

THE LAW REFORM COMMISSION  
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ  
(LRC 52-1996)

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REPORT  
ON  
FAMILY COURTS

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IRELAND  
The Law Reform Commission  
Ardilaun Centre, 111 St. Stephen's Green, Dublin 2

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First Published

The Law Reform Commission 1996  
March 1996

## THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the *Law Reform Commission Act, 1975* on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commissioners at present are:

The Hon. Anthony J. Hederman, former Judge of the Supreme Court, President;  
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The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General fifty one Reports containing proposals for the reform of the law. It has also published eleven Working Papers, nine Consultation Papers and Annual Reports. Details will be found on pp.189-194.

The post of Research Counsellor to the Commission is vacant at present.

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# *The Law Reform Commission*

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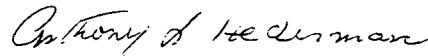
An Taoiseach John Bruton, T.D.,  
Office of the Taoiseach,  
Government Buildings,  
Dublin 2.

Dear Taoiseach,

Pursuant to the provisions of the *Law Reform Commission Act, 1975*, I have the honour to transmit to you herewith the Commission's Report on Family Courts (LRC 52-96).

The Commission proposes to publish this Report in the near future.

Yours sincerely,



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ANTHONY J. HEDERMAN  
PRESIDENT



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## INTRODUCTION

### *The Family Courts' Project: Background And Context*

The Law Reform Commission has published thirteen Reports which cover or touch upon different areas of substantive family law. This Report is concerned with the processes and procedures whereby family law disputes are resolved and remedies are obtained. The Report responds to the commitment made in the Commission's first programme to "consider the question of the best type of judicial or court structure or structures appropriate to deal with the different matters which fall under the general heading of family law".<sup>1</sup>

We explained in the Consultation Paper that "the concept of a 'Family Court' embraces a wide range of ideas about how and in what context proceedings which concern family matters should be conducted".<sup>2</sup> We therefore addressed the organisation of the family law business of the courts (including the issue of a possible unified family law jurisdiction), court accommodation, pre-trial and trial procedures and court atmosphere, the selection and training of personnel, including judges and legal practitioners, support services and the linkage between judicial and other mechanisms for resolving family disputes, as well as the question of the desirability and feasibility of a specialised family court. Arising out of the process of consultation, we have explored in preparation for this final Report a number of further matters including systems of case management, the appeals process, some issues surrounding confidentiality in the mediation process and some issues surrounding the appointment and secondment of judges. It will be seen that the Commission has taken a broad view of its brief, and has attempted to review all the more important aspects of our family justice system.

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1 Law Reform Commission, *First Programme for Examination of Certain Branches of the Law with a View to their Reform* (Pr. 5884, 1978) para. 12.

2 Law Reform Commission *Consultation Paper on Family Courts*, (hereinafter referred to as the Consultation Paper) (March 1994), Introduction, para. 2.

This Report is complete in itself. However, many of the issues with which it deals were explored in depth in the Consultation Paper, and repetition of that detailed treatment was felt to be unnecessary. This is particularly so in relation to the issues surrounding mediation and other forms of alternative dispute resolution.

### *A System In Crisis*

In the Consultation Paper, and again in this Report, we draw attention to serious deficiencies in the existing family justice system. The last twenty years have seen a growing recognition by society of the wide variety of problems associated with the breakdown of family relationships. Substantive family law has undergone a transformation during this period, with the introduction of a wide range of remedies and rights designed to protect vulnerable or dependent family members in the wake of breakdown, and to secure the fair distribution of family assets. Unfortunately the means for the delivery of these new rights and remedies have not received the same level of attention. The structures which this society offers for the mediation and resolution of family conflict are inadequate in the extreme.

The courts are buckling under the pressure of business. Long family law lists, delays, brief hearings, inadequate facilities and over-hasty settlements are too often the order of the day. At the same time too many cases are coming before the courts which are unripe for hearing, or in which earlier non-legal intervention might have led to agreement and the avoidance of courtroom conflict. Judges dealing with family disputes do not always have the necessary experience or aptitude. There is no proper system of case management. Cases are heard behind closed doors, protecting the privacy of family members but offering little opportunity for external appreciation, criticism, or even realisation, of what is happening within the system. The courts lack adequate support services, in particular the independent diagnostic services so important in resolving child-related issues. The burden placed on those who operate the system, especially judges and court officials, has become intolerable. Legal aid and advice services, despite substantial recent investment, continue to labour under an expanding case-load, and too many litigants go to court unrepresented. An unhealthy two-tier system of family justice is developing in which poorer often unrepresented litigants seek summary justice in the District Court while their wealthier neighbours apply for the more sophisticated Circuit Court remedies. Finally, there is to the whole family justice system a negative ethos which does little to encourage the responsible resolution and management of family conflict by family members themselves.

The situation described here is chronic. It has arisen as a result of a failure to appreciate and address the consequences for the family justice system of the substantial increase in family breakdown over the last quarter of a century. The family justice system is now in crisis.

### ***Reforms And Resources***

The solution to this crisis requires a combination of structural and legal reforms together with a major injection of resources. Proposals for structural and legal reform must be sensitive to resource issues. We have been conscious of this throughout our deliberations, and we have tried to develop a set of realisable objectives. The strategy we recommend involves a combination of measures designed to promote agreement and avoid litigation where possible, and to improve the organisation and quality of the family courts service where its use is unavoidable. In approaching reform of the courts system we have rejected as infeasible and unnecessary the most radical and costly solution -the creation of an entirely new and independent system of family courts. We have favoured instead the development of a discrete family courts system with a unified jurisdiction, as a branch of an existing court, making use as far as possible of existing resources, but at the same time offering a more specialist service and one which would accord to family law cases the priority and attention they deserve.

While our proposals recognise that resources are finite, we must point out that there is a price attached to the provision of an efficient and sensitive family justice system. The present structures have been allowed to atrophy for so long that the initial cost is bound to be high. This will be the case regardless of the level within the courts' hierarchy at which the new Family Court is to operate. The same applies to the development of the courts' support services and the alternatives to litigation, in particular mediation services, which in this country are at a very early stage of development. Moreover, if we are to avoid a repetition of the neglect which has occurred, it is essential to put in place permanent mechanisms for monitoring and reviewing the operation of the family justice system.

### ***The Consultation Process***

The Commission's *Consultation Paper on Family Courts* was published in March 1994. Written submissions were received from the persons, groups and bodies listed in Appendix A. Many of these were lengthy, and all were carefully considered. We express our thanks to their authors. A Consultative Seminar was held at the Commission's offices on 10 December 1994. The persons who attended are listed in Appendix B. This exercise, and the many comments, expressions of concern, criticisms and suggestions concerning the family justice system which it elicited, were of enormous value, and we would like to express our appreciation to those who attended.

The Expert Group on Family Courts, which had been established to assist and advise the Commission in preparing the Consultation Paper, again met to offer the Commission observations and reflections on that Paper. Members of the Group also furnished detailed written responses to a draft chapter on Case Management, a subject which had not been addressed in the Consultation Paper. We wish once more to record our great appreciation to the members of the Expert Group for their commitment to the project and for their wise observations. They are, however, to be absolved of any blame for the conclusions

reached, and the recommendations made, in this Report, which are the responsibility solely of the Commission. The members of the Expert Group were:

The Hon. Mr. Justice Francis D. Murphy (High Court);  
His Honour Judge Matthew Deery (Circuit Court);  
Her Honour Judge Catherine McGuinness (Circuit Court);  
Judge Thelma King (District Court);  
Cormac Corrigan Esq., B.L.;  
Frank Murphy Esq., Solicitor;  
Ms. Muriel Walls, Solicitor.

### *Acknowledgements*

We would like to record our thanks to the following persons, who provided advice, information or assistance to the Commission and its research staff during the course of the Family Courts project:

Judge Svend Danielsen, Judge of the Danish High Court;  
Judge William Harnett (District Court);  
Mr. Tony Fahey, E.S.R.I.;  
Mr. S. O'Braonáin, former Chief Examiner, Department of Justice;  
Ms. Marie Ryan, Courts Division, Department of Justice;  
Mr. John Delahunty, Chief Registrar, High Court, Dublin;  
All of the County Registrars;  
Mr. Anthony Jeeves, Family Policy Division, Lord Chancellor's Department,  
London;  
Mr. David P. Watts, Judicial Appointments Section, Lord Chancellor's  
Department, London;  
Mr. Gordon Murray, Scottish Courts Administration;  
Mr. Richard Morgan, Senior Government Counsel, Attorney General's  
Department, Canberra;  
Mr. Clive Buckley, The Court Service, Principal Registry of the Family Division,  
London;  
Mr. Richard Sax, Family Law Committee, The Law Society, London.



## CHAPTER 1: THE IRISH FAMILY LAW SYSTEM

1.01 Chapter 1 of the Consultation Paper on Family Courts examined the structure of the Irish family law system, and provided a detailed description of how family law business is divided between the District, the Circuit and the High Courts. It is not proposed in this Report to repeat that analysis but, rather, to summarise the principal features of the system in order to set the final recommendations of the Commission in context.

### *Principal Features Of The Present System*

#### **(a) Fragmented jurisdiction<sup>1</sup>**

1.02 Family proceedings are divided between three levels of court having original jurisdiction - the District, Circuit and High Court. The most locally accessible of those, the District Court, deals with a large number of private law cases involving disputes over maintenance, child custody/access, and barring/protection orders, as well as some minor property issues. It also serves as the principal court dealing with matters of child protection under public law. Its jurisdiction does not extend to the making of major orders affecting status such as judicial separation, annulment of marriage, or declarations of parentage, though it may make guardianship orders. Appeals from it lie to the Circuit Court.

1.03 The Circuit Court has over recent years been assuming a more central role in family matters and is known, when exercising its family law jurisdiction, as the Circuit Family Court. It has jurisdiction to grant decrees of judicial separation, which may be accompanied by a wide range of ancillary orders

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<sup>1</sup> For a more detailed description, see the Consultation Paper, paras. 1.01-1.14.

covering most of the issues which can arise in the wake of a broken marriage. Many of these orders (e.g., custody/access, barring/protection, and certain orders relating to property) are also available independently. It follows that in many of these matters the Circuit Court has a parallel jurisdiction with the District Court, though in most cases the Circuit Court's jurisdiction is wider in terms of the levels of order which it may make. It may also grant declarations of parentage, wardship orders and injunctions, and legislation is currently being enacted to give it a nullity jurisdiction.<sup>2</sup> It hears appeals from the District Court and appeal from it lies to the High Court.

1.04 Article 34.3.4 of the Constitution of Ireland vests the High Court with full original jurisdiction and power to determine all matters and questions whether of law or fact. Other courts (District and Circuit) may constitutionally be given parallel jurisdiction with the High Court, but the authorities are divided on whether legislation may exclude from the High Court's jurisdiction family matters which are dealt with by the lower courts.<sup>3</sup> In practice, since the coming into operation of the *Courts Act, 1981*, the purpose of which was in part to reduce the High Court's burden of family law work, the High Court has entertained such cases only where it is satisfied that in a particular case there is a serious danger that justice will not be done if the Court declines to exercise jurisdiction. The High Court has retained an exclusive jurisdiction to grant nullity decrees and its full jurisdiction in respect of certain other family law matters such as wardship and some property matters. It has exclusive jurisdiction in relation to a number of adoption matters and in respect of international child abduction cases. The High Court also hears appeals from the Circuit Court. Appeal from it lies to the Supreme Court.

**(b) Full-time professional judges**

1.05 The qualifications for judicial office differ from court to court, but the basic condition is a period of practice as a barrister or solicitor.<sup>4</sup> There are no lay or part-time judges in the Irish judicial system. Article 35.3 of the Constitution requires that no judge may hold any other office or position of emolument. If lay or part-time judges were to be employed, this principle would place a severe limitation on those who would be eligible for appointment. Further, despite the fact that it has been the practice to appoint District Judges originally for a fixed term, usually of one year, doubts have been expressed as to whether the appointment of fixed-term judges would be consistent with the requirements of judicial independence and objectivity.<sup>5</sup>

**(c) A non-specialist judiciary<sup>6</sup>**

1.06 Judges who deal with family matters in Ireland are not required by law

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<sup>2</sup> *Family Law Act, 1995.*

<sup>3</sup> See *R v. R* [1984] I.R. 206; *Tormey v. Ireland* [1985] I.R. 289; *Consultation Paper, para. 104 et seq.*

<sup>4</sup> See Appendix C.

<sup>5</sup> See *Consultation Paper, para. 7.31.*

<sup>6</sup> *Ibid.*, paras. 6.01-6.07.

to have any special qualifications, training or experience in, or aptitude for, family law matters; neither are they appointed specifically as family judges. Internal arrangements operate in the different courts whereby a judge may be assigned for a specific period to deal with family law cases. In the High Court, for example, the period would be no more than a matter of weeks whereas in the District Court in the Dublin area the period may be much longer. There is also a specialist Children Court sitting in Dublin to which a District Judge is generally assigned for several years.

**(d) Predominance of "judicial" over "administrative" decision-making**

1.07 Judicial rather than administrative tribunals are the primary decision-makers in the family law area. This is underpinned by the provisions of Article 34.1 and 37.1 of the Constitution which provide that justice must be administered by judges appointed under the Constitution, except where, in a civil matter, there is involved only the exercise of limited powers and functions of a judicial nature.

1.08 Apart from the area of social welfare, where administrative decision-making is the norm, the only major area of family law in which use is made of an administrative decision-making model is that of adoption. The power to make adoption orders is vested<sup>7</sup> in an Adoption Board comprising a chairperson and vice-chairperson, who must be legally qualified, and six ordinary members. Doubts have arisen as to whether the Board, in granting an adoption order, might as a non-judicial body be acting unconstitutionally by exercising an unlimited power of a judicial nature. These doubts have never finally been resolved, but the constitutionality of adoption orders made by the Board has been secured by an amendment to the Constitution (Art. 37.2) which makes such order immune to any challenge based on the fact that they are not made by judges duly appointed under the Constitution.

**(e) Adversarial procedures<sup>8</sup>**

1.09 Judicial proceedings concerning family law matters are conducted primarily along adversarial lines, the evidence before the court being provided largely by the parties themselves. However, the circumstances in which the judge may assume an inquisitorial role have been expanding, particularly in those cases concerning children where the main concern is to arrive at an outcome which will be in the best interests of the child. Thus in private custody or access proceedings<sup>9</sup> and in public care or protection proceedings<sup>10</sup> the court has power of its own motion to procure reports concerning the welfare of the child. A court is also now allowed to adjourn private custody/access proceedings where it appears that a care order may be needed in respect of a child, and to require

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7 *Adoption Act, 1952* as amended.

8 See Consultation Paper, paras. 4.02-4.06.

9 Section 11 of the *Guardianship of Infants Act, 1964* as amended by section 40 of the *Judicial Separation and Family Law Reform Act, 1989*, and section 47 of the *Family Law Act, 1995*.

10 Section 27 of the *Child Care Act, 1991*.

a Health Board to investigate the child's circumstances.<sup>11</sup>

**(f) Reduced formality<sup>12</sup>**

1.10 The general principle now operating with respect to family law proceedings is that they should be "as informal as is practicable and consistent with the administration of justice."<sup>13</sup> Some of the physical aspects of formality, such as the wearing of wigs and gowns, have been removed. However, it would be wrong to confuse informality with procedural laxity. Adherence to the principles of natural and constitutional justice, as well as to the rules of evidence, remain important and this necessarily results in a certain degree of formality.

**(g) *In camera* hearings<sup>14</sup>**

1.11 The Constitution requires that, "Justice ..., save in such special and limited cases as may be prescribed by law, shall be administered in public."<sup>15</sup> Despite this general principle, the position with regard to family law cases is that they are almost invariably heard "otherwise than in public."<sup>16</sup> The public and press are excluded, and it is difficult even for *bona fide* law students or researchers to gain admission. Restrictions of this broad nature are usually justified as being necessary to protect the privacy of family members and to prevent distress and possible harm, especially to children.<sup>17</sup> The right to privacy, and the right to marital privacy, though not explicit in the Constitution, have been recognised as unenumerated constitutional rights.<sup>18</sup>

**(h) Allied services and mediation**

1.12 The Probation and Welfare Service of the Department of Justice provides the courts with an investigative and reporting service mainly in the context of private child custody/access disputes and cases where barring orders are sought. However, the service is not comprehensive and is under-resourced. It is not available to the Circuit Court outside Dublin, and where it is available there are often considerable waiting periods for reports.

1.13 Out-of court mediation facilities are available in some parts of the country. The government established the Family Mediation Service in Dublin as a pilot scheme in 1986, and has recently announced plans to increase spending on mediation services in and outside Dublin. The Family Mediation Service engages in comprehensive mediation (finance, property and children) for couples

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11 *Ibid.*, section 20.

12 See Consultation Paper, para. 4.25.

13 Section 33(1) of the *Judicial Separation and Family Law Reform Act, 1989*.

14 See Consultation Paper, paras. 4.71-4.72.

15 Article 34.1.

16 See, for example, section 45(1) of the *Courts (Supplemental Provisions) Act, 1961*.

17 See *Re McCann v. Kennedy* [1976] I.R. 326.

18 *McGee v. Attorney General* [1974] I.R. 284. However, the courts have not yet ruled on the question whether current restrictions may be broader than is required to achieve the necessary protection.

who have decided to separate or who have already separated.<sup>19</sup>

**(i) A two-tier structure**

1.14 In a sociological study on *Marital Breakdown and Family Law in Ireland* by Tony Fahey and Maureen Lyons, attention is drawn to the two-tier structure which has developed within the existing courts system:

"The lower tier is dominated by cases which are centred on protection against domestic violence, or, to a lesser extent, on discrete aspects of marital separation such as maintenance or child access, which take place in the District Court, which are legally unrepresented or represented by Legal Aid solicitors, and which have a heavy concentration of less well-off couples, particularly in that one or both partners may be dependent on social welfare and are much less likely to be in owner-occupied housing than the population at large. The upper tier is dominated by cases which are concerned with fully-fledged legal separation, which are focused on the Circuit Court or else try to arrive at separation agreements without going to court, which are represented by private solicitors or, to a lesser extent, by Legal Aid solicitors, and which have an over-representation of better-off couples, particularly in that both partners may have paid jobs."<sup>20</sup>

1.15 An instance of this dualism is the way in which the barring order is typically used to achieve a separation at District Court level, often without the benefit of legal representation, while in the Circuit Court the central remedy is the judicial separation. Aim Group, in its *1994 Statistical Report*, has suggested that:

"[t]he Barring Order is now becoming the dominant instrument in family law for dealing with marital breakdown. If the client has evidence of violence it is much cheaper and quicker to obtain than a judicial separation. Given the legal aid situation it is understandable how barring [orders] can fulfil (sic.) this function."<sup>21</sup>

A number of observations made to the Commission have stressed the undesirability of a family law system operating on two levels, one for the rich and the other for the poor.

**(j) Legal representation and legal advice**

1.16 The Legal Aid Board has administered the non-statutory Scheme of Civil

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19 The number of trained mediators countrywide is still small but growing. A professional structure is developing, and the Mediators Institute of Ireland is working towards a scheme of accreditation. See Consultation Paper paras. 2.26-2.30.

20 T. Fahey & M. Lyons, *Marital Breakdown and Family Law in Ireland - A Sociological Study* (1995, Oak Tree Press, Dublin, in association with the Economic and Social Research Institute), at p.122.

21 Finola O'Riagáin (AIM Group), *Aim Statistics* (November 1994), at p.7.

Legal Aid since its establishment in 1979, providing legal representation to "persons of modest means at little cost"<sup>22</sup> through twenty-six full-time Law Centres countrywide. There are also eighteen part-time Centres which are serviced by staff from the full-time Centres for one or two days a month. Due to resource increases, waiting times for appointment with legal aid solicitors have generally been shortened in most of the Law Centres, according to the Board's *Annual Report 1994*,<sup>23</sup> and it is envisaged that additional solicitors will be assigned to Centres with long waiting lists.

The Legal Aid Board received a grant of £6.2m for 1995 compared to £3.2m in 1993 and, overall, the resources allocated by the Government to the Board have increased by 131% over the last three years.

1.17 The *Annual Report* records that almost 10,000 persons received legal advice from the Legal Aid Board in 1994, of whom 3,282 received legal aid for representation in court.<sup>24</sup> The remaining 6,712 people received legal advice only, almost double the figure for 1992. Overall, the Report highlights a general increase in the numbers of persons who have received legal advice and/or aid over the last number of years.<sup>25</sup> According to the Board:

"In the ... two-year period [1992-4], the numbers provided with both legal advice and representation in court increased by 86%. The increase in the number of persons assisted over the past two years has been due mainly to the employment of more solicitors, the opening of additional Law Centres and the use of private practitioners in providing a legal aid service in certain District Court cases."<sup>26</sup>

1.18 As has been observed in previous years, the overwhelming majority of cases dealt with by the Law Centres concerned family law matters: approximately 98% of court cases and 90% of legal advice cases.<sup>27</sup> Of these, judicial separation proceedings "constitute a major element in the legal aid services provided by the Board",<sup>28</sup> numbering 898 out of the total of 2,568 proceedings initiated by Law Centres in 1994.<sup>29</sup>

1.19 Taking account of the pilot private practitioner project, the Legal Aid Board's services focus on the lower courts, with the majority of Legal Aid certificates (i.e. legal advice and representation) being granted to District Court litigants: in 1994, District Court cases accounted for 58% of certificates granted by the Board, Circuit Court cases accounted for 37% and High and Supreme

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22 Legal Aid Board, *Annual Report 1994*, at p.5.  
23 *Ibid.*, at p.12. At March 1995, waiting times for appointments with a solicitor at a Law Centre varied from one month (Athlone, Castlebar, Galway, Limerick, Tralee and five of the seven Dublin centres) to nine months (Dundalk and Letterkenny).  
24 *Ibid.*, at p.7.  
25 *Ibid.*, at pp.6-7.  
26 *Ibid.*  
27 *Ibid.*, at p.8.  
28 *Ibid.*, at p.9.  
29 *Ibid.*, at p.32.

Court cases for 5%.<sup>30</sup>

1.20 Despite the resource increases however, the Lyons and Fahey study, which found that the greatest proportion of family law business is concentrated at District Court level, has also revealed that 55% of applicants and 56% of respondents in the District Court do not have legal representation on the day on which their case is heard in court, and they comment:

"... legally unrepresented cases form a large and highly significant part of the family law system and should be taken into account in any overall assessment of the social role of family law."<sup>31</sup>

1.21 Substantial developments in the legal aid service occurred in 1995. The *Civil Legal Aid Act, 1995*<sup>32</sup> provides for the establishment of a new Legal Aid Board,<sup>33</sup> sets out criteria for the granting of both legal aid and advice,<sup>34</sup> lays down financial qualification requirements for eligibility<sup>35</sup> and requires persons to contribute to the cost of legal aid and advice in certain circumstances.<sup>36</sup> There are also sections dealing with the selection of solicitors and barristers<sup>37</sup> and the relationship between the lawyer and the person receiving legal aid or advice.<sup>38</sup> Given that the primary purpose of the Act is to place the existing civil legal aid scheme on a statutory footing, it is unlikely that its provisions will make much practical difference to the legal aid/advice situation in the family law area.

**(k) Private ordering**

1.22 The extent to which privately ordered, non-litigated settlements are arranged in Ireland is difficult to ascertain. There is a dearth of instructive statistical data, but anecdotal evidence would appear to suggest that out-of-court settlements (whether mediated, solicitor-negotiated or otherwise negotiated) are quite common.

1.23 In respect of solicitor-negotiated settlements, the Lyons and Fahey study<sup>39</sup> suggests that:

"many family law cases which are initiated through solicitors are settled by agreement without going to court, usually with solicitors for the two sides taking part in, if not leading, the negotiation process which leads

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30 *Ibid.*, at p.30. Note that in 1993, prior to the introduction of the private practitioner pilot project, 45% of all legal aid certificates were granted for District Court proceedings, compared with 47% for cases conducted at Circuit Court level. Proceedings in the High and Supreme Courts accounted for 8% of the total. (See Legal Aid Board, *Annual Report 1993*, at p.9).

31 *Op. cit.*, f.n. 20 at p.10.

32 This legislation was enacted on 16 December 1995. However, at the time of writing the Act had not yet been brought into force.

33 Section 3.

34 Sections 24, 26 and 28.

35 Section 29.

36 Sections 29 and 37.

37 Section 31.

38 Section 32.

39 *Op. cit.*, f.n. 20 at p.11.

to agreement. Such negotiated settlements are then formalised through deeds of separation (separation agreements) or other agreements drawn up by solicitors. In other words, for many family law litigants, their solicitors *are* the family law system as far as their contact with the system is concerned."

Furthermore, it would appear from the comments of practitioners and registrars that, generally, judges give litigants ample opportunity to settle and readily grant adjournments for this purpose.

1.24 However, the need for the provision of information, counselling and mediation services in order to facilitate out-of-court settlements was highlighted in many submissions to the Commission.<sup>40</sup> The need for a *nationwide* Family Mediation Service was also stressed.<sup>41</sup>

1.25 In respect of mediated agreements, a 1992 study of the Family Mediation Service (FMS) by Máire Nic Ghiolla Phádraig found that 501 couples had completed the mediation process by July 1989, and 55% of these had reached an agreement.<sup>42</sup> Further, in three-quarters of these cases, this was a "full and final agreement on all issues."<sup>43</sup> The study also found that 14% of couples reached interim agreements, and 9% reached partial agreements. Ms. Nic Ghiolla Phádraig also examined the issue of "whether or not making an agreement is more likely in certain circumstances" and found that "neither education nor social class made any difference.. [although].. there was a slight tendency for younger clients to make an agreement... [and t]hose who had been to court were less likely to make an agreement than those who had not."<sup>44</sup>

1.26 The Family Mediation Service itself has not conducted any research since the Nic Ghiolla Phádraig study due to lack of resources and personnel. However, it was estimated almost two-thirds of FMS clients reach a full (i.e. comprehensive) and final agreement.<sup>45</sup>

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40 See also the views of Citizens' Information Centres personnel recorded in the National Social Service Board's *Family Matters: A Social Policy Report* (September, 1994), at p.45.

41 See also M. Nic Ghiolla Phádraig, "Marital Separation in Ireland", in Kiely (ed.) *In and Out of Marriage: Irish and European Experiences* (1992, Family Studies Centre, U.C.D.), at p.6.

42 *Ibid.*, at p.14.

43 *Ibid.*

44 *Ibid.*

45 Source: Ms. Maura Wall Murphy, Co-ordinator, Family Mediation Service.



## CHAPTER 2: CRITICISMS OF THE SYSTEM

### *Criticisms Of The System*

2.01 The criticisms of the existing system made in Chapter 7 of the Consultation Paper<sup>1</sup> have been widely endorsed in submissions and comments made by judges, members of the legal profession and others. No dissent was voiced from the Commission's general expression of concern in paragraph 7.01:

"We must begin this chapter by expressing concern about a range of serious problems and defects in the manner in which family cases are handled within our existing courts system. This concern is shared by many professionals working within the system. Many of the problems derive from under-resourcing, both physical and human. The picture which emerges is one of a system struggling and barely managing to cope with the very great increase in family litigation in recent years. The result is a sad parody of that which might be expected in a State whose Constitution rightly places such emphasis on the protection of family life."

We summarise here the main criticisms expressed in the Consultation Paper, further developing some of them.

#### (a) **Pressure of business**

2.02 The increase in family law litigation over the last twenty years has placed the family justice system under considerable strain. A series of reforming Acts, beginning in 1976 with the *Family Law (Maintenance of Spouses and Children)*

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<sup>1</sup> Consultation Paper, paras. 7.01-7.11.

*Act*,<sup>2</sup> introduced a range of new or improved remedies in respect of maintenance, domestic violence and family property. The introduction of the scheme of legal aid in civil cases in 1980 made these new, and other existing,<sup>3</sup> remedies more widely accessible. The new system of judicial separation brought in by the *Judicial Separation and Family Law Reform Act 1989*, together with its attendant ancillary remedies, has generated a substantial volume of new work for the Circuit Court. Further statistical information, acquired since the publication of the Consultation Paper, provides evidence of the still escalating volume of family law business especially in the District and Circuit Courts.

Between 1990 and 1994, the total number of family law applications made to the District Court rose from 8,028 to 14,274, an increase of 77.7%.<sup>4</sup> The number of applications to the Circuit Court for decrees of judicial separation rose from 636 in the fourteen months ending 31.12.1990 to 2,806 in the legal year ending 31.7.1994, an increase of 341%.<sup>5</sup> Between 1980 and 1993, the number of applications for civil decrees and annulments to the High Court rose from 16 to 70, an increase of 337.5%.<sup>6</sup>

### ***The District Court***

2.03 There has been a steady and dramatic rise in the number of family law applications made to the District Court. In total, the District Court dealt with 14,274 family law applications in the legal year ending 31 July 1994.<sup>7</sup> This compares with 6,062 applications in the legal year ending 31 July 1988,<sup>8</sup> an increase of 135.5% in six years. No additional judicial positions were created in the District Court in that period.

The District Court dealt with 2,943 applications for maintenance in the legal year 1993-94.<sup>9</sup> In the same period, 4,457 applications for barring orders and 3,091 applications for protection orders were made to the Court.<sup>10</sup> In addition, 3,665 applications for guardianship were filed.<sup>11</sup> The Court also deals with miscellaneous applications brought under the *Family Home Protection Act, 1976* and the *Status of Children Act, 1987* as well as applications for enforcement of court orders.

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2 See particularly the *Family Home Protection Act, 1976* and the *Family Law (Protection of Spouses and Children) Act, 1981*.

3 For example, applications for custody of or access to children under section 11 of the *Guardianship of Infants Act, 1964*.

