Legal Aid.
- Conclusion.

Throughout this submission, the work done by our members in courts at different levels will be detailed, an outline of the issues arising in relation to the Scheme as observed and experienced by our members will be given and some day to day operational issues (such as the payment of fees) will be addressed. Further, for the purposes of this submission, the Council commissioned an independent firm of legal cost accountants (Peter Fitzpatrick & Company) to review the 2012 Terms in the context of work done by our members on legal aid cases and to provide an opinion on the 2012 Terms. A copy of this opinion is contained at **Appendix 2** of this submission and its principal conclusions are summarised further on in this submission. On the basis of all this material, the Council's principal submissions (as set out at the conclusion of the document) are as follows:

(a) A fundamental review of the 2012 Terms as they operate across all courts to include:

(i) a restructuring of the basis on which fees are calculated so that fees are paid for work which is actually done and in particular for interlocutory applications, individual court appearances, consultations and significant additional drafting such as court orders,

(ii) a recalibration of fees payable so that the fees which are paid constitute a fair and reasonable payment for the work done which properly reflects the professional nature of the work carried out and the expertise, commitment and skill which is required,

(iii) incorporation of provisions providing for the payment of fees on an interim basis.

(b) An extension of the operation of the Board's Private Practitioner Scheme (the "PPS") in the District Court to provide for retention of counsel so as to reflect the current reality of counsel being actively involved in such cases.

(c) An extension/enhancement of the availability of legal aid for reports on the wishes of the child so that proceedings are not delayed by a difficulty in seeking to obtain funds for such a report or in seeking to identify an appropriate expert who is willing to carry out the assessment and the report for the amounts paid by the Board. It is clear from the Annual Reports of the Board that the number of other professionals engaged to undertake supporting work has significantly declined with spending on other professional fees reducing by 40% from 2006 – 2015.

(d) An amendment to the Scheme so that legal aid is automatically granted to parents of children who are the subject of care applications and to respondents in child abduction cases.

(e) The steps to be taken to address day to day operational difficulties such as the claim form, non-payment of fees due, the lack of transparency in respect of payment and the absence of any proper formal efficient structure to query payments received.

## THE REQUIREMENT FOR CIVIL LEGAL AID

The availability of legal aid in many types of civil cases has long been recognised as an essential component of ensuring that a person's constitutional rights of access to the courts and to a fair hearing are given effect to.[1] The Council strongly believes that a properly functioning and effective legal aid system is an essential element in the administration of justice in a democratic society in seeking to ensure access to justice for all and the conduct of litigation on an "equality of arms" basis.

## THE PARTICIPATION OF BARRISTERS IN THE PROVISION OF CIVIL LEGAL AID

In so far as litigation is concerned and given the structure and operation of the courts system and the legal profession in the State, there can be little doubt that an effective and proper legal aid system has to involve the participation of qualified, competent and experienced barristers to advise and represent legally aided clients. The very fact that a matter has gone to litigation generally means that it is a highly contentious and/or complex matter. Whilst some litigation is conducted by solicitors alone without the involvement of barristers, the intensity and complexity of many legal aid cases from the District court upwards is such that the contribution of the specialist advocacy and other skills of barristers is required. Our members have always participated in the provision of legal aid by representing legally aided clients. Through the participation of our members in the provision of legal aid, legally aided clients have had the benefit of representation by and advices from barristers with a high level of experience, expertise and talent who are subject to an exacting code of conduct. It is important to point out therefore that the participation of barristers in legally aided cases is, amongst other matters, essential for the proper and effective functioning of the legal aid system in the State.

Where one of our members accepts a brief on behalf of a legally aided client, the Council confirms the absolute commitment and obligation of that member to advise and represent that client to the highest

[1] O'Donoghue v The Legal Aid Board [2006] 4 I.R. 204

professional and ethical standards in accordance with the Council's Code of Conduct. Section 2.3 of this Code provides as follows:

> *"Barristers must promote and protect fearlessly and by all proper and lawful means their client's best interests and do so without regard to their own interest or to any consequences for themselves or to any other person including fellow members of the legal profession."*

Any member accepting a brief on behalf of a legally aided client (or any client) is bound to act in accordance with this principle and will continue to be so bound regardless of whatever difficulties they encounter in carrying out their brief.

This submission will now address in turn the operation of the Scheme in the District Court, in the Circuit Court and in the High Court.

**THE OPERATION OF THE SCHEME IN THE DISTRICT COURT**

## Introduction

A substantial amount of legally aided work is carried out in the District Court where important childcare and family law issues (such as guardianship, custody, access, maintenance and relocation) are determined. Our members act in a substantial number of these cases on the instructions of one of the Board's Law Centres or on the instructions of private solicitors who are retained under the Board's Private Practitioner Scheme (hereafter, the "PPS"). This is a private practitioner Legal Aid Board Scheme which provides that the Board can issue certificates to clients covering them with legal aid fees for applications taken before the District Court. The Board itself does not represent the client, rather the client can take this legal aid certificate to any private practitioner solicitor who is on the Board's approved list. The solicitor is then free to brief counsel if he or she wishes. As an agreement or arrangement between the Board and solicitors, neither the Council nor our members have any direct involvement with the Board in the PPS although, as will be set out in further detail in this submission, a substantial amount of the court representation which is provided under the auspices of the PPC is provided by our members.

A substantial amount of cases in the District Court are difficult, legally and factually complex, very time consuming (both in terms of preparation, consultation and actual court time) and involve multiple court hearings on different dates. Examples of the work involved for barristers in different types of cases are set out below and this is followed by a summary of the issues which arise for the operation of the Scheme in the District Court.

## Childcare cases

Nature of Childcare proceedings

These are applications by the Child and Family Agency (hereafter the "CFA") to have children removed from their present circumstances (often from the care of their parents or one of them) and placed in the care of the State. They are proceedings which, by their very nature, can have a serious impact upon families and family life. In such applications, a court has the jurisdiction to remove a child from the care of his or her parents until he or she is 18 years old. The grounds upon which a Care Order is sought will generally involve serious allegations of physical, sexual, emotional and psychological abuse and of neglect. It is difficult to

imagine proceedings which could have a more significant impact on the lives of those who are involved. Given this and given also the nature of the conflicting interests involved and the legal and factual complexities of such cases, they are, generally speaking, difficult, lengthy and complex requiring significant input from all the professionals involved, including barristers.

Our members who are briefed by the Board's law centres in such cases are generally briefed to represent parents and other relatives who are *in loco parentis*. As well as being fully conversant with and experienced in court procedure, barristers acting in such cases have to have a comprehensive knowledge of Childcare Law, Family Law, Constitutional Law, the Law of Evidence, European Union ("EU") and European Convention of Human Rights ("ECHR") law. Further, it has to be borne in mind that clients in these cases are often amongst the most vulnerable and disadvantaged in society. They can have serious addiction and health issues, intellectual disabilities and often have experienced being in the care system themselves as children. In some situations, the parents are foreign nationals who face language barriers and an unfamiliarity with the Irish legal system. For very understandable reasons, clients often present as very distressed and angry. They are persons who are very much in need of professional guidance on the court system and advice as to their rights and obligations. Accordingly, as well as having the necessary intellectual and advocacy skills, barristers acting in such cases also need to have the inter-personal skills necessary to effectively engage with their clients so as to enable them to participate fully in the proceedings and to ensure that their position is properly represented to the court.

Work involved in Childcare cases

Childcare proceedings have in recent years become greatly expanded and significantly more complex in their scope and structure. The Court will not simply grant the CFA whatever Orders they seek. The Court will require the CFA to prove its case in respect of threshold and proportionality. Court hearings, even at Interim Care Order or Supervision Order stage, can last several hours and sometimes several days.

The work involved in representing clients in these proceedings is significant. It is not simply a matter of attending Court on the day for an Interim Care Order application or a Full Care Order hearing. There is a significant amount of court and other work required by counsel in advance of a hearing and between hearings. An outline of the work involved for counsel representing parents in a typical childcare case is set out below.

(i) Every childcare application must be made by way of an *ex parte* docket / Notice of Motion and a Grounding Affidavit. Counsel will draft same in their case and will sometimes have to put in replying affidavits where other parties have brought the application.

(ii) Along with Social Work evidence, there is very often evidence given from Gardaí, clinical psychologists, psychiatrists, Sexual Abuse Assessment Units, Doctors, Support workers, addiction service providers, Public Health Nurses, School Teachers and a wide variety of other professionals. Professional reports can be lengthy and complex. A brief for a Full Care Order hearing can be hundreds of pages long. Counsel will need to fully review same in preparing to cross examine witnesses.

(iii) Counsel will also have to take instructions from clients on the contents of these statements and this can necessitate lengthy consultations both on the day of the hearing and in advance.

(iv) There is also an increased reliance on video evidence from Garda Interviewers and Sexual Abuse Assessment units. Such videos also have to be reviewed in advance by Counsel.

(v) Where video evidence is being relied upon, it will usually necessitate a further consultation with clients to take their views after the client parents have themselves viewed the video tapes in advance of hearings.

(vi) Applications under Section 23 of the Children Act 1997, about admitting hearsay evidence of children so as to avoid a child having to come to Court to give evidence, are also routine and often highly contested. Written legal submissions will often be required. The evidence, disclosures made by children to various professionals, can often be central to grounding the CFA's application. Consequently, they are very often not accepted by client parents. Again, counsel need to have an in-depth knowledge of rules of evidence (including exceptions to hearsay rule, rules around video link evidence and the taking of evidence via an intermediary) to be able to deal with such applications.

(vii) The legal complexity of these cases cannot be understated. Applications will routinely involve issues of Constitutional Law, EU law, ECHR law and of course childcare law. For example, inquiries pursuant to Article 17, EC Council Regulation 2201 of 2003, can be held in respect of the jurisdiction of the Court to hear applications which have a cross border EU dimension. Written legal submissions will often be required in these and in many other types of applications.

(viii) Further, in these applications, the Court does not simply deal with applications for an Interim Care Order/ Full Care Order or Supervision Order. A wide range of applications made under Section 47 of the Childcare Act 1991 for directions on an issue concerning the welfare of the child will often be brought by parents or *Guardians ad Litem*, often at a separate hearing. These can be fully contested, necessitating replying affidavits and legal submissions. In addition, an application made under Section 37 of the Childcare Act 1991 can also be brought in respect of access which itself may require a separate contested hearing preceded by an exchange of affidavits drafted by counsel.

(ix) Even after a Care Order is granted, there will be a number of Court reviews, and significant legal issues in respect of the care the child is receiving can arise, including the breakdown of foster placements, access to education and support services and aftercare planning, necessitating further consultation with Clients.

Since the 31st of January 2013, pursuant to District Court Practice Direction "DC05" (see **Appendix 3**) the following further obligations are placed on practitioners of child care in Dublin (the President of the District Court's practice direction is only enforceable in Dublin, but when moveable judges are sent to other districts, they sometimes enforce it also):

(i) The Court now directs that the legal practitioners must have a settlement meeting or meetings in advance of a Full Care Order hearing to narrow issues. At the hearing call over practitioners will be asked to confirm that this settlement meeting has taken place, or will be taking place.

(ii) In advance of any such settlement a further consultation with the client will often be required to take their instructions in respect of proposals that might have been made by the CFA.

(iii) The Court also requires practitioners to attend a Case Hearing Call over in Court approximately seven to ten days in advance of the hearing.

(iv) The CFA is required to prepare a written Statement of Proposed Findings of Facts and furnish same to all the parties. Practitioners for parents are required to file, in advance of the Full Care Order hearing date, full written replies to those proposed findings of fact. It is not unusual for a Statement of Proposed Findings of Fact to include fifty separate proposed findings of facts dealing with allegations over a number of years and a number of children. Counsel will have a consultation with clients to get their instructions and must draft the written replies which can be lengthy and time consuming.

(v) The Court will often direct that parties agree letters of referral for psychological assessments and Counsel must liaise with Counsel for the other parties in terms of drafting of same and the terms of reference to be included.

A new Practice Direction ("DC06") is expected to be introduced in Spring of this year, which will place further obligations on practitioners concerning Case Management in Child Care Proceedings.

It can be observed therefore that childcare cases in the District Court are complex, involve multiple hearings and do require a significant amount of work on the part of counsel who are retained on behalf of legally aided clients.

By way of further illustration, an example of work actually done by one of our members in an actual childcare case is set out at **Appendix 4** of this submission together with a summary of the fees received by that member of the work which was done.

## Legal Aid in General Family Cases

Types of Cases

As pointed out above, as well as childcare cases, our members who work in legally aided cases in the District Court also represent clients in general family law cases dealing with day to day issues such as custody, access, guardianship and relocation. The experience of our members is that it is relatively rare for counsel to be retained directly by one of the Board's law centres for such cases but many of our members are retained in such cases on the instructions of solicitors who participate in the Board's private practitioners Scheme (the "PPS"). It is understood that, as a matter of practice, barristers sometimes appear in the District Court on behalf of a client without being attended by a solicitor or solicitor's agent. Because the Scheme makes no provision for the retention of counsel in such cases, the level of fees to be paid to the counsel is a matter for private agreement between the individual counsel and solicitor.

Custody/Access Cases

These are cases generally determining disputes between parents in relation to issues of custody of and access to minor children. Such cases have become considerably more complex and time consuming over recent years. This additional complexity is due, to a significant extent, to the reforms brought in by The Children and Family Relationships Act, 2015 (the "2015 Act") following the Constitutional referendum in 2012 which inserted Article 42A (concerning the voice of the child) into the Constitution.

Section 3 of the of the Guardianship of Infants Act, 1964 (the "1964 Act") (as inserted by section 45 of the 2015 Act) now requires that, in a wide range of applications relating to a child (such as guardianship, custody and access) the court must regard the "best interests" of the child as the "paramount consideration". Section 31 (2) (as inserted by Section 63 of the 2015 Act), sets out a non-exhaustive list of the factors to be considered when the Court is determining what is in the child's best interests. This is a very comprehensive list consisting of eleven separate broad factors (such as the physical, psychological and emotional needs of the child) and many judges require the parties to go through each factor individually so that the court can be satisfied that what is proposed is in the child's best interests. In particular, under section 31(2)(b) a court must have regard to the views of the child which are ascertainable. On some occasions, a Judge may think it more appropriate to speak directly to a child if he/she is of a certain age. However, more often than not, it is deemed more appropriate for an expert report to be completed under section 32 and a judge will order that such a report be procured. Prior to the amendments incorporated by the 2015 Act, the 1964 Act required the court to have regard to the "welfare" of the child as being first and paramount consideration and beyond that was not as prescriptive as to what a court had to take into account in determining an application under that Act.

Accordingly, district court applications relating to children now invariably involve multiple hearing dates and the provision of expert evidence as opposed to one or two relatively brief hearings. An outline of the progress of such a case involving a child is set out below.

- On the first return date of such an application, a court will frequently order that a report under section 32 of the 1964 Act be procured before it will hear the application. The application will generally be adjourned for a number of weeks to allow the parties to make appropriate enquires as to who can complete such a report, the cost of same and the timeframe for how long the report will likely take to complete.

- On the next return date, if the assessment has not taken place or if an assessor cannot be agreed between the parties, the court, having looked at the proposed assessor's information, qualifications, costs, timeframe and having heard oral submissions from counsel on this issue, decides who will be requested to complete the report. The matter is then adjourned for a number of weeks to allow the report to be drawn up. A real difficulty may arise at this point if the parties do not have the means to pay for a report as the contribution that is made by the Board to those holding a legal aid certificate is not always sufficient to cover the costs for such a report. Delays in obtaining a report can also limit or restrict access during this time, causing further hardship to the parties involved.

- On the next return date, an update must be given to the court. If, which is less often the case, the report is complete or close to complete, a Judge may then give the case a hearing date. The court will also likely give a prior "for mention" date in order for the report to be released to the parties (as the report is a court ordered report, the completed report is sent to the relevant court office and not to the individual parties or their solicitors).

- Once the report has been obtained and prior to the hearing date, a consultation with the solicitor/barrister is generally necessary to read through the report with the client. It may be the case that the assessor will need to be called by either or both parties to give evidence (unless the contents of the report are accepted.) This incurs a further cost and an expert is unlikely to come to court without the costs of same either having been discharged by the parties prior to the hearing date or that the said costs being held on account by the relevant solicitors.

- At the hearing of the application the parties, as well as other relevant persons such as the assessor, will be required to give evidence. Where a report is ordered and a hearing date assigned, the court may allocate half day hearing, full day hearing or indeed if appropriate a longer period of time to hear and determine the case.

- In many cases, at least one further consultation (either before the proceedings have commenced or after they have concluded) will be necessary.

Accordingly, as can be seen from the foregoing, these applications are now lengthy and complex and can involve at least four separate court attendances, at least one consultation, numerous other counsel advices and the procurement, review and examination of expert evidence.

Maintenance Cases

These are cases seeking maintenance on behalf of spouses and/or minor children. Prior to appearing in such a case, counsel will have to review a significant amount of financial information such as bank statements, credit union statements, mortgage statements, rental agreements, utility bills, wage slips, social welfare receipts, P45s, P60s, pension documentation and all vouching documentation in relation to income and expenditure. This involves reviewing hundreds of pages and conducting a forensic analysis of the financial material. Frequently, such applications are adjourned on the first hearing so as to enable the parties to obtain further documentation.

Domestic Violence Applications

Applications for safety or barring orders are also made under various legislation. New legislation is proposed under the Domestic Violence Bill 2017. The Bill seeks to update and consolidate the existing law in relation to domestic violence. It integrates the changes to the Domestic Violence Act 1996, the Domestic Violence (Amendment) Act 2002, the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, the Civil Law (miscellaneous Provisions) Act 2011, the Courts and Civil Law (Miscellaneous Provisions) Act 2013 and the Children and Family Relationships Act 2015. The Bill expands the scope of safety orders as well as creating a new type of order being an emergency barring order. Cases involving domestic violence often deal with very vulnerable individuals subjected to physical and/or mental abuse and must be handled delicately. More often than not they must wait in the same waiting area as the other party which can cause considerable upset. Gardaí and medical practitioners are often required to attend to give evidence. The case will often be adjourned to allow such witnesses to attend and a Protection Order will remain in place where one has been awarded through an *ex parte* application.

Relocation Applications

In the last number of years there has been a significant increase in the number of applications coming before the District Court and the Circuit Court (on appeal) for permission from the Court to relocate children outside the jurisdiction.[2] These applications are traditionally brought in circumstances where parties are either joint guardians of the minor child or are already subject to a Court Order in respect of access to the minor child. Applications to relocate are usually issued by the parent with primary care and control of the minor child.

[2] Relocation applications can also come before the High Court.

Grounds for said application traditionally include the following –

(i) the primary carer seeks to return home to avail of the support of their extended family;

(ii) improved opportunities for employment;

(iii) relocation to build a new life with a new partner.

It has been common case that applicants are seeking to relocate outside Ireland but increasingly applications have been issued where a parent is seeking to relocate to another county/province in Ireland.

Applications are brought under Section 11 of the Guardianship of Infants Act 1964, seeking permission to relocate outside the jurisdiction pursuant to a question concerning the welfare and best interests of the child. Applicants who have been granted Civil Legal Aid in respect of such an application are issued a Certificate to Institute Custody/Access Proceedings – this Certificate discharges a fee in the amount of €339 to the solicitor acting in the case. Junior Counsel are often briefed by Solicitors in receipt of a legal aid certificate due to the complex legal arguments and interpretation required in such cases. The fee paid to solicitors is usually split between Junior Counsel and the briefing solicitor. Separate fees for Junior Counsel are only discharged where an application is made by the instructing solicitor in respect of a certificate for Junior Counsel. Applications by Solicitors who are members of the Legal Aid Panel for District Court Family Law cases for a brief for Junior Counsel are rarely successful. The fee discharged by the Board covers all work carried out in respect of the case including the hearing. There is no facility for a refresher fee should the matter be adjourned to a further day(s).

