Reform of the Family Law System

Law Society of Ireland, February 2019
The Society welcomes the opportunity to contribute to the consideration by the Joint Oireachtas Committee on Justice and Equality, on what is a vital part of the justice system and one that impacts on the lives of so many people, particularly children.

We have set out headline commentary to the questions forwarded by the Committee. Our 2014 Family Law – The Future proposal continues to inform the Society’s position on many of the issues raised, notwithstanding that some legislative measures since 2014 have to be accommodated.

1. Court Structure

1.1. Difficulties arising out of the current courts system, including heavy case loads, delays, inadequate facilities, and judges lacking specialist expertise in family law.

Current difficulties: Family Law is in crisis

1.1.1. Inadequate security, unsafe environment for litigants and unsafe working conditions for courts staff, lawyers and judges, unsafe premises for family law in Dublin and nationwide as evidenced by the recent security issue on the 20 December 2018 when a Circuit Court Judge in Phoenix House Dublin was taken hostage along with a lawyer and client. The situation is particularly bad in Dublin as regards premises as the childcare courts are currently housed in Victorian criminal law courts which are not fit for purpose, the private District Family Law Courts are held in Dolphin House which are not fit for purpose due to the numbers attending and the unsuitability of the premises. The security issues in the Circuit Family Court in Phoenix House have recently been exposed by the security issue. The promised new family law facilities at Hammond Lane appear to have stalled.

1.1.2. The introduction of the Child and Family Relationships Act 2015 has put an increased burden on an already over worked District Family Court system by making it necessary to hear the voice of the child in all proceedings involving access, custody and access. No resources have been provided to pay for the experts required to complete the voice of the child reports pursuant to section 32 of the Guardianship of Infants Act, 1964 as inserted by the 2015 Act.

1.1.3. Prior to the 2015 Act custody, guardianship and access disputes could be resolved on the first listing of a case, now the first listing may only deal with the name of the expert to be appointed or whether or not there should be one appointed. If no expert is appointed then further court time may be expended by the Judge fixing a date in the future when he can take time to meet the child or children. Generally cases now require a number of listings before they can be resolved further increasing the workload of the District Court Judges.

1.1.4. A specialist division of family law courts and judges would assist greatly in dealing with family law cases more efficiently as it would be likely that the same judges would be available to deal with cases which appear regularly before the courts and a greater
degree of consistency could be established. It has been noted elsewhere that judges should not be confined to this specialty but should be appointed as ‘general’ judges who could be assigned to family law but who would not necessarily spend all their judicial career in family law.

1.1.5. More focus should be placed on settling cases earlier on in the process. Very active intervention in family law cases by Judges, not County Registrars, or other officials, with an emphasis on resolution and ADR could result in significant savings of time, resources for all concerned.

1.1.6. The unintended consequences which will flow from the introduction of regulations 6-10 as contained in the Guardianship of Infants Act 1964 (Child’s Views Expert) Regulations 2018 which set a maximum fee for experts who provide section 32 reports to the family law courts. The remainder of the regulations are welcomed and can be implemented provided regulations 7-10, (which are in any event, stand alone), are removed. There is already a shortage of experts to complete these reports resulting in delays preventing the timely resolution of family law disputes for children and parents causing further unnecessary upset to the parties. The result of the implementation of regulations 7-10 will result in a flight of experts from this area of work and has made a bad situation much worse.

1.1.7. The legal aid board appears chronically underfunded and it is not economically possible for solicitors to make a living from the private practitioner scheme which has led to a flight of solicitors from the District Family Court where it operates.

1.2. Whether these issues could be remedied through the establishment of a dedicated family law courts structure throughout the country. How exactly should this system be structured? Would it require a change to the Constitution?

1.2.1. See our 2014 submission for a more detailed exposition of the pros and cons of various systems. However, the short answer is that a dedicated family law courts structure throughout the country could remedy many of the problems currently faced, but only if:

a. The family law court system was properly resourced and
b. The family law court system was integrated with ADR and the legal aid board in the court houses, providing facilities not only for the courts but also for ADR and the legal aid board.

c. Proper premises were provided for the family law courts.
d. The geographic court jurisdictions were merged to create perhaps 10-14 dedicated and specialist family law courts comprising District, Circuit and High Courts eg cases currently dealt with in Carrickmacross would now be dealt with in a District Court in Dundalk which would deal with a number of District Court areas and Circuit Court areas such as those in Cavan, Monaghan, Meath. This would mean more travelling for litigants and lawyers and the location of these centralised courts would have to be considered.
e. It is not proposed to change the work undertaken by each court, the important issue is that only family law cases would be heard in these courts and they
would take the family law cases out of the more general courts before which they are currently being heard.

f. If it were simply a case of creating a family law division within existing structures then a referendum would not be required. Equally the changes to District and Circuit Court would require some consideration. See also our 2014 submission for alternatives to this model, which might require a constitutional referendum.

g. There is a benefit to making the change as simple as possible to ensure that it takes effect rather than seek to change everything while it remains the same.

