



**BAR COUNCIL SUBMISSION
TO THE MINISTER FOR JUSTICE & EQUALITY
IN RELATION TO PROPOSED REFORMS
RELATING TO FAMILY LAW COURTS.**

20th JUNE 2013



SUBMISSION ON BEHALF OF THE BAR COUNCIL OF IRELAND IN RELATION TO PROPOSED REFORMS RELATING TO FAMILY LAW COURTS.

The Bar Council welcomes the announcement by the Minister for Justice that he intends addressing the manner in which family law cases are dealt with a view to seeing how improvements can be achieved.

The Minister for Justice addressed a Seminar on Constitutional Reform relating to the Courts on the 2nd March 2013. In his speech, the Minister set forward certain proposals for the organisation of courts hearing family law cases. He stated that he envisaged a two-tier court comprising of a lower family court with limited jurisdiction and a higher court with unlimited jurisdiction. He proposed that the court of unlimited jurisdiction would eventually have vested in it all current Circuit and High Court jurisdiction in family matters including adoption and child abduction. The Minister envisaged that the lower family law court would essentially exercise the family law jurisdiction and the jurisdiction in child care matters presently vested in the District Court. He indicated that he envisaged that hearings in relation to children would be more inquisitorial and less adversarial.

The Minister announced that a Seminar will be held on 6th July 2013 to deal solely with the issue of Family Law Courts. This seminar will be addressed by the President of the Family Court of Australia and will facilitate a comprehensive discussion on the workings, within this State, of a dedicated family law court structure.

In the absence of further detail in the Minister's proposals, the Bar Council necessarily makes these brief submissions as a preliminary to what needs to be a full and comprehensive discussion of the issues arising and the proposed solutions. The Bar Council will consult fully with its members on the detailed proposals for change when they are made known. The views of the many barristers working in family law will clearly be of the utmost importance in reaching any final decision.

Present Court structure and jurisdiction

At present, the High Court and Circuit Court have concurrent jurisdiction to deal with judicial separation and divorce cases. For example the Circuit Court has power to make orders for financial provision amounting to many millions of euro, if that is what is required to make proper provision for separating or divorcing couples. A party to proceedings can object in

very rare cases to the Circuit Court exercising jurisdiction.¹ Otherwise the Circuit Court has jurisdiction to deal with the all cases which the High Court can hear.

In cases concerning children, only the High Court has jurisdiction in matters of child abduction and adoption. However the District Court has been given exclusive jurisdiction in child care cases. Given that most adoption applications concern applications by foster carers of children in their long term care, the District Court proceedings are very often the precursor to and the first stage in the adoption of children. Therefore, the District Court has power to make decisions which effectively remove children from the care of their parents, either on a short, intermediate or long term or indeed permanent basis.

In Dublin there are three Circuit courts sitting five days a week hearing family law cases. There are two High Courts allocated to hearing such cases.

Outside of Dublin, much depends on the practice on each circuit, but there is usually one sitting each term in each county of the circuit, where family law is dealt with.

Necessity for reform

The present system allows the Circuit Court deal with the vast majority of private family law litigation. The High Court is available to deal with more complex or urgent matters, or where it is thought appropriate that the High Court hear the case. It is submitted that this division of jurisdiction works well, and reflects the ability of differing courts to administer justice within their spheres. Rules of procedure exist to filter cases brought in the High Court which are more suited to determination in a lower court. For example, a custody application brought in the High Court is automatically listed to allow the Applicant make arguments why the High Court should deal with the case and why the matter should not be remitted to the District or Circuit Court. In any case commenced in the High Court a party may apply to have it remitted down to the Circuit Court for hearing.

It is submitted that there is appropriate balance in allocation of cases in differing jurisdictions at present.

Geographical spread

Certain difficulties could arise in relation to the establishment of a permanent family law division spread geographically through the country. There may only be one location in each Circuit (or perhaps in a smaller geographical area) where a Family Law Court would sit to hear cases. This gives rise to great concern that parties and witnesses would have to travel

¹ Where the rateable valuation of a property, the subject matter of proceedings, exceeds the Circuit Court jurisdiction a party can insist the matter is determined by the High Court.

long distances to have their cases heard, or that public transport would not be available for those relying on same to travel to the Court. Parties may not be guaranteed that their case will be heard on a specific day. If a roll over system applies, litigants and witnesses may have to travel on a daily basis over the course of the sittings in the hope that their case will be reached.