Work carried out by Junior Counsel in such cases can be summarised as follows:

(i) Attendance at Consultation with Client and Solicitor in advance of the date of hearing to advise in respect of documentation required to proceed with an application by primary carer to relocate;

(ii) Letter of Advices to Briefing Solicitor in respect of documentation required, likelihood of success in the application and whether an expert report in respect of minor child would be required;

(iii) Collation of material provided by Client to Solicitor;

(iv) Advices as to whether an interpreter is required for the application;

(v) Analysis of expert reports prepared by psychologists and/or social workers ordered in respect of the application;

(vi) Further consultation with Client in respect of explanation of expert reports prepared in respect of the application;

(vii) Preparation and attendance at hearing of the application – including any interim applications and adjournments;

(viii) Where a report is ordered during the course of the hearing – a further hearing will be required

in terms of the outcome of the report and if necessary cross examination of the author of the report.

In light of the foregoing, applications generally run into a further day because of the requirement for the preparation of a report in respect of the views and wishes of the child. In some circumstances, the child is required to attend Court to determine his or her views in respect of the application and in those circumstances that can lead to an adjournment to a further day for hearing and for the parties to address issues that may be raised on foot of the child speaking with the Judge determining the application.

As set out in detail above, cases in the Family Law District Court are increasingly complex and time consuming and other than in very rare cases, they are not dealt with in just one day as is envisaged by the 2012 Terms. In these circumstances, the absence of any for mention fees or refresher fees is unsustainable. An example of work done and the fee payable in an actual district court case is set out at **Appendix 5** of this submission.

## Other Cases

The Children and Family Relationships Act 2015 inserted into the Guardianship of Infants Act, 1964, rights of certain parents to guardianship (Section 6B) or the right to apply for guardianship to persons other than the parents of a child (Section 6C). Also, the court now has the right to appoint temporary guardians (Section 6E). This has led to an abundance of new applications before the District Court (Sections 6B to 6E).

## Fees Payable

PPS

Under the PPS (which is how a substantial number of our members are retained to appear in the District Court) where the case concerns access / custody / guardianship only and not any other application (such as maintenance), the total fee payable under the PPS is €339 (excluding VAT). If the solicitor and barrister agree to split the fee on a 50/50 basis (which appears to be common practice), the barrister receives a fee of €169.50 for this application.

DISTRICT COURT LEGAL AID BOARD FEES (exclusive of VAT):

| | |
|---|---|
| Maintenance only | €339 |
| Guardianship only | €339 |
| Custody and/or Access only | €339 |
| Domestic Violence only | €339 |
| Custody and/or access and guardianship | €339 |
| Maintenance and custody/and or access /and/or guardianship | €423 |
| Domestic violence and maintenance | €423 |
| Domestic violence and custody / and or access / and/or guardianship | €423 |

Maintenance and domestic violence and custody/and or access/and/or guardianship €508

## Issues for the operation of the Scheme at District Court level

As can be seen from the foregoing and the cases outlined in the appendices, District Court cases can and do have a significant impact on the lives of the parties involved. They are now factually and legally complex, time consuming and require a high level of commitment, skill and experience from all the professionals involved (including counsel). The following serious issues arise for the operation of the Scheme in respect of such cases.

1. In practice, a client is only entitled to one legal aid certificate per year. It is understood that where it is a matter of an application under the Domestic Violence Acts, a second certificate in a twelve-month period may issue. However, the fact that a client must wait a full year before they can make an application in respect of other important matters which can arise in the middle of proceedings, for example, access or maintenance, places a significant delay on access to justice and is not in the public interest.

2. As regards childcare proceedings, it appears that legal aid for the retention of counsel is not automatically available to parents (or persons *in locus parentis*) of children who are the subject of such proceedings. The Board appears to only provide certificates for Counsel where the case involves significant complexities. The Board appears not to provide certificates for cases involving neglect only. For a number of reasons, this makes no sense. Firstly, as is apparent from the foregoing, these cases can have a hugely significant impact of the lives of the parents involved and this, of itself, merits the full legal representation and advice that parties generally have before the courts. Secondly, as also outlined above, such cases are invariably complex and even where factual issues may not be contested, the legal issues involved are still complex and do require the input of a person with specialist skill, knowledge and experience. Whilst a case may at first appear to be simple, the nature of litigation in general and of these cases in particular is that unexpected complexities may well arise during the course of the proceedings and in such circumstances, the parents may be prejudiced by the absence of counsel. Thirdly, it will often be the case that other parties in such proceedings (such as the CFA or another family member or persons *in locus parentis*) will be represented by counsel. Accordingly, where a parent is not represented by counsel, there will be an inevitable perception on the parent's part that there is an "inequality of arms" in representation thereby undermining that parent's faith and confidence in the court process. Fourthly, it is, on the face of it, anomalous that a parent who is the subject of serious allegations such as sexual or physical abuse receives legal aid for representation by counsel whereas a parent who is the subject of allegations which may not be considered as serious or urgent, does not receive such aid. This appears to be unfair from the point of view of the parent who is the subject of less serious allegations. For these reasons, the Council believes that in child care cases where legal aid is granted for parents or other parties affected, such legal aid should include provision for the retention of counsel.

3. As regards other types of general family law cases operated under the PPS, the legal aid made available for these cases should make proper provision for the retention of counsel. The fact that counsel is not separately generally instructed by the Board's law centres suggests that the Board believes that, save in exceptional cases, counsel is not necessary. However, this view does not appear to be shared by the solicitors operating in the PPS who take these applications on behalf of the Board and are then largely reliant on counsel to advise on, and act in, the application. In fact, in many cases,

solicitors do not themselves attend court and counsel attends court himself/herself without the benefit of courtroom assistance from solicitors. These solicitors are clearly of the view that these applications do now require the specialist input and advocacy expertise of counsel. It is clear that such input and expertise *is* required. Similar to childcare cases, such cases can have a significant impact on people's lives and have become increasingly complex. It appears to be the policy of the Board that, save in exceptional circumstances, counsel is not retained in District Court cases. This may have been a justifiable policy in the past when applications may have been simpler involving fewer witnesses and the legislative framework was not as prescriptive. However, in light of the developments outlined above, such a policy is not conducive to providing effective legal aid in such cases and is no longer tenable.

4. It makes no sense that where legal aid is granted for legal representation in general family law cases, it is not automatically available for any report which may be required under section 32 of the 1964 Act. Section 32(9) of the 1964 Act provides that fees and expenses of an expert shall be paid by the parties in such proportions as the court may determine. Reports are usually ordered to be paid on a 50/50 basis. For those holding a legal aid certificate, the Board may make a contribution which is often in the region of €350. However, the amounts differ from case to case and the deciding factors which result in such variations are unclear. The income thresholds applying to qualify for legal aid are very low and it has to be clear that if a person comes under these thresholds (which he/she must to obtain legal aid), he/she will not be able to afford a sum, ranging between €750 - €5000, to pay for an independent report which is ordered by the court. If a report is ordered and if there is insufficient or no legal aid available, this will inevitably lead to a delay in the proceedings while the parties try to arrive at a solution which may involve monies being raised from third parties for the full amount, or the shortfall, or finding an assessor to do the assessment for a reduced fee. This inevitable delay interferes with the running of the application thereby impacting adversely on the parties' access to justice. Furthermore, this interferes with the Constitutional rights of the child for his/her voice to be heard in the application.

5. In childcare cases where counsel is retained, the fees paid to counsel are wholly inadequate and do not, in any way, reflect the level of work, expertise, skill and complexity involved. This is partly due to the structure of the basis on which fees are paid which is set out in the 2012 Terms and which is completely unsuitable for the purpose of determining fees in these types of cases. This issue is addressed in more detail in the legal costs accountant' opinion contained in **Appendix 2** of these submissions.

6. **I**n general family cases, the fees paid are also wholly inadequate for the representation and advice which is required – especially when a solicitor and barrister are involved. The prescribed fees (as summarised earlier on in this submission) are clearly inadequate and do not recognise the expertise, skill, time and value to the client of counsel's input. It cannot be described as legal aid in any meaningful sense of the term. Of particular concern is the fact that no provision whatsoever is made for separate appearances in court. As outlined in the examples given above and in **Appendices 4 and 5,** most District Court cases involve multiple appearances in court on different days. Not only does this require attendance in court for the hearing itself, it also requires attendance in the court area to wait for one's case to get on and to engage in discussions/consultation with clients or the representatives for the other side. However only one fee is payable in respect of all these appearances with the effective result that a barrister is not actually paid for most of the appearances in court. This is simply not fair or acceptable. As set out further on in these submissions, it is the view

of the Council based on the experience of our members and on the legal costs accountant's opinion contained at **Appendix 2** of this submission that the 2012 Terms should be amended so that, amongst other matters, separate fees are payable in respect of each court appearance.

7. Even where fees are payable, many of our members have experienced extreme difficulty in receiving proper payment from the Board. This appears to be a particular problem for our members in childcare cases and will be dealt with further on in this submission under the heading "day to day operational issues".

**THE OPERATION OF THE SCHEME IN THE CIRCUIT COURT**

## Introduction

A substantial amount of the work carried out by counsel in the Circuit Court on the instructions of the Board's law centres is carried out in the area of family law – in particular in relation to judicial separation, divorce and related matters such as custody and access. A description of the work carried out by counsel in a typical circuit court family law case is set out below.

(i) Counsel is briefed with papers and required to draft pleadings such as a family law civil bill or defence and counterclaim. On occasion, it is necessary to have a consultation of approximately one hour with the client prior to papers being finalised. On furnishing the draft pleadings, counsel will give general written advices on the conduct of the proceedings. On many occasions counsel will have to also make amendments to the draft pleadings following further and additional instructions being provided by the client. Frequently 3 drafts of the civil bill or defence will be required from counsel before it is ready to be filed.

(ii) If counsel is acting for an applicant and difficulties are being encountered in serving the pleadings, it will be necessary to advise on an application for substituted service, draft papers for such an application and make the necessary court application. If this is the first motion on the papers, there will be no additional fee for this drafting or application.

(iii) Following the service of a family law civil bill on a respondent, it is usually necessary to bring at least one application for judgment in default of appearance or defence. The practice varies from law centre to law centre as to whether counsel is asked to draft this application. Some require counsel to do so and others draft themselves. Counsel is generally required to attend before court at the hearing of the application. It may be necessary to issue a second motion to compel compliance by the respondent.

(iv) Once the family law civil bill is served, another counsel will be briefed on behalf of the respondent and the steps to be taken thereafter by counsel for the respondent are similar to those which have to be taken by counsel for the applicant.

(v) Following the delivery of the defence and counterclaim and related affidavits, it is necessary to consider how the proceedings should be progressed. At this point, counsel is often asked to review the vouching which has been provided, to advise on the adequacy thereof and on the steps to be taken (such as a discovery application) to remedy any shortcomings therein. In addition to vouching, counsel is often asked to advise on other interim matters such as

maintenance, access, child/spousal protection, the prevention of the dissipation of assets and on substantive legal issues arising. In some cases, a fresh legal aid certificate will be required.

(vi) In complex cases, it will be necessary to draft a notice for particulars and/or notice to admit facts and the replies thereto.

(vii) In many cases, it is necessary to bring separate interlocutory applications before the court in relation to matters such as maintenance and access. Where this is necessary, counsel is required to draft the necessary paperwork such as the notice of motion and grounding affidavit. Very often papers for such applications have to be drafted on an urgent basis and have to be "turned around" very quickly. It is then necessary for counsel to appear at the first return date and all subsequent dates for the hearing of the application until it is disposed of. The disposal of such motions (particularly where access is involved) can be extremely time consuming and often involves more than one appearance in court, drafting of detailed affidavits and lengthy negotiations.

(viii) In addition to interlocutory applications, the management of a case in recent years has involved at least two case progression hearings (and often up to 4/5) before a county registrar will give a date for the hearing of the action. In the course of these case progression hearings submissions are made on the vouching and directions given in relation to preparation for the trial. Often counsel is requested to attend such hearings. This does vary between law centres. Whether attending the case progression hearing or not, counsel has to advise on the matters to be attended to at that hearing. The procedure regarding case progression has been amended pursuant to S.I 207/ 2017. It is unclear going forward exactly how many case progressions will be required before a date can be set for hearing. The same level of advice however in each case that is required of counsel will be the same.

(ix) Before a case can be granted a date for hearing, counsel is generally required to advise on what steps should be taken to prepare for trial. This involves reviewing documentation and advising on issues such as the obtaining/agreeing of property valuations, the witnesses required to attend and, in some cases, the necessity for a report under section 47 of the Family Law Act 1995. Further, in all cases involving minor children, counsel must advise on the steps necessary to ensure that the provisions of section 31(2)(b) of the Guardianship of Infants Act 1964 (as amended) regarding the court's obligation to take into account a child's wishes where appropriate (as outlined earlier on in this submission) are complied with. This may involve a separate application to the court seeking directions on the matter whereby, for instance, the court may direct that the child be interviewed by an appropriately qualified person who will then report to the court. Under the new rules provided for in S.I. 207/ 2017 counsel will be able to certify that a case can get a date for hearing and this will necessitate the review of the papers as set out above.

(x) When the parties are ready to seek a date for the hearing of the proceedings, it is necessary to attend before the County Registrar for the purposes of applying for, and seeking, a date for hearing.

(xi) In advance of the hearing, counsel engages in the usual preparation for trial such as reading the papers, reviewing expert reports, preparing examination and cross examination and carrying out

such legal research as is necessary. In addition, in many cases, a pre-trial consultation will be held with the client a number of days in advance of the hearing date. In most cases, a settlement meeting with the other side will be convened for the purposes of seeking to settle the matter in advance of a hearing as the courts do not like time to be wasted on the date for hearing and will demand that settlement talks take place before the hearing date. Whether or not a case settles, such a meeting can be very lengthy (usually minimum of 2-3 hours). If the case does settle, it will involve the drafting of detailed terms of settlement by counsel in respect of which the client will obviously have to be advised fully by counsel.

(xii) Regardless of whether or not the matter settles in advance of the day of the hearing, it is necessary for the parties to attend court on the day of the hearing. If the matter has settled, the settlement will have to be ruled by the court. If the matter has not settled, the parties will have to wait for the case to be called on. If the proceedings are not called on first for hearing, the parties have to wait to see whether a court will become available. Sometimes, it is necessary to wait until lunchtime to ascertain whether or not a court will become available that day and if it does not, the matter is put into the list to fix dates on a subsequent day at which counsel will be required to attend to apply for a further date.

(xiii) If the proceedings are called on, the proceedings are heard and generally speaking, judgment is given on the day. Following the hearing, a post-trial consultation is held with the client to explain the consequences of the judgment. In most cases, a number of matters arise following the hearing and judgment.

(xiv) The first matter which arises generally following the delivery of a judgment on circuits outside Dublin and occasionally in Dublin is the drafting of a court order reflecting the judgment which has been given. Counsel generally has to at least settle (and sometimes draft) the court order and seek to agree its contents with counsel for the other side. This can be time consuming as the orders are generally lengthy and have to provide for a large number of matters such as custody/access, maintenance, property sale or transfer and succession. It is necessary for the parties' respective legal representatives to agree the contents of the said order and often this can be contentious and time consuming as the parties may have a slightly different understanding of what was actually intended by the court. The approach of the various law centres vary in relation to whether an extension of the legal aid certificate will be obtained to cover the drafting of the order. In most cases no further money will be provided.

(xv) The second matter which often arises following a hearing is the question of whether or not one's client should appeal. Where a client is unhappy with the outcome, counsel will usually be asked to advise on the question of an appeal and to furnish a written opinion thereon or attend a consultation with the client to discuss same. If the client wishes to appeal, they are advised to lodge the Notice of Appeal personally. They then must apply for another Legal Aid Certificate for the appeal. In this situation, Counsel will usually be instructed to prepare an Opinion as to whether the client should be granted Legal Aid. Depending on this Opinion, another Certificate then must issue for the Appeal. The fees for the Appeal to the High Court are the same as a Circuit Court fee.

(xvi) The third matter which often arises is the drafting of a pension adjustment order. The time spent on drafting such orders is significant as regularly it requires several drafts and redrafts and on

each occasion a full review of the information on the pension is required. Further, an *ex parte* application is drafted (usually by counsel) to re-enter the pension matter for ruling and the attendance in court is required before the Pension Adjustment Order is ready to be ruled. Also, it is usually necessary for the Barrister to review the Pension Adjustment order from the other side, if two pensions are involved, and to make sure that it is in accordance with the Order made.

The foregoing description of a circuit court case does not allow for the considerable difficulty and complexity which can arise in interlocutory applications during the course of the proceedings. As set out below, such interlocutory applications can involve a considerable amount of work on the part of counsel.

## Safety/Barring Orders

An interim barring order, would require at least three hours for a review of the papers and preliminary drafting, often an *ex parte* application, notice of motion and grounding affidavit and inevitably a further replying affidavit once it becomes contested (requiring a further two - three hours minimum of work). There will be at least three appearances in court, if not more. The preliminary *ex parte* might require waiting all day in the list to be heard. A return date for the motion will be given and on that return date there will inevitably be legal submissions required on whether the interim order can continue. Then the respondent usually puts in a replying affidavit. There might also be a necessity of having a supplemental affidavit drafted on behalf of the applicant, which requires taking further instructions from the client and drafting time to rebut what is set out in the replying affidavit. The case will be in the list again for mention to do with when the case can be finally heard. The motion will then usually be put into a Monday long motion list where the case will take up to two hours. This may require evidence from Gardaí and social workers and may also require legal submissions and so forth. If the matter will take longer than two hours it goes into another list to get a date for hearing. The total period of time allocated to this could be 3 full days of court appearances and a minimum of 6 hours drafting. There will be consultations also with the client throughout which is included.

Unless the solicitor (which is rare) gets an extension on each date the matter is before the court, the total fee payable for all the work involved in this application is €200. If this is the first Motion in the case, there is no extra fee for this – the Legal Aid payment is inclusive of one Motion.

## Access and Welfare Motions

An access / welfare application would require at least three hours for the review of the papers and preliminary drafting of the notice of motion and grounding affidavit and inevitably a further replying affidavit once it becomes contested (requiring a further three hours minimum of work). There will be at least three appearances in court, if not more. A return date for the motion will be given and on that return date the other side will require time to put in a reply by putting in a replying affidavit. A further supplemental replying affidavit might be required. The case will be in the list again for mention to do with when the case can be finally heard. The case might then be put into a Monday long motion list where the case will take up to two hours. This may require evidence from Gardaí / social workers / legal submissions and so forth. If the matter will take longer than two hours it goes into another list to get a date for hearing. The total period of time allocated to this could be 3 full days of court appearances and a minimum of 6 hours drafting. There will be consultations also with the client throughout which is included. Often these orders are made on an interim basis and for a short period and the matter will be back before the court for review on a number of occasions before the case is finally heard. This could be up to 2/3 times and will require that the full day is set aside to deal with the matter. Often there is no fee for any review of the matter.

Unless the solicitor (which is rare) gets an extension on each date the matter is before the court, the total fee payable for all the work involved in this application is €200. If this is the first Motion in the case, there is no extra fee for this – the Legal Aid payment is inclusive of one Motion.

## Interim Maintenance Applications

An interim maintenance application would require at least 2/3 hours for review of the papers and preliminary drafting (including the review of the file), notice of motion and grounding affidavit. Inevitably a further replying affidavit will be required once it becomes contested (requiring a further three hours minimum of work). There will be at least three appearances in court, if not more. On the first return date of the motion the other side usually attends and seeks time to put in a reply (although counsel has to be ready to run the application in case there is no appearance by or on behalf of the Respondent). Usually time will be given for the opposition to put in a replying affidavit. The case will be in the list again for mention to do with when the case can be finally heard. The case may then be put into a Monday long motion list where the case may take up to two hours. As financial matters will be at issue, consideration will be given by the court to vouching documentation and therefore further dates in court may be required. If the matter will take longer than two hours it goes into another list to get a date for hearing. The total period of time allocated to this could be 3 full days of court appearances and a minimum of 6 hours drafting. There will be consultations also with the client throughout which is included.

If an extension of the legal aid certificate has been obtained a fee of €200 is payable to counsel in respect of all the work for this application. However, an extension will not be granted for the first application in a case because, as noted above, the “case fee” includes one motion.