4 *Ireland. Statistical Abstract 1994* (Pn. 1044, Jan. 1995), Table 10.16. Statistics also supplied by the Department of Justice, Courts Division.

5 Department of Justice, Courts Division; Written answer from the Minister for Justice to a question tabled by Deputy Alan Shatter (Parliamentary Debates - Dail Eireann Vol. 449, No.1, Cols. 164-166, Tuesday 14th February 1995).

6 Department of Justice, Courts Division.

7 *Ibid.*

8 *Ireland. Statistical Abstract. 1990.* (Pl. 7283, Dec. 1990), Table 10.16.

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

### ***The Circuit Court***

2.04 In the Circuit Court, the number of applications under the *Judicial Separation and Family Law Reform Act, 1989* has risen since 1990-91 (the first full year of operation of the Act), while the percentage of applications in which orders were made has remained virtually constant:

<i>Year</i>	<i>Applications made under 1989 Act</i>	<i>Applications granted under 1989 Act</i>
1989-90	636	224 (35%) <sup>12</sup>
1991	945	361 (38%) <sup>13</sup>
1991-92	2,221	786 (35%) <sup>14</sup>
1992-93	2,781	1,015 (36.5%) <sup>15</sup>
1993-94	2,806	988 (35%) <sup>16</sup>
1.8.94-31.12.94	871	304 (35%) <sup>17</sup>
<b>Total</b>	<b>10,260</b>	<b>3,678 (36%)</b>

Non-1989 Act business in the Circuit Court is now relatively insignificant.

2.05 Despite the increase in judicial separation applications illustrated by the above statistics, no additional judicial appointments have been made in the Circuit Court since the enactment of the 1989 Act.<sup>18</sup>

### ***The High Court***

2.06 Applications to the High Court for judicial separation numbered 41 in the period 1.8.1993 to 31.7.1994, and 21 were successful.<sup>19</sup> In the five month period from 1.8.1994 to 31.12.1994, 23 such applications were made to the High Court and 8 were granted.<sup>20</sup>

### ***Effects of escalation in family law business***

2.07 Some of the effects of this escalation in family law business were noted in the Consultation Paper:<sup>21</sup>

"Of major concern are the impossibly crowded lists in many Circuit and

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12 Department of Justice, Courts Division. Period 19.10.1989-31.12.1990.

13 *Ibid.* Period 1.1.1991-31.7.1991.

14 *Ibid.* Period 1.8.1991-31.7.1992.

15 *Ibid.* Period 1.8.1992-31.7.1993.

16 Written answer from the Minister for Justice, *op. cit.*, f.n. 5. Period 1.8.1993-31.7.1994.

17 *Ibid.* Period 1.8.1994-31.12.1994.

18 Section 6 and sections 9-11 of the *Courts and Court Officers Act, 1995* provide for the appointment of 18 new judges. Currently, the Minister for Justice has Government approval for the appointment of 15 new judges. Three additional judges are to be appointed to the Supreme Court, while in the High, Circuit and District Courts the number of judges will be increased by 2, 7 and 3 respectively: Announcement of the Criminal Justice Plan by the Minister for Justice, Nora Owen, T.D., 30 January, 1996.

19 *Op. cit.*, f.n. 5.

20 *Ibid.*

21 Para. 7.02.

District Courts, leading to a wholly unsatisfactory situation in which judges are being forced to make the impossible choice between brief and hurried hearings or intolerable delays. The situation is particularly acute in the Circuit Court outside Dublin, where in some venues a judge may face a list of as many as seventy cases in one day. Included among these cases are applications for judicial separation raising complex issues of family finance and property, and sensitive problems concerning child custody and access. We have heard of judges sitting late into the night in attempts to complete their lists, but for many cases adjournments for several weeks are inevitable. This is an intolerable situation for judges and litigants alike. The parties and their legal representatives, when faced with the prospect of a lengthy queue, a long wait, a somewhat peremptory hearing, or a lengthy adjournment, are forced to make difficult tactical choices. Unsatisfactory and hurried compromises may be the result. While negotiated settlements are to be welcomed, those reached in these circumstances are not the most likely to secure the long term interests of a dependent spouse or children."

2.08 The problems of delay in respect of proceedings for judicial separation have not abated since the publication of the Consultation Paper. The current position is summarised in the following Table which also highlights the variability of patterns of delay in different parts of the country. This Table was provided to Dáil Eireann by the Minister for Justice on Tuesday, 14 February 1995.<sup>22</sup> It will be noted that the total number of cases awaiting hearing at that time was 1,476.<sup>23</sup> Almost 40% of those were awaiting hearing in the Dublin Circuit Family Court.<sup>24</sup>

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22 *Op cit.*, f.n. 5.  
23 *Ibid.*  
24 *Ibid.*

**Table 1****CIRCUIT COURT**

<b>County</b>	<b>No. of proceedings issued under the Judicial Separation Act, 1989 currently awaiting hearing</b>
Cavan	19
Cavan	12
Clare	35
Cork	169
Donegal	12
Dublin	590
Galway	106
Kerry	30
Kildare	30
Kilkenny	5
Laois	12
Leitrim	13
Limerick	53
Longford	2
Louth	51
Mayo	39
Meath	57
Monaghan	27
Offaly	4
Roscommon	12
Sligo	10
Tipperary	46
Waterford	30
Westmeath	16
Wexford	31
Wicklow	65
<b>TOTAL</b>	<b>1,476</b>

**(b) Cases unripe for adjudication**

2.09 In the Consultation Paper we stated:

"Another constant and related theme in the comments we have received is the very large number of inappropriate cases which come before the courts which are not ripe for adjudication or in which the particular issues would be better addressed by some mechanism other than adjudication, perhaps counselling, mediation or conciliation. Judges, probably in the District Court, are often confronted by apparently deadlocked cases in which they sense that reason may yet prevail if only it were given some encouragement. The common practice of granting adjournments, putting off the day of the order, are symptomatic of this."<sup>25</sup>

**(c) Fragmented jurisdiction<sup>26</sup>**

2.10 The problems arising from the fragmentation of jurisdiction between three levels of court include those of difficult tactical choices for legal advisers, and some confusion for their clients particularly where it becomes necessary to involve more than one court. The growing perception, referred to in Chapter 1, that there now exist two parallel systems of justice, one for the poor operating at District Court level and the other for the not-so-poor at Circuit Court level, is a very serious cause for concern.

**(d) Physical conditions of some courts**

2.11 We drew attention in the Consultation Paper<sup>27</sup> to the poor physical conditions of some Circuit and District Court accommodation, especially outside Dublin, and to the inadequacy of ancillary facilities such as consultation/ waiting rooms. This contrasted with model new facilities in parts of Dublin.

**(e) The judiciary<sup>28</sup>**

2.12 The Consultation Paper drew attention to the absence of any requirement of special qualifications or experience in judges assigned to hear family law cases, and we referred to doubts which had been expressed about the aptitude of some judges to cope expertly and sensitively with such cases. Specific criticisms included reluctance on the part of some judges to make timely and firm decisions in cases where adjudication is necessary and appropriate. Among comments made to the Commission since the publication of the Consultation Paper have been some to the effect that the Commission somewhat understated the problems attaching to the judiciary, including in particular the problem of achieving a reasonable consistency in decision-making between courts in different

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25 Consultation Paper, para. 7.05.

26 *Ibid.*, para. 7.07.

27 *Ibid.*, paras. 7.04 & 7.08.

28 *Ibid.*, paras. 7.03 & 7.06.

parts of the country. At the same time we drew attention, in the Consultation Paper, to the very great strain imposed on judges by their often overwhelming case-loads and by the appalling physical conditions in which they are sometimes obliged to work.

**(f) *In camera* hearings**

2.13 In the Consultation Paper, concerns were expressed about some of the consequences of holding family law proceedings behind closed doors. "[I]t is increasingly recognised that the absence of any opportunities for external scrutiny of family proceedings, even if it does not in fact affect the quality and consistency of judicial behaviour, creates an unhealthy atmosphere in which anecdote, rumour and myth inform the public's understanding of what goes on in the family court."<sup>29</sup> Comments and submissions on this matter echoed these concerns, but were allied to a strong desire to continue to protect as far as possible the privacy of family members.

**(g) Lengthy trials in the District Court**

2.14 Reservations were expressed<sup>30</sup> as to whether the District Court was an appropriate forum for the resolution of any complex or extended family dispute, such as a custody case lasting several days.

**(h) The system's negative ethos**

2.15 In the Consultation Paper we said:

"Instead of concentrating on the empowerment of individuals to resolve their own family disputes, by encouraging negotiation and agreement, the emphasis of our system, with its concentration on adjudication, is on solutions which take control away from the participants. A humane system of family law, it is argued, is one which encourages the responsible resolution and management of disputes wherever possible by members of the family themselves. Judicial intervention is of course necessary to prevent exploitation or abuse between family members. The ideal of empowerment should not blind us to problems of inequality which may arise in a system of private ordering. This apart, it is perhaps time to consider how reforms in our legal processes may help in the process of personal and family empowerment."<sup>31</sup>

**(i) Allied services**

2.16 The Consultation Paper drew attention to the importance of the reporting service provided, especially in child custody and access disputes, by the

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29 *Ibid.*, para. 7.09.

30 *Ibid.*, para. 7.08.

31 Para. 7.10.

Probation and Welfare Service of the Department of Justice.<sup>32</sup> The under-resourcing of this service, with the consequent absence of any service to many courts and delayed service to others, continues to be a matter of serious concern. Attention was also drawn to the fact that mediation services are at an early stage of development, that they are thin on the ground where they do exist, and are absent altogether from many parts of the country.<sup>33</sup>

**(j) Free legal aid and advice**

2.17 It was pointed out in the Consultation Paper<sup>34</sup> that a review of the scheme of civil legal aid and advice, as it applies to family cases, was outside the Commission's brief. This remains the case, although many submissions made to the Commission emphasised that the development of the legal aid and advice service should be seen as an integral feature in any strategic reform of the family justice system. Indeed, in the introduction to the Consultation Paper, the Commission itself emphasised the importance, in the context of an effective and sensitive family courts system, of "an adequate system of legal aid and advice to help ensure fairness in negotiated and agreed arrangements and to guarantee access to the courts where necessary."<sup>35</sup>

**Conclusions**

2.18 In summary, the consultations carried out by the Commission following the publication of the Consultation Paper have confirmed the urgent need for reform which was expressed as follows in that Paper:

"The intense pressure under which judges are often working in family law cases, together with the delays and other frustrations being experienced by litigants, provide in themselves a compelling case for reform.

The introduction of new or improved family law remedies has taken place without sufficient regard for the need to prepare the courts for their additional burdens, to provide them with appropriate physical facilities, and to ensure the availability of essential support services."<sup>36</sup>

With or without the addition of further remedies the problems outlined above need to be addressed without delay. The introduction of divorce legislation will place further strains on the system. However, in any event, the problem remains of devising just, sensitive and efficient structures for resolving the issues that arise in the context of an increasing rate of breakdown in marital and other relationships.

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32 Para. 7.53.

33 Introduction, para. 9. See also para. 7.36

34 Para. 7.11.

35 Introduction, para. 10.

36 Introduction, paras. 8 and 9.



## CHAPTER 3: GENERAL PRINCIPLES AND OBJECTIVES OF REFORM

### *Special Features Of Family Law Cases*

3.01 The Consultation Paper concluded that special features attach to family law cases which, when viewed in combination, suggest the need to apply to such cases procedures and safeguards different from those which are appropriate, for example, to commercial disputes. The special features include the following:

- "(1) The issues in dispute in a family law case usually constitute only part of a broader set of problems arising from family disharmony. Some of the issues, especially those relating to child rearing, as well as maintenance, have a continuing dimension. Appropriate solutions must take account of the long, as well as the short term, needs of family members, including the importance of promoting future cooperation between estranged spouses in relation to their child-rearing roles.
- (2) Some of the issues in a family dispute, especially again those which concern parenting responsibilities, are not resolved in the traditional manner of adjudicating as between competing rights. The adjudication looks to the future more than the past and seeks a solution which will promote the welfare of the child. The outcome depends in part on predictions of how events and relationships will develop in the future. Making a decision on welfare grounds based on predictions about future human behaviour is not a typical judicial activity. This is not to suggest that judges are inappropriate to make such decisions, nor that judicial expertise in fact finding and the determination of rights has no place in family proceedings (clearly much of family law involves these matters). What is implied is the need for

additional skills and perhaps special procedures adapted to meet the unusual objectives of legal proceedings concerning children.

- (3) Special societal interests are usually involved in family law cases. There is first the interest which society has in supporting stability in family life generally, and in the social arrangements for the care and nurture of children in particular. Secondly our society accepts that it has a duty to protect family members from abuse or exploitation, especially those family members who are in dependent situations or who are otherwise vulnerable. Thirdly society has an interest in seeing that the obligations which are owed by family members to one another, in relation to such matters as support and housing, are fulfilled. This interest arises partly from society's protective function but also from a desire to avoid dependent family members becoming a burden on the taxpayer."<sup>1</sup>

#### *Ideals And Objectives Of A Good Family Courts System*

3.02 Paragraph 7.14 of the Consultation Paper set out some of the hallmarks of a good family courts system. As these constitute the objectives of and the principles underlying our reform proposals, they are worth re-emphasising, and we set them out here in a slightly different format, with some additions and further explanation.

##### **A. Accessibility and speed**

3.03 *A family justice system should provide speedy and effective access to legal remedies and services.* Speed is particularly important where protective remedies are sought in emergency situations. The concept of accessibility implies:

- (a) that the services provided are within reasonable geographic proximity to the consumer,
- (b) that the services are affordable,
- (c) that procedures are reasonably simple and comprehensible,
- (d) that appropriate information and advice (including legal advice) is readily available to those who need it, and
- (e) that legal or other representation is available.

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Consultation Paper, para. 7.12.

**B. Avoidance of conflict and hostility**

3.04 *The system should as far as possible avoid the use of procedures which may have a further damaging effect on family relationships, or which may cause harm or unnecessary distress to family members and especially children. Its procedures should be geared towards the avoidance of court proceedings except where inevitable or necessary in the interests of justice.*

3.05 Family breakdown is usually accompanied by conflict, itself the product of deeply felt emotions. Feelings of anger, resentment, betrayal or injustice may be present, as well as guilt or failure. While it is important for the legal system to recognise and remedy injustice where it has occurred, it should as far as possible avoid the use of rules and procedures which prolong or deepen conflict and hostility. Substantive law, as well as procedural law, is important here. Procedures designed to minimise conflict will be undermined by substantive rules which invite recrimination.

3.06 However, conflict cannot always be avoided and where this is so, the task of the legal system is to administer justice. This was emphasised in the introduction to the Consultation Paper:

"It needs to be recognised that judicial proceedings, even though conducted with informality and sensitivity, are not therapeutic exercises and that it is not possible to exclude from them some element of confrontation. This is one of the reasons why it is so important to avoid judicial proceedings where it is possible to do so without risk of injustice to the persons concerned."<sup>2</sup>

**C. Supporting family ties**

3.07 *The system should respect and, as far as possible, support and strengthen existing family ties, and should avoid the use of rules and procedures which unreasonably hinder or deter efforts at reconciliation.*

**D. Promoting agreement and co-operation**

3.08 *The system should promote the resolution by agreement of the problems consequent on the breakdown of a family relationship. It should be organised in such a way as to encourage members of a disharmonious family themselves to control the issues arising from breakdown, and should promote co-operation between them in managing any of the continuing problems, especially those connected with child rearing.*

3.09 These objectives were strongly endorsed during the consultation process. It was recognised, nevertheless, that the pursuit of agreement should not become a shibboleth, blinding us to considerations of justice and equality between the

parties, to the requirements of the public interest, and the interests of third parties, especially children.

**E. Respecting dignity and fundamental rights and protecting children**

3.10 *The system should operate with respect for the dignity and fundamental rights of all affected family members. It should give prominence at all stages to the interests and welfare of dependent children where they are affected.*

3.11 The concepts of dignity and fundamental rights in this context include, *inter alia*, the right to protection of bodily integrity,<sup>3</sup> the right to privacy enjoyed by individuals and the family as a unit,<sup>4</sup> and the right of a married couple to autonomy in their joint decisions.<sup>5</sup> They include also the rights of the child,<sup>6</sup> especially the rights pertaining to the child's welfare and the child's right, in accordance with his or her age and maturity, to be consulted on matters affecting his or her future.<sup>7</sup>

**F. Addressing inequality**

3.12 *The system should be capable of addressing any problems of injustice which may arise following the breakdown of a family relationship, especially those deriving from inequalities between the parties.*

**G. Linkage with other family support services**

3.13 *There should be appropriate linkages between the system of Family Courts and a range of other family services that include information, family support and welfare, mediation, health and child protection services.*

**H. Cost effectiveness**

3.14 *The system should make the most effective use of the finite resources of the State, and should keep to a minimum the costs involved for the parties.*

3.15 One member of the Commission wishes to add the following principle, viz:

*The system should be organised in such a way as to ensure that spouses who have committed themselves to a marriage should have their interests legislatively protected*

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3 Constitution of Ireland, 1937, Article 40.3; *Ryan v. Attorney General* [1965] I.R. 294.

4 Constitution of Ireland, 1937, Article 40.3.1<sup>0</sup>; *McGee v. Attorney General* [1974] I.R. 284; *Norris v. Attorney General* [1984] I.R. 36; *Kennedy v. Attorney General* [1987] I.R. 587.

5 *In the Matter of Article 26 of the Constitution and in the Matter of the Matrimonial Home Bill 1993* [1994] 1 I.L.R.M. 241.

6 Constitution of Ireland, 1937, Article 41.5; *G. v. An Bord Uchtáia* [1980] I.R. 32, *M.F. v. Supt., Ballymun Garda Station* [1991] 1 I.R. 189.

7 Section 17(2) of the *Guardianship of Infants Act, 1964*; *Cullen v. Cullen*, 8 May 1970, unreported, Supreme Court; *N.A.D. v. T.D.* [1985] I.L.R.M. 153. See also Article 12 of the U.N. Convention on the Rights of the Child 1990, and Article 1(2) and Articles 3-6 of the European Convention on the Exercise of Children's Rights 1996.

*in accordance with the constitutional guarantees relating to family and marriage.*<sup>8</sup>

It is argued that this principle arises from the constitutional guarantee to protect the family under Article 41. Marriage which involves mutual commitment of fidelity for life has to be protected not merely by substantive legal principles but also by the judicial system. A judicial system which fails to provide adequate protection for those who have committed themselves to a marriage could violate the constitutional protection of marriage. The other Commissioners regard this matter as relating to substantive rather than procedural law, and they are of the opinion that the need to respect the constitutional rights of spouses is properly reflected in Paragraph E above.

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<sup>8</sup> Para. 7.14, sub-para. (10).

## CHAPTER 4: RESTRUCTURING THE FAMILY COURTS

### *The Model Provisionally Recommended By The Commission*

4.01 The provisional recommendation in the Consultation Paper<sup>1</sup> was for the establishment of a system of Regional Family Courts, located in approximately eight to ten regional centres, functioning as a division of the Circuit Court and operating in the context of a range of family support and advice services. The new Regional Family Court would have a unified family law jurisdiction, wider than that of the present Circuit Family Court, embracing both private family law and public child protection law. Each Regional Family Court would be presided over by a Circuit Judge, nominated to serve for a period of at least one year and assigned on the basis of his or her suitability to deal with family law matters. Attached to each Regional Family Court, and operating under the aegis of the Court, would be a family court advice centre. The District Court would continue to provide, at its more localised venues, emergency and certain specific reliefs.

### **The rationale for this model**

4.02 From a structural point of view the two principal features of this model which distinguish it from the present courts system are:

- (a) the provision of a discrete family courts structure with a unified family law jurisdiction, and
- (b) the concentration of family court services at a regional level.

4.03 As regards (a), we were convinced that the traditional approach of having family law matters dealt with as part of a mixed jurisdiction has, with the

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<sup>1</sup> See para. 7.15 *et seq.*

dramatic increase in family law business, proved itself to be unsatisfactory. There has been a tendency in busy courts to provide too little time for family law cases, and often to relegate them to the bottom of an onerous mixed case-load. Moreover, the characteristics of family law cases, outlined above,<sup>2</sup> give rise to special requirements which argue for a more discrete system. These include the need for specialist support services for the courts, for mechanisms which ensure that alternatives to litigation are used wherever possible and appropriate, and for procedures which respect family privacy and the special nature of family cases. There is the need also to recognise that a degree of specialist knowledge and a certain aptitude is required of judges who preside over family law disputes, as well as of the lawyers who practice in the field.

4.04 At the same time we were well aware that, within a relatively small jurisdiction with finite resources and a limited pool of judges, the establishment of separate systems of justice for particular areas of social conflict has its problems. Specialised facilities are generally more costly than generalised services. The establishment of a family courts structure entirely new and independent of the existing courts system seemed to us to be unrealistic in terms of its costs, and not to be justified by the overall scale of family law business in a country the size of Ireland.

4.05 For these reasons we recommended a 'discrete', rather than an entirely independent system of family courts. The Regional Family Court would function as a division of the Circuit Court, making use initially of existing Circuit Court facilities where these are adequate for the purpose, and having access to the pool of judges available at Circuit Court level.

4.06 As regards (b), the matter of regional centralisation, we were conscious of the advantage in terms of access, especially in those areas of the country having a sparse and scattered population, of the localised venues which the existing District and Circuit Courts provide. We were also convinced of the need within any reformed structure, to guarantee rapid access to the courts for emergency remedies such as interim barring and protection orders. We felt, nevertheless, that a degree of regional centralisation was a price worth paying for a more specialised and higher quality family courts service:

"If family cases are to be given the special attention which we believe is warranted, if they are to be dealt with in adequate physical surroundings, and if the family court is to be clearly seen to be operating in the context of a range of family support services, with the emphasis on encouraging negotiated and agreed solutions to family disputes, there is in our provisional view a compelling case for the establishment of a limited number of regional family court centres."<sup>3</sup>

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2 See para. 3.01.  
3 Consultation Paper, para. 7.22.

#### **Responses to the Commission's provisional recommendation**

4.07 The response to our structural proposals was largely positive, with widespread recognition of the need to attach much greater priority and more resources to family law cases. There was considerable support for the concept of a family court with a unified jurisdiction, and substantial concern over the current development of a two-tier system of family law. There was a widely shared view that we had recommended too few regional centres. There was also some concern over the financial implications of the proposals, together with a fear that, should the proposals be implemented in a piecemeal way with insufficient resources, the consequences could be disastrous. There was some support for the view that the new family courts system should operate at District Court level.

4.08 While the great majority of submissions and comments favoured a separate Family Court at Circuit Court level, there was a great variety of views as to the role of the District Court. Opinion differed as to whether it should maintain its present jurisdiction, or retain only an emergency jurisdiction, or have its jurisdiction removed altogether and concentrated in the Circuit Court. Few favoured maintaining the status quo.

4.09 Other reservations concerned the details, rather than the underlying structure, of our recommendation. For example, there were different opinions on what the precise scope of the Regional Family Court's jurisdiction should be, and whether there might be rather more flexibility in the structuring and assignment of judges to the new Regional Family Courts. These matters are discussed further below.

#### ***Questions Of Structure - The Commission's Views***

##### **(a) The concept of a unified family law jurisdiction**

4.10 We are convinced of the need to establish a family court with a unified jurisdiction. Because of the central importance of this conclusion we wish to reiterate here in summary form the supporting arguments. They are that a unified jurisdiction:

- **makes possible the development of a more dedicated system of family courts in which family law cases are given the attention they deserve,**
- **makes possible the creation, on a countrywide basis, of a corps of family law judges, chosen on the basis of their aptitude, resulting in a greater concentration of expertise and more uniformity in decision-making,**
- **makes possible the more rational and economic organisation of the support services needed by the family courts,**
- **renders more feasible the development over time of courtroom and**



**related physical facilities which are appropriate to the special needs of family law cases,**

- **helps to avoid certain problems of inconvenience, cost and confusion associated with a fragmented family law jurisdiction, and**
- **arrests the development of a two-tier family courts system, one for the rich and the other for the poor.**

Detailed recommendations concerning the unified jurisdiction appear below at paragraph 4.28 *et seq.*

**(b) The question of accessibility**

4.11 We accept that a more dedicated and specialised family courts service implies a reduction in the number of judges assigned to deal with family law cases, and some reduction in the number of venues at which family cases may be heard. This is the case regardless of the level within the courts' system at which the family court operates. The inevitable consequence is some lessening in the accessibility (in its geographical sense) of family courts to the public. We believe, for the reasons given in paragraph 4.06 above, that this is a small price to pay for the considerable benefits that accrue from a unified and more specialist family courts service.

4.12 We believe that certain modifications to our provisional recommendations are possible which would offer the public some increase in accessibility. We accept that our original estimate of the number of Regional Family Court Centres required was too low. We also now accept that Family Court Judges should when necessary make use of other convenient venues away from the Regional Centres, provided that the facilities are adequate.

4.13 We also reiterate and reaffirm our view that, where applications for emergency relief are concerned, the requirements of accessibility (the availability of the judge, the geographical proximity of the court, and the ease and speed at which applications may be made) are of overriding importance. Certain emergency and interim reliefs and remedies provided for in the District Court should therefore remain available at all District Court venues.

These matters are dealt with in more detail below at paragraphs 4.25 to 4.27.

4.14 It is also suggested that consideration should be given to the introduction of subsidised transportation to and from the Regional Family Court.

**(c) The status of the Regional Family Court**

4.15 The provisional recommendation was that the Regional Family Court

should operate as a division of the Circuit Court.<sup>4</sup> There was general support for this recommendation, though in some submissions it was suggested that the new system should be located at District Court level, with appeal to the Circuit Court. The lower costs and greater accessibility associated with the District Court were the main reasons given.

4.16 We have given a great deal of further thought to this important issue. Before presenting our conclusions it may help to set out the arguments which have been advanced for and against the two levels of court:

(i) **In favour of the District Court and against the Circuit Court**

- the District Court at present has a broad jurisdiction in family matters, and it processes far more applications than does the Circuit Court. (In the legal year ending 31 July 1994, a total of 14,274 family law applications were made to the District Court.<sup>5</sup> In the same period, 2,806 such applications were made to the Circuit Court.<sup>6</sup> Furthermore, the number of emergency orders made in the District Court is substantial. In the legal year ending 31 July 1993, 4,318 barring order applications and 2,706 protection order applications were made to the District Court.<sup>7</sup> In the year ending 31 July, 1994, the figures were 4,457 and 3,091 respectively);<sup>8</sup>
- costs are relatively low and procedures are simple and, in emergency cases, generally swift;<sup>9</sup>
- there are already many District Judges with experience of, and aptitude for, family law business, and more judges with such aptitude and experience could be appointed;
- there would be a larger pool from which to assign judges to family work;
- District Court clerks are experienced in advising applicants on procedures;
- there appears not to be the same backlog of cases in

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4 *Ibid.*, para. 7.30.

5 Department of Justice, Courts Division.

6 *Ibid.*

7 *Ibid.*

8 *Ibid.*

9 Note the reservations expressed by Deputy Frances Fitzgerald T.D. concerning emergency access to the District Court during the summer recess: *Irish Times*, Thursday 31 August 1995 at p.5.

the District Court as in the Circuit Court;

- given that the District Court will retain an emergency and interim jurisdiction, giving the District Court full jurisdiction will prevent fragmentation;
- the Circuit Court would find it impossible to tolerate the transfer to it of the District Court's immense case-load, with the inevitability of even longer waiting lists;
- many of the single-remedy applicants to the District Court would be deterred by the high costs, more complex procedures and reduced accessibility associated with the Circuit Court;
- the District Court already has a substantial jurisdiction in family law matters which goes well beyond the provision of summary remedies; this makes it difficult to argue against giving it a comprehensive jurisdiction on grounds of importance or status.

(ii) **In favour of the Circuit Court and against the District Court**

- many family law cases raise fundamental issues of status, as well as complex issues of finance and property, which, given the present hierarchical structure of the courts, are more appropriately dealt with at Circuit Court level and in accordance with Circuit Court procedures;
- the Circuit Court has a substantial family law jurisdiction and the policy of legislation in recent years has been increasingly to concentrate family law jurisdiction in the Circuit Court;
- there are a number of remedies in respect of which it would be unrealistic to recommend that they be dealt with in a court of summary jurisdiction, e.g. nullity, the more complex wardship, abduction and adoption cases and divorce, if introduced;
- a recommendation that the family court should be pitched at District Court level may be interpreted as an attempt to downgrade the significance of family cases;
- provided that the District Court's jurisdiction to give emergency and interim remedies is strictly defined, and

a simple composite procedure is used, the division of jurisdiction between the Circuit Court and the District Court should not cause problems;

- a split jurisdiction would in any case arise if the District Court had full family law jurisdiction, because emergency and interim remedies would be available in all District Courts while full remedies would only be available in a limited number of designated District Family Courts;
- the simplicity and speed of the District Court service comes at the price of frequently brief hearings and low levels of legal representation, a situation which, having regard to the important issues confronting the court, is unacceptable;
- special provisions as to costs will be required whatever the status of the court;
- accessibility can be increased by allowing Family Court Judges to sit at certain venues, including some District Court houses, in addition to the regional centres; in any case a family court at District Court level would also be subject to limitations on venue.

The majority of submissions to the Commission favoured the Commission's provisional recommendation for a court at Circuit Court level.

4.17 In approaching a resolution of this issue, we begin by stressing our view that considerations of substance should take priority over questions of status in devising a new family courts structure. Hence, determining the precise status which the family court should enjoy within the hierarchy of the overall courts system is of less importance than securing that certain requirements of substance are met, viz.,

- that the judges dealing with family law cases are assigned on the basis of their aptitude for such cases,
- that pre-trial procedures are relatively simple and geared towards minimising conflict,
- that the accommodation and setting of the court are appropriate for the hearing of family law cases,
- that adequate time is available for the hearing of such cases,
- that the court has available to it the necessary administrative and

support services,

- that the costs are kept to a necessary minimum, and
- that parties have reasonable access, as appropriate, to information, advice and representation.