It is the view of the Bar Council that the present system, whereby the Court travels, is one that addresses the needs of litigants and witnesses. If sufficient judges are available to hear the family law cases listed at each sitting, and if resources are made available to provide for sufficient family law sittings on each Circuit, this should ensure that litigants are dealt with expeditiously and fairly.

It is desirable that cases heard by the High Court on appeal outside Dublin be heard by judges who have experience in dealing with family law, and that these cases are listed reasonably quickly after the Circuit Court hearing.

Specialist judges

The Bar Council is opposed to any proposal that judges be appointed from any one pool of practitioners. Experience has repeatedly shown that a solicitor or barrister practising in a certain specialist area prior to appointment may be entirely suited to determine cases in a very different area once they are appointed to the bench. Of course, specialist education and training is necessary for judges hearing family law cases just as education and training is necessary for judges hearing cases in other areas of law.

The difficulty in administering family law arises from the wide discretion given by the relevant statutes to the judge hearing the case. The various factors listed in the Acts are to be all taken into account, but there is no requirement to give any one factor any more weight than another.

In these circumstances the availability of written decisions (as opposed to long written judgements) in family law cases heard in the Circuit Court or on appeal would lead to consistency and transparency and would assist other courts, parties and lawyers, and indeed the public, in knowing how the Court exercises its discretion. The existence of Digital Audio Recording in most court rooms would assist the court in this regard.

Further, an improved system of review could be useful, as family law by its nature is heard in private and therefore the parties to the hearing are bound by the *in camera* rule.

Relevant ancillary services, such as research and typing facilities, should be available to the Court hearing family law cases.

The Bar Council is not of the view that it is necessary to compel judges to be permanently allocated to hearing any one area of law. Expertise or experience can be gained by a judge sitting as a family law judge for a reasonably lengthy period of time.

Cases concerning children

Courts hearing cases about children to a large extent adopt an inquisitorial rather than an adversarial procedure. The introduction of section 47 of the Family Law Act 1995, whereby a court-appointed psychiatrist/ psychologist and/or social worker reports to the Court on matters concerning the welfare of the children, has revolutionised the manner in which such cases are heard.

However grave difficulties arise in this area from lack of resources. Due to cuts in the legal aid budget, it is difficult to obtain a certificate to pay for many professional witnesses. The rates which are presently offered to section 47 assessors are so low that it is difficult to attract appropriately qualified personnel to carry out such assessments. There are serious difficulties in cases of alleged parental alienation or in cases involving allegations of sexual abuse where there is a need for highly qualified professional assistance which is just not available because of lack of resources.

Section 24 of the 1964 Act granting the District Court power to appoint a section 47 assessor has not been brought into force.

A guardian ad litem is appointed to represent the child in all public law cases. The costs of the guardian are met by the HSE. However, due to financial restrictions, legally aided parents do not have available to them the same resources as those available to the HSE and the guardian.

The failure to provide finance for guardians ad litem to represent children in private law cases and the failure to bring into effect the already enacted legislation² to ensure that a guardian ad litem can be appointed in such litigation has meant that little effect can be given to the desire of the court to carry out an independent inquiry into the welfare of children.

² Section 28 of the Guardianship of Infants Act 1964 was amended by the Children's Act 1997. This provided for the appointment of a guardian ad litem and for separate representation in custody disputes between parents and in other private law cases. This section has yet to be commenced.

The Bar Council believes that the Government should address these matters as a matter of extreme urgency. The Bar Council is of the view that without reasonable steps being taken to provide properly funded ancillary services such as properly funded section 47 assessments, no specially constructed family law court structure will operate satisfactorily.

Mediation and other services

Mediation and conciliation services should be available to a court hearing family law cases. The probation service should also be available. Once again, financial resources are a difficulty in this area. At present legally aided parties find it difficult to obtain a certificate for any professional witness, for example, an accountant.

Constitutional reform

It is not clear, to date, whether the Minister envisages that a constitutional referendum is necessary to implement any proposed changes.

The Bar Council is concerned that any interference with the constitutional structure in relation to the courts should only be for very exceptional reasons where a grave necessity exists for such intervention. The Bar Council believes that the restructuring of the court system to allow specialist family law courts operate in each jurisdiction can be done without the necessity of a constitutional referendum. The Bar Council is concerned that any permissive amendment in the context of a proposed referendum could lead, in time, to an erosion of the independence of the judiciary.

It is hoped that there will be on-going dialogue between those many members of the Bar practising regularly in the area of family law and the Minister and his Department so that there can be a meaningful exchange of views in respect of any proposed changes.