In addition, matters may be re-entered and there may be motions for discovery, breaches and variations.

## General Points on Circuit Court Work

A number of general points can be made in relation to all aspects of Circuit Court work. Firstly, every appearance before court can, no matter how apparently short it might be, involve a considerable amount of time waiting outside court for one’s case to be called on. Thus, even a short "for mention" matter can, in fact, require the input of a considerable amount of time on the part of counsel. Secondly, where counsel is required to draft papers such as a pleading or motion papers for an interlocutory application (such as for an interim access, barring or maintenance order), the drafting of the relevant paperwork is time consuming and often has to be attended to on an urgent basis. Drafting of such pleadings will take at least two to three hours and often more. Thirdly, it should be noted that where a case is listed for hearing but does not get on, no fee is payable for that day even though counsel will have attended and been fully available for the day.

## Issues for the Operation of the Scheme at Circuit Court level

The operation of the Scheme in the Circuit Court raises a number of issues.

Under the 2012 Terms the total fee payable for all of the work in a Circuit Court case is, save in the circumstances set out in the following paragraph, €1,145.00. This applies regardless of how many court appearances, interim applications, consultations or requirements for advices there have been.

The only circumstances in which, under the 2012 Terms, the above fee would be increased is where (i) an application under section 35 of the Family Law Act 1995 or section 37 of the Family Law (Divorce) Act 1996 to prevent the dissipation of assets is required or (ii) where a legal aid certificate has been granted in advance of an interim or interlocutory application. In such circumstances, an additional fee of €200.00 is payable for all work involved in the particular application. Where a pension adjustment order is required, and legal aid has been separately given for such an application, an additional fee of €200.00 is payable however if it is considered a complicated matter then a refresher rate may be applicable. Some law centres refuse to get any funding for counsel for the approval or drafting of pension orders. If there is more than one interim application, there will be a fee of €200 for the second and any subsequent motion.

Re-Entry of cases

Where a case has to be re-entered, this may involve different counsel to that on the original case. On many occasions, a fee at refresher rate (€400) is provided, sometimes a motion fee (€200) is granted and on odd occasions a full brief fee (€1145) is granted. It is unclear what criteria is used for the sanction provided as generally if there is a re-entry of a case it will be very complex and contentious.

Cases settled in advance of hearing date / withdrawal of legal aid certificate

Where cases are settled in advance of a hearing date being set, the 2012 Terms provide that a lower rate of €750 will be paid. This is notwithstanding that the same level of complex issues may have arisen in the case. Where the client seeks to withdraw from legal aid, even where the date for hearing is set, the lower rate of €750 will be paid notwithstanding that counsel will have retained the date for hearing in their diary and completed all the work on the case which enabled the case be set down for hearing.

Opinions

Counsel is often asked to advise on issues such as nullity, contract disputes, employment matters, probate, judicial review matters etc. A fee is generally provided for 2 hours work for any such opinion (other than in exceptional cases). Rarely would any opinion (following the review of papers) be completed within a 2-hour period and generally takes 6-8 hours. Frequently the initial information provided is inadequate so the preliminary letter of advice will be what further papers are required in order for the opinion to be properly completed. Once the information is provided, then a further review of the file is required and the opinion completed. In some cases, a consultation will be required with the client and this is included in the 2-hour sanctioned payment. No additional fee is generally provided. Frequently when the opinion is provided, the solicitor will revert with further documents to be reviewed and again no further sanction for payment is required.

This level of fees is clearly wholly inadequate taking into account the level of professional expertise required, the time spent, the significance of the matters at issue for the clients involved, the complexity of the issues which are at times involved and the level of personal professional experience required on the part of the counsel. As with the District Court, the "all in" nature of the fee structure means that a substantial amount of work carried out by counsel is not separately accounted for or recognised in the fee. The effect of this is that counsel does a substantial amount of work which is not paid for or is paid for on a paltry basis. The fee structure set out in the 2012 Terms does not now in any way reflect the reality of how family law cases now run in the Circuit Court or the work which counsel do in such cases. This view is reflected in the legal costs accountant's opinion attached at **Appendix 2** of this submission.

**THE OPERATION OF THE SCHEME IN THE HIGH COURT**

## Introduction

A substantial amount of legally aided work carried out by our members in the High Court is in the area of international child abduction – in particular in applications under the Hague Convention on International Child Abduction.

## Applications under the Hague Convention

The Convention on the Civil aspects of International Child Abduction signed at The Hague (the "Hague Convention") was incorporated into Irish Law by the Child Abduction and Enforcement of Custody Orders Act, 1991. This provides for the return of children to their country of habitual residence where they had been wrongfully removed from that country to the State or wrongfully retained from that country in the State. Applications under the Convention are dealt with by a specially assigned High Court Judge. In the three years ending 31 December 2017, there were 113 special summonses issued in the list dealing with these applications in the High Court (the Hague- Luxembourg Convention ("HLC") list). Solicitors employed by the Board represent nearly all applicants in such applications and the Board also provides representation for a substantial number of the respondents (although not all).

The Board regularly retains the services of Junior Counsel and, on occasion, Senior Counsel to represent applicants and respondents in such cases. The following are a number of general points in relation to counsel's involvement to note:

Firstly, the Convention requires the "prompt" return of children to their countries of habitual residence and the relevant E.U. Regulation (Council Regulation (EC) No 2201/2003) in fact provides that all cases should be dealt with within six weeks of commencement. Accordingly, the High Court grants such cases a very high degree of priority and given these timelines, counsel is therefore required to prioritise work on such cases over and above almost every other case which they have. Accordingly, the "turnaround times" are very short and counsel are often required to draft lengthy documents in a very short period of time.

Secondly, such applications are factually and legally complex and involve many aspects of national and international law. The nature of such applications inevitably involves counsel having to address issues and procedures involved under the laws of different jurisdictions – many of which are non-English speaking. In many cases, it is necessary to review court orders and/or opinions from these different jurisdictions (many of which are not in English). Whilst official translations for such documents are provided, the requirement to deal with such matters adds another layer of complexity to such cases.

The work involved by counsel acting on behalf of a party in a typical Convention case is set out below. Clearly, each Convention case is different and the precise work involved will vary from case to case depending on the facts of the case.

(i) Prior to being briefed on behalf of an applicant, counsel is generally contacted by telephone and asked if he/she is available to take on a brief with the implicit understanding that the brief will be afforded a very high degree of priority.

(ii) On receipt of the brief, counsel is required to review documentation and give preliminary advices on the issues arising. On occasion, the documentation can be very extensive involving an exchange of, for example, copious texts/e-mail messages.

(iii) Counsel will then draft the relevant court documents such as a special summons and grounding affidavit.

(iv) In many cases when acting for the applicant, it is necessary to advise on how to effect proper service of the documentation as many respondents seek to avoid service. In some cases, it is necessary to advise on, draft papers in, and make an application for, orders for substituted service.

(v) Following the service of pleadings, counsel for the applicant is required to attend in The Hague Luxembourg Convention List ("HLC list") on the first return date of the summons. Very often, the respondent appears in person and it is necessary for counsel (in conjunction with a representative of the Board) to engage with the respondent directly and, when the matter is called on, to explain the position to the court, to ensure that the respondent gives the appropriate undertakings in relation to the non-removal of the child and to receive directions from the court in relation to the progress of the application from that point. Very often, shortly prior to the first return date, the respondent seeks assistance from a law centre whereupon the solicitor from that centre will make an application to the Board for legal aid. At the time of the first return date, this application for legal aid may be still outstanding and sometimes counsel is nonetheless requested to attend at the HLC list on the first return date and inform the Court as to what the position is.

(vi) Where a respondent obtains legal aid (which does not always occur), counsel is briefed for the respondent and will then often have a consultation with the respondent. Counsel will then be required to draft a lengthy and detailed affidavit on an urgent basis. In many Hague cases, the clients do not speak English with sufficient proficiency to enable them to understand the legal issues involved and so cannot give instructions without the benefit of an interpreter. This obviously adds significantly to the time spent in taking instructions and giving advice.

(vii) Thereafter counsel for both parties are involved in reviewing affidavits received from the other party, advising on the issues to be addressed therefrom and drafting replying affidavits. Affidavits are, invariably, extremely lengthy and address a wide range of issues. As with all matters arising in a Convention case, the drafting of such documentation has to be afforded the highest priority by counsel.

(viii) Where a child is of sufficient age, it is necessary to consider and advise on what arrangements should be put in place to ensure that the voice of the child is heard in the proceedings. In nearly all cases, this is effected by a court making an order that the child be interviewed by an independent child psychologist. Counsel is generally required to draft the appropriate order for the court. In cases where a child psychologist does issue a report, it will be necessary for counsel to review and advise on the contents thereof.

(ix) Following the initial exchange of affidavits, there will be attendances in the HLC list every two to three weeks where the court gives directions in relation to the further steps to be taken and the

time scale within which such steps are to be taken. At such times, it may be necessary to bring an interlocutory motion to address an issue such as interim access or (in cases where a child has a particular medical condition) a child's medical treatment. Further, counsel will be required to address pre-hearing issues such as whether or not a notice of cross-examination should be served and whether additional evidence (such as a child psychologist or an affidavit of laws) is required.

(x) Once a date for hearing has been fixed by the court, counsel are generally required to prepare written submissions detailing the factual background to the case and addressing the very often complex legal issues which arise under national law, the law of the Convention and under EU law. In conjunction with the preparation of such submissions, it is sometimes necessary for counsel to prepare a book of authorities for the court. Counsel will, of course, as well as preparing the written submission and the book of authorities, engage in the usual preparation for a hearing which will involve reading all relevant material, preparing submissions and, in some cases, preparing cross examination. In addition, in most cases, a relatively lengthy consultation with the client will be necessary.

(xi) In conjunction with preparing for the hearing, it is often necessary to engage in negotiations to seek to settle the proceedings as it is considered to be in the interests of all parties concerned to make real efforts to arrive at a settled outcome. Often, a judge will delay or adjourn a hearing to allow such discussions to take place. To this end, counsel often engage in lengthy negotiations lasting a number of hours. Where the matter is settled, detailed terms of settlement are drafted by counsel and signed by the parties. Where it is resolved to allow the child to remain in the State, it is necessary to draft relatively complex terms of settlement which provide for general welfare matters such as a child's custody, access and maintenance arrangements in relation to the child. In these cases, it is necessary to prepare a revised summons so that the court can rule the settlement under the provisions of the Guardianship of Infants Act, 1964.

(xii) In cases which do not settle, counsel represents the client at a hearing (which can go into a second day). Thereafter, it is necessary to attend to take judgment, to advise on the effects of the judgment and, where the client is unsuccessful, to consider and advise on the prospects of an appeal. Where an applicant is successful in obtaining an order that the child be returned, it is often necessary to negotiate undertakings to be given by the applicant to ensure that the child can be returned in a safe and orderly fashion.

## Issues for the Operation of the Scheme at High Court level

The operation of the Scheme in these cases raises the following issues.

1. Whilst legal aid is automatically available to applicants who (as in the vast majority of Hague cases) come through the Central Authority, it is not always available to respondents. It appears that when an application for legal aid is initially made by a respondent, the Board assesses that application on a merits' based criteria and if the view is taken that the respondent has no real defence, the application is refused and the respondents then appear in court stating that they have been refused legal aid. These respondents then go on to represent themselves or seek the assistance of McKenzie Friends. For a number of reasons, the Council believes that legal aid should be automatically available to respondents in Hague cases. Firstly, such cases are, and are acknowledged by the courts to be, legally complex and a party who does not have legal representation is placed in a significantly

disadvantaged position. Secondly, arising from such complexity, it is in most cases impossible to conclude at the initial stage of a case whether or not a respondent does have a stateable defence. This is because not only of the complexities of Hague cases but also because, at that stage, the child's views will not be known and, in many cases, this is a substantial ground of defence where the child is of a sufficient age and degree of maturity for the court to take account of his or her views (generally 7 years and upwards). Therefore, any assessment of the merits of the defence which is conducted before the child's wishes are ascertained (which can only take place during the course of the proceedings) is based on incomplete information. Accordingly, a respondent may well have a good defence even if it initially appears that he/she has no real defence. Thirdly, where a party is unrepresented, the ensuing proceedings will invariably be longer and take up more court time. Clearly, an unqualified person will take somewhat longer to navigate the court process and the courts are, for understandable reasons, inclined to give more leeway on procedural issues to unrepresented clients. Further, where a party is unrepresented, the prospects of a case settling are much lower as that party will not know the relative strengths and weaknesses of his/her case and will not be in a position to consider whether or not it is in his or her best interests to settle. In addition, the legal representatives for the applicant will be less willing, for proper professional reasons, to engage in detailed negotiations directly with the respondent. The result of this is that cases which would, in other circumstances, probably settle end up running, taking up court time and thereby unnecessarily delaying other litigants in having their cases heard. Fourthly, even where an applicant is successful in obtaining an order for the return of the children to the State of their habitual residence, considerable complexities can arise in seeking to provide for the terms of the return (for example in relation to matters such as undertakings) and the finalisation of such terms (which will be incorporated in to the final order) generally benefits considerably from the professional input of counsel.

2. Under the 2012 Terms, the brief fee payable to junior counsel for a Hague case is €2,135 (in nearly all cases, a junior counsel only is retained). This fee is in respect of all work done by counsel up to and including the first day of the hearing – the drafting of all pleadings, affidavits and advices, all attendances in court (of which there would generally be at least four or five (both case management and interlocutory matters) requiring attendance in court of an average forty minutes)), consultations, settlement negotiations, ongoing advices, preparation for the case and the running of the case itself. A refresher of €1,000 is payable for an additional day's hearing but only if this involves the taking of evidence or legal submission of more than 30 minutes. In addition, a refresher is payable in respect of any written submissions which are directed by the court. There is also a fee of €150 payable in respect of taking judgment. These fees are totally inadequate and do not reflect the level of expertise, importance, complexity, time or commitment involved. In particular, the concept of the "all in" case fee is completely inappropriate for such cases where there are several court appearances requiring the attendance of counsel in court and there is an ongoing requirement for urgent drafting and advices. Again, this issue is addressed in more detail in the legal costs accountant's opinion attached at **Appendix 2** of this submission.

## Applications to Detain a Minor

An example of work done by our members in respect of the detention of a minor is outlined below.

There are two distinctive types of cases:

**1.** Where the matter is before the High court where the detention of minor is required in an institution. These applications are made on an ongoing basis.

The application is brought by way of Plenary Summons with a notice of motion and grounding affidavit by the CFA. These pleadings, together with appendices can run to hundreds of pages of medical/psychiatric reports. A replying affidavit can be provided on behalf of the parent having legal representation through the Board.

A hearing will take place at the outset where the CFA will have to prove to the court that the detention of the minor is required in his best interest. This may or may not necessitate the calling of expert evidence and cross examination. This hearing usually takes a considerable period of time.

The order is made (usually for a short period) and is reviewed thereafter on a periodic basis (usually every 2 – 4 weeks) and the court on each occasion has to determine whether the minor should be detained for any further period. On other occasions, the court may simply have the case listed for an update on matters and what progress has been made in relation to the minor child.

On each occasion that the matter is before the court, the reports (one from the *Guardian ad Litem* and one from the CFA – roughly 20-30 pages between them) have to be printed off by counsel as they come in at the last minute. The reports take at least 20-30 minutes to review before court. The client then may come to court and a consultation is required with them before the 10am list (15 minutes on average). The matter will be in the list which will require attendance generally between 10-12noon. The commitment from counsel is required for the necessary period and one never knows when the case will be called on. Counsel uses the time to negotiate with Counsel for the CFA in order to narrow issues, thereby shortening the length of time that the application must be heard by the Judge. When the case is called, generally submissions take between 10-15 minutes but if something is contentious this can take 20-40 minutes. Discussions with the client after the application may be required if the client has attended (15 minutes). A letter back to the solicitor will be required to give advice on what action is required before the next appearance in court. (30 minutes)

On many occasions a legal issue is determined as to whether the minor child should be detained. On other occasions the court may simply have listed the matter for review and an update on the welfare of the minor and any progress being made.

On some occasions where there are complex issues in the case, expert evidence will be required. This will necessitate special sittings for the case and could take a full day of hearing.

Where the periodic return each Thursday involves a legal issue extending the detention order for a minor, and where the matter has been in court for in excess of 30 minutes, then a refresher fee will become payable (albeit there may be difficulty getting sanction for this payment). Where however the case is merely listed for mention (and can take the same length of time before the court), no legal issue will be determined and then no payment is provided by the Board as the matter will not come within the criteria for a refresher fee claim.

**2.** When the matter is before the High court for the purposes of having a minor child detained in a facility in another jurisdiction.

The application is brought by way of Plenary Summons with a notice of motion and grounding affidavit by the CFA. A replying affidavit can be provided on behalf of the parent having legal representation through the Board.

A hearing will take place at the outset where the CFA will have to prove to the court that the detention of the minor is required in his best interest. This may or may not necessitate the calling of expert evidence and cross examination. This application usually takes a significant period of time.

The order is made for the duration of the child's stay abroad and there is a review thereafter on a periodic basis (usually every 4 weeks). Periodically the court will require expert evidence as to whether they should continue the detention order abroad thereby continuing the detention.

On each occasion that the matter is before the court, the reports (one from the G*uardian ad Litem* and one from the CFA – roughly 20-30 pages between them) have to be printed off by counsel as they come in at the last minute. The reports take at least 20-30 minutes to review before court. The client then may come to court and a consultation is required with them before the 10am list (15 minutes on average). The matter will be in the list which will require attendance generally between 10-12noon. The commitment from counsel is required for that period as one never knows when the case will be called. Counsel uses the time to negotiate with Counsel for the CFA in order to narrow issues, thereby shortening the length of time that the application must be heard by the Judge. When the case is called, generally submissions take between 10-15 minutes but can take 20-40 minutes. Discussions with the client after the application will be required if the client has attended (15 minutes). A letter back to the solicitor will be required to give advice on what action is required before the next appearance in court. (30 minutes)

On each occasion that the case comes before the court for a simple review (which can be sometimes be every 2-4 weeks) and update, there is no sanction for payment at all from the Board. When there is an adjudication upon whether the detention order should be continued then there will be a sanction for payment.

## DAY TO DAY OPERATIONAL ISSUES

At present, our members are encountering a number of difficulties in their day to day dealings with the Board, a summary of which is set out below:

### Claim Form

At the meeting held with the Board on 7th November 2017, at which the unilateral introduction of a new claim form for barristers was discussed (see **Appendix 6**), the Board explained that the new claim form was issued in the context of the Board's governance procedures and to meet both internal and external audit obligations. The Board noted the concerns raised by The Bar of Ireland in relation to the language and tone of the claim form and agreed to review the matters raised, particularly relating to travel expenses and timekeeping. It was also agreed to consider allowing the use of the previous claim form for cases in which the legal aid certificate predates the new claim form.

### Non-Payment of Fees Due

Many of our members have encountered significant difficulties in receiving from the Board fees due to them, pursuant to the 2012 Terms, in respect of work actually done. Our enquiries indicate that this is encountered most frequently in the area of child care where there are multiple hearings in relation to one case and the Board does not accept that refreshers are payable in respect of attendance by counsel on certain days and/or in respect of written submissions. Further, in many cases, it is the experience of many of our members that when they do raise queries with the Board in respect of their fees, their dealings with the Board are unsatisfactory. In particular, there does not appear to be any structured basis on which the amount of fees paid to a barrister can be queried or reviewed. It appears to be that if a barrister does wish to query the fee paid to him or her, he/she has to contact the Board's accounts section in Cahirciveen and each query is dealt with in a different way by a different person and, in many cases, there can be a difficulty in identifying the appropriate official to deal with the matter. It appears that there are no designated procedures for dealing with such queries and this contributes to considerable difficulties in dealing with such queries, many of which are left unresolved. We welcome the acknowledgment by the Board of the need to increase transparency in respect of the fees that are paid and not paid.