4.18 Our second observation is that in some respects the comparison which has been made between the District and Circuit Courts as they presently operate is off the point. We must begin by recognising that, whether the Family Court becomes a branch of the District or the Circuit Court, far-reaching changes will be required in its organisation, procedures, support services and structure of costs. For example, a Family Court with a unified jurisdiction operating at District Court level could obviously not apply the same summary procedures in all cases; some of the procedural devices of the higher courts (for example interrogatories and orders for discovery) would need to be incorporated in some way. Nor would we wish to see continue the present unsatisfactory situation in which a substantial number of parties to District Court proceedings are legally unrepresented, and in which decisions, which can have an enormous impact on a family, may have to be taken after a sometimes brief and summary hearing. Equally a Circuit Family Court with a comprehensive jurisdiction may be expected to introduce simple procedures for some types of application, and there would be a case for new and special provisions as to costs to take account of the wider range of cases coming before the court.

4.19 Our third comment relates to our assertion, made in the Consultation Paper,<sup>10</sup> that fundamental issues relating to the status of persons are not appropriate for determination at District Court level. Some further explanation is required. It was not intended to suggest that District Judges lack the qualifications or capacity to make such decisions. Indeed it is important to recognise that, in the context of child protection and domestic violence,<sup>11</sup> the District Court already has powers to make far-reaching decisions which may indeed have a fundamental and long-term impact on family members and their relationships. However, we remain of the view that, as long as the District Court remains a court of "summary jurisdiction" with considerable limitations in its jurisdiction generally (i.e. not only in relation to family law),<sup>12</sup> it would appear, to say the least, anomalous to confer upon it a comprehensive family law jurisdiction. Further, given the status and the high level of protection guaranteed to the family and its members, especially under Articles 41 and 42 of the Constitution, it would be objectionable to confer a comprehensive jurisdiction in respect of family law matters on a court of summary jurisdiction. On the other hand, it should be noted that the legislature has already gone far in the extent of

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10 Para. 7.29.

11 *Child Care Act, 1991; Family Law (Maintenance of Spouses and Children) Act 1976; Family Law (Protection of Spouses and Children) Act, 1981; Domestic Violence Act, 1996.*

12 For example, by virtue of section 4 of the *Courts Act, 1991*, in respect of cases concerning *inter alia* contract, breach of contract and certain categories of tort, the jurisdiction of the District Court is limited to claims which do not exceed £5,000. See also sections 5-13 of the same Act.

the family law jurisdiction which it has conferred<sup>13</sup> on the District Court.

4.20 We must now move towards conclusions. Our first conclusion represents our preferred solution for the long term. In view of the heavy involvement of both the District and Circuit Court in family law business, there is much to be said for the introduction of a unified family courts system which draws on the resources (especially the judiciary) of both courts. In the Consultation Paper we considered as impractical a Family Court with judges drawn from courts of different status. However, given that a much wider review of the courts' system is now underway, the possibility of a more radical restructuring of courts of first instance arises.<sup>14</sup> Without in any way prejudging the outcome of this wider review, it is appropriate for us to point out that *such a restructuring, especially if it were based on a model of a single-tier first instance jurisdiction below that of the High Court, would facilitate the creation of the type of specialist family courts service which we envisage.*

4.21 Until decisions are made on these broader questions, we feel obliged to make a choice between Circuit and District levels. On balance, we believe that our provisional recommendation in favour of a Circuit level Family Court is correct. We do not believe that remedies such as divorce, annulment or judicial separation should be made available at the level of a court of summary jurisdiction. *Therefore, if there is to be a unified family law jurisdiction, as we strongly believe there should be, it must at this time be established at Circuit level.*

#### **Some further comments on accessibility and costs**

4.22 We appreciate that this recommendation may give rise to concerns about accessibility and costs. With regard to accessibility, we would emphasise the following:

- emergency and interim remedies should be available at District Court level;<sup>15</sup>
- while the number of Regional Family Court Centres would be limited to approximately 15,<sup>16</sup> Family Court Judges would from time to time travel to other convenient venues where the facilities are adequate.

4.23 With regard to the question of costs generally, any restructuring of the family courts system, whether at Circuit or District level, has resource implications. A better family courts' service has a price attached. However, we are not recommending the wholesale introduction of an entirely new family courts structure. What is being recommended dovetails into the existing courts

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13 For example, the *Domestic Violence Act, 1996*.

14 We refer to the examination currently being conducted by the Working Group on a Courts Commission, the establishment of which was announced by the Minister for Justice, Nora Owen, T.D. on the 8th of November, 1995.

15 See below at para. 4.34 *et seq.*

16 See below at para. 4.26.

structure, accepts the use of existing facilities in the interim, and (with the exception of the recommendations concerning judicial assignment) can be implemented on a progressive basis. We do recognise that our recommendation would involve a very substantial increase in the family law work carried out at Circuit level, and that this transfer should not be undertaken without the necessary resourcing. This matter is further emphasised in the "Caveat Concerning Resources" at the end of this Chapter.

4.24 As regards costs to litigants, *we recommend that a special scheme of costs be devised for the new Regional Family Courts which would reflect the wide range of procedures included in its unified jurisdiction.* We believe that this new form of unified jurisdiction requires an imaginative and flexible approach to the question of costs.

#### ***Number And Locations Of Regional Family Courts***

4.25 The Commission is aware that re-organisation of the Circuit Court has been under discussion for some time.<sup>17</sup> We also recognise that final decisions concerning the number and location of Regional Family Courts will require detailed analysis on a regional basis of the current volume of family law business in both the Circuit and the District Court. We do not have access to such data. For these reasons we confine ourselves to generalised proposals concerning these matters, concentrating on the underlying considerations.

4.26 We believe that *approximately 15 Regional Family Court Centres will be needed.* We accept the advice in a number of submissions that our original estimate of 8 to 10 centres was too low. *In deciding on the precise number and locations of centres it will be necessary to take account of population density, geographical accessibility, as well as current levels of family law business. Proximity to relevant services, such as legal aid and advice, mediation and welfare services, will also be relevant.*

4.27 It is clear that, with 15 Regional Family Court Centres, it will not be possible to appoint a separate Family Court Judge to sit in each centre. Some judges may need to preside over more than one Regional Family Court, and flexibility may demand that, in particular circumstances, a judge may have to operate in more than one Circuit.<sup>18</sup> It may therefore be asked why it is necessary to limit the number of Regional Family Court Centres. The reason is that, in our view, if each Family Court Centre is to have appropriate courtroom and other physical facilities, together with the necessary support and advice services, considerations of economy require the number to be limited. We do however accept, as we have already indicated, that *Family Court Judges should be permitted to make use of other suitable venues apart from the Regional Centres where considerations of accessibility make this appropriate.*

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A review committee was established in March 1984 under the chairmanship of the President of the Circuit Court.

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See below, paras. 5.16 & 5.17.

### ***The Unified Jurisdiction***

4.28 In the Consultation Paper it was provisionally recommended that the Regional Family Court should have jurisdiction in the following matters:<sup>19</sup>

- (1) *Legal separation and ancillary relief under the Judicial Separation and Family Law Reform Act, 1989;*
- (2) *Child custody, access and other guardianship matters under the Guardianship of Infants Act, 1964;*
- (3) *Maintenance proceedings (without upper limits on awards) under the Family Law (Maintenance of Spouses and Children) Act, 1976;*
- (4) *Barring (without limit of time) and protection orders under the Family Law (Protection of Spouses and Children) Act, 1981;<sup>20</sup>*
- (5) *Proceedings under the Marriage Act, 1972;*
- (6) *Proceedings for matrimonial injunctions;*
- (7) *Proceedings under the Family Home Protection Act, 1976;*
- (8) *Proceedings under the Married Women's Status Act, 1957;*
- (9) *Proceedings under the Succession Act, 1965;*
- (10) *Proceedings (between family members) under the Partition Acts, 1868 to 1876;*
- (11) *Wardship proceedings;*
- (12) *Proceedings under the Legitimacy Declaration (Ireland) Act, 1868;*
- (13) *Proceedings under Part VI of the Status of Children Act, 1987.*

It was noted that the Circuit Court already has a partial jurisdiction in each of these matters.

4.29 We recommended in addition that the Regional Family Court should have jurisdiction in the following matters:<sup>21</sup>

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<sup>19</sup> Consultation Paper, para. 7.32.  
<sup>20</sup> This Act has been repealed by section 23 of the *Domestic Violence Act, 1996*. The reliefs available under the 1981 Act (barring and protection orders) are now provided and extended by the 1996 Act. Note that, at the time of printing of this Report, the text of the Act has not been published; the section numbers cited here are from the version of the Bill passed by both Houses of the Oireachtas on 21 February, 1996: *Domestic Violence Bill, 1995* [No. 35c of 1995].

<sup>21</sup> *Ibid.*, para. 7.33.



- (1) *Nullity proceedings together with ancillary relief, as proposed in the White Paper on Marital Breakdown. (See Scheme of the Family Law (No. 1) Bill, section 46).*
- (2) *Proceedings under section 3 of the Adoption Act, 1974 and section 3 of the Adoption Act, 1988. We believe that the Family Court would be the appropriate setting in which to resolve the matters (such as dispensing with consent to adoption and determining whether a marital child with a living parent may be freed for adoption) addressed in these sections.*
- (3) *Proceedings, other than emergency proceedings, under the Child Care Act, 1991. Again, we believe that the Family Court is the proper setting for the making of decisions concerning the future care or custody of a child deemed to be in need of care or protection. The same applies to proceedings under the School Attendance Acts, 1926 to 1967.*

It should be noted that nullity proceedings are soon to come within the jurisdiction of the Circuit Family Court under section 37 of the *Family Law Act, 1995*.

4.30 The provisional proposals for a unified jurisdiction received broad support. Some contributors suggested that consideration be given to including criminal proceedings against children. It was also suggested that the Commission should go further by giving the Regional Family Court a comprehensive jurisdiction, including an emergency jurisdiction, in family law matters. It was argued that, by concentrating all such jurisdiction on the Regional Family Courts, a unified jurisprudence would be facilitated and inconsistencies in practice between different District Courts would be eliminated. This matter is discussed further under the "Jurisdiction of the District Court".<sup>22</sup>

4.31 There were some objections to the provisional recommendations. One view was that the Commission should give consideration to the idea of a concurrent jurisdiction in the District and Circuit Courts, leaving parties to decide in which court to present their case. The issue of resources was also raised. A number of contributors drew attention to the need for adequate funding of any jurisdictional changes, especially where the workload of any particular court would be increased.

4.32 We confirm the provisional recommendation with the following modifications. *The jurisdiction of the Regional Family Court should be comprehensive and include all emergency remedies, including emergency care proceedings under the Child Care Act, 1991 and the emergency relief provided by the Domestic Violence Act, 1996. This is without prejudice to any parallel*

*jurisdiction in the District Court (a matter discussed below).*<sup>23</sup>

*Jurisdiction under the Domestic Violence Act, 1996 and under the Child Abduction and Enforcement of Custody Orders Act, 1991 should also be vested in the Regional Family Court, as should jurisdiction under section 7 of the Adoption Act, 1991, under the Maintenance Act, 1994, and under divorce legislation, if divorce is introduced.*

4.33 As regards criminal proceedings involving children and young persons, we would prefer to reserve our position. The issue of juvenile justice is a complex one. Whether the Regional Family Court would be an appropriate forum to hear cases alleging criminal conduct by children and young persons will depend in part on whether there are to be changes in the manner in which such cases are to be processed and characterised. If, for example, the age of criminal responsibility were raised, from the current 7 years, and if cases involving children below the new age (as well perhaps as some cases including older children) were to be treated more in the nature of civil (i.e. care and protection) cases, the argument for involvement of the Regional Family Court would be strengthened. But many other issues would arise including the impact on the Circuit Court of transferring to it this very substantial area of work, as well as the future of the specialist Dublin Metropolitan Children's Court.

### *The Jurisdiction Of The District Court*

#### **Provisional recommendations**

4.34 In the Consultation Paper we recommended provisionally that the District Court's jurisdiction in family matters should be confined to the giving of emergency and certain specific remedies,<sup>24</sup> viz:

- (1) Barring and protection orders, as at present (i.e. barring orders up to a maximum of one year's duration).<sup>25</sup>
- (2) Orders under s.11 of the *Guardianship of Infants Act, 1964*, i.e., principally orders for custody of and access to children. It is necessary for the District Court to retain the power to make such orders pursuant, for example, to a barring order. Full custody hearings should, however, take place in the Regional Family Court.
- (3) Maintenance orders under the *Family Law (Maintenance of Spouses and Children) Act, 1976*, subject to existing maxima (£200 per week for a spouse, and £60 per week for a dependent child).

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<sup>23</sup> *Ibid.*

<sup>24</sup> Consultation Paper, para. 7.34.

<sup>25</sup> Note that the *Family Law (Protection of Spouses and Children) Act, 1981* has been repealed. See further, *op. cit.*, f.n. 20.

- (4) Orders under s.9 of the *Family Home Protection Act, 1976*, subject to the existing limits on the value of the chattels in question.
- (5) Emergency orders under part 3 of the *Child Care Act, 1991*.

#### **Submissions and comments**

4.35 Some commentators argued for the complete removal of the District Court's family law jurisdiction. The following is a sample in summary of the comments and suggestions made on this matter:

- This option would help to develop a "unified jurisprudence" and would help overcome the "uneven practice in the various District Courts in relation to emergency applications".
- The existing concurrent jurisdiction between the District and Circuit Court is "one of the big problems". There can be confusion and overlap when proceedings are heard before both courts, and there may be "deferential" delay at District Court level.
- If the District Court maintains its present jurisdiction there is a danger of having a two-tier system of family justice wherein poorer litigants effectively achieve judicial separation by continually renewing barring orders in the District Court, while those with the necessary means apply to the Circuit Family Court.
- Emergencies could be dealt with by Circuit Family Judges and, where necessary, relief could be granted from a judge's home, as happens at High Court level in respect of injunctions.
- A factor giving rise to the need for an emergency jurisdiction is delay in the courts system. Elimination of, or reduction in, delays should reduce the need for emergency relief.
- Special days could be set aside in the Circuit Family Court for emergency applications, with the possibility that the same judge would preside over the emergency application and the full hearing.
- A single Family Court would be the "ideal situation", but only on condition that it was accessible to all. If accessibility to all cannot be guaranteed the jurisdiction of the District Court should not be removed.
- The Regional Family Court should have a facility whereby there would be a Registrar and a Judge permanently available to make *ex parte* orders.

4.36 There remained, on the other hand, considerable support for the

retention of an emergency jurisdiction in the District Court.

- Eradicating the "two-tier" system of family justice does not necessarily mean the total removal of the emergency jurisdiction of the District Court.
- There could be a procedure, not unlike the "return for trial" system, whereby emergency applications would be made to the District Court, but extensions of interim orders and the substantive issues would then be dealt with by the Family Court at Circuit Court level.

4.37 There was also a suggestion that, within the new system, it might be possible to allow the District Court to retain a form of reserve jurisdiction in respect of certain cases if the Regional Family Court were unavailable or not sitting.

#### **Should the District Court retain an emergency jurisdiction? - The Commission's views**

4.38 Where applications for emergency relief are concerned the requirements of accessibility - availability of the judge, geographical proximity, and the ease and speed with which applications may be made - are of overriding importance.

4.39 If it were possible to guarantee the same level of accessibility in the Regional Family Court as presently exists in the District Court, then it might be desirable to give the Regional Family Court exclusive jurisdiction in all matters including emergency applications. This would certainly contribute to greater uniformity in practice which, according to a number of our commentators, is lacking at present.

However, we are not convinced at this stage that suggested measures to ensure accessibility in emergency cases to the new Regional Family Court would be adequate. It should not be forgotten that emergency applications in family law cases are not rare events. The setting aside of special days or times for emergency applications would be helpful, but it would not resolve the problem of the real emergency occurring outside normal court time. Also, given the number of Regional Family Court Centres proposed,<sup>26</sup> it would be practically impossible to ensure the availability of a Circuit Judge at all times in all regions. The idea that it might be possible, in cases of emergency, for a court registrar to make *ex parte* orders is worth considering, but there could well be constitutional difficulties and it would still not be possible to provide comprehensive coverage. The great advantage of an emergency jurisdiction in the District Court lies in the large number of District Judges available and in the broad geographical spread of the District Courts.

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Approximately 15 Regional Family Court Centres will be needed. See above, para. 4.26.

4.40 For these reasons we have concluded that *the District Court should for the present retain an emergency jurisdiction*. Once the system of Regional Family Courts has been in operation for some time, this matter will need to be reviewed in the light of experience. For the moment we believe that the risks attached to removing all emergency jurisdiction from the District Court are too great.

4.41 The idea of an emergency jurisdiction in the District Court needs to be further defined. If the District Court's general jurisdiction over matters such as maintenance and child custody and access is to be terminated, any emergency measure capable of being taken by it will need to be interim in nature. A full hearing of the issues for the purpose of making a more permanent order should be deferred to the Regional Family Court. The procedures for sending on cases from the District Court to the Regional Family Court will need to be clarified.<sup>27</sup>

**Should the District Court retain any other elements of its family law jurisdiction? - The Commission's views**

4.42 When a District Court grants emergency relief, such as an *ex parte* interim barring order,<sup>28</sup> certain consequential orders, though not necessarily emergency in their nature, may be required on an interim basis. There may be a need, for example, to order maintenance and make provision concerning custody of or access to dependent children pending a full hearing before the Regional Family Court. There may be need for provisional orders protecting family property. Full provision, therefore, should be made for the District Court to grant interim orders which are either in themselves emergency orders or necessary ancillaries to emergency orders.

***Recommendations***

4.43 *The jurisdiction of the District Court in family law matters should be limited to the making of emergency orders and interim orders especially in situations of emergency. In all of these matters the jurisdiction of the District Court would be parallel with the jurisdiction of the Regional Family Court.*

What we envisage is a system whereby *all substantive decisions having long-term effect would be reserved to the jurisdiction of the Regional Family Court*. The District Court would retain jurisdiction to make interim decisions, especially where they are needed in an emergency, pending a hearing in the Regional Family Court. *Any extension of an interim order would be determined in the Regional Family Court.*

4.44 *The District Court's jurisdiction should include the following matters in particular:*

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See below, para. 4.45.  
Provided for in section 4 of the *Domestic Violence Act, 1996*.

Domestic violence

*Jurisdiction to make a protection order under the Domestic Violence Act, 1996,<sup>29</sup> where an application is made to the Regional Family Court for a barring or a safety order, and terminating with the decision in respect of such application.*

*Jurisdiction to make an interim barring order under the Domestic Violence Act, 1996,<sup>30</sup> where an application is made to the Regional Family Court for a barring order, and terminating with the decision in respect of such application.*

Child protection

*Jurisdiction to make an emergency care order under the Child Care Act, 1991.<sup>31</sup>*

*Jurisdiction to make an initial interim care order under the Child Care Act, 1991,<sup>32</sup> provided that an application for a care order has been or is about to be made to the Regional Family Court.*

Guardianship and custody

*Jurisdiction to make an interim order under section 11 of the Guardianship of Infants Act, 1964, ancillary to a protection or interim barring order, or in other situations of emergency, provided that an application for such order has been made to the Regional Family Court, and terminating with the decision in respect of such application.*

Maintenance

*Jurisdiction to make an interim maintenance order under the Family Law (Maintenance of Spouses and Children) Act, 1976, ancillary to a protection or interim barring order, or in other situations of emergency, provided that an application for a maintenance order has been made to the Regional Family Court and terminating with the decision in respect of such application.*

Family property

*Jurisdiction to make an order under section 9 of the Family Home Protection Act, 1976, subject to existing limits on the value of the chattels in question.*

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29 Section 5.  
30 Section 4.  
31 Section 13.  
32 Section 17.

4.45 *Where application for the above interim or emergency reliefs is made to the District Court, the procedure should be simple, involving the minimum necessary formality, and composite in the sense of automatically triggering proceedings in the Regional Family Court.*

***Caveat Concerning Resources***

4.46 The changes in jurisdiction which we have recommended will result in a major shift of family law business from the District to the Circuit Court. We have pointed out that the District Court at present deals, in terms of numbers of family law applications, with the great majority of cases. The result of our proposals will be to reverse this situation.

4.47 We have explained the reasons why we favour this change. We have also indicated that we are aware of the extraordinary service that the District Court provides. It is remarkable that the District Court has been able to cope with its enormous case load. It has relied heavily on the experience, hard work and flexibility of its judges and supporting staff.

4.48 We remain convinced that the recommended reforms will lead to a higher-quality and more consistent family courts service. We are, however, well aware of the risks involved in jurisdictional changes, particularly if the appropriate resources are not made available to the courts on which new responsibilities are imposed.

4.49 *If the system of Regional Family Courts is to operate successfully, the following are absolute prerequisites:*

- (1) *there must be a sufficient number of Regional Family Courts and outlying venues to ensure a reasonable degree of geographical accessibility,*
- (2) *there must be a sufficient number of judges assigned to the Regional Family Courts to cope with the major expansion of business which our proposals imply,*
- (3) *provision will need to be made to ensure that adequate free legal aid and advice is available to those requiring such services,*
- (4) *the Information Centres attached to the courts must be properly resourced,*
- (5) *the administrative support structures for the Regional Family Courts (proposed in Chapter 8) must be properly resourced,*
- (6) *application procedures must be simple and as expeditious as the nature of the case demands.*

*In short our recommendations are conditional upon the provision of the substantial additional resourcing necessary to support the establishment of a high quality and*

*accessible family courts service.*

4.50 We add that, regardless of our proposals, it is likely that, if divorce is introduced, it will result in a substantial increase in Circuit Court family law business, including some transfer of business from the District Court. We also add our view that the need for a substantial investment of resources arises irrespective of the precise shape or status of a revised family courts structure. Note also that it is not within our remit to suggest any changes to the current jurisdiction of the High Court in family law matters.<sup>33</sup>

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33 The constitutional implications of the original jurisdiction of the High Court are discussed in the Consultation Paper at paras. 1.04-1.14.



## CHAPTER 5: FAMILY COURT JUDGES<sup>1</sup>

### *Provisional Recommendations Concerning Judicial Appointments To The Regional Family Courts*

5.01 We provisionally recommended in the Consultation Paper:

- (a) that the Regional Family Courts should be presided over by specially nominated Circuit Court Judges;<sup>2</sup>
- (b) that the selection and assignment of judges should be determined by the President of the Circuit Court together with two ordinary judges of that Court;<sup>3</sup>
- (c) that only those judges should be selected who, by reason of training, experience and personality, are suitable persons to deal with matters of family law;<sup>4</sup>
- (d) that any one period of assignment should be for not less than one year;<sup>5</sup> and
- (e) that the Government should be required when considering appointments to the Circuit Court, to take account of the need to ensure that there are sufficient judges qualified to sit on the Regional Family Courts.<sup>6</sup>

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1 See Appendix C.  
2 Consultation Paper, paras. 7.28 & 7.30.  
3 *Ibid.*, para. 7.56.  
4 *Ibid.*  
5 *Ibid.*  
6 *Ibid.*

### **Status Of Family Court Judges**

5.02 Our provisional recommendation was that the Regional Family Courts should be presided over by Circuit Court Judges. We considered the possibility that District Judges might also be eligible for nomination to the Court.<sup>7</sup> We recognised that this would enlarge the pool from which Family Court Judges are drawn and acknowledged the fact that there are already a number of District Judges with a tried and tested capacity to deal expertly and sensitively with family law cases. However, we provisionally concluded that a system whereby judges would in effect rotate between the District and Circuit Courts could give rise to serious problems of judicial status.<sup>8</sup>

### **Submissions and comments**

5.03 This matter gave rise to a debate at our December 1994 Seminar which revealed a variety of opinions. There was some support for our provisional conclusion, and some concern that a Court staffed by District and Circuit Court Judges might give rise to jurisdictional questions or even "judicial squabbles" over status and pay. However, a contrary view was strongly expressed. It was argued that it would place an impossible burden on the Circuit Court if the new system were to be staffed entirely by Circuit Court Judges, and it would deprive the Regional Family Court of the expertise of many District Court Judges. It was suggested that concerns over problems of judicial status were exaggerated, that it is "the sin of the legal system and profession to worry too much about status", and that English and Scottish systems provide examples of how judicial secondment between different levels of court may operate successfully.<sup>9</sup> An alternative view was that, to avoid the loss of accumulated expertise in the District Court, consideration should be given to the promotion to the Circuit Court of District Court Judges with the appropriate expertise.

### **Appointment, promotion and secondment of judges**

5.04 The Commission decided to enquire further into the issues of appointment, promotion and secondment of judges. The results of this enquiry appear in full in Appendix C which includes analysis of the current situation in Ireland, as well as a discussion of current practice in England, Wales and Scotland. For the purpose of the present discussion, the following are some of the more important facts and conclusions.

5.05 In Ireland there is no provision for secondment of District Judges to the Circuit Court.<sup>10</sup> Neither is there any provision for the appointment of

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7 Para. 7.28.

8 Para. 7.29.

9 See Appendix C.

10 If it were deemed necessary or desirable to do so, it would appear to be possible for the Legislature to provide by statute for such secondment. Article 36 of the Constitution provides that the number of judges and their terms of appointment "shall be regulated in accordance with law". Further, "the constitution and organisation of the said Courts and judges, and all matters of procedure" shall also be statutorily regulated (Constitution of Ireland 1937, Article 36.iii). The case of *State (Walshe) v. Murphy*, [1981] I.R. 275, which involved interpretation of Article 36, may be instructive in this regard.

temporary judges for the specific purpose of alleviating backlogs.

5.06 In Scotland and in England and Wales systems of secondment of judges from lower to higher courts have been operating for many years. There is also an established practice in both legal systems of appointing judges on a temporary basis. In Scotland temporary appointments are sometimes for substantial fixed periods (for example, 3 years) which may be renewed. In general, where secondment or temporary appointment operates, the judge concerned has all the same functions and powers as a permanent judge of the court in which he or she sits, but does not enjoy equal status in respect of such matters as remuneration, allowances, pensions, and in matters of judicial precedence. The practice of secondment has from time to time been criticised as a device for avoiding the expense involved in full promotion.

#### **Analysis of issues**

5.07 The somewhat rigid judicial structure which operates in this country raises some broad questions which go beyond the scope of this more limited discussion of family courts.<sup>11</sup> Greater flexibility in this area would undoubtedly have certain advantages. Predicting with any degree of accuracy the flow of business in the courts is inherently difficult. There will inevitably be troughs and peaks in any area of practice. Distribution of business geographically may also be uneven. A system which would allow greater scope for the redeployment of judicial resources would have much to recommend it. A flexible system is particularly important where, as we are suggesting in the area of family law, a degree of specialism is required. There is only a small pool of Circuit Court Judges available, and it may be difficult to find from within it a sufficient number with the special qualities required to deal with family law issues. If, as we have suggested, Family Court Judges are to rotate, this problem would be even greater. We note with satisfaction, however, that the *Courts and Court Officers Act, 1995*, increases the maximum number of ordinary judges of the Circuit Court from seventeen to twenty-four.<sup>12</sup>

5.08 As regards possible secondment of District Judges to the proposed new Regional Family Court, the main benefits would be enlargement of the pool of judges available and the opportunity to use the services of District Judges who have experience of, and an aptitude for, family law cases. There would be greater room for manoeuvre and more flexibility in responding to particular needs, such as the removal of bottlenecks, within the system. On the other hand, if District Judges are to be seconded to the Regional Family Court on a substantial and regular basis, this would argue for a further increase in the number of Circuit Judgeships. A system of Regional Family Courts, operating as a branch of the Circuit Court, in which the secondment of District Judges was

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11 Note that the provisions of the *Courts and Court Officers Act, 1995* attempt to reform certain aspects of the current system. See Chapter 2, f.n. 18. Note also that an examination of the courts system is currently being conducted by the Working Group on a Courts Commission, the establishment of which was announced by the Minister for Justice, Ms. Nora Owen, T.D. on the 6th of November, 1995.

12 Section 10.

institutionalised and substantial, seems to us to be inappropriate. The majority of Commissioners believe that secondment would not be appropriate even in exceptional circumstances. One Commissioner is of the view that District Judges should be eligible for secondment, in exceptional circumstances and for a fixed period, to the Regional Family Court. Exceptional circumstances would include a situation in which it proves impossible to fill a vacancy on the Regional Family Court from among the Circuit Court Judges, or one in which additional judicial resources are needed to overcome a temporary crisis, such as the sudden build-up of a backlog of cases.

5.09 As for promotion of District Judges to the Circuit Court, we confine ourselves to the comment, in the context of the reorganisation of family courts, that there are a number of District Judges who have gained a reputation for the sensitivity and skill with which they handle family law cases and that their experience and expertise should not be lightly abandoned.

5.10 The appointment of temporary judges to the Regional Family Court for fixed time periods would be another way of injecting flexibility into the system, and could be of particular assistance in helping to reduce backlogs when and where they occur. Again this is not a simple matter. In the Consultation Paper<sup>13</sup> we expressed some doubt as to whether fixed-term appointments would be consistent with the requirements of judicial independence. There is a danger that the perceived economic advantages of temporary judicial appointments may lead to their proliferation and to a consequent weakening of the judiciary.