1.3. Is there a need to define more clearly the jurisdiction of the various courts in making and enforcing family and child Orders?

1.3.1. An examination of the jurisdiction is contained in our 2014 submission.

1.4. Whether lessons can be learned from other jurisdictions.


2. The costs of family law cases

2.1. Does the general practice of not awarding costs against parties in family law proceedings encourage delaying tactics and frivolous applications? Is there a need for costs penalties for parties who abuse the system? Should costs be awarded against parties who lose an appeal?

2.1.1. It is more complex than that as costs are seem to be paid from the one pot. However there is a need to revisit this costs rule in cases where malicious delay can be proven or in the case of applications to court which should never have been taken. Yes there is a need for costs penalties for those who abuse the system.

2.1.2. In relation to the appeal, again it would be wrong to have a mandatory position as appeals will turn on the facts of the case.

2.1.3. Perhaps a better way to look at the issue of costs is to encourage settlement at every possible opportunity, to increase case management and to have a costs order as a punishment for those who insist on proceeding with their cases where they have been made an offer by the other side that they are unlikely to better in court. The use of Calderbank letters could be considered however again, this should be introduced on a case by case basis.

2.1.4. If there is to be any realistic prospect of a coherent policy approach to costs in family law cases then either legislation is required or a specialist division of family law judges who will apply the law in a similar manner.
2.2. Can the family law courts be restructured in such a way as to reduce legal costs?

2.2.1. Early settlement discussions should be facilitated in separation and divorce cases by a rigorous case management system.

2.2.2. Meaningful court appearances which have as their object not only preparing the case for hearing but in addition moving the parties towards ADR.

2.2.3. Consistent judicial supervision of cases to ensure that ADR is considered prior to issue of proceedings, immediately post issue of proceedings and at all times during the currency of proceedings.

2.3. Can more be done to encourage the early settlement of disputes, including greater costs penalties for failure to engage in alternative dispute resolution?

2.3.1. Our comments above apply in this respect. The allocation of a specific judge to case manage a case from early on in judicial separation or divorce, who is also a trained mediator/collaborative lawyer/arbitrator would be likely to facilitate the early settlement of disputes.

2.4. Is the system of free legal aid adequate in ensuring access to justice in the family law context?

2.4.1. One of the great difficulties in the family law system is the lack of resources given to the legal aid board. In order to properly deal with the huge backlog of work and delays in granting legal assistance to clients they require an increase in resources.

3. Alternative dispute resolution

3.1. How Ireland compares with other jurisdictions in terms of the application of alternative dispute resolution processes to family law proceedings. Could more be done to embed ADR in the Irish family law courts system?

3.1.1. It should be stressed that ADR is not restricted to mediation but includes collaborative law, mediation, potentially arbitration as well as lawyer assisted settlements.

3.1.2. The current Court structures must be re-examined to consider the following dynamics:

- Early settlement discussions should be facilitated in separation and divorce cases by a rigorous case management system.
- Meaningful court appearances which have as their object not only preparing the case ready for hearing but in addition moving the parties towards ADR.
- Consistent judicial supervision of cases to ensure that ADR is considered prior to issue of proceedings, immediately post issue of proceedings and at all times during the currency of proceedings,
- Information sessions on ADR should not be mandatory but should instead be voluntary but encouraged and should be available on a regular and visible basis in situ in the District Court, Circuit Court and High Court nationwide.
- ADR specialists such as accredited mediators, conciliators and collaborative lawyers only should provide the information sessions, adhere to a code of conduct and should not furnish legal advice, but merely information on ADR. Such specialists should also not seek to screen clients for the suitability for ADR nor should they seek to gain referrals from the information session. Only lawyers who have either trained as a mediator or a collaborative lawyer should be qualified to provide the information sessions.
- Family law clients should also be recommended to attend either a course or an information session on shared parenting.
- Judges should also have, at their discretion, the authority to either determine or mediate a case. All judges and county registrars should therefore be trained as mediators.
- Judges and county registrars should also have the power to direct parties to attend an ADR information meeting.

3.1.3. One of the principles of mediation is that it must be voluntary so there is some reluctance, even in the Mediation Act, 2017 to compel mediation or even to compel mandatory attendance at information on mediation sessions. Information sessions on ADR should not be mandatory but should instead be voluntary but encouraged and should be available on a regular and visible basis in situ in the District Court, Circuit Court and High Court nationwide.