### Remittance Statement

When fees are paid, the remittance statement furnished by the Board in respect of a payment is extremely short and contains very little information as to what the payment actually relates to. This makes it very difficult for counsel to identify what particular item of work he/she has been paid for and how much he/she has been paid in respect of that work. This obviously makes it more difficult for counsel to raise queries in respect of that fee and presumably makes it more difficult for officials from the Board to address any queries which are raised. Typically, a remittance statement simply sets out the name of the case, the amount paid in respect of the brief fee and the total amount paid in respect of all refreshers. This causes a particular difficulty in that it is not possible to discern from this what the payment relates to. Where it is clear from the amount paid that the Board has decided not to pay the full amount in respect of which payment is sought, it is not possible to identify the particular item in respect of which a fee has been sought and in respect of which the Board has decided not to pay. For example, in a child care case, a fee may have been sought for three days refreshers and one set of written submission. However, the remittance statement may just have an entry for "Refresher" and a statement of the amount paid under this heading. From the figure for the

amount paid, it can be discerned how many "refreshers" have been paid but it is not possible to identify in respect of what work these refreshers have been paid. So, in this example, if it was clear from the remittance statement that only two refreshers had been paid, it would not be possible to identify the work in respect of which these refreshers had been paid – whether it was for the submissions and one of the additional days (and for which one of the three?) or whether it was two of the additional days (and which two of the three?) only and not for the submissions at all. In summary, there is no transparency in the remittance statements.

The Council believes that this lack of transparency in relation to the payment of public monies by a state body is not consistent with good practice. Further it is reasonable to infer that it leads to inefficiencies in the system as a lot more time has to be spent by counsel and by officials from the Board when a payment has to be looked into. Most importantly however from our members' point of view, this lack of transparency is unfair to our members. It is unfair in that it hinders significantly their ability to query or review the fee which has been paid. Where a barrister charges a fee in good faith for a particular item of professional work and the Board takes a decision not to pay that fee, the least the barrister is entitled to is to be informed of that decision by the Board and of the reasons for that decision.

## Lack of Consistency in Fees

Our members have experienced a lack of consistency in how certain applications are dealt with for the purposes of fees. For example, on occasion, a member receives a refresher fee of €150 for an access application in a District Court childcare matter and on other occasions that member has received a refresher fee of €400 for the same type of application. This difficulty is accentuated by the lack of transparency in the remittance statement as detailed above and this inconsistency is another factor which makes it difficult for counsel to review and query the fees which they have received. It is obviously undesirable from everybody's point of view that there should be such a lack of consistency.

At the meeting on 7th November 2017, the Board noted the concerns raised by The Bar of Ireland regarding the incomplete payment of claim forms and also the lack of clarity on what elements of a claim form are paid and not paid, and the reasons for same. The Board confirmed that they are conscious of the need for transparency relating to the fees that are paid and will work to increase this. The Bar of Ireland welcomes this and furthermore proposed making a presentation to the claim decision makers on the practicalities of running cases and the increasing complexity to afford a greater understanding of the claims submitted. The Board agreed to consider this proposal.

## Non-Payment during the Currency of Proceedings

It appears to be the practice of the Board that counsel is generally only paid when a case has completed and all matters have been disposed of. Whilst there may be cases where this is appropriate, there are many cases where it is not. Some cases can involve a significant amount of work at an interim stage where counsel is required to attend to work on an urgent basis which can involve consultations, written submissions, drafting affidavits and lengthy court hearings. Following the completion of this interim work, it may be some time (a year to eighteen months) before the proceedings are ultimately completed. In such cases, very often, counsel will not receive payment for all the work which he/she has done until the case is completed. This may result in the counsel having to wait for two years until payment is received. This is unreasonable and is simply not fair. The Board is a State Body and there is no reason that it cannot pay for such work as it is carried out. The Council is of the view that a payments system should be put in place whereby barristers submit their claims

on a quarterly basis. Furthermore, barristers should be able to submit their claims electronically via email in the interests of speed and efficiency.

## Amendment of Certificates

Legal services cannot be provided under the Legal Aid Scheme without a valid legal aid certificate. This certificate gives authority to the solicitor to represent a client in specified proceedings and to avail of specified services such as counsel, expert witnesses and reports. There are occasions however where the authority granted by the certificate does not cover all of the necessary work that is integral to the progression of a case and in such cases this necessary work is not paid for. A request to amend the certificate to incur the required additional expenditure can be made. However, where such request is denied, the additional work which is integral to the proceedings is nonetheless undertaken without pay. This work can include the drafting of replying affidavits and legal submissions which can be lengthy and very time consuming. The Council believes that where counsel, retained by one of the Board's solicitors, advises that a particular step should be taken, the appropriate amendment to the certificate should be made save in exceptional circumstances. This also applies where a counsel advises that an expert witness (such as an accountant or a medical practitioner) be retained. On occasion, even where counsel advises that such witnesses be made available, a certificate is not granted. This may result in the client's case being prejudiced to some extent. Further, it may also result in the legal representatives seeking to carry out roles which are beyond their strict remit such as analysing complex financial documentation. This is simply not fair to the client or to the legal representatives retained on behalf of the client.

## Breach Applications

It is unclear whether legal aid certificates will be issued for breach applications. In many circumstances, these are not issued as a breach is seen as a criminal offence. However, such breaches are listed in the Family Law Courts and not the criminal courts. In many cases, several matters may be before the courts including alleged breaches. These are not included in the legal aid certificates and therefore these applications are run by solicitors and/or counsel where a fee for same is not payable under the Legal Aid Scheme. In many circumstances, a Judge will adjourn the breach (as well as the other applications) in order to give a penal warning to the individual alleged to have breached a court order as such a breach is subject to possible imprisonment.

## THE 2012 TERMS AND EXPENDITURE ON LEGAL AID

It is clear from the forgoing that the work in civil legal aid which our members do on behalf of their clients is enormously important to their clients, is often complex and involves an onerous workload. Nearly all clients on whose behalf our members are instructed are involved in a legal process which will have a hugely significant impact on their lives. Invariably, the outcome of such a process will determine matters such as the day to day nature of family relationships, where people will live, with whom they will live, (in the case of separated families) the extent to which they will see other family members, their standard of living, their education and many other similar fundamental matters. The skills required to advise and represent clients effectively and properly in these situations are very wide ranging. A barrister must of course be fully informed on an increasingly complex legal environment and have experience and competence as an advocate dealing with all types of court situations. In addition to this, clients are inevitably in very stressful situations and in some cases have had very difficult life experiences and/or limited education. This not only makes the taking of instructions and giving of advice more time consuming and difficult but it also requires special personal skills so that a client can be advised and represented in a sympathetic but professional and effective manner. Our members are conscious of their duty to advise and represent their clients to the highest professional and ethical standards and to take whatever steps are necessary to do so in accordance with the Code of Conduct. It is submitted that experience in the vast majority of cases has shown that the interests of legally aided clients have been very well served by our members who have taken on the responsibility of representing their clients in a dedicated, professional and thorough manner. However, the current fee levels as outlined above in the 2012 Terms are wholly inadequate and do not constitute a fair or reasonable fee for the work done and the expertise involved. Furthermore, the basis on which fees are calculated is not appropriate. Accordingly, the 2012 Terms are not fit for purpose and require a significant and fundamental review so as to ensure the continued provision of legal services by experienced counsel on behalf of the Board.

The *Value for Money & Policy Review of the Legal Aid Board, October 2011* acknowledges that the fees are all inclusive and the private practitioner does take on some risk "*but it is expected that easy and difficult cases will balance out over time*". However, it is the almost universal experience of our members that the vast majority of the cases they deal with are difficult and complex and that there are in fact no "easy cases".

As noted in the introduction, the Council commissioned an opinion from an independent firm of legal costs accountants to review and assess work undertaken by Counsel on the instructions of solicitors from the Board for its clients in proceedings before the District, Circuit and High Court. The opinion (which is based on a comprehensive review of redacted papers in actual cases and on interviews with counsel) states, amongst other matters, that the effect of the 2012 Terms is that counsel's work is not paid for at all or if it is paid for it is negligible, that the median rates applied point to unfair remuneration, that the existing framework does not capture nor reflect work of counsel that typically prevails in 2018 and that the case fee is neither fair nor reasonable. A copy of this opinion attaching reviews of an analysis of different types of case is set out in **Appendix 2** of this submission. The Council believes that this independent opinion supports the contention that a fundamental review of the 2012 Terms is now required.

## Reduced Expenditure on Counsel Fees under the Civil Legal Aid Scheme

Notwithstanding the increasing complexity and work involved for counsel in civil legal aid cases, the Council notes that the Board has reduced expenditure on fees paid to counsel as demonstrated in the following table:

| **Year** | **2013** | **2014** | **2015** |
|---|---|---|---|
| **Expenditure on Counsel Fees** | 11% decrease on 2012 | 4% decrease on 2013 | 2% decrease on 2014 |

Since 2006, expenditure on counsel fees has decreased by 38%, from €6,846,818 in 2006 to €4,215,657 in 2015, with consistent decreases occurring since the 2012 Terms came into force on 1 August 2012.

## Comparison with the Expenditure of Other Jurisdictions

According to a 2016 report by the European Commission for the Efficiency of Justice (CEPEJ), Ireland's expenditure on legal aid, as a whole, is far below that of its neighbouring common law jurisdictions in the UK. The annual public budget allocation to legal aid has decreased from €87m in 2010 to €80m in 2014, with 36% allocated to legal aid within the total annual public budget of the judicial system (that is the sum of the budgets allocated to the courts, legal aid and the public prosecution service). This resulted in a per capita spend of €18.40. By contrast, England and Wales allocated 43% of the relevant budget to legal aid with a per capita spend of €38.14 whereas Northern Ireland allocated 51% with a per capita spend of €73.53. The per capita spend in Scotland was €33.28.

An examination of legal aid expenditure on civil cases, using figures supplied by the State and other countries to the CEPEJ for 2014, illustrates how the spend on civil legal aid in this jurisdiction (€32.5 Million and €7.04 per capita) was far less in 2014 than comparable common law jurisdictions such as England and Wales (€1 Billion and €17.43 per capita).

## Ensuring Access to Justice – Family and Childcare Law

The Bar of Ireland recognises that in order for any legal system to operate at its optimum level, access to justice must be available to all. This is particularly relevant in the work on behalf of the Board through which barristers are advocating on behalf of some of the most vulnerable cohorts of society. Given the increasingly complex, demanding and underfunded practise of family and childcare law, we are concerned with the potential impact on manpower within this area as a result of the untenable terms and conditions attaching to work for the Board. Anecdotally, some Junior Counsel who previously took first year devils on an annual basis are now not in a position to take on pupils. Decreasing numbers of devils is particularly problematic in the area of family law; should a barrister not choose to devil in the area of family law, due to the 'in camera' rule, they will be unable to attend family law courts and view a case. It is therefore very unlikely that they would undertake these cases in the future, potentially resulting in a manpower shortage within family and childcare law into the future. Additionally, the increasing demands coupled with terms and conditions that are not fit for purpose is impacting on the morale of existing members of the profession, the long-term effect of these issues will be corrosive and most certainly not in the public interest.

The Council recognises that the Board encountered stringent budgetary pressures across all of its areas of expenditure during the recent economic downturn which resulted in cuts to its available finances. However, this does not detract from the reality that the ability of barristers to provide a proper service in the manner

that is required to represent some of the most vulnerable members of our society is now under substantial pressure and strain. The legal aid scheme would be far more costly if the State were to bring the provision of legal services in house. If this were the case, the State would need to make provision for all of the costs and the risks that are associated with the appointment of employees, for example pension contributions, the cost of office space and the maintenance of premises, provision of law libraries and other research tools and materials, maternity leave, sick leave and holiday entitlements, secretarial, administrative and support staff, continuing professional development and other training needs. However, by contracting the services of the independent Bar, these costs and associated risks are avoided as they are absorbed by the barristers who participate in the scheme. The independent Bar therefore results in significant cost savings for the State year on year, giving effect to citizens' constitutional right of access to justice in the most cost-effective and efficient manner possible.

## CONCLUSION

**Arising from the foregoing, the Council believes that the following general matters need to be addressed in relation to the operation of the Scheme:**

**(a) A fundamental review of the 2012 Terms as they operate across all courts to include:**

**(i) a restructuring of the basis on which fees are calculated so that fees are paid for work which is actually done and in particular for interlocutory applications, individual court appearances, consultations and significant additional drafting such as court orders,**

**(ii) a recalibration of fees payable so that the fees which are paid constitute a fair and reasonable payment for the work done which properly reflects the professional nature of the work carried out and the expertise, commitment and skill which is required,**

**(iii) incorporation of provisions providing for the payment of fees on an interim basis.**

**(b) An extension of the operation of the Board's Private Practitioner Scheme (the "PPS") in the District Court to provide for retention of counsel so as to reflect the current reality of counsel being actively involved in such cases.**

**(c) An extension/enhancement of the availability of legal aid for reports on the wishes of the child so that proceedings are not delayed by a difficulty in seeking to obtain funds for such a report or in seeking to identify an appropriate expert who is willing to carry out the assessment and the report for the amounts paid by the Board. It is clear from the Annual Reports of the Board that the number of other professionals engaged to undertake supporting work has significantly declined with spending on other professional fees reducing by 40% from 2006 – 2015.**

**(d) An amendment to the Scheme so that legal aid is automatically granted to parents of children who are the subject of care applications and to respondents in child abduction cases.**

**(e) The steps to be taken to address day to day operational difficulties outlined above such as the claim form, non-payment of fees due, the lack of transparency in respect of payment and the absence of any proper formal efficient structure to query payments received.**

**The Council looks forward to engagement with the Board at the earliest available opportunity.**

# APPENDICES

# Appendix 1

Note of meeting between the Legal Aid Board and The Bar of Ireland held on 7th November 2017

**Note of meeting between the Legal Aid Board and The Bar of Ireland**

**held on 7th November 2017**

- The Legal Aid Board acknowledges the need to comprehensively review the 2012 terms and Conditions of the Civil Legal Aid Scheme Barrister Panel, particularly in light of the increased complexity in the area of childcare arising from legislative changes and practice directions. A submission from The Bar of Ireland is awaited in this regard and will be submitted to the Legal Aid Board before the end of the year.
- The Legal Aid Board issued the new claim form in the context of their general responsibility to improve governance procedures and noting that its procedures are subject to regular review by the Comptroller and Auditor General's office, its own internal audit function and on occasion the audit function of the Department of Justice and Equality.
- The Legal Aid Board has noted the concerns raised by The Bar of Ireland in relation to the language and tone of the claim form and will review the matters raised, particularly relating to travel expenses and timekeeping, and will revert. The Legal Aid Board noted that where payment claims were based on specific time requirements it did not per se have a concern about asking claimants to affirm the time. It noted that its own solicitors must give a start and end time if making a subsistence claim. It noted the concerns about difficulties determining start and end times. Consideration will be given to allowing the use of the previous claim form for cases in which the legal aid certificate predates the new claim form.
- The Legal Aid Board noted the concerns raised by The Bar of Ireland regarding claims that are not paid as presented and a lack of clarity on what elements of a claim form are paid and not paid, and the reasons for same. The Legal Aid Board confirmed that they are conscious of the need for transparency relating to the fees that are paid and will work to increase this.
- The Bar of Ireland wishes to make a presentation to the claim decision makers on the practicalities of running cases and the increasing complexity. This will afford a greater understanding of the claims submitted. The Legal Aid Board will consider this proposal.
- The Legal Aid Board and The Bar of Ireland agreed to the commencement of a review of the terms and conditions to be concluded in as timely and efficient a manner as possible, commencing with the submission from The Bar of Ireland. Both parties noted the requirement that any revision to the terms and conditions will require Ministerial approval.

Patrick Leonard SC
Chair Civil State Bar Committee

# Appendix 2

Opinion of the independent firm of legal costs accountants Peter Fitzpatrick & Company

# OPINION

# LEGAL AID FEES

**The Council of the Bar of Ireland**
**145-151 Church Street**
**Dublin 7.**

## INTRODUCTION

I was instructed by the Council of the Bar of Ireland to review the 2012 Terms and Conditions ("*Terms*") relative to the instruction of barristers for child care, Judicial Separation/Divorce and The Hague convention cases. The review examined their fitness for purpose in the current legal environment. A separate analysis of each category of case was undertaken and further reference can be made to the covering letters relative to each category together with the estimates appended thereto. This Opinion provides a general overview and commentary on all categories and on the *Terms* generally.

## THE 2012 TERMS FOR COUNSEL

The Legal Aid Board are one of the largest purchasers of Barrister services in the state. The de facto purchasers on the ground however are individual Solicitors in each of the Law Centres spread around the country. That requires structure and the Board must have central control over pricing to ensure there is value for services rendered and the expenditure has a proportionate relationship to the services given. The most recent "*Terms*" are the 2012 edition which came into operation on the 1 August 2012 and which was a revision of an agreement dated 30 September 1998 between the Board and the General Council of the Bar of Ireland. The "*Terms*" are an essential component for the Board in endeavouring to make uniform the invoicing practice across multiple Law Centres covering multiple types of cases in multiple courts and venues. Crafting *"Terms"* to achieve balance between value for services and fair and reasonable remuneration is not easy. Any "*Terms*" must be simple and easy to follow. They also must be easy to process and be capable of verification and supervision by Board management. The "*Terms"* clearly achieve that but in my opinion do so to the detriment of Counsel. On balance the "*Terms*" are clear and user friendly, however they are capable of being adjusted marginally to fairly remunerate Counsel for services performed. My review of three categories of cases (see below) revealed that on many levels, Counsel`s work is not paid for at all or if it is paid for, it is negligible.

## LEVEL OF FEES

I was instructed to prepare an independent report on three primary types of cases for which Counsel are regularly instructed by the Board;

1) Childcare cases
2) Judicial Separation and Divorce cases (Circuit Court)

3) Hague Convention cases

I was briefed with fully redacted Counsels' working papers (from which the identity of the parties nor personal details could be discerned) for Hague Convention cases and Divorce cases. I read them and noted the principal areas of work undertaken by reference to obvious "*steps*" in the cases such as pleading work, motions, appearances, consultations, briefing, refreshers, for mention dates, Judgment and research. I examined these by reference to the dates upon which the work was undertaken. I then estimated the time that, in my opinion, *reasonably* should have been devoted to each task or category of work. Once this was completed, I prepared a table of estimated total time and labour which I then contrasted with the total fees paid in each of the cases. I performed this exercise (known as the "Expense of Time" exercise) to evaluate approximately the average or median hourly rate being paid to Counsel for their services. In order to *cross check* my own estimate, I called for a meeting with the individual Barristers who acted in each of the above sample cases. I did this to perform a *sense check* of my estimate with the intimate knowledge and memory of each Counsel and I re-assessed each entry. This exercise also enabled me to familiarise myself with the nature and extent of the services performed (as a file will never contain all relevant information). The results of each estimate were considered in light of the issues in the case, the *Terms* and the ultimate fee paid to Counsel. The results of the estimates and the "Expense of Time" exercise are stark. The median rates (by reference to work actually and reasonably undertaken) point to unfair remuneration. Within the legal services market, I doubt if any lower rates can be found. The rates arising (€51-€68) can be compared against the following:

1. They are half of the current Trainee Solicitor rates charged by the larger commercial firms.

2. They are a quarter of the *lowest* rates allowed by independent Adjudicators (Taxing Masters).

3. They are less than the Boards own applicable hourly rates (when such are applied) of €76 and €150 for non-court work.

4. They are less than the lowest rates deemed reasonable (which are currently under challenge) by Independent Commissions of Inquiry.