### **Conclusions**

5.11 Our conclusions are as follows:

1. *The Regional Family Courts should be presided over by specially assigned Circuit Judges. The overall number of Circuit Judges will need to be further augmented in response to the increase in the Court's family law jurisdiction.*
2. *We recommend that District Judges with expertise and experience in family law cases should be considered for promotion to the Circuit Court, with a view to their assignment to the Regional Family Court.*
3. *We recommend that further consideration be given to the general question of temporary judicial appointments.*

### **Suitability For Assignment To The Regional Family Courts**

5.12 We expressed the view in the Consultation Paper that judges who deal with family law cases should be nominated to do so on the basis of their aptitude

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13 Para. 7.31.

for such cases.<sup>14</sup> There has been general support for, and no dissent from, this view in the submissions and comments received. We therefore confirm our provisional recommendation:

- *that only those judges should be assigned to preside over the Regional Family Courts who, by reason of training, experience and personality, are suitable persons to deal with matters of family law.*

#### ***Assignment To The Regional Family Court***

5.13 Our provisional recommendations concerning assignment of judges to the Regional Family Court are set out in paragraph 5.01 above. We suggested that assignment of appropriate judges should be made by the President of the Circuit Court. We wish to modify that recommendation, and propose that *the selection and assignment of appropriate judges to sit on Regional Family Courts should be made by the President of the Circuit Court together with the two senior ordinary judges of the Circuit Court.*

#### **The period of assignment**

5.14 We provisionally recommended that the period of assignment to the Regional Family Court should be for not less than one year. We were opposed to the idea of a permanent family court judiciary, preferring instead a system of rotation within the Circuit Court. There is both a tradition against judicial specialisation within our system and a commonly held view that it is excessively stressful and may lead to "fatigue" if a judge deals exclusively with family law on a permanent basis. We believed that recruitment to permanent judgeships in the Regional Family Court would prove difficult.

5.15 Some commentators have suggested that problems of stress and fatigue, if they exist, are the product of the excessive case load and other adverse factors associated currently with family law cases. If reforms in the system are successful there would not be the same level of resistance to the idea of a permanent family law judiciary. We accept that this is possibly so and that in some perhaps exceptional cases it may be appropriate for a judge to be assigned to the Regional Family Court for a substantial period of time. There should, in our view, be flexibility in this matter. We stipulated a minimum one year period of assignment. This offers a reasonable degree of continuity and recognises that newly assigned judges may need an opportunity to familiarise themselves with the system. There may, nevertheless, arise exceptional circumstances in which a shorter period of assignment of a judge who has previous experience of family court work may be appropriate, as for example where there occur periodic or isolated backlogs.

### **Fixed and roving assignments**

5.16 Concern for flexibility in the new system prompted some commentators to question the idea of assigning a separate judge to each Regional Family Court. Attention was drawn to the considerable differences in the volume of family law cases between counties.<sup>15</sup> The necessary flexibility would be provided, in the opinion of some, by the assignment of a "roving" or "locum" Circuit Judge. There was much support for the deployment within the present system of extra judges, where necessary, moving from circuit to circuit, and sitting with the resident Circuit Judge in venues having the capacity to accommodate two judges simultaneously.<sup>16</sup>

5.17 We accept the need for flexibility in the assignment of judges to the new Regional Family Court. We have already indicated that the choice of Regional Family Court centres should take into account the volume of business in the different regions. Nevertheless there will be occasions when backlogs require the deployment of an auxiliary judge; there may also be occasions when the level of business in one Regional Family Court is slack enough to allow the assigned judge to provide temporary assistance in a neighbouring Regional Family Court.

### **Conclusions**

5.18 We recommend as follows:

- *The selection and assignment of Circuit Court Judges to sit on Regional Family Courts should be made by the President of the Circuit Court, together with the two senior ordinary judges of the Circuit Court.*
- *Any one period of assignment to the Regional Family Court should normally be for not less than one year, with the possibility of renewal.*
- *Assignment for a shorter period should be permitted only in exceptional circumstances, and only if the judge so assigned has previous experience of family court work.*
- *A judge should normally be assigned to preside over one or more specified Regional Family Courts. Provision should, however, be made for the possible appointment of "roving" Family Court Judges, as well as for the temporary transfer of a judge from his or her designated court(s) to another, if the volume and regional distribution of family court business so justifies.*

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<sup>15</sup> See Table 1 above, para. 2.08.

<sup>16</sup> At present a Circuit Judge must be assigned permanently to a particular Circuit by the Government. See section 20(2)(a) of the *Courts (Supplemental Provisions) Act, 1961*. However a Circuit Judge may deal with urgent cases which are outside his or her Circuit: see section 22(1) of the same Act.

## CHAPTER 6: APPEALS

6.01 The matter of appeals in family law cases was not dealt with in the Consultation Paper. The Commission has been persuaded, in view of the number of submissions on the matter, that it should be discussed in this Report. It is necessary to begin with a brief description of the present situation.

### *Existing System Of Appeal In Civil Cases*

6.02 The Constitution of Ireland establishes the Supreme Court as the Court of Final Appeal<sup>1</sup> and provides for a right of appeal, as determined by law, from decisions of the Courts of First Instance, the latter including the High Court<sup>2</sup> and "Courts of local and limited jurisdiction".<sup>3</sup> Against this background, legislation provides the appellate framework within which decisions of the different Courts may be challenged.<sup>4</sup>

### **Appellate jurisdiction of the District Court**

6.03 The District Court, as the "lowest" in the hierarchy of courts, has the most restricted appellate jurisdiction and may hear appeals from decisions of some statutory bodies.<sup>5</sup>

### **Appellate jurisdiction of the Circuit Court**

6.04 Section 84 of the *Courts of Justice Act, 1924* empowers the Circuit Court to conduct a full rehearing of a District Court case and such an appeal may be

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1 Constitution of Ireland, 1937, Article 34.4.1<sup>o</sup>.

2 *Ibid.*, Article 34.3.1<sup>o</sup>.

3 *Ibid.*, Article 34.3.4<sup>o</sup>.

4 *Ibid.*, Article 36 (iii).

5 See, for example, *Fire Services Act, 1981* and *Safety, Health and Welfare at Work Act, 1989*.

initiated by either the plaintiff or the defendant. The Circuit Court may also hear appeals from certain administrative decisions.<sup>6</sup>

#### **Appellate jurisdiction of the High Court**

6.05 The High Court may hear appeals from both the District and Circuit Courts. Appeals on a point of law from decisions of the District Court may be entertained by the High Court by virtue of section 52(1) of the *Courts (Supplemental Provisions) Act, 1961*. This appeal is often referred to as a "case stated". Following argument before the High Court, the presiding judge rules upon the point of law raised and the case is referred back to the District Court for final determination. Section 52(2) of the 1961 Act also provides for a further appeal on a point of law from the decision of the High Court to the Supreme Court, but only with the leave of the High Court Judge.

6.06 The High Court may also conduct full re-hearings of cases initiated in the Circuit Court, in accordance with the *Courts of Justice Act, 1936*. The decision of the High Court Judge in such a case is final<sup>7</sup> unless that judge, upon application by either party, adjourns the High Court hearing and grants leave to appeal on a point of law to the Supreme Court *before* he or she reaches a final verdict.

#### **Appellate jurisdiction of the Supreme Court**

6.07 Under the Constitution, the Supreme Court is the only court of final appeal,<sup>8</sup> but it is not *only* a court of appeal and may exercise a non-appellate jurisdiction, for example under Article 12.3.1<sup>9</sup> and Article 26 of the Constitution.<sup>9</sup> It is clear from Article 34.4.3<sup>9</sup> that, subject to such exceptions<sup>10</sup> and regulations as may be laid down by law, the Supreme Court has appellate jurisdiction from "all decisions of the High Court" and "from such decisions of other courts as may be prescribed by law."<sup>11</sup> Further, no law may be enacted which would have the effect of limiting the jurisdiction of the Supreme Court to hear appeals from the High Court in constitutional cases.<sup>12</sup>

6.08 Where a case is "stated" to the Supreme Court with the leave of the High Court pursuant to section 52(2) of the *Courts (Supplemental Provisions) Act, 1961*, the Supreme Court rules upon the point of law raised and returns the case to the

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6 For example, the refusal of the Minister for Agriculture, Food and Forestry to grant an abattoir licence may be appealed to the Circuit Court: section 16 of the *Abattoirs Act, 1988*.

7 Section 39 of the *Courts of Justice Act, 1936*.

8 Constitution of Ireland, 1937, Article 34.4.1<sup>0</sup>.

9 *The State (Browne) v. Feran* [1967] I.R. 147; *The People (Attorney General) v. McGlynn* [1967] I.R. 232. See also J.M. Kelly, *The Irish Constitution* (1994 3rd ed., Butterworths), at p.501 *et seq.*; Byrne & McCutcheon, *The Irish Legal System*, 1989 (2nd ed., Butterworths, Dublin), Chapter 6.

10 Exceptions from the general right of appeal to the Supreme Court are set out in Kelly, *ibid.*, at pp.519-520.

11 According to Kelly, *op. cit.*, *l.n.* 9 at p.518, the Supreme Court enjoys a limited appellate jurisdiction from certain decisions of the Court of Criminal Appeal by virtue of section 29 of the *Courts of Justice Act, 1924* and section 3 of the *Criminal Justice Act, 1993*, and from the Courts-Martial Appeal Court under section 14 of the *Courts-Martial Appeals Act, 1983*.

12 Constitution of Ireland, 1937, Article 34.4.4<sup>0</sup>.



High Court; that point of law cannot thereafter be appealed back to the Supreme Court.

6.09 The procedural aspects of the Supreme Court's appellate jurisdiction are governed by Order 58 of the Rules of the Superior Courts, 1986.

#### The introduction of new evidence

6.10 Generally, the introduction of new or updated evidence is permitted by an appellate court although, in respect of new evidence, queries may be raised as to why the information was not adduced at the earlier hearing. There may also be restrictions on the introduction of new material before the Supreme Court.<sup>13</sup>

#### Appeals in family law cases<sup>14</sup>

6.11 In the family law context, barring orders,<sup>15</sup> maintenance orders,<sup>16</sup> orders made under the *Guardianship of Infants Act, 1964*<sup>17</sup> and orders for committal<sup>18</sup> made by the District Court may be appealed to the Circuit Court.<sup>19</sup> An appeal against a District Court order will usually operate as a stay on that order, provided that a recognizance is entered into.<sup>20</sup> However, this provision does not apply in relation to appeals against a barring order made in the District Court.

6.12 Similarly, appeals may be lodged to the High Court against decisions of the Circuit Court<sup>21</sup> in respect of barring orders,<sup>22</sup> maintenance orders<sup>23</sup>, orders under the 1964 Act,<sup>24</sup> orders under the *Judicial Separation and Family Law Reform Act, 1989* and other miscellaneous family law orders within the jurisdiction of that Court.<sup>25</sup>

6.13 Family law orders made by the High Court may be appealed to the Supreme Court, subject to procedural rules regarding the nature of the Supreme Court's appellate jurisdiction.<sup>26</sup>

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13 *B. v. B.* [1975] I.R. 54; *E.K. v. M.K.*, July 1974, unreported, Supreme Court; *J.M. & G.M. v. An Bord Uchtála* [1988] I.L.R.M. 20. See further W. Duncan & P. Scully, *Marriage Breakdown in Ireland* (1990, Butterworths, Dublin), para. 15.059 *et seq.*

14 For a full discussion of the family law jurisdiction of the different courts, see the Consultation Paper on Family Courts, Chapter 1, Part 1A.

15 See Duncan & Scully, *op. cit.*, f.n. 13, at para. 5.048.

16 *Ibid.*, para. 9.045.

17 *Ibid.*, para. 15.010.

18 *Ibid.*, para. 9.083 *et seq.*

19 Rules 190-198 of the District Court Rules, 1948.

20 Rule 192 of the District Court Rules, 1948.

21 Circuit Court (No. 6) Rules, 1982, S.I. No. 158 of 1982.

22 See Duncan & Scully, *op. cit.*, f.n. 13, at para. 5.065.

23 *Ibid.*, para. 9.108.

24 *Ibid.*, para. 15.027.

25 See Consultation Paper, para. 1.02 *et seq.* for a full summary of orders which are within the jurisdiction of the Circuit Court.

26 See Byrne & McCutcheon, *op. cit.*, f.n. 9.

### ***Submissions***

6.14 Many submissions received by the Commission questioned whether the prevailing type of appeals procedure, which involves a full re-hearing of cases, is suitable for family law matters. One suggestion was to change the present system to provide for appeals by way of motion based on a transcript of the proceedings. Indeed, quite a number of submissions focused on the issue of the use and availability of transcripts in a revised appeals process.

6.15 It was noted that appeals on transcript would be costly, would slow proceedings down and would mean that a case would not get a full re-hearing on appeal. It was also argued that the introduction of a transcript system of appeal must be conditional on the State providing a transcript whenever it is required. The need to introduce a transcript system of appeal was challenged on the basis that it was an expensive and time consuming way of addressing the issue.

6.16 Another suggestion was that the automatic right of appeal from the Circuit Court to the High Court should be restricted to cases involving child custody, adjustment of property rights and nullity, and in those cases appeal would be by way of transcript. It was also suggested that an appeal should only be allowed on a point of law to the High Court since, it was argued, there was little point in going over the whole case again in another Court.

6.17 While accepting all that is said by those who are unhappy about appeals in family law cases and hoping that new procedures will lessen the risk of bad decisions, we cannot overlook the fact that judges are humans and inevitably will sometimes get things wrong. Therefore, appeals will be necessary in certain circumstances. The guiding principle is that it is vitally important that the best possible decisions are reached in family law cases, having regard both to the nature of the decisions and their effect upon families and their members.

6.18 Discussion also centred on the issue of the number of family law decisions which are actually appealed. Acknowledging the possibility of regional variations, contributors estimated that the number of appeals was generally small.

6.19 As a result of these discussions, the Commission was of the opinion that the issues raised should be considered in the light of any available statistics.

### ***Statistical Information***

#### **The District Court**

6.20 In the year ending 31.07.1992, 448 orders were appealed amounting to 3.6% of the total number of orders made by the District Court. There were 384 appellants. This latter figure suggests that a number of appellants challenged more than one order.

In the year ending 31.07.1993, 495 District Court orders were appealed, amounting to 3.8% of the total number of orders made. There were 404

appellants.

In the year ending 31.07.1994, 594 orders were appealed from the District Court which represents 4.16% of the total number of orders made. There were 499 appellants.

#### **The Circuit Court**

6.21 It has not been possible to obtain figures in respect of the number of Circuit Court orders in family law cases which are appealed to the High Court.

#### **The High Court**

6.22 Neither has it been possible to obtain figures in respect of the number of High Court orders in family law cases which are appealed to the Supreme Court.

#### ***The Australian System***

6.23 The Australian Family Court Guidelines establish an appeals system for family law matters based upon the premise that "the opportunities for an appeal to be used as a negotiating tool and/or delaying tactic on behalf of one party"<sup>27</sup> should be minimised:

"The aim of the court's appellate system is to afford parties full and fair access to the due processes of the law, to ensure that the court's standards of judicial decision-making are maintained and to resolve in a consistent manner questions which are novel, difficult, the subject of conflicting authorities or of importance in the general public interest or in the administration of the Family Law Act 1975."<sup>28</sup>

6.24 In the Australian appeals system, the general standard of expedition for the disposal of appeals is set at six months from the filing of the notice of appeal to the delivery of judgment.<sup>29</sup> To achieve this target, parties and their legal representatives are obliged to follow a timetable<sup>30</sup> and their progress is monitored by the Deputy Registrar (Appeals) in the Appeals Registry. Where time standards are not adhered to, and where no good reason for any delay can be given, the relevant Court may dismiss an appeal.<sup>31</sup>

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27 Family Court of Australia *Case Management Guidelines*, Practice Direction 1993/2 made pursuant to Regulation 4 of the Family Law Regulations, under section 125 of the *Family Law Act, 1976*. It came into effect on 1 July, 1993. Guideline 13.3.1. See Appendix G.

28 *Ibid.*

29 *Ibid.*, Guideline 13.3.2.

30 *Ibid.*

31 *Ibid.*, Guideline 13.3.3. Alternatively under Order 32, rule 18, the court may lay down certain requirements, compliance with which will avert dismissal of the appeal. The rule provides also that "any other order the court thinks just" may be made. Note that an appeal may only be dismissed under rule 18 where the appellant has received 21 days notice of the court's intention to dismiss.

6.25 When notices of appeal are filed, many of the case management measures and procedures (outlined in Chapter 8) are activated. An appointment may be made for the parties to attend a conciliation conference; such conferences have been introduced on a trial basis for appeals.<sup>32</sup> Solicitors should provide the regional appeal registrar with an estimate of the length of hearing and a report on their current state of preparedness, including whether any problems are anticipated, to aid the setting of a timetable.<sup>33</sup> Appeal books must be filed six weeks prior to the hearing date,<sup>34</sup> and the appellant, and cross-appellant if any, are required to "file and serve [an] outline of argument and list of authorities not less than seven days before the hearing date."<sup>35</sup> The respondent must file and serve his or her corresponding documents "not less than two clear working days before the hearing date."<sup>36</sup> The regional appeal registrar maintains considerable control over the progress of the proceedings and must know "at all times the state and progress of the matter."<sup>37</sup>

6.26 The emphases, therefore, in the Australian family law appeals system are on swift hearings, pre-hearing clarification of issues and, as far as possible, the prevention of the appeals process being used as a negotiating tool or delaying tactic by either party.

### **Recommendations**

6.27 We believe that the appeals process should not be used as a negotiating or delaying tactic by any party to proceedings. *Accordingly, we recommend that the relevant Court Rules Committees should introduce the necessary rules and procedures to ensure that the risk of such abuse of the appeals process may be minimised.*

6.28 *In particular, we recommend that case management procedures should be introduced in relation to the conduct of appeals as well as in other areas of the litigation process.<sup>38</sup> Such procedures should ensure, inter alia, that those aspects of a court decision which are being appealed are clearly and specifically identified in the notices of appeal and cross-appeal (if any). Pre-trial conferences and exchanges of documents should be required; the relevant issues would thus be clarified and crystallised prior to the hearing. Further, control should be exercised by the courts in respect of the speed with which an appeal is processed; a time standard, similar to that under the Australian Family Court Guidelines, may be a useful innovation. Administrative responsibility for the pre-trial procedures, including the monitoring of the progress of appeals cases, should be assigned to the Family Court Office.*

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32 *Ibid.*, Guideline 13.3.4(a) & 13.3.6.

33 *Ibid.*, Guideline 13.3.4(c).

34 *Ibid.*, Guideline 13.3.4(d).

35 *Ibid.*, Guideline 13.3.4(e).

36 *Ibid.*

37 *Ibid.*, Guidelines 13.3.4 & 13.3.5.

38 See Chapter 8.

6.29 We are also of the opinion that *a full re-hearing of a family law case on appeal from the Circuit to the High Court should, in general, be avoided*. Instead, notices of appeal should clearly set out the aspects of the relevant order(s) which are being appealed and only those aspects of the case should be discussed at appeal stage. This would speed up the appeals process, reduce costs and avoid exacerbating or rekindling any of the earlier acrimony by "going over the whole thing again".

6.30 Given the relatively low number of appeals, and the financial and time implications of the transcript system, we have concluded that it would not be appropriate to recommend changes to the appeals process which would require the transcribing of all cases. Rather, *it is recommended that audio-tape recording facilities should be installed in courtrooms; all proceedings should be recorded without excessive cost or delay*. Reference at the appeal stage to audio-tapes of the original proceedings should obviate the need for a full re-hearing of the oral and expert testimony given at the original hearing and, where required, should facilitate clarification of aspects of the case not specifically under appeal.

6.31 *We also recommend that the Family Court Office should be assigned the responsibility of collating statistical information on notices of appeals lodged. In addition to the numbers of orders appealed, record should be kept of the number of cases which settle before the hearing, the number which are heard by the appellate court and the nature of the specific orders or aspects thereof which are appealed*. It may become apparent that certain orders (perhaps relating to child custody, for example) are appealed more often than others; these issues could then be addressed more comprehensively or in greater detail at mediation or pre-trial stages.

## CHAPTER 7: PROMOTING AGREEMENT AND AVOIDING LITIGATION

7.01 The system which we provisionally recommended in the Consultation Paper was based upon the central principle that, as far as is possible and just, people should be encouraged to resolve their disputes and agree on solutions without having recourse to the adversarial courts system.

7.02 Already, many family disputes are resolved by agreement or settlement.<sup>1</sup> The recurrent findings of studies into the role of lawyers and courts in other jurisdictions "in promoting settlement-seeking and the use of informal judicial interventions to reduce the likelihood of trial" demonstrate that "settlement dominates".<sup>2</sup> Anecdotal evidence in Ireland suggests that a large number of disputes are settled without formal recourse to the courts.<sup>3</sup>

7.03 The negative effects of litigation and adversarial procedures are well recognised. In the introduction to the Consultation Paper we stated:

"It needs to be recognised that judicial proceedings, even though conducted with informality and sensitivity, are not therapeutic exercises and that it is not possible to exclude from them some element of

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1 We wish to highlight the definitional distinction between the concepts of 'settlement' and 'agreement', for they are not synonymous terms. In the words of Erianger *et al.* (1987) 21 *Law & Society Review* 585, at p.602, "[t]here is settlement - but not agreement - when contentious parties sign unsatisfactory stipulations out of impatience, frustration, or emotional distress." It should be commented, however, that even where agreements are reached in situations involving impatience, frustration or distress, not every stipulation will necessarily be unsatisfactory.

2 R. Dingwall & D. Greatbatch (1994) *What is Mediation an Alternative To?*, a paper presented to the Families and Justice Conference, Catholic University of Louvain, Brussels on Friday, 8 July, 1994, at p.11.

3 Comments to this effect were received by the Commission from a number of practitioners. See generally T. Fahey & M. Lyons, *Marital Breakdown and Family Law in Ireland - A Sociological Study* (1995, Oak Tree Press, Dublin, in association with the Economic and Social Research Institute); M. Nic Ghiolla Phádraig, 'Marital Separation in Ireland', in Kiely (ed.) *In and Out of Marriage: Irish and European Experiences* (1992, Family Studies Centre, U.C.D.); National Social Service Board Report, *Family Matters: A Social Policy Report* (September, 1994); Annual Reports of AIM Group.

confrontation. This is one of the reasons why it is so important to avoid judicial proceedings where it is possible to do so without risk of injustice to the persons concerned."

7.04 The Chief Justice of the Australian Family Court has aptly stated the requirement that:

"those who initiate disputes are able to settle them at as early a stage as possible, before they have fired unnecessary shots across each others bows or expended large sums of money on legal fees. Nothing inflames emotions more than allegations and counter-allegations or lawyers exchanging letters on behalf of their distressed, angry and hurt clients.

Research has consistently shown that litigation exacerbates hostilities and the capacity for ongoing co-operative parenting, and that early settlement has the converse effect."<sup>4</sup>

We wish to reiterate that the active *promotion* of dialogue and agreement must be an integral feature of the family justice system.

#### ***Essential Components Of The New System***

7.05 In the Consultation Paper, we stated that if the resolution of family disputes through means other than adversarial court proceedings is to be encouraged, there are a number of prerequisites:<sup>5</sup>

(1) *The availability of alternatives*

"Services must be available on a countrywide basis to support alternative methods of dispute resolution. For example, adequate mediation services should be available on a countrywide basis, ideally located within or proximate to the regional family court centres, and staffed by properly trained personnel. Also, lawyers around the country, practising in the field of family law, should by their training be made aware of the importance of avoiding adversarial conflict, they should be versed in negotiating skills appropriate to the resolution of family conflicts, and they should be aware of the alternative services."

(2) *Diversion*

"The road to litigation should be marked at every step with sign posts indicating the alternatives to court proceedings and the advantages of negotiated settlements."

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4 The Hon. Justice Alastair Nicholson, Chief Justice, Family Court of Australia, (1994) *Mediation in the Family Court of Australia*, a paper presented to the Families and Justice Conference, Catholic University of Louvain, Brussels on Friday, 8 July, 1994 at pp.3-4.

5 Consultation Paper, para. 7.35.

(3) *Pre-trial procedures*

"Pre-trial procedures should avoid, where possible, pre-disposing the parties to take confrontational positions which reduce the chances of negotiation and agreement."

(4) *Protection of the mediation process*

"The legal context in which alternative mechanisms operate needs to be favourable. Special rules giving privilege to statements made in the course of mediation or negotiation are an example. The rules giving legal effect to (including the mechanisms for enforcing)<sup>6</sup> agreed outcomes are another example, though these must necessarily be balanced by rules and procedures designed to prevent exploitation, to protect third parties and to cater for unforeseen circumstances."

(5) *Substantive law background*

"The substantive family law which forms the backdrop to negotiations may also influence attitudes towards out-of-court agreements. For example, the substantive rules governing the ownership of matrimonial property, and its distribution on separation, annulment or death, which constitute the legal parameters within which negotiations take place, influence the bargaining position of the parties."

Many of the legal issues surrounding the process of mediation are dealt with in Chapter 8. In this Chapter we confine our comments to (2), (3) and (5) above.

## **Diversion**

(a) *Family Court Information Centres*

7.06 Each Regional Family Court should have attached to it a Family Court Information Centre with responsibility for providing to those who have begun, or are considering the institution of, family law proceedings impartial, objectively presented information relating to available alternatives to litigation, implications of separation, court processes and case management information and information on available support services. Any legal information received should be information only, and not advice.

7.07 In the Consultation Paper we provisionally recommended that:<sup>7</sup>

- (1) *Where proceedings for judicial separation have been instituted, the parties should be required within two weeks to attend a Family Court Centre (which should be attached to each Regional Family Court), if they have*

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<sup>6</sup> The words in brackets have been added to the original.  
<sup>7</sup> Consultation Paper, para. 7.37.



*not already done so,*

- (a) *to receive information as appropriate concerning the various family support services available, including welfare services;*
- (b) *to receive information and advice concerning the availability and purpose of mediation.*

*This information and advice should be given by an official who has appropriate knowledge and counselling skills and who would act under the auspices of the court. It might be augmented by an appropriate video, and by the provision of a full information pack. There should be emphasis throughout on the need to give priority to the interests of any dependent children and on the importance of avoiding any damage or distress to them.*

- (2) *In relation to other family law proceedings before the family court, including custody, access, maintenance and barring applications, the opportunity should be presented to the parties to attend the family court centre to receive similar information and advice. This should not be compulsory, but the judge should be obliged to consider at the beginning of the hearing whether to adjourn proceedings, if appropriate, to require the parties to attend the centre to receive the appropriate information and advice. The judge should not, however, adjourn proceedings for this purpose unless he or she is satisfied that no additional risks are involved in respect of any family members whose safety or welfare is in issue.*

7.08 The response to these proposals was positive. *We reaffirm them but subject to the following additions and modifications:*

- (a) *The parties should be required to attend the Family Court Information Centre to receive impartial, objectively presented information relating to available alternatives to litigation, implications of separation, court processes and case management information and information on available support services. Any legal information received should be information only, and not advice.<sup>8</sup>*
- (b) *The parties should not be required to attend the session together.*
- (c) *Attendance at information sessions should be free of charge.*

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<sup>8</sup> In the Lord Chancellor's White Paper on divorce law reform in England and Wales, a similar distinction was drawn between legal information and legal advice: Lord Chancellor's Department *Looking to the Future. Mediation and the ground for divorce. The Government's Proposals*, presented to Parliament by the Lord High Chancellor, April 1995. (1995, HMSO, London) (Cm 2799). The former was stated to comprise "an abstract statement of legal principles and procedures relating to divorce and its consequences with general examples of how the law works in practice. Legal advice involves an explanation of how the law applies to the facts of a particular case and the recommendation of a course of action. This latter would be outside the scope of an information session." (para. 7.9).

- (d) *Attendance should be certified by the Information Centre. In appropriate cases, (for example, for reasons of distance, imprisonment of either party, physical disability, recent conciliation counselling, the terms of a recent order of a court, the nature of the relationship between the parties or other relevant circumstances) the requirement of attendance at an information session should be waived. Written information<sup>9</sup> should be sent to persons exempted from attendance and, where appropriate, additional assistance should be offered (for example, information could be given by telephone and videos could be given on loan).*
- (e) *Where the appropriate certificate of attendance, or waiver, has not been obtained the presiding judge should have the right, at his or her discretion, to adjourn the case until the parties have attended the Information Centre. Where one or both of the parties still refuses to attend, the Court should proceed with the hearing, but written information should be sent to the parties.*
- (f) *In relation to family law proceedings other than proceedings for judicial separation, the opportunity to attend the Information Centre should also be presented to applicants for safety orders pursuant to the Domestic Violence Act, 1996.*

7.09 The Family Court Information Centres will also play a very important role in respect of the significant number of legally unrepresented litigants, particularly at District Court level. A study of marital breakdown and family law in Ireland<sup>10</sup> has shown that "legally unrepresented cases form a large and highly significant part of the family law system ...."<sup>11</sup> The authors identify the "dualism of legal representation" in this jurisdiction, where most legally unrepresented cases occur at District Court level,<sup>12</sup> estimating that "about half of family law cases in the District Court (that is, about one-third of all family law cases in the courts) occur in this way."<sup>13</sup> These cases are largely concerned with seeking the protection of the court in the form of barring and protection orders. They usually involve only a brief contact with the family law system and are often undertaken with no prior legal advice.<sup>14</sup>

7.10 The study also charts the course of many unrepresented District Court cases, highlighting the important role of District Court clerks.<sup>15</sup> District Court clerks are often asked to initiate proceedings on behalf of unrepresented

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9 For this purpose, an information booklet should be prepared by a relevant Government Department or perhaps by the staff of the Information Centres. The example of the information document provided by the Australian Family Court may be instructive in this regard: see sections 17 & 61c of the Australian *Family Law Act, 1975*, and the Australian *Family Law Rules*, Order 25, rule 3.