3.1.4. The Judicial Separation and Family Law Reform Act, 1989 introduced ground breaking provisions directing practitioners to discuss and advise their clients about inter alia mediation Before the amendments made to these acts in the Mediation Act 2017 Solicitors were only obliged to certify that they had discussed and advised their clients about inter alia reconciliation, engaging in mediation, effecting a separation by means of deed or agreement and furnishing clients with appropriate contact details.

3.1.5. Following the commencement of the Mediation Act 2017 the safeguards have been substantially increased - Solicitors are now obligated to make a Statutory Declaration confirming that they have advised separating clients (Section 5 and 6 of the 1989 Act) and divorcing clients (Section 6 and 7 of the Family Law (Divorce) Act, 1996) as above. The penalty for making a statutory declaration which is to the knowledge of the declarant is false or misleading is set out in section 6 of the Statutory Declarations Act, 1938 and includes both a fine and a term of imprisonment.
4. Conduct of family law proceedings/role of children/rights of fathers

4.1. It has been argued that, currently, there does not appear to be a coherent view, either amongst the judiciary or legal practitioners, as to how family law proceedings should be conducted. The degree of formality can vary greatly. Should family law proceedings be conducted in a less robust manner out of sympathy for the parties and a desire to lessen the trauma of litigation? Or is the current approach too sympathetic, to the detriment of a speedier and less costly resolution of disputes?

4.1.1. Again the introduction of a cohesive, consistent division of the court with judges who are assigned for a number of years would probably determine the best way to deal with this issue. The current system has evolved, like the family law legislation in a piecemeal manner and the conduct of family law proceedings currently depends on the approach and personality of the judge, lawyers and clients in a particular case.

4.2. There is now a Constitutional requirement to hear the voice of the child in certain family law proceedings. To what extent is this being done in practice? What are the best means of ensuring that the voice of the child is heard?

4.2.1. Following the constitutional amendment to Article 42 of the Constitution and the subsequent Child and Family Relationships Act 2015, District Court Judges have been given the power to order reports (in proceedings for guardianship, custody or upbringing of, or access to a child) pursuant to section 32 of the Guardianship of Infants Act, 1964. The District Court Judge may give such directions as he thinks proper for the purpose of procuring from an expert a report in writing on any question affecting the welfare of the child; and/or appoint an expert to determine and convey the child’s views.

4.2.2. While the constitutional amendment was welcomed, unfortunately no additional resources were allocated to the District Court to provide for the expert reports or the experts. This lack of resources appears to be one of the most significant causes of the blockages in the District Family Court as if experts cannot be appointed due to the lack of any resources available to pay for same by the courts then either the District Court Judge hears the voice of the child by speaking directly to the child or children thus using up further valuable Court time or the voice of the child is not heard directly.

4.2.3. Realistically the best way of ensuring the voice of the child is heard is through the appointment of an expert by the Court. There is a significant issue regarding efficient use of resources if a judge must personally hear the voice of the child or children.
4.3. **Operation of the in camera rule:** How best can we reconcile respect for the privacy of the parties to proceedings with the need to monitor consistency both in the conduct of proceedings and in the nature of judgments being handed down?

Some relevant figures from 2014 are as follows:

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### Trends: Applications received

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**Source:** Courts Service Annual Reports 2014-2017

4.3.1. As the figures show above, the vast majority of Judicial Separation and Divorce cases are taken in the Circuit Court rather than the High Court. Most judgements are delivered by the High Court and very few from the Circuit Court.

4.3.2. One of the best ways of ensuring consistency rather than media involvement in cases is to introduce publication in a certain format of Circuit Court cases.

4.3.3. The creation of a specialist division of the Circuit Court for family law would encourage this consistency of decisions and judgements.

4.3.4. It is more difficult in the District Court which is a court of summary jurisdiction and where the volume of cases is much greater.

4.3.5. Currently it is very difficult to get access to the court files rather than the cases. Access to the court files would permit a researcher to provide a much more detailed piece of research on the operation of family law cases and this amendment could be made easily to the 2004 Act.

4.4. **The Rights of fathers – are they being adequately respected and protected within the family law system?**

4.4.1. From a practical viewpoint but without empirical evidence, it appears that fathers who wish to have extensive access with their children face an uphill battle in the Irish courts and will not receive extensive access without the agreement of their spouse or a section 47 or 32 report. Shared parenting ie 50/50 is not widespread currently.
4.4.2. Fathers are being respected but in relation to children they may not always be fairly treated.

4.4.3. Again more fact based research is required. The creation of a specialist family law division may assist in the development of a court policy towards fathers which may be more enlightened than the current position.