5. They are less than non-legal fees paid to professional Guardian Ad Litem.

Evaluating the work of Counsel by reference to hourly rates is only one measure to assess the viability of the work. It is a helpful indicator. It does not mean that Counsel ought to be paid by the hour. For many reasons assessing fees in that manner would be unwieldy for both Counsel and client and is almost impossible to assess and control. The cost of supervision and control of such an approach in itself would be considerable. There are potential variations to the existing structure that would improve the process. The difficulties from the perspective of Counsel are in the main twofold; the pricing is too low and large categories of work are not being paid for at all. This appears to have come about by the passage of time and changing circumstances such as;

- Length of court hearings
- Increased documentation being briefed
- Court listings
- Increasing complexity (legally and factually)
- Increased responsibility
- Increased number of Court appearances

**THE CASE FEE**

The existing framework does not capture nor reflect work of Counsel that typically prevails in 2018. A modification of fee payments and a broadening of the categories and modernisation of some of the fee concepts would address that. At the heart of the problem is the rigidity of the 2012 Rules and, in particular, the concept of a *Case fee* and what it covers. It is an omnibus fee that gives no weight to actual and real work undertaken. It is a "*one size fits all*" approach that has little regard to actual work undertaken. It is not transparent and the lack thereof penalises Counsel. Counsels *Case fee* simply covers a multitude of legal categories of work that in most sectors of the legal services industry are paid for separately. These are;

- Consultation(s)
- Pleading(s)
- Motion(s)
- Settlement negotiation(s)
- Case Progression Hearing(s)
- Appearance(s)

All other categories[1] are for the best part subsumed into the *Case Fee*. To illustrate how this works it is important to distinguish between a *Brief fee* and a *Case Fee*. A *Case fee* is more restrictive than the more commonly used concept of a *Brief fee*. Where a *Brief fee* is paid separate distinguishable items of work pre and post hearing are noted and paid for separately. A *Brief fee* includes attendance on the first day of hearing. If those pre and post hearing items are paid at only nominal levels, the Brief fee is treated as the *equaliser* to ensure overall payment is satisfactory and fair. Where a *Case fee* is applied no such *equalisation* occurs and more often than not the extent of work required in the pre hearing phase means in effect the preparatory work such as make-up of the brief, the preparation of evidence, collation of Authorities and the first day of hearing is almost undertaken free gratis by Counsel. I illustrate the point by setting out below the six categories of costs separate to Brief preparation and attendance on the first day. For each, I have placed a fair and typical fee for each item of work. I have then benchmarked this against the *Case fee* (using the Circuit Court Case fee of €1,145.00). The fees listed below are typical for Circuit court work. The cumulative value of the fees listed below is €1,150.00. The *Case fee* is €1,145.00. In this example, if there was one consultation, a Defence, one Motion, one settlement meeting and one Appearance it effectively means no fee is paid for the preparation, nor the first days hearing. I understand many Circuit Court cases will have more than one of each of these categories thereby eroding the value of the *Case fee* further making it negligible or non- existent.

| | € |
|---|---|
| • Consultation(s) | 150 |
| • Pleading(s) | 200 |
| • Motion(s) | 200 |
| • Settlement negotiation(s) | 300 |
| • Case Progression Hearing(s) | 150 |
| • Appearance(s) | 150 |

The simplicity of a *Case Fee* from an administrative perspective is attractive, but it is neither fair nor reasonable. Legal costs are moving on to a new era of transparency, concepts and new structures (Office of the legal Costs Adjudicator will become operative this year) and the existing concepts of the 2012 Terms, in my opinion, require adjustment to bring them in line with the ever changing environment in which costs are incurred. Hourly rates and the application of hours to rates is a blunt tool and as such is not a viable alternative, however a

[1] One exception to this appears to be the €200.00 provision for Section 35 and Section 37 Applications in the Circuit Court.

structure of weights and grading is possible to allow for fair remuneration, value for services rendered but which, at the same time, does not cause administrative burdens for the Board. The inherent difficulty is the *preparatory* time. This is a significant portion of the work of Counsel. It is hard to quantify and capture however it should be paid for. The level of preparation before any case is an essential component of the general administration of justice and ensuring cases are progressed through the courts as expeditiously as possible. Preparation time, read in, preparation of evidence, written submissions are key factors in keeping lists moving. This work is largely undertaken in chambers and appears to be largely uncaptured.

**CONCLUSION**

The analysis of each type of case revealed similar results and heavily pointed to *median* rates below industry standards and in some instances below the guidelines of the 2012 *Terms*. The *Terms* provide for recommended hourly rates for some non-court work (€76) and court work (€150). Across all three categories the substantive body of work is paid below these rates. This appears to have come about because of the concept of the *Case fee* and what it covers. In the 1998 *Terms*, the fees were fixed on the basis that Counsel might spend an average amount of time (believed to be based on averages of 12, 15 & 20 hours for District, Circuit and High Courts respectively). This median or average approach also appears to have influenced the fees for the 2012 *Terms*. The increased documentation, complexity, changed court practices and professional time expended on these cases strongly suggests a re-appraisal of these is required. It is noteworthy that the hourly rate in 1998 of £70.00 (€88.88) is more than the lowest rate in the 2012 *Terms,* notwithstanding the passage of twenty years.

The Childcare analysis stands out more than others as the rates/fees paid to Counsel are notably less than professional Guardian Ad litem. On a lesser level, I note that the travel expenses are measured at 50% of the highest Civil Service rate which appears unfair.

Stephen Fitzpatrick
B.A. Solicitor
F.I.L.C.A

23.1.2018

PETER FITZPATRICK & COMPANY
LEGAL COSTS ACCOUNTANTS

[redacted]

SF/289/16/CR

20th December 2017

**Re: Legal Aid Fees - Childcare**

Dear [redacted]

I refer to the above matter.

I have reviewed the documentation briefed to me in this matter which comprised of a comprehensive narrative (in Table form) of work undertaken by Counsel and a second Table which identified the payments actually made to Counsel. The narrative is most comprehensive because it highlights the type of documentation received (and the extent thereof) and the work undertaken by Counsel. It is also very clear as it contains a description of the services performed by reference to dates upon which the work was undertaken. There is additional helpful information distinguishing the different time spent on *preparation* for hearings and actual *court time* and *waiting time*.

On review of this brief, I formed an opinion on the reasonable amount of time to be assigned to each of the tasks involved. In the attached Table, I set out the result of that exercise. I also met with Counsel twice and I made enquiries about her own estimate of time and how it had been arrived at. The total time noted on Table no. 2 can be cross referenced with the ultimate fee paid in this matter (in order to test the reasonableness of that fee). You will note from the Table no. 2 that 452 hours were reasonably spent. This can be measured against the total fee paid by the Legal Aid Board (€22,200.00).

The fees ultimately paid for Counsels work were in accordance with the 2012 Terms and Conditions. Within that framework there is no *Brief fee.* Instead the Terms provide for a primary fee entitled a "*Case Fee*". This is an indiscriminate fee of an omnibus nature that covers all work (save items 2-4 below) no matter what level of documentation is furnished. The basis of charges in the 2012 scheme are broken down into five primary types of fees which are:-

1. Case fee of €750.00
2. An additional fee of €150.00 per interim care order
3. A Refresher fee of €400.00
4. A Judgment fee of €150.00

Examining the work actually and reasonably undertaken in the example given to me with the ultimate fee paid, yields a stark result. The fee paid of €22,200.00 means an average hourly rate of €49.12 per hour is being paid. This however is not a *true* reflection as the total amount of time spent by Counsel is more than what is paid for as the 452 hours only reflect costs captured by the Terms. Additional professional time

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arose that is not included. The categories of costs excluded by the Terms can amount to considerable work. The obvious categories are;

- Drafting letters of Voluntary Discovery,
- Drafting Discovery Motion and Grounding Affidavit,
- Preparation of Legal Submissions.
- Review of Discovery documents [often a review of DVDs of interviews).
- Access applications (if listed on the same day as an Interim Care Order).
- Application for Directions under Section 47 (if listed on the same day as an Interim Care Order).
- Appearances when the matter is in for mention.
- Preparation time.

The *Case fee* in particular is inadequate as it does not reflect the evolving nature of a Brief/instructions. The papers of Counsel increase throughout the currency of the case and no payments are made for *reading in* as the brief grows in volume and perhaps complexity. There is no flexibility. In this case, the following documents were first briefed;

1. 2 Social Worker reports
2. 2 Minutes of Case meetings
3. GAL Report
4. Medical reports
5. 2 Parental Capacity reports
6. 5 Care Plans for each child.

The fee of €750.00 when first set seems to have been heavily influenced by an assumption that thirteen hours work might be involved for the most basic of cases. My analysis of this case reveals significantly more time is required in preparation at the outset and throughout the lifetime of the instructions. The *Case Fee* lacks transparency and the "*one size fits all*" approach means that how (and to what extent) Counsel is remunerated, is a matter of chance and circumstance. I understand most cases will involve at least one consultation, one pleading, several case progressions and one Motion. Counsel is therefore at the mercy of the *facts* of the case. In addition the *behavior* of the parties can determine remuneration. Perversely, the more involved and difficult cases (involving more consultations, motions, pleadings and settlement meetings) will under this scheme pay Counsel less because the value of the fee paid to Counsel as a result is eroded significantly. This lost time is not "*made up for*" on other categories of payment. There is no balancing provision and significant work of Counsel is not captured at all by the Terms.

I also observe that Counsel instructed by the Legal Aid Board in Childcare matters have perhaps the greatest burden, yet are paid substantially less than Counsel representing the CFA or Guardian Ad litem. The CFA scheme is much broader and encapsulates work that the Legal Aid Board scheme does not. The disparity between the levels of fees payable by the respective agencies on Full Care Orders is notable (CFA pay over twice the fee payable by the Board). Refresher fees are also notably lower.

I hope this assists.

Yours faithfully,

**STEPHEN FITZPATRICK**
stephen.fitzpatrick@peterfitzpatrick.ie

Encl. Table of Fees

**LEGAL AID FEES - CHILDCARE**

| | Date | Work undertaken | Hours Est | Fee Paid |
|---|---|---|---|---|
| A | 01/08/2014 | First Interim Care Order Application pursuant to s. 17 of the Child Care Act, 1991. Evidence (examination and cross examination) of social worker, submissions - Order granted under s.17 of the Child Care Act, 1991. Reading Brief and and attending Court (full day) | 15 | 400 |
| | 23/09/2014 | Application for extension of I.C.O. Evidence of Social worker (examination and cross examination), Order granted under s.17 of the Child Care Act 1991. | 2.5 | 150 |
| | 28/10/2014 | Ext I.C.O. - evidence of social worker and Guardian ad Litem (examination and cross examination). Issues re Parental Capacity assessment of Psychologist litigated | 2.5 | 150 |
| | 25/11/2014 | Ext I.C.O. evidence of social worker and Guardian ad Litem (examination and cross examination). Issues in respect of the [ ] assessment litigated. Order granted under s. 17 of the Child Care Act 1991. | 2.5 | 150 |
| E | 16/12/2015 | Attended at [ ] Hospital with the instructing solicitor, for a full day to view 5 DVD's of interviews. | 6 | 400 |
| F | 08/01/2015 | Ext I.C.O. - s. 37 application for access, s.47 application of the Child and Family Agency and Section 23 application for the admittance of hearsay evidence of the children returnable before the court. The s.23 application was not moved. Evidence of social worker and Guardian ad Litem (examination and cross examination). Order granted under s. 17 of the Child Care Act 1991. | 2.5 | 150 |
| G | 05/02/2015 | Ext I.C.O. evidence of social worker and Guardian ad Litem (examination and cross examination). Issues in respect of parents lack of consent to therapy of children. Evidence heard in respect of s.47 application of CFA for therapy to be directed. Interim Care Order Granted | 2.5 | 150 |

| | | | | |
|---|---|---|---|---|
| H | 19/02/2015 | Attended at Migrant Family Support Services Office with the instructing solicitor and client for two hours | 2 | nil |
| I | 03/03/2015 | Ext I.C.O. evidence of social worker and Guardian ad Litem (examination and cross exaination). Issues in respect of access. Interim Care Order Granted | 2.5 | 150 |
| J | 25/03/2015 | Ext I.C.O. evidence of social worker and Guardian ad Litem (examination and cross examination). Interim Care Order granted | 2.5 | 150 |
| [redacted] | 29/04/2015 | Ext I.C.O. evidence of social worker and Guardian ad Litem (examination and cross examination). Client strongly objected to suggestion of children meeting the judge. Issue litigated. Interim Care Order granted Orders made in respect of children meeting the judge. | 2.5 | 150 |
| [redacted] | 20/05/2015 | Application pursuant to S. 23 children's act 1997 to admit hearsay evidence (day 1) s.47 application (adjourned) Discovery application including legal submissions in Court. Discovery Orders Made Hearing from 10:30 - 15:00 | 7 | 400 |
| M | 12/06/2015 | Viewing of interview of children over 5 DVD's together with client and solicitor, for the purpose of taking instructions. Smithfield law centre with client (10-5) | 6 | 400 |
| N | 24/06/2015 | Ext I.C.O. evidence of social worker and Guardian ad Litem (examination and cross examination). Interim Care Order granted. Case management in respect of s.23 application | 2.5 | nil |
| [redacted] | 08/07/2015 | Application pursuant to S. 23 children's act 1997 to admit hearsay evidence (day 2) | 7 | 400 |
| P | 09/07/2015 | Application pursuant to S. 23 children's act 1997 to admit hearsay evidence (day 3) | 7 | 400 |
| [redacted] | 10/07/2015 | Application pursuant to S. 23 children's act 1997 to admit hearsay evidence (day 4) | 7 | 400 |

| | | | | |
|---|---|---|---|---|
| R | 19/07/2015 | Application pursuant to s.23 resulted in having to view DVD interviews x 4 of respondents being interviewed in [ ]- This is the fifth day of the 5 day cert granted | 7 | 400 |
| | 20/07/2015 | Ext I.C.O. evidence of social worker and Guardian ad Litem (examination and cross examination). Interim Care Order granted. Case management in respect of s.23 | 2.5 | 150 |
| T | 17/08/2015 | Ext I.C.O. evidence of social worker and Guardian ad Litem (examination and cross examination). Interim Care Order granted. Case management in respect of s.23 application | 2.5 | 150 |
| U | 14/09/2015 | Ext I.C.O. evidence of social worker and Guardian ad Litem (examination and cross examination). Interim Care Order granted. Case management in respect of s.23 application | 2.5 | 150 |
| | 05/10/2015 | S. 18 - Full Care Order Hearing day 1 | 9 | 400 |
| W | 06/10/2015 | S. 18 - Full Care Order Hearing day 2 | 9 | 400 |
| X | 07/10/2015 | S. 18 - Full Care Order Hearing day 3 | 9 | 400 |
| Y | 08/10/2015 | S. 18 - Full Care Order Hearing day 4 | 9 | 400 |
| Z | 09/10/2015 | S. 18 - Full Care Order Hearing day 5 | 9 | 400 |
| | 02/12/2015 | S. 18 - Full Care Order Hearing day 6 | 9 | 400 |
| | 03/12/2015 | S. 18 - Full Care Order Hearing day 7 | 9 | 400 |
| | 14/12/2015 | S. 18 - Full Care Order Hearing day 8 | 9 | 400 |
| 4 | 15/12/2015 | S. 18 - Full Care Order Hearing day 9 | 9 | 400 |

| | | | | |
|---|---|---|---|---|
| [redacted] | 16/12/2015 | S. 18 - Full Care Order Hearing day 10 | 9 | 400 |
| [redacted] | 17/12/2015 | S. 18 - Full Care Order Hearing day 11 | 9 | 400 |
| [redacted] | 18/12/2015 | S. 18 - Full Care Order Hearing day 12 | 9 | 400 |
| [redacted] | 21/12/2015 | Researching / preparing legal submissions which were directed by Judge Toale. Submissions in relation to novel point of law after 12 days of evidence as to whether a judge can refuse to admit hearsay evidence and the interpretation of s.23 (2) of the Children's Act 1997. | 6 | 400 |
| [redacted] | 03/01/2016 | Researching / preparing legal submissions which were directed by Judge Toale. Submissions in relation to novel point of law after 12 days of evidence as to whether a judge can refuse to admit hearsay evidence and the interpretation of s.23 (2) of the Children's Act 1997.<br><br>Reading of the submissions of Counsel for the Guardian ad Litem and Counsel for the Child and Family Agency. | 6 | 400 |
| [redacted] | 04/01/2016 | Writing legal submissions which were directed by Judge Toale. Submissions are 32 pages in length, they traverse areas of domestic law of both the District Court, the Superior Courts and European Union Law. They engage matters of constitutional law, human rights law, administrative law and the law of evidence. The submissions both present legal arguments on behalf of the Client, and also respond to the submissions of Counsel for the Child and Family Agency and the Guardian ad Litem. | 6 | 400 |
| [redacted] | 05/01/2016 | Writing legal submissions which were directed by Judge Toale - as above.<br><br>*The legal submissions run to 32 pages in length and can be provided to the legal aid board on request.* | 6 | 400 |
| [redacted] | 07/01/2016 | s. 18 Full care Order hearing day 13 - Resumed hearing and evidence. Legal submissions | 9 | 400 |

| | | | | |
|---|---|---|---|---|
| [redacted] | 12/01/2016 | Section 18 full care order hearing resumed, Judge Toale to question each counsel on legal submissions & deliver judgment in s.23 of Child Care Act 1997 matter, matter before the court and court indicating insufficient time to deal with matter | 7 | 400 |
| 14 | 15/01/2016 | s. 18 Full care Order hearing day 14 - Resumed hearing and evidence from Social worker and GAL. S.17 ICO extended within the context of lengthily Full Care Order hearing. Submissions in respect of s.47 direction in respect of welfare of child | 9 | 400 |
| 15 | 21/01/2016 | s. 18 Full care Order hearing day 15 - Judge Toale, over the course of a couple of hours, questioned the legal practitioners on their legal submissions. | 9 | 400 |
| [redacted] | 29/01/2016 | Matter in for mention in respect of awaited judgment | 1 | nil |
| 17 | 09/02/2016 | s. 18 Full care Order hearing day 17 - Judgment in respect of s.23 of the Children Act 1997. Judge Toale indicates the requirement for further evidence from an expert child psychologist. S.17 extension and section 47 application adjourned. Hearing and evidence. Legal submissions ico extended in the context of ongoing ico | 7 | 400 |
| [redacted] | 10/02/2016 | s.18 Full care Order hearing day 18 - Resumed hearing and evidence. Legal submissions in respect of the judgment given the day before, issue of costs argued in respect of cost of expert, costs reserved. | 7 | 400 |
| [redacted] | 12/02/2016 | s. 18 Full care Order hearing day 19 - Legal submissions and arguments. Further clarification on judgment and on further application to be brought by the Child and Family Agency in respect of Section 23 of the Children Act, 1991. Order made in respect of expert pursuant to s.27 (4) of the Child Care Act, 1991 | 7 | 400 |
| 20 | 01/03/2016 | s. 18 Full care Order hearing day 20 - Resumed hearing and evidence in respect of Full Care Order | 9 | 400 |
| [redacted] | 02/03/2016 | s. 18 Full care Order hearing day 21 - Resumed hearing and evidence of medical social worker and witness from women's refuge. | 9 | 400 |

| | | | | |
|---|---|---|---|---|
| [redacted] | 03/03/2016 | s. 18 Full care Order hearing day 22 - Resumed hearing and evidence of clinical psychologist in respect of assessment of parents | 9 | 400 |
| 23 | 07/03/2016 | s. 18 Full care Order hearing day 24 - Resumed hearing and evidence of foster daughter in respect of new s.23 application | 9 | 400 |
| [redacted] | 08/03/2016 | s. 18 Full care Order hearing day 25 - Resumed hearing and evidence of main social worker working the case on that date | 9 | 400 |
| [redacted] | 09/03/2016 | s. 18 Full care Order hearing day 26 - Resumed hearing and evidence of witness from women's refuge and original social worker | 9 | 400 |
| [redacted] | 10/03/2016 | s. 18 Full care Order hearing day 27 - Resumed hearing and evidence of witness from Migrant Family Support Services | 9 | 400 |
| 27 | 11/03/2016 | s. 18 Full care Order hearing day 28 - Resumed hearing and evidence resumed evidence of original social worker. Evidence of current social worker in the context of having to extend the ICO within the Full Care Order proceedings. Directions of the court in respect of engagement of expert child psychologist. | 9 | 400 |
| [redacted] | 27/06/2016 | s. 18 Full care Order hearing day 29 - Resumed hearing and evidence of psychiatrist for mother called by the Child and Family Agency | 9 | 400 |
| [redacted] | 29/06/2016 | s. 18 Full care Order hearing day 30 - Resumed hearing and evidence of expert child psychologist | 9 | 400 |
| 30 | 30/06/2016 | s. 18 Full care Order hearing day 31 - Resumed hearing and evidence of expert child psychologist | 9 | 400 |
| [redacted] | 04/07/2016 | s. 18 Full care Order hearing day 32 - further section 23 application to admit evidence of daughter in care. Social worker evidence, cross examination and evidence of guardian. Court directs visit to child. | 9 | 400 |

| | | | | |
|---|---|---|---|---|
| 32 | 05/07/2016 | s. 18 Full care Order hearing day 33 - decision in respect of new s.23. Evidence of current social work in respect of Full Care Order | 9 | 400 |
| 33 | 06/07/2016 | s. 18 Full care Order hearing day 34 - Resumed hearing and evidence of previous social worker in respect of Full Care Order hearing. Evidence of Guardian | 9 | 400 |
| [redacted] | 12/07/2016 | s. 18 Full care Order hearing day 35 - Resumed hearing and evidence of evidence of social worker in respect of extending the Interim Care Order, cross examination, evidence of Guardian, directions hearing in respect of the Full Care Order hearing resuming in Autumn - allocation of dates. | 7 | 400 |
| 35 | | Five additional full hearing days Full Care Order hearing (7x5 hrs) | 35 | 2000 |
| 36 | | Taking Judgment and review with client | 2 | 150 |
| | | **TOTAL** | **452** | **22200** |

PETER FITZPATRICK & COMPANY
LEGAL COSTS ACCOUNTANTS

[redacted]

SF/289/16/CR

20th December 2017

**Re: Legal Aid Fees - Divorce prceedings**

Dear [redacted]

I refer to the above matter.