10 T. Fahey & M. Lyons, *op. cit.*, f.n. 3.

11 *Ibid.*, at p.10.

12 *Ibid.*, at p.118 *et seq.*

13 *Ibid.*

14 *Ibid.*

15 *Ibid.*, at pp.8-12.

applicants. Following a brief interview with the clerk, the applicant may, perhaps within an hour, have a protection application heard in the chambers of the District Judge.

7.11 The lack of legal representation or advice in many District Court cases gives added importance to the Family Court Information Centres. However, given that applications for protection in an emergency are likely to continue to be made at District Court level, it is clear that the Information Centres can only partially relieve District Court Clerks from their present informal role. In this context, the role of the District Court Clerk must be clarified. At present, these officers are administrators of court business yet they "often play a significant role in advising those clients who request them to issue proceedings in family law cases on their behalf" but "any advisory function they perform is informal and fleeting rather than a formally defined function."<sup>16</sup>

(b) *The role of the solicitor*

7.12 As the first port of call for many potential litigants, the solicitor has an important role in encouraging people to pursue alternative means of resolving disputes within this new framework. At the moment, where parties approach a solicitor with a view to instituting or responding to proceedings under the *Judicial Separation and Family Law Reform Act, 1989*, sections 5 and 6 of that Act require him or her to advise the client of the alternatives to separation proceedings and to assist attempts at reconciliation.<sup>17</sup> Where the applicant and/or the respondent are represented by a solicitor, any application for judicial separation under the Act and any Entry of Appearance or Notice of Intention to Defend such an application must be accompanied by a certificate by the solicitor that he or she has complied with these requirements.<sup>18</sup>

7.13 The Law Society's *Code of Practice*<sup>19</sup> emphasises the importance of the solicitors' role in this regard:

"4.3 The Solicitor should ensure that the client is aware of the existence and range of all other services which may be of assistance in bringing about a resolution and helping members of the family through the process of family breakdown. In particular, the Solicitor, having regard to the provisions of Section 5 and 6 of the 1989 Act should discuss with the client:-

(a) the possibility of reconciliation and give the names and

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16 *Ibid.*, at p.11, f.n. 7.

17 Sections 5 & 6 of the draft *Divorce Bill*, contained in the Government's document *The Right to Remarry*, imposes a similar obligation on solicitors in respect of divorce proceedings: *The Right to Remarry. A Government Information Paper on the Divorce Referendum*. (September 1995, Stationery Office, Dublin).

18 Sections 5(2) & 6(2) respectively of the *Judicial Separation and Family Law Reform Act, 1989*.

19 *Family Law in Ireland. Code of Practice*. Issued by the Family Law and Legal Aid Committee of The Law Society of Ireland (1995). The guidelines contained in the Code "cannot be absolute rules, but they are recommended to the profession as encompassing a practical set of ground rules and conditions based on which the practitioner can conduct his/her practice." (see para. 3 of the Conclusion).

addresses of persons qualified to help effect a reconciliation between spouses who have become estranged;

- (b) the possibility of engaging in mediation to help effect a separation on an agreed basis with an estranged spouse and give the names and addresses of persons and organisations qualified to provide a mediation service;
- (c) the possibility of effecting a separation by negotiation and the conclusion of a Deed of Separation or a settlement leading to a Consent Order."

7.14 The Code goes further and sets out the principles upon which solicitors should base their family law practice - principles which are very much in accord with the philosophy underlying this Report. The Code provides, *inter alia*, that:

"1.2 The Solicitor should advise, negotiate and conduct matters so as to encourage and assist the parties to achieve a constructive settlement of their differences as quickly as may be reasonable,...

...

4.6 The Solicitor's correspondence, both with the client and with the other side, should focus on how contentious issues might be resolved rather than emphasising difficulties that have occurred in the past.

....

7.1 The taking of any action or proceedings which is likely to cause or increase animosity between the parties must be balanced against the likely benefit to the client and the family.

....

7.3 A Solicitor should conduct family law proceedings, including preparation, advocacy and implementation, in the most cost-effective manner and in such a way as not to increase hostility unnecessarily and so as to allow reasonable opportunity for settlement.

7.4 The Solicitor should encourage the parties to endeavour to agree as many issues as possible in advance of a court hearing so as to reduce the areas of conflict, and should co-operate with the other side on the production of documents to ensure the smooth running of the case.

....

9.2 The Solicitor should aim to promote co-operation between parents in decisions concerning the children, and should consider encouraging arrangements to be reached directly between the parties, or through mediation."

(c) *The role of the judge*

7.15 Judges have also been given a specific statutory role in respect of assisting attempts at reconciliation or attempts to agree a settlement.<sup>20</sup> Section 7(1) of the *Judicial Separation and Family Law Reform Act, 1989* provides that where an application is made to the court under that Act for a decree of judicial separation,

"the court shall give consideration to the possibility of the reconciliation of the spouses concerned and, accordingly, may adjourn the proceedings at any time for the purpose of affording the spouses an opportunity, if they both so wish, to consider a reconciliation between themselves with or without the assistance of a third party."

7.16 Where, in the same circumstances, it appears to the court that no reconciliation of the spouses is possible, the court:

"may adjourn or further adjourn the proceedings for the purpose of affording the spouses an opportunity, if they both so wish, to establish agreement (with or without the assistance of a third party) on the terms, so far as possible, of the separation."<sup>21</sup>

Where the court exercises its powers of adjournment under sub-sections 1 or 3 of section 7, "it may at its discretion advise the spouses concerned to seek the assistance of a third party for the purpose set out in the appropriate subsection."<sup>22</sup>

7.17 *We reaffirm our provisional recommendation that in all family proceedings before the Regional Family Court, it should be open to the judge, at any time during those proceedings, to recommend that the parties attempt to resolve any outstanding issue through negotiation or mediation and, in exceptional cases, to require that they attempt to do so, and to grant an adjournment for that purpose.*

***Pre-Trial Procedures***

7.18 In respect of pre-litigation advice, we reiterate that our recommendation envisages requiring parties to attend the Advice Centre to receive information on available alternatives to litigation, on the implications of separation and on court processes as well as case management information and information on available support services. Potential litigants should also be given a brief explanation of

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20 The powers of the court to adjourn proceedings under section 7 of the 1989 Act (and the obligations on solicitors under sections 5 & 6 of that Act) were discussed in the case of *T.F. v. Ireland* [1995] 2 I.L.R.M. 321, at pp.350-2. Granting judges the power to adjourn proceedings in order to facilitate reconciliation and/or mediation appears to be a growing trend: see, for example, the Lord Chancellor's White Paper on divorce law reform in England and Wales, *Looking to the Future*, *op. cit.*, f.n. 8 and the provisions of sections 14(2) & (5) and section 43(d) of the Australian *Family Law Act, 1975*.

21 Section 7(3) of the *Judicial Separation and Family Law Reform Act, 1989*.

22 *Ibid.*, section 7(6). Note that a provision similar to section 7 of the 1989 Act is contained in section 7 the draft *Divorce Bill*, *op. cit.*, f.n. 17.

court procedures and the time periods within which the different stages of the proceedings are likely to be completed.

7.19 If either party then decides to proceed with an application to court, the principles of case-management which we endorse in Chapter 9 focus on the resolution of procedural difficulties between the parties and the reduction of points of contention. We recommend in that Chapter that a system of case-management should be introduced which will encourage as much agreement as possible between the parties before a matter comes up for full hearing. In addition to the implications such initiatives will have in respect of delay and costs, they will also constitute another method of promoting agreement and minimising hostility by reducing the number of contested administrative and substantive issues between the litigants. Our basic premise is that pre-trial procedures should avoid, where possible, pre-disposing the parties to take confrontational positions which reduce the chances of negotiation and agreement.

7.20 Another pre-trial method of promoting agreement which should be considered is the facilitation of joint applications. The Lord Chancellor's White Paper on divorce law reform in England and Wales<sup>23</sup> is instructive in this regard, in that it proposes that the document required to initiate divorce proceedings, the statement of marital breakdown, should be "capable of being filed by one spouse alone or by both spouses jointly, ...."<sup>24</sup> Further, following the required "period of reflection and consideration", it proposes that the application for either a separation or a divorce:

"should be capable of being made by one party alone or **both** parties jointly irrespective of which spouse filed the statement of marital breakdown or whether this was a sole or joint statement; ...."<sup>25</sup>

7.21 Under the existing law in Ireland there are many matters in which joint application will not be appropriate. However, there are some (for example, where an application is made for a judicial separation, with the consent of the respondent, on the basis that the parties have lived apart for one year) in which joint application is appropriate and should be encouraged. *We recommend that further consideration be given to the circumstances in which joint applications for matrimonial relief might be facilitated.*

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23 Lord Chancellor's Department, *Looking to the Future*, *op. cit.*, f.n. 8.

24 *Ibid.*, para. 7.30.

25 *Ibid.* Emphasis in the original.

## **CHAPTER 8:            PRE-TRIAL PROCEDURES AND CASE MANAGEMENT**

### ***Existing Problems***

8.01    In its examination of the conduct of court proceedings, two problems identified by the Commission in the Consultation Paper and which were stressed in many submissions are:

- (a)    Delay and drift in family law cases, with the attendant increase in cost and frustration;
- (b)    Confusion (exacerbating the problem of delay) caused by the fragmentation of jurisdiction within the present system. In particular, this fragmentation necessitates the duplication of documents and transfer of files between court offices, and results in litigants being required to go to a variety of offices, fill out numerous forms etc. ...

8.02    The rules of procedure and pleadings which exist are insufficient in themselves to prevent delay and drift. The problem is well described in a submission made to us:

"Whilst rules of procedure and pleadings are indispensable, it is right to be sceptical as to what they can achieve in the absence of very close supervision by somebody other than the parties themselves. Countless rules require the parties in various proceedings to take steps within well defined time limits but it is common - almost invariable - that one finds that actions required to be taken in weeks are not carried out until after several months and sometimes years."

8.03    It is expected that the establishment of the system proposed by the

Commission in this document (i.e. Family Information Centres, a unified Family Court, and the District Court retaining some jurisdiction etc..) will help to alleviate these problems. In respect of the *conduct* of litigation, however, we believe that further detailed attention to certain procedural aspects of pre- and in-court activity is required.

#### ***Procedural Reform - A Way Forward***

8.04 Complementary to the appointment of additional judges, there are other possible initiatives which would help to ensure speed and efficiency and reduce the cost of litigation.

8.05 At present, only a limited practice of case-management exists within the Irish family law system.<sup>1</sup> At Circuit and High Court level, pre-trial activity consists primarily of the exchange of pleadings, applications for orders of discovery, notices for particulars and further particulars, and interrogatories. Further measures may be taken at an informal level between cooperating legal representatives. At District Court level, cases are initiated by summons/application and there is no appearance or defence, with the result that it may not be known until the day of the hearing whether or not the respondent will appear or defend the case. It is possible that a Notice of Particulars could be served but, as it is not required by the Rules, there is no obligation on the receiving party to respond.

8.06 Recent developments in other jurisdictions are instructive. For example, a trend has emerged in the UK,<sup>2</sup> Australia,<sup>3</sup> the US,<sup>4</sup> and Canada<sup>5</sup> whereby "case management" procedures have been introduced to speed up proceedings and reduce costs, primarily by distilling the matters in issue at the outset, and by giving the presiding judge "greater control over the preparation for and conduct of hearings than had hitherto been customary."<sup>6</sup>

8.07 The need for the introduction of formal case-management procedures

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1 See, for example, the *Practice Direction on Pre-Trial Written Submissions on Legal Issues* (High Court, November 1993).

2 *Practice Direction (Civil Litigation: Case Management)* issued by the Lord Chief Justice, Lord Taylor of Gosforth in the High Court on January 24th 1995 (See *The Times*, 25th January 1995 at p.38). See Appendix D; *Practice Direction (Family proceedings: Case Management)* issued by Sir Stephen Brown, President of the Family Division, with the concurrence of the Lord Chancellor on 31st January, 1995 (See *The Times*, 8th February 1995 at p.36). See Appendix E. See also *Delay in Public Law Children Act Cases: preliminary report*, an interim report by Dame Margaret Booth (published 2 May 1995, Lord Chancellor's Office, London) and White R. "Family Practice - Delay", *New Law Journal*, August 4th 1995 at p.1192.

3 Family Court of Australia *Case Management Guidelines*, Practice Direction 1993/2 made pursuant to Regulation 4 of the Family Law Regulations, under section 125 of the *Family Law Act, 1976*. It came into effect on 1 July, 1993. See Appendix G. See also The Hon. Mr. Justice D.A. Ipp (1995) "Judicial Intervention in the Trial Process" 69 ALJR 365; *idem*, (1995) "Reforms to the Adversarial Process in Civil Litigation - Part I" 69 ALJR 705; *idem*, (1995) "Reforms to the Adversarial Process in Civil Litigation - Part II" 69 ALJR 790.

4 Case management initiatives have been introduced in a number of U.S. States and cities, e.g. Arizona, New Jersey, San Francisco and Detroit.

5 E.g. Toronto Civil Case Management Rules, (15 November, 1991) in J.J. Carthy, W.A. Deery Millar & J.G. Cowan, *The Ontario Annual Practice 1995-96* (1995, Canada Law Book Inc., Aurora, Ontario); see also J.M. Wilson, "Case Management in Ontario: When There's a Will, There's a Way", *The Advocates' Society Journal*, June 1990 at p.3.

6 *Practice Direction (Family Proceedings: Case Management)*, *op. cit.*, f.n. 2 at para. 1.



throughout the family law system, has been highlighted<sup>7</sup> and would serve to further alleviate the problems of delay and backlog. The areas in which case management procedures could be effectively introduced may be divided into three:

1. Procedural Consolidation
2. Time and Cost Control
3. Rationalisation of Documentation

#### 1. Procedural consolidation

8.08 Calls for the consolidation of pre-trial "administrative" activity have come from a number of quarters.<sup>8</sup> At present, the separate offices of the District, Circuit and High Courts all deal with family law cases since the family law jurisdiction is fragmented, and the efficient administration of the system is frustrated. Administrative matters which have been identified as problematic include the required duplication of records, delays in transmitting orders and results between courts, the duplication of work and the transfer of files from one court to another. In addition, litigants are required to fill out numerous forms, attend different offices, etc..

8.09 The P.S.E.U. has recommended the establishment of a Family Law Office which

"would receive the originating documents and would schedule the case for the appropriate court depending on the relief sought .... Appeals would be heard as appropriate. In this way, the Officer of the Family Law Court would be acting as Registrar to the District Court Judge, the Circuit Court Judge and the High Court Judge as required. ... What would happen is that the Office/Officers would administer the system at 3 jurisdictional levels rather than three offices at present ...."<sup>9</sup>

The Union noted that the *Courts Officers Act, 1945* provided for the interchangeability of court officers between the various courts.

8.10 Other suggestions to the Commission have included the proposal that the powers of the registrar should be augmented and his or her role expanded to include the tasks of fixing dates and screening cases for hearing (i.e. a pre-trial review function). This pre-trial review function might include the possibility of directions to the parties with respect to counselling or mediation without prejudicing the right of any party of access to the court. It was suggested that,

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7 See, for example, B. Gallagher, "LRC Consultation Paper on Family Courts - A Practitioner Responds", *The Law Society of Ireland Gazette*, October 1994 at p.302; See also "Viewpoint - Efficiency of our Court Procedures", *The Law Society of Ireland Gazette*, March 1995 at p.53.

8 P.S.E.U., *Recommendation by the Public Service Executive Union on Family Law Courts* (March 1993); "Viewpoint - Efficiency of our Court Procedures?" *The Law Society of Ireland Gazette*, *ibid.* This view was also expressed to the Commission by a number of persons responding to the Consultation Paper.

9 P.S.E.U. *ibid.*, at pp.2-3.

should a unified Family Court be established, a new office of Master of the Family Court might be created.

## 2. Time and cost control

8.11 In January 1995, Sir Stephen Brown, President of the Family Division of the English High Court, issued a *Practice Direction* on case management in family law proceedings.<sup>10</sup> This *Direction*, which implements an earlier general *Direction* issued by the Lord Chancellor in respect of all civil litigation<sup>11</sup>, "shall apply to all family proceedings in the High Court and in all Care Centres, Family Hearing Centres and divorce county courts."<sup>12</sup>

8.12 The aim of the family law *Direction* is succinctly set out in the opening paragraphs:

"1. The importance of reducing the cost and delay of civil litigation made it necessary for the court to assert greater control over the preparation of hearings than had hitherto been customary.

Failure by practitioners to conduct cases economically would be visited by appropriate orders for costs, including wasted costs orders.

2. The court would accordingly exercise its discretion to limit - (a) discovery; (b) the length of opening and closing oral submissions; (c) the time allowed for the examination and cross-examination of witnesses; (d) the issues on which it wished to be addressed; (e) reading aloud from documents and authorities."

8.13 Central features of the case management system as established by the family law *Direction* are, first, a system of pre-trial review and, second, increased judicial control of the proceedings (e.g. limitations on the volume of documentation presented to the court and on the length of oral submissions).

### *Pre-trial review*

8.14 The purpose of pre-trial review is the resolution of procedural difficulties between parties and the reduction of points of contention. In addition to the measures outlined in paragraph two above therefore, the *Direction* requires that an application should be made for pre-trial review of cases estimated to last for five days or more and in which no pre-trial review has been ordered.<sup>13</sup> A pre-trial review:

"... should when practicable be listed at least three weeks before the

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10 *Practice Direction (Family Proceedings: Case Management)*, *op. cit.*, f.n. 2.

11 *Practice Direction (Civil Litigation: Case Management)*, *op. cit.*, f.n. 2.

12 *Practice Direction (Family Proceedings: Case Management)*, *op. cit.*, f.n. 2 at para. 10.

13 *Ibid.*, at para. 6.

hearing and be conducted by the judge or district judge before whom the case is to be heard and should be attended by the advocates who are to represent the parties at the hearing. Whenever possible, all statements of evidence and all reports should be filed before the date of the review and in good time for them to have been considered by all parties."<sup>14</sup>

8.15 The system of pre-trial review has been a feature of divorce proceedings in the English courts for a number of years and the Family Proceedings Rules empower a judge, *inter alia*, to give further directions in respect of the conduct of proceedings, including the timetabling, transfer and/or consolidation of proceedings.<sup>15</sup> The *Direction* confirms the importance of this procedure in all family law cases. Indeed, the system of pre-trial review has been introduced in respect of all civil litigation in England by virtue of the earlier *Practice Direction (Civil litigation: Case Management)*.<sup>16</sup>

8.16 An English Rules Committee Working Party, consisting of representatives of the Family Law Bar Association (FLBA), the Solicitors Family Law Association (SFLA), the Law Society's Family Law Committee and the judges of the Family Division, has made recommendations on the rationalisation of the English family law system in the form of a Draft Rule.<sup>17</sup>

8.17 The Working Party envisages a type of pre-trial review, called "the First Appointment", which takes place before a District Judge and at which many preliminary issues are dealt with. Directions are also given at the First Appointment in respect of evidence sought to be adduced by each party and the District Judge fixes dates for further directions appointments, for FDR (described below) appointments and for final hearing. The case may also be adjourned to facilitate out-of-court mediation.<sup>18</sup>

8.18 Central to the scheme proposed in the Draft Rule is the Financial Dispute Resolution (FDR) appointment. In the opinion of the Working Party, FDR "is not a head-banging process, but a genuine opportunity to resolve any contentious issues in an atmosphere conducive to settlement with all the known facts and information available."<sup>19</sup> The appointment would be presided over by a District Judge with "special training for this new process which is neither arbitration, adjudication or mediation ...."<sup>20</sup> Given that financial matters occupy a large proportion of court time, the Working Party was of the view that a pre-trial review system which incorporates an FDR element is essential.

8.19 The Working Party also recommends two exchanges of documents.

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14 *Ibid.*

15 Family Proceedings Rules 1991 (implemented by S.I. 1991 No. 1247), rules 4.14 and 4.16.

16 *Op. cit.*, f.n. 2. See also Booth preliminary report, *op. cit.*, f.n. 2 at para. 13.

17 Rules Committee Working Party, *Draft Rule Reflecting Views of Meeting Held on 28/06/93*. See Appendix F.

18 *Ibid.*, at para. 5.

19 Rules Committee Working Party, *Notes to Accompany Draft New Rules* dated 20.09.93, at para. 4.2.

20 *Ibid.*, at para. 4.1.

Paragraph 2 of the Draft Rule would require that within twenty-one days of the filing of an application for ancillary relief, parties would "each file with the Court and simultaneously exchange with the other party a statement signed by him [or her]" containing quite detailed information.<sup>21</sup> Paragraph 4 foresees the filing in court and the service on the other party of three documents "not later than seven days before the hearing of the first appointment". These documents are:

1. a questionnaire setting out the further information sought of the other party;
2. a schedule setting out the documents sought of the other party; and
3. a concise statement of the apparent issues between the parties.

8.20 Both models - that under the civil litigation *Direction* and that proposed by the Working Party - would appear to be more concise than the affidavits and particulars currently required by the Irish system.

8.21 There are also examples of pre-trial reviews in other jurisdictions. The Family Court of Australia *Case Management Guidelines*<sup>22</sup> set out quite a complex system of case management. Cases are classified as "short", "general" and "long" at the first direction hearing "on the basis that the hearing of a matter is estimated to take 1 day or less, in excess of 1 day but no more than 4 days, and more than 4 days respectively ...."<sup>23</sup> This classification may be reviewed as the case proceeds. "Time standards" are laid down which "apply to the completion of key stages of the litigation process"<sup>24</sup> and which registries are expected to meet. The system established under the Guidelines comprises the following stages: the filing of an application, attendance at information sessions<sup>25</sup>, directions hearings<sup>26</sup>, pre-hearing conference<sup>27</sup>, and the hearing. Depending on the nature of the case, pre-filing counselling<sup>28</sup> and conciliation conferences<sup>29</sup> may also be required.

8.22 Directions hearings under the Australian system are "usually the first occasion on which proceedings come before the court."<sup>30</sup> All parties and their legal representatives are required to attend<sup>31</sup>, and the latter must "[have] the conduct of the matter or [be] otherwise fully conversant with the matter."<sup>32</sup> The function of the hearing is to facilitate settlement negotiations and to enable the parties:

"to appreciate the impact of procedural directions and the steps along

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21 See Appendix D.  
22 Family Court of Australia, *Case Management Guidelines*, *op. cit.*, f.n. 3.  
23 *Ibid.*, Guideline 12.1(e).  
24 *Ibid.*, Guideline 14.0.  
25 *Ibid.*, Guideline 2.  
26 *Ibid.*, Guideline 6.  
27 *Ibid.*, Guideline 11.  
28 *Ibid.*, Guideline 1.  
29 *Ibid.*, Guidelines 3 & 7.  
30 *Ibid.*, Guideline 6.4.  
31 *Ibid.* Note Guideline 6.6 which allows the court to excuse non-appearance in certain circumstances.  
32 *Ibid.*, Guideline 6.4.

the Case Management pathway and in particular to appreciate their obligations and those of their legal representatives for the timely preparation of the case."<sup>33</sup>

Directions hearings are not required in urgent or interim matters.

8.23 Where Rules of Court have not been observed, the matter will be adjourned to a later date to ensure compliance with any directions made at the hearing.<sup>34</sup> Adjournments will usually be granted "to extend or adjourn the directions hearing date by consent to enable conciliation options to be explored fully."<sup>35</sup> Where the court considers that a party or solicitor "has not pursued or defended the application with due diligence"<sup>36</sup> it may:

- "(a) strike out a pleading;
- (b) make an order for costs;
- (c) direct that the matter lose priority in the Pre-Hearing Conference List, or
- (d) refer the application to the judicial duty list for consideration of dismissal of the application, or for the determination of the application as undefended."<sup>37</sup>

8.24 Between two and three weeks following the directions hearing, a pre-hearing conference (PHC) will be held in respect of all unresolved undefended matters.<sup>38</sup> The Guidelines require that "[a]ll reasonable avenues of conciliation and/or mediation are to be exhausted"<sup>38</sup> and all interlocutory orders should be completed before the PHC.<sup>40</sup> All parties must attend, unless they can show reasonable cause for non-attendance, and legal representatives must also be present.<sup>41</sup> Generally, all parties are required to file and serve a list of pleadings and affidavits which are to be relied upon not later than one clear working day before the conference.

8.25 At the conference, the legal representatives must be able to inform the registrar as to, *inter alia*, the nature of the relief sought, the issues of fact and law involved, the number of expert witnesses to be called and their availability, and the prospect or likelihood of settlement as well as "any other matter which might affect the readiness for trial or scheduling for trial...."<sup>42</sup> The registrar will then set a "not before" date for hearing and, in consultation with legal representatives, may issue directions "prescribing a timetable in respect of matters which may

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33 *Ibid.*, Guideline 6.5.

34 *Ibid.*, Guidelines 6.3.

35 *Ibid.*, Guidelines 6.8.

36 *Ibid.*, Guideline 6.9.

37 *Ibid.*

38 *Ibid.*, Guideline 11.

39 *Ibid.*, Guideline 11.2.

40 *Ibid.*, Guideline 11.4.

41 *Ibid.*, Guideline 11.6.

42 *Ibid.*, Guideline 11.7.1. See Appendix G for a complete list of the matters which must be addressed at this stage.

affect the readiness for trial".<sup>43</sup>

8.26 Guideline 11.9 provides that "[a]pproximately 21 days prior to the trial date the list clerk will telephone the legal representatives and confirm that they have complied with the directions made at the PHC". Where there has been non-compliance, the list clerk will schedule a "compliance conference" in an attempt to ascertain whether the matter will be ready to proceed at the appointed date. If it will not be ready, the matter will be listed for further directions following consultation with the list judge.

In this way, strict control is maintained on the conduct of cases and every effort is made to ensure that cases proceed in accordance with the time standards laid down in the Guidelines.<sup>44</sup> To facilitate this, the Guidelines provide a system whereby at every juncture legal representatives are required to report to the court on the progress of the case preparations and to identify any possible impediments to compliance with the relevant time standard.

8.27 The idea of pre-trial reviews has been supported in submissions made to us. However, one view expressed is that such reviews are more likely to be effective if presided over by an experienced and respected judge rather than a Court Officer. If legal practitioners are to be persuaded to depart from existing practices and routines and to set aside their anxiety to exploit interlocutory proceedings in the interests of their clients, proposals made in pre-trial reviews should ideally come from a person who is respected by the litigants as one who is thoroughly familiar with the difficulties which arise in such cases.

#### *Judicial control of proceedings*

8.28 As well as establishing a Pre-Trial Review procedure, the English family law *Direction* increases the level of judicial control over the volume of documentation and evidence and the length of submissions presented to the court. In ancillary applications, parties and their advisors are required to "use their best endeavours: (a) to confine the issues and the evidence called to what was reasonably considered to be essential for the proper presentation of their case; (b) to reduce or eliminate issues for expert evidence; (c) in advance of the hearing to agree which were the issues or the main issues."<sup>45</sup>

8.29 Furthermore, "whenever practicable and in any matter estimated to last five days or more" each party is required to lodge in court and deliver to other parties "a chronology and skeleton argument concisely summarising that party's submissions in relation to each of the issues, and citing the main authorities relied upon. It is important that skeleton arguments should be brief".<sup>46</sup> This should be effected not less than 2 clear days before the hearing of a case.

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43 *Ibid.*, Guidelines 11.7.2.

44 *Ibid.*, Guideline 14.

45 *Practice Direction (Family Proceedings: Case management)*, *op. cit.*, f.n. 2 at para. 4.

46 *Ibid.*, para. 7.

8.30 In respect of non-family law civil litigation, the *Practice Direction* on civil litigation and case management provides that, unless otherwise ordered by the court, each party must lodge with the listing officer (or equivalent) of the court "a completed pre-trial check-list" in the form annexed to that *Direction*.<sup>47</sup> This checklist must contain information regarding the setting-down of the action, the pleadings, interrogatories, evidence, discovery and preparation of documents, pre-trial review, estimated length of trial and attempts to resolve the dispute by alternative forms of dispute resolution. This document must be lodged in court and delivered to the other parties "no later than two months before the date of trial".<sup>48</sup> There is no comparable document in the Irish system,<sup>49</sup> although a practice does exist in respect of a number of categories of High Court actions whereby counsel must certify that cases are ready for trial before they can be put into a list to fix dates.

8.31 In summary, therefore, the emphasis in the English system is on economy and speed, effected by pre-trial reviews, exchange of information, the distillation of contentious issues and the limitation of discovery, oral submissions and examination and cross-examination.

8.32 The Draft Rule drawn up by the Working Party also emphasises the pre-trial exchange of information and documents in the context of applications for ancillary relief.<sup>50</sup> Conscious of the fact that "[a] common feature of many .. [ancillary relief] cases is that they settle at the door of the court"<sup>51</sup> leading to a waste of legal costs and judicial time (the latter being a waste of public resources), the Working Party envisages that, under the New Rules, costs could be saved in the following ways:

- (i) The timetable [controlled by the court] will suit each individual case to avoid drift while leaving room for settlement at the moment appropriate to that particular case.
- (ii) Excessive and unnecessary disclosure will be controlled [by the court].
- (iii) A Financial Dispute Resolution appointment will avoid "door of the court" negotiation which wastes judicial time and the cost of preparing for a trial and often produces an unsatisfactory and pressurised settlement.
- (iv) The exchanged statements of information will provide relevant information in a uniform and easily understood form, avoiding lengthy narrative and diverse presentation.

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47 *Practice Direction (Civil Litigation: Case management)*, *op. cit.*, f.n. 2 at para. 7. The *Direction* applies to all lists in the Queen's Bench and Chancery Divisions, except where other directions specifically apply: para. 10.

48 *Ibid.*, at para. 7.

49 Note that, in relation to any family law matter which has been given a date for hearing before the Dublin Circuit Family Court, "a Certificate that the matter is ready to proceed, and that all papers are in order, and all pre-trial Applications have been disposed of" should be filed in the Circuit Court office and served on other parties "at least three weeks before the date of hearing". See *Practice Direction, Family Law Matters, Dublin Circuit Court, 1994*. This *Direction* only applies to legally represented parties, but does not appear to be strictly enforced.

50 See also M. Rae (1995) 'A Proactive Court for Ancillary Relief Cases' 25 *Family Law* 133.

51 Working Party, *Notes to Accompany Draft New Rules*, *op. cit.*, f.n. 19 at para. 1.2.

- (v) It is hoped that courts will more readily impose costs orders against parties or their advisers who flout the rules or behave obstructively.
- (vi) The courts will have the opportunity to emphasise to the parties the cost effect on them personally, including to legally aided parties and the duty to the Legal Aid fund.<sup>52</sup>

*Case listing*

8.33 Another method of controlling court time is through an effective and flexible case-listing process. While case management measures should generally reduce the number of cases where adjournments are sought for want of readiness or which settle "at the door of the court", attention should nevertheless be directed at possible amendments to the present listing system.

8.34 In the Consultation Paper, we implicitly recognised the merit of Judge Costello's 1993 *Practice Direction* on family law cases before the High Court and the benefits of the advance listing of cases.<sup>53</sup>

8.35 The Dublin Circuit Family Court *Practice Direction 1994* also attempts to deal with problems caused by cases settling just before the hearing by requiring certification of readiness to proceed, but this is an isolated example<sup>54</sup> and does not appear to be strictly enforced.

8.36 With the exception of the Booth preliminary report<sup>55</sup>, very little direct attention has been given to this aspect of court procedure in English and Welsh case management initiatives or studies. The Booth Report describes the unhappy lot of the listing officer<sup>56</sup> and emphasises the inaccuracy of time estimates of cases provided to them by both the judiciary and the legal profession.<sup>57</sup> The latter problem "can only be remedied if time estimates are accurate and this can only be achieved if timetabling and directions are tighter and, wherever possible, pre-trial reviews take place."<sup>58</sup> According to one commentator, the Booth report envisages that pre-trial reviews should be held "in sufficient time before the date set for the hearing to enable the listing officer to use any time saved."<sup>59</sup>

8.37 The Australian Family Court *Case Management Guidelines*<sup>60</sup> devotes considerably more attention to this matter. Part II.B requires judge administrators to designate a list judge to "monitor the progress of contested

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52 *Ibid.*, at para. 1.4.

53 Consultation Paper, para. 3.16.

54 An unsuccessful attempt was made to introduce a similar system on the South Eastern Circuit. The purpose of the scheme was frustrated as certificates were regularly returned certifying readiness to proceed "subject to the availability of witnesses". However, we recognise the difficulties the difficulties in requiring solicitors or counsel to act on any other basis than making the setting down subject to the availability of witnesses.

55 *Op. cit.*, f.n. 2 at para. 14.

56 *Ibid.*

57 *Ibid.*, at para. 14.3.

58 *Ibid.*

59 White, *op. cit.*, f.n. 2 at p.1192.

60 Family Court of Australia, *Case Management Guidelines. op. cit.*, f.n. 3.



matters set for hearing and ensure that the goal of commencement of hearings on the scheduled date is met in most cases.<sup>61</sup> The regional registrar is required to appoint a list registrar in each registry whose function is to "supervise the Pending Cases List and the listing of matters for hearing" and otherwise to liaise with the list judge and to manage and co-ordinate the operation of the lists.<sup>62</sup> Part II.B of the Guidelines also provides for the appointment of a list clerk "to be responsible for the allocation of trial dates and ... to liaise with the list judge and list registrar in respect of the management of the defended lists."<sup>63</sup>

8.38 The Australian system divides cases awaiting hearing into a number of lists: the Pending Cases List, Dissolution Lists<sup>64</sup>, Enforcement Lists<sup>65</sup>, the Duty List, the Judicial Duty List and Judge Specific Lists. Guideline 12 sets out a "uniform listing system and standardised listing practices [to] ... be adopted in the court".<sup>66</sup>

8.39 The Pending Cases List comprises all cases which proceed beyond the first directions hearing, and functions as "a queuing device which ensures that the progress of all cases is supervised and that matters are dealt with in priority order."<sup>67</sup>

8.40 The Registrar Duty Lists are conducted by registrars and deal with directions hearings, interlocutory matters, unopposed adjournments and consent "final" orders which have been reduced to writing.<sup>68</sup> Matters transferred from this list to the Judicial Duty List "will be accompanied by a sheet completed by the representatives which deals with time estimates and contentious issues" in a prescribed format.

8.41 The Judicial Duty Lists deal with interlocutory matters ancillary to the main proceedings. They are "conducted by judges and judicial registrars wherein urgent and interlocutory relief is sought in respect of issues which are outside the jurisdiction of a registrar."<sup>69</sup> Guideline 5.2 includes consent orders, unopposed matters, short opposed matters (20 minutes) and opposed matters within the "remit" of these Lists, and the Duty Judge hearing matters listed before him or her will not necessarily be the judge who has carriage of the case in general. Any matters in which directions are required may be transferred back to the registrar's Duty Lists.<sup>70</sup>

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61 *Ibid.*, Part II.B (1).

62 *Ibid.*, Part II.B (3).

63 *Ibid.*, at Part II.B (4).

64 These are lists "usually conducted by registrars for the determination of applications for dissolution of marriage": Family Court of Australia, *Case Management Guidelines*, *ibid.*, *Glossary of Terms*.

65 These are lists "usually conducted by registrars for the enforcement of orders and assessments for the payment of money including child support." Family Court of Australia, *Case Management Guidelines*, *ibid.*, *Glossary of Terms*.

66 See Appendix G.

67 Family Court of Australia, *Case Management Guidelines*, *op. cit.*, t.n. 3, Guideline 4.2.

68 *Ibid.*, Guideline 5.1. See also *Glossary of Terms*.

69 *Ibid.*, *Guidelines, Glossary of Terms*.

70 *Ibid.*, Guideline 5.1.2.

8.42 Guideline 12 comes into operation only when the conciliation processes required under the Guidelines have failed to achieve a resolution of all the issues between the parties. In this situation, a "fully defended hearing" is necessary. Under Guideline 12(i) defended matters are set down in individual judge lists ("Judge Specific Lists") and each matter is assigned to a judge who will deal with all the issues involved in the case unless the matter is formally re-assigned to another judge.

#### *Costs*

8.43 All the above-mentioned measures, by reducing the amount of time spent in the courtroom, also have an impact on the costs of litigation, although it should be remembered that pre-trial hearings themselves will have cost implications. In addition, however, there has been a positive move in respect of the issue of costs in England. The family law *Direction* dictates that "[f]ailure by practitioners to conduct cases economically would be visited by appropriate orders for costs, including wasted costs orders."<sup>71</sup> Further, where documents were not prepared for the court in the manner required under paragraph 5 of the Practice Direction<sup>72</sup>, i.e. where they were "copied unnecessarily or bundled incompetently", the cost incurred would be disallowed.<sup>73</sup> The Rules Committee Working Party also specifically addresses the issue of costs. In an effort to maintain control on costs, the Working Party recommends that "[a]t each court hearing each party shall produce to the court a written estimate of the solicitor and own client costs hitherto incurred on his behalf."<sup>74</sup>

8.44 The introduction of similar case-management procedures in this jurisdiction would not be a completely new departure. Informal "case-management"-type procedures exist between co-operating legal representatives, and the expansion of the role of the registrar in the small claims court<sup>75</sup> could be regarded as an example of a prototype kind of case-management system.<sup>76</sup>

8.45 An editorial in The Law Society's *Gazette*<sup>77</sup> concerned with the question of the efficiency of the courts system in general suggested that:

"[i]t may be that a part-solution lies in the appointment of more Masters of the High Court and similar quasi-judicial officials in the Circuit Court, who would be responsible, within specified time limits, for reviewing with the lawyers for the parties every case set down for hearing before being listed for actual hearing, with authority to make

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71 *Practice Direction (Family Proceedings: Case management)*, *op. cit.*, f.n. 2 at para. 1.

72 The requirements of paragraph 5 are based on those contained in Order 34, rule 10(2)(a)(b)(c) of the English Rules of the Supreme Court in respect of "the court bundle".

73 *Practice Direction (Family Proceedings: Case management)*, *op. cit.*, f.n. 2 at para. 5.

74 *Working Party Draft Rule*, *op. cit.*, f.n. 17 at para. 10.

75 S.I. 356/93.

76 See the High Court *Practice Direction on Pre-Trial Written Submissions*, *op. cit.*, f.n. 1. Note also the provisions of section 68 of the *Solicitors (Amendment) Act, 1994* which requires that solicitors advise clients about the level of costs in advance of cases.

77 "Viewpoint - Efficiency of our Court Procedures", *op. cit.*, f.n. 7.

recommendations as to the agreement of issues e.g. medical evidence. Such a procedure could be coupled with a sanction that if such recommendations are not accepted that the trial judge could ultimately make a "wasted costs" order against a party seen to have been unreasonable in that regard."<sup>78</sup>

The editorial urged the Superior Courts Rules Committee to examine the English family law *Practice Direction* and to incorporate it as appropriate into our own procedures.<sup>79</sup>

8.46 The Family Court of Australia *Case Management Guidelines* also address the issue of costs. In Part I, the *Statement of Case Management Principles*, it is stated that the Court has "a responsibility and a duty to those who approach it to facilitate the just resolution of disputes in a manner which is prompt and economical."<sup>80</sup> To this end, solicitors are required to deliver to their client(s) at various stages memoranda in writing setting out approximate costs of the client to date and estimated future costs.<sup>81</sup> Furthermore, if, at a directions hearing, the court is of the opinion that a party or a solicitor "has not pursued or defended the application with due diligence" the court may, *inter alia*, make an order for costs.<sup>82</sup>

### 3. Rationalisation of documentation

8.47 In the Consultation Paper,<sup>83</sup> the documentation required to commence family proceedings in the District, Circuit and High Courts was examined. It was recognised that the method of pleadings in the High Court "could be improved by the adoption of clear and concise language in the initial form" with clear instructions as to remedy being sought and the relevant procedural steps, with the result that "the inclusion of inflammatory material may be avoided."<sup>84</sup> It was also noted that, in respect of the High Court Family Summons, "the new Rules with regard to the form of affidavits have resulted in affidavits becoming very long, in that they tend to refer to every possible legal and factual permutation - even matters which will not usually be considered at the trial."<sup>85</sup>

8.48 In respect of the documentation used in family litigation, there are two issues to be addressed - volume and format.

#### (i) Volume

8.49 The reduction of the volume of documentation presented to the Court,

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*Ibid.*

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*Ibid.*

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Family Court of Australia *Case Management Guidelines*, *op. cit.*, f.n. 3, Part I - Statement of Case Management Principles, para. (a).

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*Ibid.*, Guidelines 6.10, 7.2.9, 11.10 and 12.1(s).

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*Ibid.*, Guideline 6.9.

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Consultation Paper, para. 3.05 *et seq.*

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*Ibid.*, para. 3.15.

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*Ibid.*, para. 3.06.

and the consequent reduction in delay, is an issue in need of consideration. The English family law *Direction* is again instructive,<sup>86</sup> granting the court a discretion to limit the issues upon which it wishes to be addressed.<sup>87</sup> The form in which documentation is to be presented to the court is clearly laid down<sup>88</sup>, and the system of pre-trial review distils the issues at an early stage.<sup>89</sup> Further, a chronology and brief skeleton argument must be submitted to the court and delivered to any other parties "not less than two clear days before the hearing", "summarising that party's submissions in relation to each of the issues and citing the main authorities relied upon."<sup>90</sup> In ancillary applications parties and their legal representatives are required "to confine the issues and the evidence called to what was reasonably considered to be essential for the proper presentation of their case".<sup>91</sup>

8.50 The English Rules Committee Working Party, in its Draft Rule, also recommends limiting discovery in respect of ancillary relief applications.<sup>92</sup>

(ii) *Format*

8.51 In the Consultation Paper, attention was drawn to the confusion caused by the format of court documents.<sup>93</sup> Reference was made to the view of the Joint Oireachtas Committee on Marriage Breakdown (1985), that court documents used in family law cases are "generally complex and intimidating in nature ... using a type of language and format which is offputting and unintelligible to most people."<sup>94</sup>

8.52 In summary, our provisional recommendations were:

"All documents initiating family proceedings should, as far as possible having regard to the relevant substantive legal principles, be non-confrontational. They should also contain information about the family court advice centre, and should highlight the requirements concerning the parties attendance at the advice centre."<sup>95</sup>

8.53 In relation to the High Court, it was noted that:

"... the present method of pleadings in the High Court could be improved by the adoption of clear and concise language in the initial form, instructing litigants with regard to the particular remedy being sought, the grounds on which the application is based, and the steps

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86 See Appendix E.  
87 *Practice Direction (Family Proceedings: Case Management)*, *op. cit.*, f.n. 2 at para. 2(d).  
88 *Ibid.*, para. 5.  
89 *Ibid.*, para. 6.  
90 *Ibid.*, para. 7.  
91 *Ibid.*, para. 4.  
92 Working Party *Draft Rule*, *op. cit.*, f.n. 17 at para. 5. See also p.5 above.  
93 Consultation Paper, para. 3.05 *et seq.*  
94 *Ibid.*, at para. 3.13.  
95 *Ibid.*, Recommendation 26 at p.164.

which litigants should take. By limiting the form in such a manner, the inclusion of inflammatory material may be avoided.<sup>196</sup>

### ***Recommendations***

8.54 Case management was not discussed in any detail in our Consultation Paper. *We have, nevertheless, come to the conclusion that a proper system of case management will be an essential ingredient in any new system of family courts. It is needed to prevent drift and delay, to promote economy, to give a further impetus to the resolution of issues by settlement or agreement, and to improve the efficiency with which cases are heard in court.* We have raised the issues involved with the members of our Committee of Experts and have received several submissions strongly supportive of the case management approach. The recommendations which we make are necessarily somewhat broad in their formulation. Many matters of detail will need to be considered by the appropriate Court Rules Committee.

1. *A comprehensive system of case management should be introduced and implemented by means of Rules of Court. The system should have regard to the following general principles:*
  - *the courts should, to ensure expedition and economy in family law cases, accept responsibility for the pace of litigation;*
  - *having regard to the interests of the parties and their children, realistic time limits should be set for the preparation of cases, and the progress of cases should be monitored and the time limits enforced by the courts;*
  - *the system should be consistent with the timely application of alternative forms of dispute resolution such as mediation.*
2. *An Office of the Regional Family Court should be established with administrative responsibility not only in respect of the Regional Family Court, but also in respect of the District Court (interim/emergency jurisdiction) and the High Court. As well as performing a co-ordinating role, the Family Court Office would actively monitor progress in all family law cases.*
3. *An office of Master of the Family Court should be established. The Master would be Head of the Family Court Office. The responsibilities of the Master, which should be carried out in consultation with the President or Chief Judge of the Family Court, would include initiating hearings, seeking particulars, drawing attention to delays and calling for compliance with rules and with any orders which have been made.*
4. *Consideration should be given to the introduction of a system of pre-trial*

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96 *Ibid.*, at para. 3.15.

*review. The value of such a system should be tested by a pilot project or projects. The principal features of the system should be the following:*

- *the review should take place within a very short time after initiating documents have been served;*
- *the review should be conducted by a judge (or possibly the Master of the Family Court) in the presence of the parties' legal representatives who will have charge of the case at hearing;*
- *the review should consider what steps have been taken, and what steps should be taken, to settle the issues by means other than litigation;*
- *where a hearing is to take place, documentation should be reviewed with a view to defining and if possible narrowing the issues which divide the parties;*
- *the range of potential witnesses should be reviewed and an attempt should be made to achieve consensus on any expert witnesses who may need to be called or whose reports may be required;*
- *the system would not be applicable to emergency or interim applications.*

5. *Tighter control on costs should be included as an element of a case management structure. In particular, consideration should be given to the English and Welsh "wasted costs orders"<sup>97</sup> and the proposal in the Working Party Draft Rule in respect of regular monitoring of costs charged.<sup>98</sup>*
6. *Judicial training should include instruction on effective case management.<sup>99</sup> The use of modern technology should also be increased in the courtroom.<sup>100</sup>*
7. *The system of case management should incorporate measures to improve the flexibility, and thus the effectiveness, of the case listing process. Further, any new system should be designed to ensure that, as far as possible, one judge is assigned to hear all aspects of the same case.*
8. *Extra resources should be provided to establish the necessary administrative structures to facilitate the effective operation of a system of case management. The reduction in delay would, in the opinion of the Commission, result in a more efficient and cost-effective judicial system in the long-term.*
9. *The operation of an effective case management system would require the*

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97 *Practice Direction (Family Proceedings: Case Management)*, *op. cit.*, f.n. 2 at para. 1.

98 *Working Party Draft Rule*, *op. cit.*, f.n. 17 at para. 10.

99 See *White*, *op. cit.*, f.n. 2 at p.1192. See also Chapter 11 of this Report.

100 Booth preliminary report, *op. cit.*, f.n. 2 at paras. 3.24 and 5.8.

*alteration of the current administrative structures and some staffing increases, for example, the appointment of more clerical staff to assist Registrars.*

10. *Greater emphasis should be placed on the gathering of statistics in respect of the operation of the courts system. Such detailed information should be gathered on an on-going basis, recording the volume of cases being processed through the system and any delays experienced, and identifying problematic procedures. Responsibility for gathering statistical information should be assigned to a member of the Family Court Office.<sup>101</sup>*
11. *Continuous monitoring of the new system is essential. Responsibility for this monitoring and on-going evaluation should be assigned to the Family Court Office.*
12. *All documents initiating family proceedings should, as far as possible having regard to the matters in issue, be non-confrontational and in a standard form. Their language should be clear and concise, and they should be set out in a format which inhibits the inclusion of inflammatory material. They should contain, where appropriate, information about the Family Court Information Centre and the requirements concerning attendance at the Centre. They should contain, where appropriate, information concerning pre-trial review procedures. They should also outline basic case management principles, impressing upon the parties and their legal representatives their duty to refrain from delaying or obstructing proceedings.*

#### ***Postscript***

8.55 The Commission is conscious that the introduction of pre-trial procedures which are excessively complex or inflexible may itself become the cause of additional delays and costs. The hallmarks of an effective system must be simplicity and flexibility. We have included in Appendices D to G some examples of case-management practice directions, draft rules and guidelines emanating from England and Australia. These are provided for the purpose of illustration and their inclusion does not imply approval of them in all their detail by the Commission.

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101 See also Chapters 6 (at para. 6.31) and 12 of this Report.

## CHAPTER 9: ISSUES RELATING TO MEDIATION

### *The Consultation Paper*

9.01 In the Consultation Paper it was stated that, although it is not within the Commission's brief "to make comprehensive recommendations concerning the manner in which mediation services should be made available, ... it is appropriate for us to examine the role of mediation in the context of a reformed legal process for dealing with family law cases, which emphasises the avoidance of adversarial conflict and the promotion of dialogue and agreement".<sup>1</sup>

9.02 The Consultation Paper describes the different forms that mediation services may take, and the various ways in which they may be linked to the legal process.<sup>2</sup> It describes the development of mediation services in Ireland, especially the Family Mediation Service which began operating in Dublin on 1 September 1986. It explores a number of issues surrounding mediation, including its appropriate scope and measures for ensuring fairness in the mediation process. Finally, in an Appendix<sup>3</sup> to the Consultation Paper there is a description of aspects of the mediation services operating in Australia, New Zealand, England, Canada, Denmark, the United States and Japan.

No attempt is made to repeat this extensive treatment of mediation in this Report. What is said in this Chapter should be read against the background of the discussion which appears in the Consultation Paper.

### *Advantages And Risks In Mediation*

9.03 In the Consultation Paper we recognised the importance of mediation

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1 Consultation Paper, para. 7.36.  
2 Chapter 2, Part I.  
3 Appendix I.



in the avoidance of adversarial conflict and the promotion of dialogue and agreement.<sup>4</sup> Mediation forms an integral part of the system of family justice which we provisionally recommended.

9.04 We also recognised in the Consultation Paper that mediation offers specific advantages as an alternative to the adversarial process, as follows:<sup>5</sup>

- Adversarial court hearings may exacerbate the friction and hostility inherent in most marital disputes, while the emphasis in mediation is rather on fostering co-operation and establishing workable arrangements for the future.
- Mediation offers the parties an opportunity to take control over their future arrangements, instead of leaving it in the hands of professionals.
- The costs of mediation may be less than the costs of a full hearing and disputes can be resolved more quickly than through the court process.
- Arrangements reached through agreement are more likely to be adhered to than solutions imposed by a court. This is especially so in arrangements relating to child custody and access.
- Mediation is private. Mediation usually limits outside intervention (with the exception of legal advisers) to one professional."

9.05 At the same time we acknowledged that criticisms have been levelled at certain forms of mediation, as follows:<sup>6</sup>

- "- The process of mediation with its emphasis on the voluntary agreement of the parties tends to mask social and economic imbalance between the parties. The economically dependent spouse, usually the wife, is generally in a weaker contracting position than her partner.
- Mediation designates agreement between the parties as its aim, and it operates without the protection of legal norms and principles.
- Mediation removes control from the parties, even where its intention is to give them greater control. This criticism is

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4 Para. 7.36.  
5 Para. 2.03.  
6 *Ibid.*, para. 2.04.

associated in particular with schemes where the mediator actively encourages a particular form of settlement rather than letting the parties define their own terms.

- Mediation instead of deregulating proceedings, actually extends regulation,<sup>7</sup> in particular under in-court schemes where experience shows that the professionals may tend to dominate and the affair becomes more adjudicative than conciliatory in nature. Mediation may also extend regulation in that simpler, alternative means of settlement might have been used if mediation were not available, such as settlement through solicitors. "In other words, the rhetoric of 'private control' and 'informal decision making' conceals the reality of a dramatic extension of the coercive regulation of the divorce process".<sup>8</sup>
- The cost of mediation may be significant, and it is not established that it is in all cases less than the cost of court proceedings."

It is recognised that if mediation fails, the costs of both the mediation session(s) and any subsequent court proceedings have to be met.

9.06 Research into, and assessment of, the mediation process is still at an early stage. While mediation is given a positive profile in many of the writings, it has also been the subject of serious reservations. Many research studies have been undertaken but the results of these studies, especially in the United States and the United Kingdom,<sup>9</sup> are often in conflict. However, while it must be acknowledged that the use of mediation is still at the stage of social experimentation,<sup>10</sup> we believe that there is enough evidence to indicate that many families benefit from the mediation process and the non-adversarial approach to dispute resolution.<sup>11</sup> By contrast the problems facing those who

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7 J. Dewar, *Law and the Family* (1989, Butterworths, London), at p.194. See also J. Dewar, *Law and the Family* (1992, 2nd ed., Butterworths, London) at pp.285-286 & p.288.

8 *Ibid.*

9 For example, Pearson & Thoenes (1985) 'Divorce Mediation: An Overview of Research Results' 19 Colum. J.L. & Soc. Probs. 451; Erlanger, Chambliss & Mellii (1987) 'Participation and Flexibility in Informal Processes: Cautions from the Divorce Context' 21 Law & Society Review 585; J. Kelly (1990) *Mediated and Adversarial Divorce Resolution Processes: An Analysis of Post-Divorce Outcomes*, Final Report prepared for the Fund for Research in Dispute Resolution (Dec. 1990); J. Kelly (1991) 'Parent Interaction After Divorce: Comparison of Mediated and Adversarial Divorce Processes' 9 Behavioral Sciences and the Law 387; Relate Centre for Family Studies (U.K.) (1994) *Mediation: the Making and Remaking of Co-operative Relationships*; Bohmer & Ray (1994) 'Effects of Different Dispute Resolution Methods on Women and Children After Divorce' 28 Family Law Quarterly 223. See also Sclater 'The Limits of Mediation', [1995] *Family Law* 494.

10 L.E. Teitelbaum & L. DuPaix (1988) 'Alternative Dispute Resolution and Divorce: Natural Experimentation in Family Law', 40 Rutgers Law Review 1093 at p.1128.

11 For example, J. Kelly (1990), *op. cit.*, f.n. 9; J. Kelly (1991), *op. cit.*, f.n. 9; Kelly & Dryee (1992) 'Women's and Men's Views of Mediation in Voluntary and Mandatory Mediation Settings' 30(1) *Family and Conciliation Courts Review* 34; Relate Centre for Family Studies (UK)(1994), *op. cit.*, f.n. 9; J. Kelly (1994) 'The Determination of Child Custody' Vol. 4(1) *The Future of Children - Children and Divorce* 121.

find it necessary to have recourse to the courts are well recognised and serious.<sup>12</sup> *The balance of risk, in our view, justifies the strong shift in emphasis which we have advocated away from the adversarial process and towards mediation.*

9.07 Nevertheless, it is important to stress that mediation should be seen as an alternative to, and not a replacement of, the court-based system. Teitelbaum and DuPaix write:

"There is a tendency, particularly among some ADR advocates, to picture the world with two possibilities. In one corner, there is the traditional, contentious legal proceeding in which lawyers force their clients into the most adversarial position imaginable and then batter each other to the profit of nobody except the advocates themselves. This is the Dickensian view, whose pale reflection might perhaps be found in *L.A. Law*. In the other corner, we have the sensitive, non-contentious mediator who discovers the common ground between two parties who do not really hate each other and do not really want to fight the matter out. This is the ADR model.

The world is more complicated than this dichotomy suggests."<sup>13</sup>

9.08 The ideals and objectives of a good family law system identified in the Consultation Paper<sup>14</sup> may be achieved in a "bi-partite" family dispute resolution system, which encourages people to mediate their disagreements and conflicts in the first instance and provides them with the means to do so, but in which mediation is seen as complementary to the formal, court-based adjudication process and not as a replacement thereof. Where mediation is unsuccessful, or unsuitable, or is rejected as an option by the parties, the path of litigation will always be available.

#### ***The Provisional Recommendations***

9.09 We suggested in the Consultation Paper that, if mediation was to constitute an integral part of a reformed family justice system, "there must exist a professional mediation service with adequate numbers of trained mediators and proper facilities for consultation, and a supporting administrative framework".<sup>15</sup> Further, these services should be available countrywide. Recognising that the development of mediation services would probably involve a combination of public and private initiatives, we suggested that "plans should be made to link the development of mediation services with the establishment of the regional family

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12 See generally, Consultation Paper on Family Courts. See also T. Fahey & M. Lyons, *Marital Breakdown & Family Law in Ireland - A Sociological Study* (1995, Oak Tree Press, Dublin, in association with the Economic and Social Research Institute); Women's Aid, *Making the Links*, (1985, Dublin); National Social Service Board Report, *Family Matters: A Social Policy Report* (September, 1994); Annual Reports of AIM group; see also above, Chapters 1, 2 & 7.

13 Teitelbaum & DuPaix, *op. cit.*, f.n. 10 at p.1131.

14 Consultation Paper, para. 7.14, repeated above in Chapter 3.

15 *ibid.*

courts."<sup>16</sup>

9.10 In the context of the "primary consideration which is that of promoting agreed solutions",<sup>17</sup> we considered the "appropriate linkage" between the mediation process and the legal system, and concluded that:

- (a) Mediation is unlikely to be successful unless both parties are agreed that it should be used.
- (b) It is important to avoid placing any unreasonable restrictions on the parties' right of access to the courts.
- (c) There are some cases, in particular those in which there is a history of matrimonial violence, where attempts at mediation are usually inappropriate.<sup>18</sup>

9.11 We went on to recommend provisionally the system of integration which is described and discussed under the heading of "Diversion" in Chapter 7 of this Report.<sup>19</sup> We also made recommendations directed towards ensuring fairness in the mediation process, which we discuss in further detail below.<sup>20</sup>

#### ***Responses To The Consultation Paper***

9.12 While our provisional recommendations were generally welcomed, there were calls in a number of submissions for further attention to be given to certain aspects of the proposed system. In particular, it was suggested that further attention was required in respect of the issue of power imbalances in the mediation process and in respect of the role of legal advisers in the mediation process. These matters are discussed further below.<sup>21</sup>

9.13 It was argued by one contributor that a nationwide mediation service is required to fulfil the requirements of section 5 of the *Judicial Separation and Family Law Reform Act, 1989*, and that these services should be voluntary, privileged and separate from other services and functions. Doubts were expressed in another submission as to whether an expanded mediation service would in fact reduce the number of cases coming before the courts. It was also argued that a change in Government policy is required in this area, with an emphasis on mediation as the preferred route for separating couples. However, it was stressed in yet another submission that:

"[i]t is particularly important ... to ensure that the mediation process does not develop into a substitute court, that the parties

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16 *Ibid.*  
17 *Ibid.*, para. 7.37.  
18 *Ibid.*  
19 Para. 7.06 *et seq.*  
20 Para. 9.25 *et seq.*  
21 Para. 9.32 *et seq.*

do not feel under an obligation to arrive at a mediated agreement and that recourse to the courts remains unimpeded."

9.14 In respect of concerns about power imbalances and the ability of mediators to deal with complex legal issues, one commentator proposed that these concerns are "important but not insurmountable", and pointed to the Canadian example of the Family Mediation Service in Montreal, Quebec which was established in co-operation with the Superior Court of Quebec, a number of Ministries and professional bodies. An "in-house attorney" works as part of the Service's team, providing legal information to mediators, safeguarding the legal rights of the parties during sessions and reviewing final agreements.

9.15 Another example of North American practice cited to us was that of a document written by Judge Lee D. Baxter, Family Law Judge, Superior Court of California, a copy of which must be served "with the Summons and Petition for Dissolution, Summons and Complaint for Paternity, or with any other initial pleadings involving custody and visitation." On the second page of that document, Judge Baxter writes that:

"If you have an attorney your attorney should schedule the mediation session and accompany you to the initial session."