I have reviewed the documentation briefed to me in this matter (redacted files and correspondence) relating to Divorce proceedings. On review of this brief, I formed an opinion on the reasonable amount of time to be assigned to each of the tasks involved. This I undertook by reference to the primary dates upon which work was undertaken. In the attached table, I set out my estimate of hours spent. Once this exercise was undertaken, I met with Counsel and I made enquiries about her own estimate of time and verified whether mine varied to any great degree. It did not.

The estimated time can be cross referenced with the ultimate fee paid in this matter (in order to test the reasonableness of that fee). You will note from the table that 21.5 hours were reasonably spent. This can be measured against the total fee payable by the Legal Aid Board (€1,145.00 was paid). The fee paid is entitled a "*case fee*". It is an indiscriminate fee of an omnibus nature defined in the 2012 scheme that covers all work no matter what level of documentation is furnished. It also includes the costs of one Motion and all pleadings. The basis of charges in the 2012 scheme are broken down into five primary types of fees which are:-

1. Case fee of €1,145.00
2. Case fee where Counsel is briefed after the Notice of Trial of €750.00
3. An additional fee of €200.00 per interim Application
4. A Refresher fee of €400.00
5. A Judgment fee of €150.00

In the example given to me no fees for refreshers interim applications nor Judgment fees arose and therefore the time estimated by me is relevant only to the "*case fee*" of €1,145.00.

My estimate of the total time spent is 21.5 hours. Applying an hourly rate of €250.00 per hour would yield a fee of €5,375.00. The fee paid €1,145.00 means an average of €53.25 per hour is being paid. That is grossly inadequate and particularly so because it appears to be the case that Barristers regularly instructed in Divorce proceedings by the Legal Aid Board are in excess of ten years *call*. A crude but notable benchmark is that this work is paid at approximately half of the rate some of the top five firms charge out for their trainee solicitors.

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VAT Registration Number: IE 4881495J Registered No: 118168

The concept of a *case fee* is out dated. The fee of €1,145.00 when first set was it seems heavily influenced by an assumption that 13 hours work might be involved for the most basic of case. My analysis of this case reveals significantly more time is required. This case however was a relatively straightforward one and one could easily conceive of another one whereby there would be:-

1. Several further interim applications
2. Heavier documentation and more complex documentation
3. Multiple consultations in advance of hearing
4. Additional pleadings

Extra work falling within the above categories is not provided for within the existing framework. The application of a *case fee* is a "*one size fits all*" approach. Such an approach might work for all participants in a scheme such as this if there was a significant volume of work and on any given day as Counsel would be in a position to hold multiple briefs. That might work because over time the good would pay for the bad and these matters could be considered "*on the round*". That is simply not the case because the listings of the Court (and the number of Judges hearing these cases) does not allow for the retention of several briefs. In addition, the level of documentation and the extent of the issues contained within the brief precludes any more than one brief being held on any one day.

The work of Counsel in these cases is in my opinion improperly provided for. There is over reliance on Counsel to such an extent that it appears even within the context of Counsel's *case fee*, Counsel are at times asked to undertake work that ordinarily is within the remit of the solicitor. This therefore erodes the value of the *case fee* for the Barrister.

In addition the "*one size fits all*" approach makes no distinction for the *seniority* of the Barrister. If it is the case that the Board is regularly instructing Barristers with only in excess of ten years *call,* then there is no recognition of this in the fee. It means the Board is requiring minimum standards of experience but it is not willing to pay for that experience. Even if the Board elected to use Barristers that are relatively inexperienced and perhaps only several years at the bar, the rates are in my opinion still wholly inadequate.

The scheme itself lacks sophistication because there is no provision for a form of proper certification by the Solicitor to account for difficult and complex cases and those that are more document heavy. Within other State Bodies there are schemes in operation to account for such variables.

The *case fee* also lacks transparency. The multiple components to it obscures the fee. A fairer approach would be to sub divide the *case fee* into proper component parts and assign flexible fees or indeed a range of fees (depending on certification). Obvious components are:-

1. Pleading fees
2. Brief fees
3. Consultation fees
4. Refresher fees
5. For Mention fees
6. Motion briefs
7. Judgment fees

The *case fee* captures most *headline* work and is grossly inadequate for even the most basic of divorce applications. It also appears to be considerably removed from the general marketplace.

This case is simple one with little variation however most cases will require many consultations, Motions and negotiations, appearances. As a result the value of the fee paid to the Barrister is eroded significantly and is likely to be considerably lower than the €53.25 per hour.

There are a number of other variables of the case that could significantly impact upon a Barrister's time and they are simply not catered for (travel time to other jurisdictions and of course waiting time). It would not take too much effort to formulate a fair working guide or scheme for payment of Counsels' fees that is

reflective of work reasonably and actually undertaken by Counsel. This could be easily undertaken to ensure there is value to that public for the services rendered but is equally balanced and fair in the payments made to the Barristers engaged.

I hope this assists.

Yours faithfully,

**STEPHEN FITZPATRICK**
stephen.fitzpatrick@peterfitzpatrick.ie

Encl. Table of Fees

Peter Fitzpatrick & Company
Haliday House, 32 Arran Quay, Dublin 7
Ph: 01 873 0688 DX 1053 Four Courts

| | Date | Work undertaken | Hours Est |
|---|---|---|---|
| A | 24/04/15 | Receipt of brief of 62 pages which included background documentation, Mediated agreement of 2012 and correspondence. Undertaking preliminary review. | 1hr 30 mins |
| [redacted] | 28/04/15 | Review documentation briefed, prepare Defence and Counterclaim and letter of advice | 3 hrs |
| C | 01/05/2015 - 18/06/2015 | Receipt of letters of instructions on 1st May, 13th May, 17th June and 18th June 2015 noting content and updated instructions. | 1hr |
| D | 26/11/15 | Receipt of case progression attendance note and up to date inter party correspondence (13pages), vouching documentation and review thereof. | 1hr 30 mins |
| E | 14/12/15 | Receipt of further vouching documentation (23pages) , further case progression Order and diary date of hearing ( listed for a half day). | 1hr 30 mins |
| F | 10/02/2016-16/2016 | Receipt of Updated Affidavit of Means and review thereof and associated documentation (36pages). | 1hr 30 mins |
| G | 22/02/16 | Receipt of formal Valuation report(7pages), briefing documentation ( pleadings 90 pages), vouchers(75pages) analysing and verification of figures and the claim. | 2hrs 30 mins |
| H | 03/03/16 | Preparation for hearing by final read in of brief, preparation of examination and cross examination (5hrs) attending pre-trial consultation on morning of hearing (1 hr) and attending hearing (4). | 9 hrs |
| | | | 21hrs 30 mins |

PETER FITZPATRICK & COMPANY
LEGAL COSTS ACCOUNTANTS

[redacted]

SF/289/16

16th January 2018

**Re: Legal Aid Fees- Hague Convention case**

Dear [redacted]

I have reviewed the documentation briefed to me in this matter (redacted files and correspondence) relating to important and urgent Hague Convention proceedings.

On review of this brief, I formed an opinion on the reasonable amount of time to be assigned to each of the tasks involved. This, I undertook by reference to the primary dates upon which work was undertaken. In the attached table, I set out my estimate of hours spent. Once this exercise was undertaken, I met with you twice to receive your own estimate of time and verify whether mine varied to any great degree.

The estimated time was then cross referenced with the ultimate fee paid in this matter (in order to test the reasonableness of that fee). You will note from the table that 68.5 hours were reasonably spent. This, when measured against the total fee payable by the Legal Aid Board (€4,285.00 was paid) shows the fee is unfair and inadequate for services provided. The fee paid includes a "*Case fee*". It is an indiscriminate fee of an omnibus nature defined in the 2012 scheme that covers all work no matter what level of documentation is furnished. It also includes the costs of one Motion and all pleadings. The basis of charges in the 2012 scheme are broken down into three primary types of fees which are:-

1. Case fee of €2,135.00
2. Refresher fee of €1,000.00
3. A Judgment fee of €150.00

Many typical categories of costs are not paid for no matter how many arise. The obvious ones are consultations, court appearances, interim applications. In the example given to me two fees for Refreshers arose (one for written submissions and one for a day long Judgment). There was no child assessment application although normally there would be that type of application in a case of this nature. If additional work arose under such an application, it would have had no bearing on the fee paid notwithstanding the significant work involved.

The analysis of the total time spent came to 68.5 hours. Applying an hourly rate of €250.00 per hour would yield a fee of €17,125.00. Application of the Tusla rate for Childcare matters would yield €13,700.00. The fees paid of €4,285.00 are notably lower and it points to an average of €62.55 per hour. That is grossly inadequate and particularly so because it appears to be the case that Barristers regularly instructed in this type of case are in general are in excess of ten years *call*. Using the number of hours as a "*checking mechanism*" for the reasonableness of the fee in the first instance, means that this work is inappropriately paid. It is not a suggestion that the work should be paid on an hourly basis. It points to the fact the payment

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is unfair. Independent benchmarks will also show the fees require revision. The primary reason why the fees are unfair is because a notable number of categories of work are excluded.

I note the fixed refresher fee of €1,000.00 applies to Junior Counsel only is not lead by Senior Counsel and where Junior Counsel does not advocate in court. When lead, it is reduced to €300.00. At face value that appears harsh. If the brief fee is paid at approximately two thirds, I see no obvious reason to depart from this for a refresher fee. The fact Junior Counsel may not be "*on their feet*" does not diminish the work to be undertaken. This looks like a double discount. In practice, this inter alia is why the fee is not of parity with Senior Counsel and is instead generally measured at two thirds refresher.

Yours sincerely,

**STEPHEN FITZPATRICK**
stephen.fitzpatrick@peterfitzpatrick.ie

Encl

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| | Date | Work undertaken | Hours Est |
|---|---|---|---|
| A | 30/09/14 | Receipt and review of comprehensive brief containing extensive documentation including, amongst other matters, an exchange of approximately 100 text messages. | |
| B | 01/10/14 | Drafting Special Summons and Grounding Affidavit 08.10.14. | 4 hrs |
| C | 08/10/14 | Brief written advices on timing of issue of proceedings. | 30mins |
| D | 22/10/14 | Attendance in Hague Luxembourg Convention List ("HLC List") in the High Court for the purposes of ensuring respondent gave necessary undertakings and receiving court directions in relation to exchange of Affidavits. | 1hr |
| E | 12/11/14 | Attendance at HLC List in relation to receipt of replying Affidavit and issue of proposed vaccine for child. | 1hr |
| F | 19/11/14 | Attendance in HLC List at which point the vaccine issue had been resolved. | 1hr |
| G | 24/11/14 | Drafting Replying Affidavit of approximately thirty paragraphs on behalf of Applicant. | 4hrs |
| H | 03/12/14 | Attendance at HLC List in relation to directions. | 1hr |
| O | 03/12/14 | Consultation with case worker following court to settle final version of Affidavit. | 1hr |
| J | 18/12/14 | Advice on correspondence between solicitors in connection with admissibiility of exhibits. | 30m |
| K | 19/12/14 | Attendance in High Court when matter was in "for mention". | 1hr |
| L | 07/01/15 | Drafting second Replying Affidavit on behalf of Applicant. | 2hrs |
| M | 09/01/15 | Reviewing official documents from French Authorities in relation to domestic violence legislation in France. | 1hr |
| N | 14/01/15 | Attendance at HLC List for directions. | 1hr |
| O | 21/01/15 | Drafting letter to be sent by Applicant's solicitors to Respondent's solicitors. | 30m |
| P | 27/01/15 | Preparation of detailed legal submissions as directed by the court (twelve pages) | 6hrs |
| Q | 02/02/15 | Drafting Notice of Motion and Grounding Affidavit in respect of Applicant's application for access. | 1hr30m |
| R | 03/02/15 | Attendance at High Court to move application for short service of access Motion. | 1hr |
| S | 04/02/15 | Attendance at High Court to move aplication for short service of access Motion. | 1hr |

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| | | | |
|---|---|---|---|
| [redacted] | 04/02/15 | Advising on contents of Affidavit to be sworn by solicitor for Applicant in relation to application for short service. | 25m |
| U | 06/02/15 | Hearing of access Motion. This involved being engaged in telephone discussions directly with the Applicant (who was then outside the country) in the presence of instructing solicitor and negotiating with the solicitors for the respondent - the access was ultimately agreed and was ruled in the early afternoon - the matter took the entire morning and counsel was finished at about 2.30 pm. (including preparation time) | 5hrs |
| [redacted] | 09/02/15 - 10/02/15 | Preparing for trial which included:- Reading papers and preparing submissions for the Trial. Preparing booklets of authorities which involved agreeing contents thereof with Counsel for the Respondent and copying/printing and collating of the authorities thereof with Counsel for the respondent and copying/printing and collating of the authorities. One ad a half hour consultation with the client on the evening before the Trial. conducting negotations with Counsel for the Respondent in attempting to resolve the matter (this involved preparing detailed draft Terms of Settlement). | 10hrs |
| W | 11/02/15 | After approximately two hours of unsuccessful negotiations, the trial commenced before the High Court at 12 noon and went on for the rest of the day. | 7hrs |
| | | **The matter went into a second day and further work was involved. Particulars of this additional work are set out below.** | |
| [redacted] | 12/02/15 | Second hearing day | 6hrs |
| [redacted] | 22/02/15 | The matter was in "for mention" in relation to a supplemental Affidavit which had been filed. | 1hr |
| [redacted] | 04/03/15 | Judgment was given. This actually involved a full day before the Court and with the clien | 7hrs |
| A3 | 05/10/15 - 10/03/15 | Subsequent to the above, it was necessary to reduce the foregoing oral undertakings to \ | 2hrs |
| A4 | 11/03/15 | The terms of the agreed Order were handed into Court and ruled formally. | 1hr |
| | | | 68hrs25m (say68.5hrs) |

# OPINION

# LEGAL AID FEES

**Peter Fitzpatrick & Company**
**Legal Costs Accountant**
**Haliday House**
**32 Arran Quay**
**Dublin 7.**

7

# Appendix 3

District Court Practice Direction DC05

**DC05**

**Dublin Metropolitan District - Dolphin House**

**Practice Direction**

**Case Management in Child Care Proceedings**

## 1. Overriding objective

1.1 The overriding objective of this practice direction is to enable the court to deal with each case in a manner which is just, efficient and cost effective and, in particular ensuring:

(a) That in all decisions, directions and recommendations made with respect to the conduct of the case, the safety, welfare and well-being of the child or young person, the subject of the proceedings, are paramount;

(b) That it is dealt with expeditiously and fairly;

(c) That it is dealt with in a manner which is proportionate to the nature, importance and complexity of the issues;

(d) That the parties are on an equal footing; and

(e) That it is allotted an appropriate share of the court's resources while taking into account the need to allot resources to other cases.

1.2 The court will give effect to the overriding objective when it interprets the provision of this practice direction, however the practice direction does not limit or interfere in any way with the powers and discretions of the judge under the Child Care Acts 1991-2011 and District Court Rules either generally or in a particular case.

## 2. Save in exceptional circumstances

2.1 The hearing of such proceedings should be completed in this court within nine months to one year from the date of commencement or earlier in appropriate cases.

2.2 The Child and Family Agency (CFA) should in advance of instituting proceedings have regard to the Principals of Best Practice in Child Protection contained in paragraph 1.1.1 of the Children First National Guidance for the Protection and Management of Children (2011) and evidence of such compliance should be available as set out in Appendix 1.

2.3 The parties should have an opportunity of entering into productive discussions at the earliest possible opportunity.

## 3. Legal representation

3.1 The CFA shall endeavour to inform every respondent of their entitlement to apply for civil legal aid and to furnish them with the address and telephone number of the nearest law centre as well as the law centre in Dolphin House in this regard.

3.2 Respondents who wish to be legally aided should be made aware of their entitlement to have their application prioritised in law centres. They should also be made aware of any scheme or facility for the waiver of any legal aid contribution. Supports available to overcome potential vulnerabilities with regard to issues of capacity, literacy, first language *etc.* should be made known to them at the earliest opportunity.

3.3 Without prejudice to paragraph 3.1 any respondent who wishes to proceed without a legal representative remains entitled to do so.

3.4 In the event that a legal representative for a party becomes aware of any circumstance or circumstances which may warrant the provision of additional assistance to overcome barriers that impede access to the court system by persons with physical, mental or sensory disabilities the legal representative may apply to the court for directions.

**4. Guardian ad Litem for the child**

4.1 Where the court is satisfied that it is in the interests of the child and the interests of justice to appoint a *Guardian ad Litem* in any proceedings under Parts IV, (care/supervision proceedings), Part VI (children already in the care of the CFA), and Part IVA as inserted by section 16 of the Children Act, 2001 (children in need of special care and protection) and where the child to whom the proceedings relate **is not a party**, the court may appoint a *Guardian ad Litem* to independently establish the wishes, feelings and interests of the child and present them to the court with recommendations.

4.2 The format of *Guardian ad Litem* reports to court should adhere to the template set out in Appendix A of the Children Act Advisory Board Guidelines in addition to paragraph 8.3 of this practice direction.

4.3 The *Guardian ad Litem* shall be provided with access to all CFA files, memoranda and notes regarding the child in respect of whom they have been appointed by the court. The *Guardian ad Litem* shall also be given notice of all applications and copies of all reports to court.

**5. Direct participation, party status and representation of child**

5.1 Where a request is made by a child to be present during the hearing or a particular part of the hearing of the proceedings such request may be brought to the attention of the court in order for the request to be considered within the parameters of section 30 (2) of the Child Care Act, 1991.

5.2 The court may direct the procurement of a report pursuant to section 27 (1) of the Act to assess the level of maturity of the child and their capacity to make independent autonomous decisions in respect of their care and welfare in the context of the proceedings.

5.3 Where the court is satisfied that it is necessary in the interests of the child and the interests of justice to join a child as a party to the proceedings or a particular part of the proceedings it may do so having considered:

(a) The age of the child;

(b) The level of understanding of the child;

(c) The wishes of the child; and

(d) The circumstances of the case including any report as set out at paragraph 5.2.

5.4 The court may appoint a solicitor to represent the child in the proceedings and give directions as to the performance of his duties (which may include, if necessary, directions in relation to the instruction of counsel).