The document ends as follows:

"It is my hope that you will actively participate in mediation and cooperate in creating a parenting plan that is in the best interests of your children. You should utilize the mediation process to retain control of your parenting role and not give up your responsibility to the Court."

### ***Recent Developments***

9.16 Since the publication of the Consultation Paper on Family Courts in March 1994, there have been a number of pertinent developments in this area which merit mention. Generally, the trend has been to encourage the use of mediation in family law matters and to expand existing services.

9.17 In a Government document entitled *The Right to Remarry*,<sup>22</sup> considerable attention is directed at the mediation process. It is apparent that mediation is regarded as being an integral part of the legislative and administrative framework currently in place "to help protect the Family, to prevent marriage breakdown as far as possible and to minimise the trauma of marital conflict".<sup>23</sup> The document charts the increases in funding for the Family Mediation Service from £120,000 in 1992 to £300,000 in 1994, and states that the

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22 *The Right to Remarry. A Government Information Paper on the Divorce Referendum.* (September 1995, Stationery Office, Dublin).

23 *Ibid.*, at p.6.

latter level of funding was maintained in 1995.<sup>24</sup> According to the paper:

"This has facilitated the drawing up of a development plan for the Family Mediation Service which proposes that the centre in Dublin be expanded, that a new centre be established in Limerick, and that voluntary organisations and/or private individuals who are experienced in providing mediation be employed on a fee per case basis in other locations. Under the development plan a more extensive service, co-ordinated from Dublin, will become available through a network of private mediators and the Limerick centre."<sup>25</sup>

9.18 A number of non-governmental bodies have also published documents which deal with issues relating to family disputes, including mediation. For example, The Law Society of Ireland has published a *Code of Practice* in respect of family law which emphasises that "[t]he Solicitor should advise, negotiate and conduct matters so as to encourage and assist the parties to achieve a constructive settlement of their differences as quickly as may be reasonable, whilst recognising that the parties may need time to come to terms with their new situation."<sup>26</sup> The Code stresses that the solicitor should "ensure the client appreciates that the interests of the children should be a primary concern."<sup>27</sup> Furthermore, it states that:

"[the client] should be appraised of the advantages to the family of a constructive and non-adversarial approach to the resolution of the couple's difficulties and advised that the client's attitude and approach to negotiations can affect not only the family as a whole, but may impact on their relationship with the children.

The Solicitor should encourage the attitude that a family dispute is not a contest in which there is one winner and one loser, but rather a search for fair solutions. The Solicitor should avoid using words or phrases that imply a dispute when no serious dispute necessarily exists.

Because of the involvement of personal emotions in family disputes the Solicitor should, where possible, avoid heightening such emotions in any way."<sup>28</sup>

9.19 On the issue of mediation, The Law Society's Family Law and Legal Aid Committee, which drafted the Code, states the view "that Solicitors should not act as Solicitors and Mediators in the same case."<sup>29</sup>

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24 *Ibid.*, at p.8.

25 *Ibid.*

26 *Family Law in Ireland. Code of Practice*. Issued by the Family Law and Legal Aid Committee of The Law Society of Ireland (1995), at para. 1.2.

27 *Ibid.*, para. 1.3.

28 *Ibid.*, paras. 1.3-1.5.

29 *Ibid.*, para. 1.7. See also S. Roberts (1995) 'The Lawyer as Mediator' 25 *Family Law* 636.

9.20 The National Social Service Board Report, entitled *Family Matters - A Social Policy Report*,<sup>30</sup> concludes that family mediation is extremely important as it enables separating couples to deal with the joint parenting, access, property and maintenance issues in a non-adversarial manner.<sup>31</sup> However, it stresses that "for many mediation is only a real option if provided by the State"<sup>32</sup> and, citing the Nic Ghiolla Phádraig study,<sup>33</sup> points out that there is "a crucial need for a network of regional centres both on the basis of equity and also of the likely demand, given the incidence of separation countrywide."<sup>34</sup> Finally, the Report suggests that "[c]onsideration should also be given to making the mediator service available to co-habiting parents who are in the process of separating."<sup>35</sup>

9.21 In England and Wales, a White Paper on divorce law has been published by the Lord Chancellor's Department entitled *Looking to the Future - Mediation and the Ground for Divorce*<sup>36</sup> which deals extensively with the issue of mediation in divorce proceedings. Among the key aspects of the proposals contained in the White Paper<sup>37</sup> are the requirements that couples attend a compulsory information-giving session before initiating divorce proceedings, and the introduction of comprehensive family mediation as part of the divorce process. The objectives of these measures include the facilitation of referrals to marriage guidance sessions when couples believe there may be some chance of saving the marriage, the provision of "every opportunity to explore reconciliation even after the divorce process has started",<sup>38</sup> the removal of acrimony and hostility as far as possible and the encouragement of couples "to meet the responsibilities of marriage and parenthood before the marriage is dissolved."<sup>39</sup>

The White Paper outlines the usefulness of mediation<sup>40</sup> and the case for increased use of mediation,<sup>41</sup> and proposes that family mediation should be an integrated part of the divorce process.<sup>42</sup> Issues such as the obligation of legal advisers to advise clients of other services including marriage counselling and family mediation,<sup>43</sup> the role of the court in respect of mediated agreements<sup>44</sup> and the questions of privilege and disclosure are also discussed.<sup>45</sup>

Many of the Lord Chancellor's proposals have been the subject of intense debate and, at the time of writing, the outcome of this debate is unknown. It did

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30 *Op. cit.*, f.n. 12.

31 *Ibid.*, at p.71.

32 *Ibid.*, at p.72.

33 M. Nic Ghiolla Phádraig, "Marital Separation in Ireland", in Kiely (ed.) *In and Out of Marriage: Irish and European Experiences* (1992, Family Studies Centre, U.C.D.).

34 N.S.S.B. Report, *op. cit.*, f.n. 12 at p.72.

35 *Ibid.*

36 Lord Chancellor's Department, *Looking to the Future. Mediation and the ground for divorce. The Government's Proposals*, presented to Parliament by the Lord High Chancellor, April 1995. (1995, HMSO, London) (Cm 2799).

37 *Ibid.*, Chapters 5-8 and the Preface.

38 *Ibid.*, Preface, p.(vi).

39 *Ibid.*

40 *Ibid.*, paras. 5.4-5.9.

41 *Ibid.*, paras. 5.10-5.20.

42 *Ibid.*, paras. 5.21-5.25.

43 *Ibid.*, para. 7.31.

44 *Ibid.*, paras. 7.37 & 7.38.

45 *Ibid.*, paras. 7.34-7.36.

appear, however, to be a possibility at the time of writing that the proposal relating to compulsory information-giving sessions might be abandoned.

### ***Basic Recommendations***

9.22 We confirm our provisional recommendations with respect to the proposed Mediation Service as complementary to the judicial process, and not as a replacement thereof. *For mediation to form an integral part of this reformed family law system, we recommend the establishment of a professional mediation service with adequate numbers of trained mediators and proper facilities for consultation, and a supporting administrative framework. This service should be available countrywide, and must be adequately resourced. The service must embody sufficient safeguards to ensure that the allied goals of fairness and justice are achieved. We also recommend that the development of the mediation service should be linked with the establishment of the Regional Family Courts.*

9.23 We reiterate our earlier comments on the appropriate linkage between the mediation process and the legal system, viz. that *mediation should be voluntary, that unreasonable restrictions should not be placed on the parties' access to the courts and that in some cases, for example where there has been family violence, attempts at mediation are usually inappropriate.*

9.24 Recommendations concerning the linkage between mediation and the legal process were made in Chapter 7. More detailed recommendations concerning legal aspects of mediation follow.

### ***Fairness And The Mediation Process***

9.25 In responses to the Consultation Paper there was some emphasis on the need to ensure fairness in the mediation process, and some concern that, in the absence of legal structures and safeguards, bargains may sometimes be struck which are unbalanced or not in the interests of certain family members. It should be explained that we do not have evidence that serious injustices have arisen from mediated agreements in Ireland, but it is important to be alive to the risks, and to attempt to reduce them to a minimum. As to the sources of risk, we summarised them as follows in the Consultation Paper:<sup>46</sup>

"Factors which can distort the mediation process include unequal bargaining strengths between the parties, deriving from economic or psychological causes. The full disclosure of assets, necessary if there is to be a fair bargain on matters of finance and property, cannot always be guaranteed. Nor is it possible for the parties at the time of mediation to foresee all the possible risks and changes in circumstances which may subsequently occur."



9.26 We went on to suggest three important elements in ensuring fairness in the mediation process:

- (a) appropriate training and a code of practice for family mediators;
- (b) appropriate advice and review of agreements by legal advisers; and
- (c) appropriate powers in the courts to review and, if necessary, vary agreed terms.

***Training Of Mediators And A Code of Practice***

9.27 We stated in the Consultation Paper that:

"It is essential first that mediators themselves should, through their training, be able to identify inequalities in the bargaining strengths of the parties, and that they should be aware of techniques for redressing obvious imbalances. As a last resort, where for example it becomes clear that one party is concealing vital information, or where one party is exercising a dominant role, the mediator should be prepared to advise that mediation should cease. All this points to the need for an agreed code of practice for family mediators."<sup>47</sup>

9.28 In the context of recommending a more central role for mediation in the family court system, it is critical that the profession of mediation be regulated, accredited and thus in a position to command the confidence of clients, legal practitioners, judges and other relevant professions. This concern for high professional standards is shared by the Family Mediation Service which has been instrumental in developing this new profession in Ireland, providing training and developing codes of conduct.

9.29 There are many models of training in operation in other countries. *The Commission believes there would be merit in establishing a formal training course in mediation under the auspices of a university, and that this course would be at post -graduate level.* A training course in a university has the considerable advantage of being subject to well established standards of academic excellence, external evaluation of student work, access to good library resources and close links with other professional training courses on campus. To provide comprehensive training, the course would need to be of two years' duration for full-time students and appropriately longer for part-time students.

9.30 The selection procedure will be an important element of any new model of training. Eligibility criteria introduced in the UK by National Family

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47 *Ibid.*

Mediation in 1991 demand (a) an aptitude for mediation, and either (b) a degree or relevant professional qualification or (c) at least five years' recent work experience with the responsibility for the conduct of inter-personal relations.<sup>48</sup> A Selection Working Party was established to "pioneer and oversee those new developments in selection",<sup>49</sup> and one of its first tasks was "to draw up a specification of personal attributes, both essential and desirable, relevant to effective practice of family mediation".<sup>50</sup>

"These attributes were analysed in terms of four main components - intellectual, interpersonal, ethical and personal, and motivation. With the help of a consultant firm of occupational psychologists, a range of specific selection exercises and procedures was devised to identify and assess these personal attributes in candidates. These include a detailed application form, references, a structured (and rated) interview procedure (conducted by the local service provider) and a national selection procedure consisting of a video test and a group exercise. Each exercise is designed to elicit a range of the attributes set out in the person specification, resulting in the creation of a profile of each candidate's strengths and weaknesses. This is an open opportunity for candidates to show their potential personal suitability as mediators, rather than being a competition between candidates. Selection is carried out by a team of selectors trained specifically to conduct these procedures according to nationally uniform criteria.

The final decision as to whether or not a candidate has demonstrated aptitude across the range of indicators is made jointly by a panel of three selectors (three selectors to every eight candidates). This decision is based on the assessment of all the written evidence made up of the individual selector's own ratings for each selection exercise plus the local service interview rating."

9.31 *We recommend that the following model should be considered:*

Eligibility criteria for the course could include an undergraduate qualification in a relevant discipline, such as law, psychology, social work, human resource management; relevant work experience and general personal suitability for the role of mediator. In some circumstances, the course might admit students who do not have a third-level qualification but who have an exceptional portfolio of relevant experience.

The course in mediation could be structured along the lines of existing post-graduate professional training courses. The course would comprise

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48 R. Blacklock & M. Roberts (1994) "Professional Standards in the Selection of Family Mediators" 24 *Family Law*

206.

49 *Ibid.*

50 *Ibid.*

a formal academic component and supervised placements in mediation settings. The formal academic programme would provide teaching in those areas of psychology, family studies, law and accountancy as are relevant to mediation, as well as intensive teaching in dispute resolution and conflict management which constitute the core competencies of mediation. The course would be self-funded from the fees paid by students. However, the Department of Justice might be in a position to offer funded places to students who would undertake to work in the mediation service upon qualification or to provide a grant-in-aid to the university to help defray start-up costs.

In setting up the course, the advice of the American Academy of Family Mediators, National Family Mediation (U.K.) or the senior academic staff of existing, accredited courses should be sought, as well, of course, as that of the personnel of the Family Mediation Service.

#### *A Code of Practice*

9.32 A Code of Practice for mediators should include an obligation on a mediator to advise that mediation should cease in circumstances such as those outlined above, that is, where there are substantial power imbalances between the couple which cannot be redressed through the mediation process and that these power imbalances are resulting in vital information not being disclosed, in the oppression of one party by the other, or in one party only benefiting from legal or other professional advice. There should also be an obligation to end mediation in situations where there is on-going violence or abuse of a child or the other partner. Mediators should also be obliged to ascertain, before they embark on mediation with a couple, if there has been a history of violence or abuse, and to satisfy themselves that this has now ceased. Clearly, such a Code of Practice, containing provisions of this sort, will achieve its objectives only if mediators receive training which enables them to identify serious inequalities in the bargaining process and to screen for family violence and abuse.

#### *Legal Advice And Review Of Agreements By Legal Advisers*

9.33 The importance of independent legal advice for parties involved in mediation was stressed in the Consultation Paper.<sup>51</sup> Parties who engage in mediation do so in the absence of the procedural and substantive safeguards designed to achieve fairness when disputes are litigated. This informality is more conducive to agreement, but it carries the risk that a party may agree to measures which fall far short of his or her legal entitlements. While compromise, including compromise concerning legal entitlements, is a necessary feature of a process focused on reaching an agreement tailored to the particular needs and interests of the parties, such compromise must be based on informed choice. The parties should be aware of what their legal entitlements or expectations are and any

waiver should be made knowingly and with a full understanding of its legal consequences.

9.34 We pointed out in the Consultation Paper that involvement of legal advisers in the mediation process may take different forms. The parties may seek legal advice before, during or after the completion of the mediation process, or at each stage. One exceptional model is to have legal advisers present at mediation sessions. We stressed the importance of having mediated agreements, before being reduced to binding legal form, reviewed by the parties' respective legal advisers. We also referred to the subtlety necessary in giving legal advice in such circumstances.

"On the one hand ... [the lawyer] must advise the client thoroughly on the legal implications, long and short term, of the various terms of the agreement, and give warning where it appears that the client is waiving or prejudicing his or her legal rights. On the other hand, there must be recognition of the compromise that is a necessary feature of many mediated agreements. It is important that in the training of family lawyers, these skills are addressed."

9.35 We acknowledge recent developments in this regard within the solicitors' profession, in particular the provisions of The Law Society's *Code of Practice* referred to in Chapter 7.<sup>52</sup>

9.36 *We reaffirm our recommendation that mediated agreements should normally be reviewed by the parties' respective legal advisers. We further recommend that the parties should be encouraged to seek independent legal advice before and, as necessary, during the mediation process. Where a party wishes to receive legal advice and is waiting for an appointment to consult a Legal Aid Board solicitor, mediation should be suspended until such advice becomes available. Provisions to this effect should be included in the Code of Practice.* We do not believe that the mediation process would be best served by the attendance or participation of legal advisers at mediation sessions, although we would not advocate preventing the parties having their legal advisers available for *consultation* at any time during the mediation process.

#### ***Judicial Review Of Agreements***

9.37 The Consultation Paper contains substantial discussion of the role of the courts in reviewing unfair, improvident or unwise agreements. Clearly intervention by the courts is sometimes necessary to prevent injustice as between the parties, or to achieve other ends such as the protection of third parties, especially children. It has long been recognised that the general principle of contractual freedom cannot be allowed to operate without restraint in the area of family relations. On the other hand, as is stated in the Consultation Paper, "if

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52 See above, para. 7.13 *et seq.*

agreements are subject too easily to alteration by the courts, the incentive towards negotiation and agreement may be reduced".<sup>53</sup> Our provisional recommendations attempted to achieve a balance between these differing considerations.

**(a) Agreements concerning custody of or access to children**

9.38 The present position concerning agreements in respect of child custody and access is explained in the Consultation Paper,<sup>54</sup> and for the reasons given there, *we confirm our view that there would be no practical advantage in extending the courts' powers to review agreed arrangements.* In the Consultation Paper, we stated that "[w]e regard the parental right to proceed under section 11 of the *Guardianship of Infants Act*, in circumstances where agreed arrangements appear to have failed, as an adequate safeguard."<sup>55</sup>

**(b) Agreements concerning financial and property matters**

9.39 The following statement, summarising the legal status of agreements relating to finances and property matters, appears in para. 7.40 of the Consultation Paper:

"Our courts have very limited powers to vary the terms of an agreed settlement on financial and property matters. Many agreements will themselves provide for periodic review, particularly in relation to the level of maintenance payments. In the absence of such terms, there is no general power in the courts to order variations, even where the agreement has been made a rule of court under s.8 of the *Family Law (Maintenance of Spouses and Children) Act, 1976*. However, a number of factors ameliorate what might at first appear to be an unfair situation. The court probably does have power to vary the terms of such an agreement in the context of proceedings for judicial separation. (See the *Judicial Separation and Family Law Reform Act, 1989*, s.15(10)(c) and (d)). A court may refuse an application to make an agreement a rule of court under s.8 of the 1976 Act on the basis that the absence of an appropriate review clause may render the agreement unreasonable or unfair. Moreover, it is, in practice, not possible to enforce payment of agreed maintenance in circumstances where the liable spouse has insufficient means to make the necessary payments. By contrast, a spouse who believes that he or she has been short changed by an agreement may always apply for maintenance under the *Family Law (Maintenance of Spouses and Children) Act, 1976*."

9.40 Two recent judicial decisions deserve note. *N(C) v. N(R)*,<sup>56</sup> a decision

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<sup>53</sup> Consultation Paper, para. 7.40.

<sup>54</sup> Para. 7.39.

<sup>55</sup> *Ibid.*

<sup>56</sup> [1995] 1 Fam. L.J. 14. A separation agreement is a 'post-nuptial settlement' for the purposes of section 15(1)(c) of the *Judicial Separation and Family Law Reform Act, 1989*.

of McGuinness J. in the Circuit Court, confirms the view expressed above that the courts have power to vary the terms of separation agreements in the context of proceedings for judicial separation. *JH v. RH*,<sup>57</sup> a decision of Barr J. in the High Court, has reaffirmed the principle<sup>58</sup> that a spouse may not by agreement surrender his or her right to apply for maintenance under the *Family Law (Maintenance of Spouses and Children) Act, 1976*. In that case the wife was permitted to apply for maintenance notwithstanding the fact that her separation agreement with her husband had been expressed as "a full and final settlement of all matters outstanding between them".

9.41 In the Consultation Paper<sup>59</sup> we raised the question whether the courts should, in addition to their powers referred to in the preceding paragraph, be given wider powers to vary the terms of agreements relating to property and finance. Our view was that some additional powers are needed to deal with cases of blatant unfairness and situations where, following the agreement, circumstances have changed in ways which could not be anticipated by the parties. We see no reason to depart from our provisional recommendation which was as follows:

*There should exist a more general power in the courts to review and, if necessary, vary, on the application of either party, the terms of agreements concerning maintenance and property on the following grounds:*

- (a) *that facts have come to light since the agreement was entered into which, had either party been aware of them at the time, could reasonably be expected to have effected a material change in the terms of the agreement, or*
- (b) *that the economic circumstances of the parties have altered since the agreement in a manner which could not reasonably have been anticipated by the parties at the time of the agreement, and which makes it unreasonable to insist on the application of the original terms of the agreement.*

*We recommend also that, in the above circumstances, the court should have the power to confirm, cancel or vary any terms in the agreement, but should not disturb transactions which have already been concluded under the provisions of the original agreement.*

(c) **Application to have an agreement recorded or made a rule of court**

9.42 We confirm the provisional recommendation made in the Consultation Paper that:

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57 27 July 1995. Reported in the *Irish Times*, 30 October 1995.  
58 Embodied in section 27 of the Act of 1976, and previously confirmed by the Supreme Court in *H.D. v. P.D.*, 18 May 1978, unreported, Supreme Court.  
59 Para. 7.41.

"In every case where an application is made to a court to have an agreement, which affects the parties' financial or property relationships, recorded or made a rule of court, there should be an obligation on the court not to grant the application unless it is satisfied that the agreement is a fair and reasonable one which in all the circumstances adequately protects the interests of the parties and of any dependent children. A similar rule already applies where application is made to have an agreement made a rule of court under s.8 of the *Family Law (Maintenance of Spouses and Children) Act, 1976*, and this has already prompted some judicial comment on the question of what constitutes a fair and reasonable agreement (see for example *JD v BD*<sup>60</sup>). It is reasonable to expect that judicial scrutiny of such agreements will be that much more intense where either party has not had the benefit of legal advice."

### ***Confidentiality And The Mediation Process***

#### **The current status of information arising in the course of mediation**

9.43 It has been decided by the High Court that, in the context of marriage counselling, communications between spouses and a priest attract privilege, and that the privilege is that of the spouses and may be waived by them.<sup>61</sup>

9.44 As was noted in the Consultation Paper,<sup>62</sup> it is possible that the courts might extend privilege to cover statements made during mediation in other non-separation contexts. In the Consultation Paper, the Commission proffered the opinion that there is a strong public interest in fostering mediation but voiced doubts as to whether such privilege could be regarded as absolute, drawing attention to the comments of the English Court of Appeal in the case of *Re D (Minors) (Conciliation: Disclosure of Information)*.<sup>63</sup>

9.45 Further, certain statements made in the course of reconciliation sessions and mediation sessions are inadmissible in subsequent court proceedings. Pursuant to section 7(7) of the *Judicial Separation and Family Law Reform Act, 1989*, where proceedings under the Act have been adjourned to facilitate reconciliation or mediation under subsections (1), (3), or (6),

"any oral or written communication between either spouse and any third party to whom *subsection (1), (3) or (6)* of this section relates (whether or not made in the presence of the other spouse) and any record of such communication caused to be made by such third party, shall not be

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60 [1985] I.L.R.M. 688.

61 *E.R. v. J.R.* [1981] I.L.R.M. 125, *per* Carroll J. relying on the principle in *Cook v. Carroll* [1945] I.R. 515. See Consultation Paper, para. 2.65. See also the Law Reform Commission *Report on Contempt of Court*, (LRC 47-1994), at paras. 4.13-4.14.

62 Para. 2.64 *et seq.* See also W. Duncan & P. Scully, *Marriage Breakdown in Ireland: Law and Practice*, (1990, Butterworths, Dublin) at para. 18.043.

63 [1993] 1 FCR 877, FD. See also Consultation Paper, para. 2.68.

admissible as evidence in any court."<sup>64</sup>

9.46 There is general acceptance in Common Law jurisdictions of the view that statements made during mediation should receive a certain amount of protection.<sup>65</sup> However, there are differences in respect of the *model* of protection favoured.

9.47 The Law Commission of England and Wales recommended that a statutory privilege should be conferred upon statements made in the course of mediation, and this was endorsed by the Lord Chancellor in his White Paper on divorce law reform in England and Wales.<sup>66</sup> The Scottish Law Commission has taken a different approach in recommending that statutory provisions should be enacted to render "information arising out of family mediation *inadmissible* as evidence in subsequent legal proceedings"<sup>67</sup> as opposed to rendering such information privileged. Similarly, in Australia admissions made to counsellors attached to the Family Court are inadmissible in any court proceedings.<sup>68</sup>

9.48 Despite the fact that these two models should be mutually exclusive, the Irish system embraces both - the "admissibility subject to privilege" model under the Common Law and the inadmissibility model under statute. We believe that this situation should be regularised and that *one or other* model should be recommended as the way forward. For this reason, further research has been conducted since the publication of the Consultation Paper and two possible approaches have been identified.

9.49 There are two main options:

(a) endorsement of the Common Law approach - information arising in the course of mediation will be *admissible* in subsequent court proceedings *unless privilege is successfully claimed*,

or

(b) reform of the law so that such information is rendered *inadmissible* in subsequent proceedings, except in certain limited circumstances.

The former option concentrates protection on the participants in the mediation

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64 A similar provision is contained in section 7(6) of the draft *Divorce Bill*, contained in *The Right to Remarry*, *op. cit.*, f.n. 22.

65 For example, Lord Chancellor's Department (1995), *op. cit.*, f.n. 36 at para. 7.34 *et seq.*; Law Commission (1990) *Family Law: The Ground for Divorce* (Law Com. No. 192), para. 5.44; Scottish Law Commission (1992) *Report on Evidence: Protection of Family Mediation* (Scot Law Com No 136); *Re D (Minors) (Conciliation: Disclosure of Information)* [1993] Fam. 231; Sections 12, 18(2) & 62 of the *Australian Matrimonial Causes Act, 1959*; Section 62A(1) of the *Australian Family Law Act, 1975*, as amended by *Family Law Act, 1995*. See also T. Ingam, "Privilege in the Family Mediation Process" (1995) 111 L.Q.R. 68.

66 Lord Chancellor's Department (1995), *op. cit.*, f.n. 36.

67 Scottish Law Commission (1992), *op. cit.*, f.n. 65 at para. 2.14. Emphasis added.

68 Sections 12, 18(2) & 62 of the *Matrimonial Causes Act, 1959*; Section 62A(1) of the *Family Law Act, 1975*, as amended by the *Family Law Act, 1995*. Order 24, rule 1(8) & (9) of the Family Law Rules.



process, while the latter protects the process itself.

#### **The "admissible subject to privilege" option**

9.50 Under this model, the privilege attaches to the couple and not to the information; therefore, the information is admissible unless privilege is successfully claimed. This privilege can be waived by agreement and there are exceptional cases in which the public interest dictates that privilege cannot be claimed, e.g. where the protection of a child from a serious threat of injury would justify a court in setting aside the privilege.<sup>69</sup>

#### **The "inadmissibility" option**

9.51 The best exposition of the arguments in favour of changing the law is contained in the Scottish Law Commission's *Report on Evidence: Protection of Family Mediation*<sup>70</sup> in which the Commission recommended that statutory provisions should be enacted "rendering (subject to certain exceptions) information arising out of family mediation procedures inadmissible as evidence in subsequent legal proceedings".<sup>71</sup> The "inadmissibility" option was preferred to the option of conferring privilege on such information for the following reasons:

"Firstly, an inadmissibility rule confers greater protection than a privilege. With a privilege the information is admissible and will be admitted as evidence unless privilege is claimed. The parties to legal proceedings and their legal representatives therefore have to be continually alert to the need to claim privilege, and questions designed to elicit privileged information may be asked in the hope that no claim will be made. On the other hand where information is inadmissible as evidence no action by the parties should be necessary to prevent its disclosure in court. The inadmissibility rule would be known to the court and the parties' legal representatives so preventing, or at least discouraging, questions designed to elicit inadmissible information, and objections to any such questions would be sustained. Secondly, making certain information inadmissible as evidence is a more direct method of protecting family mediation than conferring a privilege on participants. Inadmissibility follows more naturally from ... [a] "sealed room" approach to family mediation sessions. Finally, the concept of inadmissibility is easier to grasp than the concept of privilege, and hence would be more easily explained to, and understood by, participants in family mediation sessions".<sup>72</sup>

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69 Consultation Paper, para. 2.67

70 Scottish Law Commission (1992), *op. cit.*, f.n. 65.

71 *Ibid.*, Recommendation 1 at p.8.

72 *Ibid.*, at para. 2.14.

9.52 Statutory protection of the mediation process in Australia has also taken the form of rendering information arising during mediation inadmissible as evidence in any subsequent legal proceedings.<sup>73</sup>

9.53 *Key Points Of Scottish Law Commission - Proposals*

1. The Commission recommended that "statutory provisions should be enacted rendering (subject to certain exceptions) information arising out of family mediation procedures inadmissible as evidence in subsequent legal proceedings.<sup>74</sup>
2. Protection would only be extended to information arising during mediation sessions conducted by approved mediators.<sup>75</sup>
3. "The new statutory inadmissibility rule should attach to mediation concerning:
  - (i) individuals in dispute about any matter relating to the residence of a child; or the regulation of personal relations and direct contact between a child and any other person; or the control, direction or guidance of a child's upbringing; or the guardianship or legal representation of a child; or any other matter relating to a child's welfare, or
  - (ii) spouses or cohabitants (and former spouses or cohabitants) in dispute about matters arising out of the breakdown or termination of their marriage or relationship".<sup>76</sup>
4. "The new statutory inadmissibility rule should apply to all mediation whether or not the participants were referred to mediation by a court".<sup>77</sup>
5. "The new ... rule should apply whether or not the mediation resulted in an agreement between the participants".<sup>78</sup>
6. The Commission recognised that "inadmissibility should be confined to matters which are essential to the effectiveness of mediation in order not to restrict unduly the evidence available to the courts".<sup>79</sup>
7. It was recommended that "the new ... rule should apply (subject to the exceptions stated) whether or not the parties to the court proceedings

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73 *Op. cit.*, f.n. 68.

74 Scottish Law Commission (1992), *op. cit.*, f.n. 65, Recommendation 1 at p.8.

75 *Ibid.*, para. 3.3r & Recommendation 5 at para. 3.19

76 *Ibid.*, Recommendation 2 at p.11.

77 *Ibid.*, Recommendation 3 at p.11.

78 *Ibid.*, Recommendation 4 at p.12.