5.5 The legal representative for the child is subject to the ethical requirements applicable to all solicitors and barristers, and must represent the client's instructions in the proceedings.

**6. Service and listing of certain care applications**

6.1 Where proceedings are commenced by application under Part IV of the Child Care Act, 1991 proof of service of the application as stipulated in the District Court Rules S.I. No. 93 of 1997 and District Court (Child Care) Rules S.I. No. 469 of 2008 shall be filed in court together with any relevant letter from CFA to the respondents preceding the litigation and accompanied by such other documents required or relied upon in connection with the application at least 2 clear days before the date listed for hearing.

6.2 Service of proceedings out of the jurisdiction pursuant to EC Regulation 2201/2003 shall be effected in compliance with the requirements of EC Regulation 1393/2007 and S.I. No. 635 of 2005

and S.I. No. 367 of 2009 and the standard forms as set out in the Appendix to the Service Regulation shall be used.

6.3 Service of proceedings or notice of proceedings or a non EU country shall be preceded by an application for leave to serve the proceedings out of the jurisdiction made *ex parte* and shall be supported by an affidavit, in accordance with the District Court Rules.

6.4 Service of proceedings or notice of proceedings under the Protection of Children (Hague Convention) Act, 2000 shall be effected in accordance with District Court (Hague Convention 1996) Rules 2011.

6.5 In circumstances where the CFA have assumed the care of a child or young person under section 12 (3) of the Child Care Act, 1991, it shall use its best endeavours to immediately inform the parent or parents having custody of the child or person or persons acting *in loco parentis* that the CFA has a statutory obligation to make an application to court for an emergency care order pursuant to section 13 (3) of the Child Care Act, 1991, unless it decides to return the child(ren) to their care. Furthermore the CFA shall advise them that they should immediately seek legal advice and representation as set out in paragraph 3.

6.6 Where the CFA determines that it must apply to court for an emergency care order it shall use its best endeavours to inform the parent(s) or person acting *in loco parentis* as soon as practicable of the date, time and location of that intended court application and take all steps necessary to ensure that they have been informed of the need for legal advice and representation as set out in paragraph 3 for the purposes of the said emergency court application unless the court is satisfied that to do so would compromise the safety of the child.

6.7 Where proceedings are commenced by way of application under Part III of the Child Care Act, 1991 following the removal of a child or young person under section 12 of the Child Care Act, 1991 or following assumption of a child or young person into care under section 13 (4)(c) the application under Part III or IV shall be served on the parents, or person or persons, with custody or care of the child as soon as practicable and evidence of service or attempted service is to be filed in the court office together with evidence of having notified the respondent(s) of their rights to apply for priority in procuring legal aid and advice and the location and contact numbers of the law centres to which such application can be made as well as the right to apply to have the application processed on an emergency basis.

6.8 Where proceedings under Part III section 13 of the Act are brought the application shall be grounded on an affidavit sworn by the appropriate CFA personnel, or on information on oath and in writing sworn by the appropriate CFA personnel. A copy of the affidavit or information shall be served on the respondents with the application.

6.9 Where proceedings under Part III section 13 are brought *ex parte* application pursuant to section 13 (4)(c) to have the application heard *ex parte* and the application shall be grounded on affidavit sworn by the appropriate CFA personnel, or on information on oath and in writing sworn by the appropriate CFA personnel. A copy of any order (including an order to dismiss), shall be served on the respondent(s) as soon as practicable. A note of evidence given by the CFA during the said application shall be prepared as soon as practicable by the CFA or their solicitor and approved by the judge and a copy of any affidavit or information and of the note of evidence shall be available to the respondents on application to court.

6.10 The CFA shall on request provide the solicitors for the respondents with access to all reports and documentation or records relied upon by the CFA or to which it has had regard in forming the opinion that the relevant statutory threshold under section 13 of the Act has been met or exists so as to require them to initiate proceedings. Unrepresented parties shall be provided with access to such documentation in accordance with clause 11.4 of this practice direction.

6.11 Notice of the hearing of an application for an emergency care order under section 13 shall be served at least **two days prior** to the date fixed for hearing the application unless in the urgency of the matter requires the matter to be heard *ex parte*.

6.12 An application by the CFA for an interim care order (section 17) shall be served on the respondents in accordance with the District Court Rules Order 84 Rule 9. However where possible at least seven days notice should be given to the respondents. In the case of a party residing out of the jurisdiction service shall be in accordance with S.I. No. 367 of 2009: District Court (Service in Member States of Judicial and Extra-judicial Documents in Civil or Commercial Matters) Rules 2009 or S.I. No. 301 of 2011: District Court (Hague Convention 1996) Rules 2011 or the District Court Rules for service outside the jurisdiction in non EU countries.

6.13 Any application for the extension of an interim care order under section 17 should be served on the respondents in accordance with the District Court Rules with relevant proof of service filed in court.

6.14 An application for a care order under section 18 or an application for a supervision order under section 19 should be served on the respondents at least seven days prior to the date listed for the hearing of the application and filed in court with relevant proof of service at least four clear days before the date listed for hearing.

6.15 Where a respondent cannot attend court by virtue of his involuntary detention in a State Institution, arrangements may be made for that respondent to appear by way of (audio visual link) AVL or telephone;

**7. Filing of documents and reports**

7.1 All applications to court, initiating papers, court reports and draft orders shall be filed by email within the time frames set out in the District Court Rules / this practice direction .

7.2 The title of the covering email should cite the name of the applicant and the names of the respondent(s) to the proceedings, the court file record number where relevant; and the date on which the matter is returnable before the court.

7.3 Reports and applications filed by the *Guardian ad Litem* should in addition also cite the name of the particular child or children in respect of whom the matter is filed.

7.4 All attached documents including PDF documents should be titled/labelled (in the icon) in a manner which identifies the nature of the documents, the date of the document and case to which it refers.

7.5 All reports should be in “Portable Document Format” (PDF). A file created with a word processor, or a paper that has been scanned, must be converted to PDF to be filed electronically with the court.

7.6 All documents within an email must be correctly titled with name of particular case, and contents of the document, *i.e*. CFA Social Work Report or GAL Report, including date which the matter will appear before the court.

7.7 All proposed orders submitted for a judge’s editing, if necessary, and signature shall be filed in a format compatible with WordPerfect and not in PDF.

7.8 The original of all applications and court reports (duly signed by the party or parties generating such report) shall be filed in court on the morning of the hearing; any exhibits must be properly tabbed and all papers firmly bound (“book style”). A printed copy of the filing email must be attached to the front of the document.

7.9 The court may excuse a party from electronic filing for good cause shown.

7.10 Personal litigations are not expected to file papers by email.

**8. Standard directions**

8.1 On the return date when an interim care order application (ICO section 17) comes before the court and if the court determines that an Interim Care Order should be granted or extended the court may further list the proceedings to a date not to exceed 28 days (or such longer period as may be agreed by the respondents and approved by the court in the interests of the child) after the date of the ICO with such directions (if any) as is considered to be proper to include -

(a) Whether the address or location of the place at which the child is being kept is to be withheld from the parents of the child, or either of them, a person acting in *loco parentis* or any other person;

(b) The access, if any, which is to be permitted between the child and any named person and the conditions under which the access is to take place;

(c) The medical or psychiatric examination, treatment or assessment of the child.

8.2 In all cases listed for hearing under section 18 the CFA must file in court at least 7 days in advance of the hearing including:

(1) A summary of the application;

(2) An A4 folder or folders should be filed in the court containing the following documents annexed thereto:

(a) A copy of the child's birth certificate;

(b) A copy of other relevant certificates;

(c) A chronology of previous court orders & decisions (if any);

(d) Copies of all assessments and reports available to the CFA in respect of the child;

(e) Other relevant reports and records (*e.g.*; health and education/immigration documents);

(f) Key CFA minutes & records regarding the child (including strategy discussion record/case conference records);

(g) A genogram of family/extended family membership chart;

(h) The care plan pursuant to S.I No. 260 of 1995 or Leaving Care Needs Assessment Form and Preparing for Leaving Care Plan, or After Care Plan.

8.3 Content of social work reports and *Guardian ad Litem* reports to court should be:

- As short and focused as possible;
- Be clearly set out using numbered paragraphs, headings and sub-headings and numbered pages;
- Balance description and background chronology with evaluation, summary and assessment;
- Differentiate fact from opinions;
- Unsubstantiated allegations should be highlighted as such;
- Only facts which will be substantiated by evidence at hearing should be contained in final reports;
- Present the information with sensitivity and in a way which does not exacerbate the relations between the parties;
- Be fair to the parties and demonstrate balance;
- Avoid unnecessary repetition of material which is available in other or earlier documents before the court.

8.4 On the return date when a supervision order application (section 19) comes before the court and if the court determines that a supervision order should be granted it may make such directions (if any) as is considered to be proper with respect to the care of the child and such directions may require the parents of the child or a person acting *in loco parentis* to cause him to attend for

medical or psychiatric examination, treatment or assessment at a hospital, clinic or other place specified by the court.

8.5 Any party to section 17 proceedings may apply to court on the first hearing or at any time thereafter during the currency of the ICO for a direction or the variation or discharge of any such direction under section 17(4) on notice to the other party and the court in accordance with the District Court Rules, where possible at least 7 days notice to be given to the other party and to the court.

**9. Application for a extension of an interim care order or for a sequential supervision order**

9.1 The CFA must file an application for a care order under section 18 in respect of the child before the expiration of the ICO (or provide evidence of its intention to so do) before applying for an extension of the ICO.

9.2 Any party to the proceedings may apply to extend the ICO and the court may extend the ICO if satisfied that grounds for the making of an ICO continue to exist with respect to the child.

9.3 The applicant shall serve all reports and other documentary evidence to be relied upon for the application for extension of the said order on the legal representatives of the parties and the court 4 days prior to the date of hearing.

9.4 The *Guardian ad Litem* shall serve all reports on the legal representatives of the parties and the court 2 days prior to the date of hearing.

**10. Party seeking leave to withdraw or amend application to give notice**

10.1 A party intending to apply for leave to:

(a) Amend a care application or supervision application (including the grounds upon with the order is sought);

(b) Amend the order or orders sought in the care application following the making of a determination that the child or y/p is in need of care and protection; or

(c) Withdraw a care application.

Shall give at least 7 days notice to the other parties of that application, unless such requirement is dispensed with by the court.

**11. Disclosure/discovery**

11.1 All applications for disclosure/discovery shall comply with Order 46A District Court Rules.

11.2 Where a party to the proceedings is provided with access to a report, document or record it shall be a condition of such access that the report, document or record or any copy shall not be used for any purpose other than the proceedings for which the document has been produced, unless the court otherwise directs.

11.3 Where a party is not represented by a legal practitioner access to documents is to be provided by CFA and such documents may not be photographed, copied or removed without leave of the court.

11.3 Original documents produced which are admitted into evidence during the course of the proceedings will be returned to the producer at the conclusion of the matter and will be destroyed by the office of the court 42 days after the conclusion of the matter unless arrangements have been made with the Office of the court to collect the documents.

**12. First directions hearing**

12.1 Immediately following the determination of the second order extending the interim care order the case shall be listed before the court for a first directions hearing.

12.2 In advance of the first directions hearing date the CFA shall (where possible and appropriate) schedule a formal dispute resolution conference with the parents/guardians and the GAL (if a GAL has been appointed).

12.3 In advance of the first directions hearing date the CFA shall furnish a summary care plan to the parents, the solicitors for the parents/guardians and to the GAL appointed for the child/y/p at least four days before the hearing and same shall be filed in court at least 24 hours in advance of the hearing.

12.4 At the first directions hearing the court shall be provided with a list of all witnesses proposed to be called in support of the application and whether factual issues (disputed allegations) are required to be determined by the court.

12.5 In advance of the first directions hearing date notice shall be given by the respondents to the CFA and the court whether and to what extent it is proposed to:

(a) Dispute the relevant legislative threshold criteria for the making of the order sought by the CFA;

(b) The extent of agreement/disagreement as to the content of materials disclosed;

(c) Whether further disclosure or reports are deemed necessary and the reason for such further disclosure;

(d) Whether witnesses are to be called by the respondents.

12.6 Where appropriate and if the threshold criteria are not contested the court may make an order and directions under section 47 as required or deemed necessary in relation to care of the child/ y/p.

12.7 The solicitor and/or counsel attending the first directions hearing shall ensure that he or she:

(a) Is sufficiently familiar with the proceedings as to be able to apprise the court fully of all relevant aspects of the proceedings; and

(b) Has authority from the party he or she represents to deal with any matters that are likely to be dealt with at the directions hearing;

(c) Where a party is represented by solicitor and counsel the attendance of only one of such legal advisors will be allowed on the taxation or fixing of costs (where relevant).

**13. Directions order**

13.1 At the first hearing or at any hearing in the directions list, the court, having considered the representations made by the parties or of its own motion shall:-

(a) Make such orders and issue such directions as seem appropriate and may note any agreement reached between the parties;

(b) Grant an adjournment of the hearing to enable any such orders, directions or agreements to be implemented, to facilitate the resolution of any further matters arising thereon and to enable the parties otherwise to prepare fully for the hearing of the care order or supervision order or section 47 application. Such adjournment shall, save for substantial and compelling reason, not exceed 28 days;

(c) In the absence of a request for an adjournment, deal with all relevant matters, in a manner which is best calculated to achieve the objective referred to in paragraph 1 of this practice direction ; and

(d) Then or at any time thereafter, consider and recommend as it may think appropriate such forms of alternative dispute resolution as may be helpful to resolve or reduce the issues in dispute between the parties. Such forms of alternative dispute resolution mechanism may, *inter alia*, include conciliation, mediation or arbitration in respect of some or all of the issues arising in the proceedings.

**14. Listing a case for hearing**

14.1 Proceedings shall only be allocated a hearing date when the court is satisfied having regard to the representations of the parties and to the extent of progress in the proceedings that the proceedings are sufficiently advanced that it is appropriate that they be allocated a date for hearing.

14.2 A case will not be listed for hearing unless the court is satisfied that all directions of the court have been complied with (including any direction under section 47 of the 1991 Act that the parties attend an alternative dispute resolution conference).

14.3 The parties must advise the court of the names of witnesses and their professional qualifications and the number and availability of witnesses required for cross examination, and the issues that are in dispute. In the event that more that one expert witness is to be called to give evidence in relation to a particular issue or issues, the parties are to outline for the court the reason and necessity for the multiplicity of expert witnesses and the relevant reports to be relied upon by the expert witnesses being called.

14.4 Each party must inform the court of any matter which might delay or prolong the hearing and provide the court with a realistic schedule for the hearing of the action, based on a reasoned and informed view.

14.5 In advance of the date allocated for hearing the CFA shall furnish a draft, of the order being sought from the court, to all other parties and to the court. Each party shall file and serve on the other party and on the court:

(a) A list of any affidavits (and other documents) to be relied upon by that party at hearing;

(b) Any application regarding evidence of children or notice to admit hearsay evidence under section 21-23 Children Act, 1997;

(c) A detailed statement of the real issues in dispute (for example a statement that an issue in dispute is "*whether there is a realistic prospect of family reunification/restoration"* is not sufficient;

(d) Confirmation of the witnesses required for cross-examination.

14.6 Notwithstanding the above, the court may for substantial and compelling reasons, at any time allocate the case a specific date for Hearing in the best interests of the child or y/p.

**15. Pre-hearing call over**

15.1. There shall be a pre-hearing call over on the Friday not less than one week prior to the hearing date.

15.2 The solicitor or counsel for each of the parties or, where a party is not legally represented, the party himself or herself, shall be in attendance.

15.3 Where the court considers it necessary or desirable, it may direct that a party attend the call-over, notwithstanding the fact that the party may be represented by a solicitor.

**16. Settlement/delay in proceedings**

16.1 There shall be a continuing obligation and duty on each party to bring to the court's attention as soon as possible any matter which might shorten delay or prolong the hearing of the proceedings.

16.2 There shall be a continuing obligation and duty on each party to inform the court office/court registrar of any settlement or part settlement of any proceedings.

**17. Prior to the Hearing Date**

17.1. 7 days in advance of the hearing date all legal representatives and unrepresented parties have a collective obligation to assist the court by ensuring that:

(a) All relevant applications, affidavits and reports have been filed;

(b) The applications, affidavits and reports have been reviewed and there is no need to amend the application or file further evidence;

(c) All relevant interlocutory matters have been attended to and the case is ready for hearing;

(d) The possibility of reaching agreement has been fully explored;

(e) The issues to be addressed at the final hearing are clearly identified;

(f) Evidence addressing those issues is filed or otherwise available;

(g) All expert witnesses, including medical clinicians who are required for cross-examination are available to attend the hearing and that the witness has been provided with all relevant material. Where an expert has been jointly instructed any further agreed additional material is to be provided to witnesses before the witness is required to give evidence;

(h) All other parties have been notified of which witnesses are required for cross examination;

(i) The length of time required for examination in chief and cross examination of each witness has to be estimated;

(j) All witnesses have been time-tabled and are available;

(k) Expert witnesses in particular have been allocated specific dates and times for their evidence, the length of time allocated for their evidence must be carefully assessed to ensure that it can be given without the expert witness being required to give evidence on a further occasion;

(l) All documents the production of which have been sought by witness summons have been produced;

(m) All documents procured through witness summons and upon which a party proposes to rely upon at hearing (including by way of cross examination) have been annexed to an affidavit which has been filed in court by that party;

(n) A chronology of relevant events will be filed a week before the hearing;

(o) Care plans / leaving care plans / after care plans have been filed and served on the parties;

(p) All clinical assessments have been completed;

(q) Arrangements have been made for interpreters (where necessary) and the attendance of any party at the hearing by AVL and where required a remote witness room is available;

(r) Where relevant arrangements have been made for the child to express wishes to the judge.

18. Applications for interim orders, directions, access matters, urgent matters and consent orders or orders subject to approval shall, subject to any contrary direction, be dealt with in accordance with this practice direction.

**Appendix 1**

**A PRE PRECEEDING LETTER TO PARENT/GUARDIAN**

**[Steps taken by the CFA pursuant to paragraph 5.6.5 of Children First]**

**LETTER PRE PRECEEDING APPLICATION UNDER CHILD CARE ACT 1991**

SENT BY [RECORDED DELIVERY/BY HAND]

CFA Office Address/ Contact Direct line

My ref Fax E-mail Date

Re: [insert name of CFA AREA] CONCERNS ABOUT [insert name(s) of child]

Dear [parent and/or full name(s) of guardian or party *in loco parentis* of child or y/p]

I am the Team Leader in the CFA area and I am writing to set out the CFA concerns regarding your care of [name(s) of child/ren].

[ SET OUT CONCERNS]

When you spoke to [name of social worker] on [insert date of last interaction] you were made aware of our main concerns.

You were also informed of these concerns in [reference to the letter before Proceedings/ child protection case conference/any social work meetings].

We have tried to work with you to help you address these concerns but unfortunately these concerns remain.

We are writing to tell you again that we will be going to court to apply for a [care order][interim care order][supervision order][emergency care order]. You will soon receive a copy of our application to the court.

We would urge you, if you have not done so already, to get advice from a solicitor. You should immediately contact your nearest law centre if you cannot afford to get private legal representation.

Yours sincerely

[Name]Team Leader SW Department

cc. Social Worker [name]

CFA Legal Team Centres and contact details

**Appendix II:**

The summary care plan for the child y/p should briefly and succinctly set out the following:

- The alleged risk and safety concern(s) for the child or y/p;
- The extent of the efforts made for family reunification;
- Tasks and demonstrated changes the parents/guardians need to undertake to achieve reunification safely and the relevant timeframes for the tasks changes to occur;
- The nature of the placement currently proposed for the child (both interim and long term and whether section 36 Relative Foster Placements have been investigated and to what extent);
- The kind of parent/child/sibling access currently proposed (including frequency and duration of proposed access and whether it is proposed to be open or supervised) both on an interim and long term basis;
- The child's health, education, emotional and identity needs and how these will be met.

Rosemary Horgan

President of District Court

31/01/2013

# Appendix 4

Example of work done in a child care case as recorded by a junior counsel

**Child Care Case detailing work under taken by Counsel at each stage.**

| Application | Work undertaken | Time spent in preparation | Time Spent in Court | Fee paid to Counsel for the Legal Aid Board |
|---|---|---|---|---|
| **First Interim Care Order** | • Reading full brief of papers ( 2 x Court report prepared by Social Worker, minutes of case conference meetings x 2, Guardian ad Litem report, Various Medical Reports, 2 x parental capacity assessment reports, 5 x Care Plans for each child)<br>• Detailed first consultation. This took place in the law centre and involved going through reports with the client. It lasted two hours. This client has both a language barrier and a developmental learning difficulty and therefore it can take longer to get instructions.<br>• Letter of Advices for solicitor in advance of first Interim Care Order<br>• Witness handling on cross examination of multiple expert witnesses<br>• Submissions in Court | • Reading in advance of first consultation was five hours.<br>• Consultation for two hours with the client on a day before the case.<br>• Consultation with client for one hour between 9:30 – 10:30 on the day of the case.<br>• **Total time preparation 8 hours** | • First application was contested. Arrived in court building at 9:30 for 1 hour consultation<br>• Call over of the child care list at 10:30<br>• Negotiations with other lawyers over the course of the day to narrow issues and reduce court time<br>• Get called on for hearing at 2pm and at hearing until 4:30pm<br>**Total time on feet 2.5 hours**<br>**Total time in court building 7 hours** | €400 |

| Application | Work undertaken | Time spent in preparation | Time Spent in Court | Fee paid to Counsel for the Legal Aid Board |
|---|---|---|---|---|
| **Subsequent days of the First Interim Care Order** | Not applicable in this case, but these will involve much the same work as above. | | If the case is listed for multiple days, then you are in court all day from 10:30 – 4/5 | Unclear, sometimes paid at €400 sometimes paid at €150<br><br>A separate Counsel advised that she has been told in a different case that they would be paid €150 only for a nine day hearing of an interim care order. This was not a per day fee, it was based on the fact that an interim care order is payable at €150 only. This is an example of inconsistent application of the scheme. |

| Application | Work undertaken | Time spent in preparation | Time Spent in Court | Fee paid to Counsel for the Legal Aid Board |
|---|---|---|---|---|
| **Further Interim Care Orders**<br><br>**Application made by the CFA every 28 days**<br><br>**This was up until the listing of a lengthy application to have children's hearsay statements admitted as evidence in the proceedings** | • New Social work & Guardian Report each month<br><br>• Consultation in advance for an hour on the morning of each case<br><br>• Generally the Interim Care Orders were on consent, however the information contained in the reports and the evidence of the social workers always needed to be tested as they information was often disputed as to its accuracy<br><br>• Every single ICO I was in Court until at least 3pm and sometimes until 4:30 pm<br><br>• I would always have been an hour in Court<br><br>• During the course of various interim care orders we were served with additional evidence of the child and family agency including 2 x psychological reports each running to in excess of 20 pages, 3 x Reports from a Child Sexual Abuse Assessment Unit each running to in excess of 20 pages | • At a minimum, I had to spend two hours in the days running up to Interim Care Orders reading reports and preparing advises for my solicitor. When more detailed reports were received this could lead to a full days preparation in advance.<br><br>• I always arrived in the court building at 9:30 for a 1 hour consultation in advance of the call over of the list, and would then use the time during the course of the day to negotiate with my client | • At a minimum I would be in court for each interim care order for one hour, and would often be in court until 4pm therefore dedicating my entire work day to this case | €150 |

| | | | | |
|---|---|---|---|---|
| **There were 8 of these Interim Care Order Applications** | • All of these reports need to be considered in detail in order to provide legal advice in advance of consultation, and then needed to be read through with the client in order to obtain detailed instructions.<br><br>• An interpreter was used to take instructions. | | | |

| Application | Work undertaken | Time spent in preparation | Time Spent in Court | Fee paid to Counsel for the LAB |
|---|---|---|---|---|
| **Discovery application for documents from the child and Family Agency** | • Prepare Letter of advises with regard to discovery which must be obtained to defend client (1 hour)<br>• Draft letter of Voluntary Discovery (2 hours)<br>• Draft Discovery application together with grounding affidavit (1 hour)<br>• Prepare legal submissions with regard to entitlement to access to certain documents (2 hours) | • See across – **6 hours spent in preparation**<br>• There was no need for a pre hearing consultation with client and therefore arrived to court building just before 10:30.<br>• Detailed pre hearing negotiations with lawyers for the Child and Family Agency.<br>• Contested application run in court together with oral legal submissions | • This application was actually heard over two separate days due to an allowance of time to the child and family agency to come back with information as to what they might provide<br>• Over the two court days I was in court on my feet for at least two hours | • There is no provision in the 2012 Terms with the bar council for discovery applications<br>• A special certificate of a refresher payable for the entirety of the work done was obtained. This is payable at €400 |
| **Viewing of DVDs** | • From the discovery application above, 5 DVDs of interviews carried out with the children the subject of the proceedings were obtained. These lasted approximately 4.5 hours.<br>• I viewed these once on my own time at home in order to prepare for taking instructions from the client.<br>• I then attended at a law centre with facilities for watching DVD's and watched these with my client, stopping and starting in order to allow him to give instructions on specific parts. We were in the law centre from 9:30 – 4:30 | These DVDs were used to form the content of substantive reports prepared by a Child Sexual Abuse Assessment Unit. I therefore had to re-read the report that related to each DVD in detail in advance of watching the DVD's on my own (**2 hours)**<br>• I then watch the DVD's on my own over **4.5 hours**<br>• I then watched the DVD's with my client whilst taking instructions **(6 hours -7 with a lunch break)** | Not applicable | • There is no provision in the 2012 Terms with the bar council for the viewing of DVD Evidence.<br>• A special certificate of a refresher payable for the entirety of the work done was obtained. This is payable at €400 |

| Application | Work undertaken | Time spent in preparation | Time Spent in Court | Fee paid to Counsel for the Legal Aid Board |
|---|---|---|---|---|
| **Application to have hearsay statements of a child admitted in evidence** | • This application was to seek to have statements made to a Child Sexual Abuse Assessment Unit, admitted in evidence.<br>• I was served with all of the discovery documentation in a large lever sized folder with in excess of 400 pages.<br>• I spent approximately two days in preparation for the application, going through all of the documents, which were used to ground the Child and Family Agencies Application.<br>• I researched and prepared submissions on best practice for child interviewing. | • Two full days preparation<br>• No consultation required in advance | • Three court days from 10:30 – 4:30 | • Under the Legal Aid Board 2012 Terms and Conditions this should pay at an interim rate of €150 per day, however a special certificate was obtained to pay €400 refresher rate for the court days only |

| | | | | |
|---|---|---|---|---|
| | • I jointly instructed with the other parents legal team an expert in Psychology and interview techniques to review the tapes<br><br>• The application of the Child and Family Agency to admit these statements was listed for five full days<br><br>• The Application had to cease after three days as the Child and Family Agency had not provided all documentation which had been used to reach their own conclusions and they were directed to provide us with same.<br><br>• The Application was relisted for a further five days a few weeks later and this application was to be at the start of the applications for Full Care Orders | | | |

| Application | Work undertaken | Time spent in preparation | Time Spent in Court | Fee paid to Counsel for the Legal Aid Board |
|---|---|---|---|---|
| **Interim Care Orders up until the application for full care Orders** | • New Social work & Guardian Report each month<br>• Consultation in advance for an hour on the morning of each case<br>• Generally the Interim Care Orders were on consent, however the information contained in the reports and the evidence of the social workers always needed to be tested as they information was often disputed as to its accuracy<br>• Every single ICO I was in Court until at least 3pm and sometimes until 4:30 pm<br>• I would always have been an hour in court on my feet.<br>• All of these reports need to be considered in detail in order to provide legal advice in advance of consultation, and then needed to be read through with the client in order to obtain detailed instructions. | • At a minimum, I had to spend two hours in the days running up to Interim Care Orders reading reports and preparing advises for my solicitor. When more detailed reports were received this could lead to a full days preparation in advance.<br>• I always arrived in the court building at 9:30 for a 1 hour consultation in advance of the call over of the list, and would then use the time during the course of the day to negotiate with my client | • At a minimum I would be in court for each interim care order for one hour, and would often be in court until 4pm therefore dedicating my entire work day to this case | €150 |

| Application | Work undertaken | Time spent in preparation | Time Spent in Court | Fee paid to Counsel for the Legal Aid Board |
|---|---|---|---|---|
| **Access Application to a child in care** | • A separate application was issued for increased access in circumstances where access was taking place only once every four weeks between the parent and children.<br>• This application must be issued if a parent is seeking access to their child in care. This application must be drafted and also grounded on an affidavit to be drafted.<br>• This hearing was very contentious involving multiple professional witnesses. | • Drafting Application and Grounding affidavit (**1.5 hours**)<br>• Consultation with client in advance of court **(1 hour)** | • The application ran and was contested by the child and Family Agency and therefore lasted **two hours** in court.<br>• I was in the court building from 9:30 until 4pm | **No Payment** due to the fact that the application was listed on the same day as an application for an Interim Care Order payable at €150 |
| **Application for Directions in the interest of a child (s.47)** | • Application for directions relating to the religious welfare of the children in care | • Application drafted together with grounding affidavit (**1.5 hours**)<br>• Consultation with client in advance of court | • In Court building all day<br>• In court for approximately **1 hours.** | **No Payment** due to the fact that the application was listed on the same day as an application for an Interim Care Order payable at €150 |

| Application | Work undertaken | Time spent in preparation | Time Spent in Court | Fee paid to Counsel for the Legal Aid Board |
|---|---|---|---|---|
| **Application for Full Care Orders of 5 children** | • As this application was many weeks after the original application. All of the work undertaken above in preparation for the application had to be undertaken again.<br>• A further voluminous booklet of documentation was served in respect of this application running to in excess of 600 pages | • Three days in advance of Court hearing | • 10:30 – 4:30 each day of the Full Care Order application | €750 brief fee payable for the first day<br><br>€400 refresher payable for every day thereafter. |
| **Matter in For mention** | At various points over the course of this hearing, the child and family Agency asked the court to have matters listed "For mention only". This related to for example<br>(a) To update the court on the discovery process<br>(b) To update the court regarding the dates on which certain professional reports would be available.<br>(c) To update the court regarding medical appointments for the children which were mandated by the court.<br>(d) Other general matters<br>The case was listed for mention only on four separate occasions since the start of the case. | • Little to no preparation in advance of a for mention hearing, maybe an exchange of letters with my solicitors, together with a 30 minute consultation with client on the morning before court | • I arrived in court for each for mention only matter at 10am for a consultation with client and solicitor<br>• Generally in court for about 10 – 30 minutes.<br>• Would be out before 12:30, therefore in Court building for 2 hours or so | The Legal Aid Board do not pay for "For Mentions" |

# Appendix 5

Example of work done in a District Court case under the PPS as recorded by a junior counsel (Access and Maintenance)

Sample case which was undertaken between May 2015 and December 2015:

| **Date** | **Work Attended To** |
|---|---|
| 27/05/15 | Receipt and review of brief including summons and clients initial instructions. |
| 10/06/15 | Clients Legal Aid Certificate forwarded to me. This certificate covered an Access application only. |
| 29/06/15 | 1st Day of hearing. Fully contested case concerning both an access application and a maintenance application by the other party. After the hearing the Judge made a maintenance order and interim access order and adjourned the matter to 25th November 2015.<br><br>I wrote to the solicitor outlining the above and asking for the legal aid certificate to be extended to include maintenance.<br><br>The other party appealed the order. |
| 06/10/15 | 1st day of hearing in the Circuit Court. The case was adjourned and more extensive vouching documentation ordered by the court. Both parties had vouched their statement of means, however, vouching provided was not satisfactory on either side. Case adjourned to the 1st December 2015. |
| 25/11/15 | Original case comes back to the District Court. The Judge refused to deal with it. Submissions made to the court on the issue of interim orders. The Judge adjourned it to 4th December 2015 to be heard before the original Judge who had heard the case. |
| 30/11/15 | Received updated brief containing further vouching documentation as ordered by the Circuit Court on 6th October 2015. Same was reviewed and email sent to solicitor containing queries re same. |
| 01/12/15 | Second date in the Circuit Court and full hearing of both the interim access and maintenance orders. Orders were made re both applications. |
| 04/12/15 | Back before the District Court for the third time. Both sides legal representatives agreed to be bound by the Circuit Courts decision. |

Luckily this was the case as the original Judge was not sitting that day despite the case being adjourned into her list. Had the parties not agreed to be bound by the Circuit Court's decision the case would have likely been adjourned once again.

**FEE**

The fee as per agreement with the Legal Aid Board in relation to both Access and Maintenance applications in the District Court is €423. My agreement with solicitors engaged in this Scheme is a 50/50 split, therefore my fee for the District Court case was €211.50 total. This fee is the same for District Court Appeals to the Circuit Court. In this particular case, the legal aid certificate initially just provided for an access application (as would be very common). After the first date was adjourned I asked my solicitor to contact the legal aid board in order for them to extend the certificate to cover the maintenance application also. They agreed. The certificate was then extended for the appeal. This essentially means that the client does not have to pay for another certificate for the appeal but the solicitor is paid a second fee from the Legal Aid Board. When the case was finally complete my solicitor put in two fees, one for the District Court case and the second for the District Court Appeal to the Circuit Court. Despite agreeing to extend the legal aid certificate in the District Court, the Legal Aid Board paid only a sum of €339 for that case. Therefore the fee I received in relation to the District Court case was €169.50. The legal aid board did cover both applications in the appeal and therefore my solicitor received €423 and I was paid €211.50.

Therefore the total amount paid for the case, including its appeal was €381.00.

The above figure included;

1. 5 court appearances. All court appearances, besides the final one, were fully contested and therefore full or part heard cases took place amounting to no less than 5 hours in court. This does not include the waiting period where you are waiting for your case to get on. On three out of the five court dates I was in the court building until late into the afternoon.

2. Preparing for the hearings which included reading papers, going through vouching documentation including bank statements, credit union statements, utility bills, payslips, social welfare correspondence, P45s, P60s etc.

3. Correspondence and advice to solicitor re applications and vouching documentation.

4. Conducting negotiations with counsel for the Respondent in attempting to resolve the matter.

**Application for Access by father, cross application for Maintenance by Mother**

| | Work in Court | Time in Court | Fee |
|---|---|---|---|
| **Day 1** | Arrive to meet client for pre-court consultation at 09.30.<br><br>Call over of Court list at 10:30<br><br>Wait around to be called before a judge until 3pm.<br><br>Client on the other side is unrepresented and asks for time to make an application for legal aid | In court building since 9:30am until 3.30.<br><br>In court itself for 10 minutes | No fee |
| **Day 2** | Arrive to meet client for pre-court consultation at 09.30.<br><br>Call over of Court list at 10:30 | Hearing for 45 minutes. Judge makes an interim order and adjourns for mention in a few weeks | No fee |

| | | | |
|---|---|---|---|
| | Matter gets called on in court at around 2pm | | |
| **Day 3** | Matter in for mention. Dealt with before 11am | In court for 5 minutes, Judge sets hearing date for final hearing and final orders to be made | No Fee |
| **Day 4** | Arrive to meet client for pre-court consultation at 09.30.<br><br>Call over of Court list at 10:30<br><br>Contested matter gets called on at 2pm | Hearing for 45 minutes. Judge makes a Final Order | Fee payable to solicitor of 339<br><br>Counsel generally paid 50% @ €169.50 |

# Appendix 6

New Claim Form

# Legal Aid Board  Counsel Fee Claim Form

**Counsel:**_____ BL ☐ SC ☐

**LAB Supplier Ref:**

| | | | | | |
|---|---|---|---|---|---|
| | | | | | |

Client Name:_____ Case/Certificate Ref: _____

LAB Solicitor: _____ Court Location: _____

**Court:**

| | | | | | | |
|---|---|---|---|---|---|---|
| | | | | | | |
| **District** | **Circuit** | **High** | **Central Criminal** | **Court of Appeal** | **Supreme** | **Coroners** |

Please specify and detail each individual item being claimed with reference to the Legal Aid Board's Terms and Conditions for the Retention of Counsel (or the previous Bar Council Agreement, where appropriate). **Counsel must include the relevant date(s)**. Any services not authorised in advance by the Legal Aid Board will not be payable.

## Certification of Counsel

I confirm that I have provided the services specified below, which services were authorised in advance by the Legal Aid Board. I accordingly seek payment of the appropriate fee in accordance with (a) the Terms and Conditions for the Retention of Counsel, as issued by the Legal Aid Board with effect from 1 August 2012 or, (b) the agreement between the Legal Aid Board and the General Council of the Bar of Ireland for the payment of fees in civil law cases (whichever is appropriate).

If a travel claim is additionally submitted I further declare that:

1. The travelling expenses charged have been actually and necessarily disbursed solely in relation to the legally aided cases outlined above.
2. The claim is in accordance with the agreement between the Legal Aid Board and the General Council of the Bar of Ireland for the payment of travelling expenses in civil legal aid cases.
3. The particulars furnished herein are in all respects true.

Signed:_____

Base Location of Counsel :_____

VAT Registered: Yes ☐ No ☐

VAT Number:_____

Date:_____

| Claim Item(s) | Date(s) | Details | Initial each item |
|---|---|---|---|
| **Full Case Fee**<br>(include date of substantive hearing) | | | |
| **Brief Withdrawn Fee**<br>What date were proceedings instituted?<br>No fee shall be payable in respect of a case where the brief is withdrawn by the Board prior to any work being carried out by the barrister. If the brief is withdrawn by the Board after the institution of proceedings and prior to the case being set down for trial, half the case fee shall be payable unless the legal aid certificate / authorisation is limited to a certain piece of work, e.g, drafting a court pleading, in which case the specific fee shall apply. However, if the case is settled with the assistance of the barrister the full case fee shall be payable. | | | |
| **Refresher(s)**<br>List subsequent hearing date(s).<br>For a court attendance to qualify as a refresher there must have been legal submissions and or evidence presented greater than 30 minutes.<br>Who attended from the Law Centre? | **1** | Time commenced:<br>Time completed: | |
| | **2** | Time commenced:<br>Time completed: | |
| | **3** | Time commenced:<br>Time completed: | |
| | **4** | Time commenced:<br>Time completed: | |
| **Interim/ Interlocutory Application(s)**<br>District Court (child care)<br>Circuit Court<br>Appeals to the High Court<br><br>Use additional paper if required | **1** | Time commenced:<br>Time completed: | |
| | **2** | Time commenced:<br>Time completed: | |
| | **3** | Time commenced:<br>Time completed: | |
| | **4** | Time commenced:<br>Time completed: | |
| **Taking Judgment** | | | |
| **Re-entry / Enforcement** | | | |
| **Opinion** | | | |
| **Interim Care Orders** | | | |
| **Other**<br>(please specify) | | | |

## Counsel travelling expenses claim

### Full particulars of journeys

| Date | Travelled from | Travelled to | Distance in Kms | Initial Each item |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |
| | | | | |

| Total distance claimed in Kms: | |
|---|---|

**Please complete the following if any other Legal Aid Cases were dealt with on any of the above dates:**

| Date | Name of Client | Certificate No. |
|---|---|---|
| | | |
| | | |
| | | |

(N.B. All the above sections must be completed in full and in block capitals to ensure payment. Please use an extra page if further space is required.)

## Law Centre Use Only

Law Centre:_____ Case Ref: _____

Date Received: _____ Date Sent to Head Office:_____

**Certification of Solicitor:**
I certify that I have examined the above claim and confirm that the services as set out above were provided by counsel as claimed. I further certify that any claims for interim and refresher hearings, were authorised in advance on foot of a valid legal aid certificate or other written authority from the Legal Aid Board and are properly payable.

Counsel was briefed after Notice of Trial served or after the matter was given a hearing date:

Yes ☐ No ☐ N/A ☐

Signed_____ Date_____

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