79 *Ibid.*, para. 3.20.

are the same as the parties to the mediation or the subject matter of the proceedings is the same as that mediated"<sup>80</sup> and that "the new statutory inadmissibility rule should not apply to the fact that a mediation session has taken place, the time and place of the session or the identities of the participants".<sup>81</sup>

8. Further, it was recommended that "the new ... rule should not apply to the fact that agreement (written or oral) was reached or was not reached as a result of mediation, or to the terms of any agreement".<sup>82</sup>
9. The Commission considered that a number of exceptions to the recommended new ... rule were necessary. In summary, it was recommended that the inadmissibility rule should not apply in the following situations:
  - "(a) in criminal proceedings,
  - (b) in children's hearings, adoption proceedings and certain other proceedings involving children and local authorities,
  - (c) where the parties agree,
  - (d) where the mediator is the pursuer or defender in civil proceedings arising out of the mediation,
  - (e) where a written agreement resulting from the mediation is challenged, and
  - (f) in civil proceedings relating to personal injury damage to property which occurred during mediation."<sup>83</sup>
10. Finally, in relation to agreements to admit otherwise inadmissible information, the Commission recommended that:
  - "(a) Information as to what occurred in a mediation session should be admissible as evidence if each and every participant (other than the mediator and any child too young to understand the significance of what occurred) in that session agrees that such evidence should be admitted.
  - (b) A participant below the age of 16 who understands the

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80 *Ibid.*, Recommendation 7 at p.16.  
81 *Ibid.*, Recommendation 8 at p.16.  
82 *Ibid.*, Recommendation 9 at p.17.  
83 *Ibid.*, para. 3.37.

significance of what occurred in a mediation session should have the legal capacity to agree.<sup>84</sup>

**Recommendation**

9.54 *The Commission recommends that information arising during the course of mediation should, subject to a number of exceptions, be inadmissible as evidence in any subsequent court proceedings. Statutory provisions to this effect should be enacted.*

9.55 We believe that this would be a significant support to the mediation process, encouraging full and frank disclosure and discussion by participants in the knowledge that nothing they say in the mediation session(s) can be used against them in evidence during any subsequent court proceedings. It would mean that, where mediation is unsuccessful (in whole or in part), all parties are in the same position at the initiation of court proceedings as they would have been had they not mediated their dispute. If mediation is to be encouraged and effective, it is my opinion that a "sealed room" approach (subject to certain exceptions) should be endorsed by the Commission.

9.56 One of the most obvious problems with the current situation is that couples who are not married are not covered by either the Common Law rule or the statutory provisions. In the scheme envisaged by the Commission in this Report, mediation is to be encouraged as a dispute resolution technology in family law matters. At present, the situation in respect of information arising during the mediation by *unmarried* couples of, for example, a child custody or maintenance dispute is unclear. Further, the same lack of clarity will exist should divorce be introduced in this jurisdiction in respect of the mediation of post-divorce disputes between former spouses.<sup>85</sup>

9.57 The relevant legislation should make it clear that mediation sessions in respect of which information becomes inadmissible, include sessions involving persons who are not married.<sup>86</sup>

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84 *Ibid.*, Recommendation 13 at p.22.

85 Although note section 7(6) of the draft *Divorce Bill*, contained in *The Right to Remarry, op. cit.*, 1.n. 22.

86 Note the proposals of the Scottish Law Commission in this regard, *infra.*, para. 9.54 at sub-para. 3.

## CHAPTER 10: PROCEEDINGS IN THE FAMILY COURT

10.01 In this Chapter we discuss and make recommendations on a range of issues concerning proceedings in the family court viz. -

- whether there should be any change in the basically adversarial format of the proceedings,
- whether the court should have more power independently of the parties to seek information relevant to the case,
- how best to protect the interests and respect the wishes of children,
- the need for a properly resourced and independent family assessment service,
- the degree of privacy which should attach to proceedings,
- the physical conditions and facilities of the court.

### *Adversarial Or Inquisitorial Proceedings ?*

10.02 It is sometimes suggested that the traditional adversarial mode of trial is unsuited to the resolution of family disputes. In the first place it may exacerbate the tension between the parties and contribute to ongoing friction. In the second place, it is not necessarily the best way to elicit the truth on the issues to be decided. This is particularly so in relation to the welfare of any children; there may be much evidence which the court would wish to hear but which is not put forward by either party, or by their lawyers. This has led to the suggestion that family law proceedings should be conducted on inquisitorial rather than adversarial lines.

10.03 The approach we favoured in our Consultation Paper was "to combine pragmatism with fair procedures" and to maintain the adversarial system, while supplementing it with specific inquisitorial elements. The considerations which informed the Commission's view are worth repeating here:

"There is an important distinction to be drawn between informality and laxity in procedures. The former is desirable and already pertains in many family proceedings; the latter is unacceptable and may result in the infringement of fundamental rights.

Trial procedures must respect the principle of natural and Constitutional justice. In particular, family members (parents or children) whose fundamental rights may be affected by the outcome of proceedings must be given a full opportunity (subject to considerations of age and understanding) to present their case and to challenge evidence which may be detrimental to them.

Subject to these requirements, there is no objection in principle to vesting in the court powers to initiate specified forms of inquiry and to call upon the assistance of experts to make enquiries and assessments on behalf of the court.

It needs to be recognised that judicial proceedings, even though conducted with informality and sensitivity, are not therapeutic exercises and that it is not possible to exclude from them some element of confrontation. This is one of the reasons why it is so important to avoid judicial proceedings where it is possible to do so without risk of injustice to the persons concerned."<sup>1</sup>

10.04 Comments on the Consultation paper indicated broad support for this approach. Several commentators expressed concern at our Seminar and in submissions that the rules of evidence not be whittled down in an effort to make family proceedings more "user-friendly". For example, hearsay or opinion evidence should not be admissible except in the context of an expert's report. As we mentioned in the fourth paragraph of the above extract, once cases get to court, a confrontational element is the inevitable if unfortunate result of the observance of due process. As some commentators suggested, the most that can be expected is that the professionalism of counsel and solicitors will "keep the temperature down" and that judges will be able to convey, through their use of language, both their understanding and their decisiveness.

#### **Children and the adversarial system**

10.05 Where the welfare of a child is in issue, the practical implication of the welfare principle, strengthened and underlined by the constitutional rights of the

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<sup>1</sup> Consultation Paper, Introduction, para. 12.

child, is that the case is no longer fully adversarial in nature. This was pointed out by McGuinness J. of the Circuit Court in a recent decision, *L. v. L.*<sup>2</sup> She explained that in cases under section 3 of the *Guardianship of Infants Act, 1964* or section 16(g) of the *Judicial Separation and Family Law Reform Act, 1989*, the court is cast in an inquisitorial role. Therefore the court has power to override legal professional privilege, in particular in the case of medical/expert reports, in suitable cases where the welfare of a child is in issue.<sup>3</sup> This power should be exercised only rarely and where the court is satisfied that it is necessary.

10.06 This decision recognises the greater flexibility which the court enjoys in dealing with child-related issues. However, even in cases where the welfare of the child is the paramount concern of the court, proceedings cannot become entirely inquisitorial. The procedural rights of the parents, especially where serious allegations have been made against one or both, must be respected, and this may impose an adversarial character on at least part of the proceedings. The child also has rights which he or she may wish to assert independently in the proceedings.

10.07 Our view is that the protection of children's rights and interests in family proceedings, though necessitating some departures from the adversarial model, do not require or justify its complete rejection. We are in favour of the court having specific inquisitorial powers, especially with regard to the commissioning of independent reports concerning children. This matter is discussed in Sections B and C of this Chapter. We are also in favour of expanding provision for the independent representation of the child where this is necessary as an additional channel of information relevant to the child's welfare or to ensure that the child's rights and wishes are given due respect. This matter is discussed in Section B below.

### **Financial reports**

10.08 We also made a provisional recommendation as to reports on finance or property. Unless the court is given inquisitorial powers in this area, one party to family proceedings can too easily conceal his or her means from the other, thereby escaping obligations to support his or her spouse and any dependent children. Submissions welcomed our proposal and noted that, at present, the

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2 *L.(T.) v. L.(V)*, case 51/94, 10/11/1994. Reported in [1995] Fam. L.J. 7.

3 This is a specific incidence of the general power which the court retains to override a claim of privilege if the interests of justice so require.

traditional discovery procedure is inadequate here.<sup>4</sup> We repeat our provisional recommendation in full. *The court should have a discretionary power, in any proceedings in which application has been made for a maintenance or other financial order, or a property order, to procure a report from a suitably qualified independent person on the financial or property status of the parties. The report should be furnished to the parties and their legal representatives before the hearing. The report should be received in evidence provided that its author is available for cross-examination by the parties. Where the author is not available, the reception of the report in evidence should be at the discretion of the court.*<sup>5</sup>

### ***Respecting The Rights, Interests And Wishes Of Children***

10.09 The welfare of any relevant child is a prominent consideration in most family law proceedings; and in cases concerning guardianship, custody or access, it is the first and paramount consideration. We consider in this section how, from the procedural standpoint, the interests and wishes, where ascertainable, of the child may best be represented in family law proceedings.

10.10 In a study recently published by the E.S.R.I., it was found that among married clients with dependent children, the children were a major or "secondary but significant" source of dispute in almost 60% of sample cases.<sup>6</sup> Among unmarried clients with dependent children, the children were a major focus in 74% of sample cases.<sup>7</sup> There has been a sharp rate of increase in guardianship applications during the past decade; between 1987 and 1994 the number of such applications rose more than three-fold.<sup>8</sup> Guardianship applications are quite likely to arise between unmarried partners.<sup>9</sup>

The study also concludes that:

"[i]n general, it seems that the child's voice is heard only through the parents, sometimes in the context of a bitter conflict between the father

4 Section 38 of the *Family Law Act, 1995* provides:

- “(7) In proceedings under section 8, 9, 10(1)(a), 11, 12, 13, 14, 18, 23 or 25 -
- (a) each of the spouses concerned shall give to the spouse and to, or to a person acting on behalf of, any dependent member of the family concerned, and
  - (b) any dependent member of the family concerned shall give to, or to a person acting on behalf of, any other such member and to each of the spouses concerned,
- such particulars of his or her property and income as may reasonably be required for the purposes of the proceedings.
- (8) Where a person fails or refuses to comply with subsection (7), the court, on the application to it in that behalf by a person having an interest in the matter, may direct the person to comply with that subsection.”

This enhances the discovery procedure to some extent, but it remains an inadequate mechanism.

5 See Consultation Paper, para. 7.50.

6 T. Fahey & M. Lyons, *Marital Breakdown and Family Law in Ireland - A Sociological Study* (1995, Oak Tree Press, Dublin, in association with the Economic and Social Research Institute, Table 4.8.

7 *Ibid.*

8 *Ibid.*, p.36.

9 *Ibid.*, p.32.



and the mother as to what is best for the child."<sup>10</sup>

10.11 Similar concerns are expressed in a recent paper published by the Coolock Community Law Centre entitled "Separate Representation for Children in Ireland". The authors note that in "private" custody cases, the child is often caught in the middle while the focus is on the parents' conduct:

"One of the recurring themes in family law access hearings, is the allegation, by one parent, that the custodial parent is interfering with access arrangements and/or actively encouraging the children not to go on access with the other parent."<sup>11</sup>

(i) *Reports*

10.12 In our Consultation Paper we dealt with the question of court-ordered reports when discussing the form of family proceedings. We suggested there that courts should be able to procure reports on any question affecting the welfare of a child in any proceeding where such welfare is relevant.<sup>12</sup> We note with satisfaction that section 47 of the *Family Law Act, 1995* now provides that the court may order the procurement of a written report on any question affecting the welfare of a party to the proceedings or any other person to whom they relate - in family law cases generally.<sup>13</sup> Section 38 of the Draft *Family Law (Divorce) Bill, 1995*<sup>14</sup> proposes to extend this power to proceedings for divorce.

10.13 Reports from independent experts serve a number of purposes. First, they will often meet the need for a child-centred brief before the court. Reports provide background information relevant to the determination of the child's welfare, and may contain recommendations by the reporting person. In addition, they may make the child's views known to the court; in that sense, reports and separate representation fulfil the same function to an extent. Second, reports can serve to indicate whether further steps (e.g. appointment of a legal representative or guardian *ad litem*) might be necessary and/or desirable to protect the child. In this way they can provide a filter mechanism to ensure that those more complex and costly steps are taken only where necessary and appropriate. Third, court-ordered reports diffuse the adversarial approach somewhat. Thus the child's interests are moved towards centre-stage, and are in less danger of being overlooked.

10.14 The authors of the paper "Separate Representation for Children in

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10 *Ibid.*, pp.135-6.

11 C. Corrigan & C. Forde, "Separate Representation for Children in Ireland" (1995, Coolock Community Law Centre, Dublin) at p.14.

12 Para. 7.50.

13 Statutory powers of this nature had previously been available in the context of applications under section 11 of the *Guardianship of Infants Act, 1964* (by virtue of section 40 of the *Judicial Separation and Family Law Reform Act, 1989*) and proceedings under the *Child Care Act, 1991* (by virtue of section 27 of that Act).

14 Cf. *The Right to Remarry. A Government Information Paper on the Divorce Referendum* (September 1985, Stationery Office, Dublin).

Ireland"<sup>15</sup> deny that expert witnesses (such as psychiatrists, psychologists or social workers) can perform the function of representing children. The reasons given are:

1. The position of such a witness is often complicated by a prior relationship with one or both parents. This perceived lack of objectivity can lead to ongoing difficulties.
2. In situations where the expert has had a prior involvement with the family on a therapeutic basis, his/her participation in the adversarial court process can itself severely damage the trust necessary for successful therapeutic intervention.
3. Such experts are trained in neither law nor advocacy.

We observe that the first and second of those reasons should not apply in the case of an expert appointed by the court.

10.15 It has been pointed out to us that, already, practitioners sometimes attempt to agree on a joint assessor to expedite the litigation process.<sup>16</sup> Further, we take note of a Practice Direction issued in September, 1993 by the acting President of the High Court headed "The use of medical reports and the reports of other expert witnesses in personal injury and other actions". Should counsel consider that attendance in court of an expert (e.g. a Welfare Consultant) is not necessary to explain or supplement that expert's report, a request should be made to the opposing side to admit in evidence the contents of such report without the need for oral testimony.

10.16 Under the *Family Law Act, 1995*, the costs of reports are to be paid by the parties to the proceedings, along such lines as the court decides. This provision, which has its genesis in section 40 of the *Judicial Separation and Family Law Reform Act, 1989* is far-reaching: not only may the court intervene in the presentation of the case, but the parties may have to pay the costs of the court-ordered assessment. We are aware that the cost of reports may be enormous, especially given that such professionals as psychiatrists, psychologists and accountants may be involved.

10.17 The role of the Probation and Welfare Service of the Department of Justice in providing an independent assessment service for the courts is discussed in Section C of this Chapter. That section contains our general recommendations concerning the essential features of a court-related family assessment service.

(ii) *Legal representation*

10.18 In our Consultation Paper we proposed that a child's representative

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<sup>15</sup> *Op. cit.*, f.n. 11.

<sup>16</sup> This practice could be further facilitated by pre-trial reviews. See Chapter 8 of this Report.

could be appointed in custody disputes and other family proceedings where the judge considers it necessary in the interests of the child. This proposal met with much approval, but most submissions in point emphasised that independent representation would be appropriate only in a small number of cases, especially in view of the added cost and complexity involved.

10.19 At present the law provides for the possibility of separate representation of children in the context of care proceedings.<sup>17</sup> One submission sought to explain why the provisions for independent representation and the guardian *ad litem* apply to care and not custody proceedings:

In both instances the court makes a determination as to the child's future welfare and thereby as to the future realisation of the child's constitutional rights. Nonetheless in care proceedings, the parents may be particularly protective of their own needs, vis-à-vis the Health Board; the option of institutional care is a drastic one; there is more cause for intrusive action; and the court goes beyond the regulation of family responsibility.

10.20 We would respond that there will, nevertheless, always be a certain number of private custody cases where the child needs additional protection in the form of representation. This follows from what McGuinness J. in a recent Circuit Court case termed "the well-established constitutional right of the child to have its welfare promoted and protected by the court",<sup>18</sup> a right which is strengthened and underlined by various statutes. The judiciary have a general power to shape procedure in order to give genuine content to children's constitutional rights; legislation is however needed to set up a clear and uniform system. Apart from the Constitution, the *United Nations Convention on the Rights of the Child*, which Ireland has signed and ratified, is relevant. Article 12 thereof is worth repeating here:

- "1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rule of national law."

10.21 The Draft European Convention on the Exercise of Children's Rights<sup>19</sup>

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17 Section 25(2) of the *Child Care Act, 1991*.

18 *L.(T.) v. L.(V.)*, *op. cit.*, f.n. 2.

19 Council of Europe, DIR/JUR(84)7, 10 November 1984.

contains the following propositions:

**"Article 3 - The right to be informed and to express his or her views in proceedings**

- 1 A child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted and shall be entitled to request the following rights:
  - a to receive all relevant information,
  - b to be consulted and express his or her views,
  - c to be informed of the possible consequences of his or her wishes and the possible consequences of any decision.
- 2 Parties shall consider extending the provisions of paragraph 1 to proceedings before other bodies.

**Article 4 - The right to apply for the appointment of a special representative**

1. Subject to Article 9, in proceedings before a judicial authority affecting a child where, by internal law, the holders of parental responsibilities are precluded from representing the child as a result of a conflict of interest between them and the child, that child shall have the right to apply in person or through other persons or bodies for a special representative in those proceedings.
- 2 States are free to limit the right in paragraph 1 to children who are considered by internal law to have sufficient understanding.
- 3 Parties shall consider extending the provisions of paragraph 1 to proceedings before other bodies and to matters affecting children which are not the subject of proceedings."

10.22 As the comparative survey in our Consultation Paper<sup>20</sup> showed, there are many possible models for separate representation. It is important that the role and powers of the independent representative be clear. The function of a representative is to provide information and advice to the child as to the possible consequences of his or her wishes and to put the wishes of the child before the court. However, there inevitably are problems associated with the representation

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20 Paras. 4.36-4.70.

of the wishes of the child. In custody proceedings, for example, it is usually in the child's interests (except perhaps in the case of an older child) to avoid a situation in which he or she is asked to express a preference for one parent or another. The task of eliciting a young child's wishes is a sensitive one which is not necessarily best achieved by the appointment of an independent representative. As a child becomes more mature the case for independent representation strengthens. The Court of Appeal in England has laid down guidelines concerning the ability of a child to instruct his or her own solicitor: the crucial test is not age, but level of understanding and competence to give instructions.<sup>21</sup>

10.23 One submission referred to the need for a Rule of Court and pre-trial procedure whereby the parties would indicate to the court whether separate representation would be desirable. Another suggestion was that there be a pre-trial hearing, or presentation of evidence on this issue in every case. We agree that, in many cases, separate representation will be unnecessary and inappropriate and argument on the matter would add pointless complexity to the proceedings. On the other hand there will be cases where separate representation is necessary and yet it will be in neither party's interest to suggest this to the court. We note in this regard that The Law Society of Ireland's *Code of Practice* states as follows:

"The Solicitor must keep in mind that the interests of the children do not necessarily coincide with the interests of either parent. In certain cases separate representation may be necessary in order to preserve the independent rights of the child. It is a matter which might be considered by the Solicitor and, if necessary, brought to the attention of the Court."<sup>22</sup>

10.24 Overall we are convinced that *the court should, of its own motion or upon application to it, have power to appoint an independent representative for a child whose welfare is in issue in family proceedings, where this appears to the court to be necessary in the interests of the child. Legislation should specify a list of non-exclusive factors which a judge should consider in deciding whether to appoint a representative. These factors might include the extent of hostility between the parents; whether there is a history of recurring resort to litigation; whether mental illness or disorder is relevant; whether child abuse is in issue.*<sup>23</sup>

10.25 A legal qualification does not necessarily imply suitability for interviewing children. However, *the role of legal representative is to advise the child and act as advocate for the child in court. He or she should have power to conduct cross-*

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21 *Re C.*, The Times, 1 March 1993.

22 *Family Law in Ireland. Code of Practice.* Issued by the Family Law and Legal Aid Committee of The Law Society of Ireland (1995), at para. 9.5.

23 These are some of the factors which, according to Lambert J. of the Australian Court, should cause the Court to seriously consider appointing a representative under section 65 of the *Family Law Act, 1975*: Paper delivered by Lambert J. at the Australasian Conference on Family Law, July 1980, cited in "Representation of Children in Family Law Proceedings", Report of the Family Law Council, June 1989.

*examination, to appeal a decision, to call witnesses, to request particulars and discovery, and to participate in settlement discussions.* The Law Society's *Code of Practice* gives only the following general advice on representing children:

"... the Solicitor should be aware that in acting for minors, special considerations apply and exceptional care must be taken by the Solicitor in the discharge of his retainer."<sup>24</sup>

10.26 Concern was expressed in submissions about the question of funding. Under the *Child Care Act, 1991*, the Health Board is obliged to pay the costs and expenses of separate representation, but it can then recoup the costs from the parties.<sup>25</sup> This leads us to reemphasise that our proposal envisages separate representation only where necessary and desirable. Apart from fiscal considerations, this limitation is important because the proliferation of parties and ensuing complexity and delay can itself be prejudicial to the child's interest.

(iii) *Guardians ad Litem*

10.27 In our Consultation Paper we invited comment on whether the provisions in section 26 of the *Child Care Act, 1991* should be extended to cover all proceedings where the welfare of a child is a consideration. We also invited comment on the role and method of selection of guardians *ad litem*.

10.28 Two submissions specifically suggested that a system of guardians *ad litem* would be preferable to a system of legal representatives. One of these submissions explained that:

- (a) emotional, psychological and social circumstances of a child are at the root of the issues to be addressed;
- (b) there is a need for a broad professional assessment, as opposed to simple advocacy of a child's wishes.<sup>26</sup>

The other pointed to the fact that guardians *ad litem* are specifically concerned with the child's welfare, and exclusively look after the child's needs.

10.29 Commentary on guardians *ad litem* in England indicates that their role differs from that of the welfare officer in several respects.<sup>27</sup> In England they are predominantly social workers. They are under a duty to ascertain the wishes and feelings of the child and present them to the court. They aim to build up trust with the child over a period of time. They seek to ascertain a child's wishes and feelings by the establishment of a relationship which enables the child to talk freely.

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<sup>24</sup> *Op. cit.*, f.n. 22, at para. 10.1.

<sup>25</sup> Section 25, sub-sections (4) and (5).

<sup>26</sup> These remarks were however confined to cases covered by the *Child Care Act, 1991*.

<sup>27</sup> S. Jones, "The ascertainable wishes and feelings of the child", (1992) Vol. 4(4) *Tolley's Journal of Child Law*, 181.

10.30 A recent publication of the Coolock Community Law Centre, entitled "Separate Representation for Children in Ireland,"<sup>28</sup> recommends the establishment of a Children's Legal Services Agency, with a panel of guardians *ad litem* (GsAL) under its auspices. The agency would function thus:

- (1) Whether or not there are existing proceedings, upon complaint/application by the public, it would appoint a GAL to investigate or take proceedings. (Decisions of the GAL at this initial stage would be subject to review by a panel).
- (2) Where proceedings *are* in existence, the court, upon application to it or of its own motion, could direct the Agency to appoint a GAL. Statutory criteria would oblige the judge to consider this possibility in certain circumstances.

10.31 The paper proposes that guardians *ad litem* should:

- (i) be independent of the Health Boards, the parents/guardians of the child, and any other agency in prior contact. Hence a small number of full-time GsAL are envisaged. The Agency would be attached to the D.O.J. or A.G.'s Office.
- (ii) be easily accessible.
- (iii) have, as well as some legal knowledge, training in child care and development.
- (iv) have access to legal advice and power to instruct solicitor and counsel. (The authors envisage that the GAL would instruct a legal team whenever s/he became involved in proceedings).
- (v) have access to information relevant to the child.
- (vi) have full party status. (The child would also be joined.)

10.32 The authors envisage the role of the GAL as follows. The GAL must ensure that the court is fully informed of facts relevant to the welfare of the child:

"It is submitted that the GAL must act in the interests of the welfare of the child but, where the wishes of the child are in conflict with what the GAL considers to be in the best interests of the welfare of the child, then the GAL must inform the court of the child's wishes and ensure that the child's feelings are made clear to the court."<sup>29</sup>

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<sup>28</sup> *Op. cit.*, f.n. 11.  
<sup>29</sup> *Ibid.*, p.31.

The GAL would decide :

- (a) whether the child can *directly* instruct a solicitor,
- (b) whether there is a conflict between the child's wishes and best interests,
- (c) whether certain reports should be obtained.

10.33 We consider that this proposed model is too complex. Bureaucratic complexity would only exacerbate delays which often hurt the child most of all. For example, many decisions of the GAL would be reviewable by a panel; the Agency, rather than the court directly, would appoint the GAL; and the GAL, if s/he became involved in proceedings, would then instruct a legal team. Furthermore, we consider that the proposed relationship between the scheme of guardians *ad litem* and that of legal representation for children is too complicated: the GAL would be charged with deciding whether the child could directly instruct a solicitor. We consider it unnecessary that a panel of guardians *ad litem* would have such a "filter" role, or overlap significantly with the system of legal representation for children.

10.34 Having carefully considered the matter, *we recommend that the court should have the power, in any proceedings which affect a child (i.e. not just care proceedings), to appoint a guardian ad litem where the court is satisfied that it is in the interests of the child and in the interests of justice to do so.* The need for a guardian *ad litem* could arise in several types of case. First, a court might be anxious to ascertain the child's preferences in a case where, although the child was not mature enough to instruct a solicitor directly, important evidence could be introduced by a social worker who could gradually gain the child's confidence. Second, and more usually, there might be need for an in-depth background report over and above that envisaged in section 47 of the *Family Law Act, 1995*. The role of a guardian *ad litem* in such a case could be compared to that of an *amicus curiae*. Thus a guardian *ad litem* is not a substitute for a legal representative, but should be an option where the court considers that something more than the standard social report is required for its adjudication. *An independent panel of social workers should be established, from which the court may appoint guardians ad litem.*

(iv) *Direct interviews*

10.35 Finally, we note that in some cases the best approach will be for a judge to interview a child in chambers, and we acknowledge that this is a practice which is sometimes used in this jurisdiction. In Denmark, Finland, the Netherlands and Norway, the judge must hear the views of a child over 12 years who is the subject of custody proceedings. In Iceland, the judge hears the views of a child over 12 years unless that would be detrimental to the child or unnecessary, and the judge may decide to hear the views of a child under 12 years depending on the maturity of the child. In Austria, the judge hears the



views of a child over 10 years.<sup>30</sup>

### ***The Probation And Welfare Service***

10.36 Several submissions praised the work done by the service. Its report service was described as brilliant; its officers were praised for their impartiality and professionalism. At the same time, submissions lamented that it was underresourced, leading in turn to unacceptable delays. As one submission pointed out:

"It is ironic that we are moving ahead into new areas of social legislation, without yet resourcing what's already on the statute book."<sup>31</sup>

10.37 The work of the Probation and Welfare Service is described in the Consultation Paper at paragraphs 5.06-5.11.

It was submitted to us that, where cases do come to court, the Service has a major conciliatory role to play, in identifying common ground between the parties and thereby reducing conflict. It is understandable, in the absence of adequate alternative family services, that the Probation and Welfare Service should have developed this role. However, we remain concerned about the potential for role confusion, and even conflicts of interest, where an official appointed to prepare a report for the court engages in therapeutic or conciliatory work. We would re-emphasise that, *where an expert is requested by the court to make a family assessment, it should be clearly understood by all parties that formulating a report and recommendations to the court is the primary role of that expert.*<sup>32</sup>

10.38 The family assessment work of the Service has been given some statutory recognition in the *Family Law Act, 1995*. Under section 47 thereof the court may order a report on the welfare of a child from, *inter alia*, such probation officer as the Minister for Justice may nominate. We agree with the submission made to us that reports from Probation and Welfare officers are important in helping to produce a more child-centred approach. They fill an important gap which cannot be supplied by child psychiatrists alone. Sometimes what the court needs to know are simple, mundane matters, the significance of which is clear to the officers. Clearly a major advantage is that they observe the family in the home setting. One submission explained that assessments focus on:

- (i) the present relationships,
- (ii) the welfare of the children - as told by the children themselves and with reference to collaterals (e.g. teachers, relatives),

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30 See Sheridan & Cameron, *EC Legal Systems: An Introductory Guide* (1992, Butterworths) and Sheridan & Cameron, *EFTA Legal Systems: An Introductory Guide* (1993, Butterworths).

31 See also "Social workers say resources are lacking for reports on children", *The Irish Times*, 16 November 1995, at p.7. See also T. Fahey & M. Lyons, *op. cit.*, f.n. 6, in which it is noted that solicitors often complain of how difficult it is to secure profiles or assessments from the social services, even in traumatic cases where they might be a basic requirement (at p.135).

32 See Consultation Paper, para. 7.55.

- (iii) referral for specialist help when appropriate,
- (iv) recommendations to court, particularly in custody and access matters,
- (v) organisation and monitoring of access, arrangements where necessary.

10.39 The most recent Annual Report of the Probation and Welfare Service indicates that over the past five years, Service involvement in family law matters increased to a peak of 471 cases in 1990, then fell to 364 cases in 1992 (similar to the 1988 level).<sup>33</sup> Well over half of such reports in 1992 were made in cases involving applications for guardianship, custody or access; over a third related to applications for a barring order; and a small minority concerned maintenance applications.<sup>34</sup>

10.40 One submission stated that it was inappropriate that the service, which has a predominantly criminal justice ethos, should be involved in civil family law matters. It was suggested in that submission that the non-criminal family law work of the Service be transferred to a new, professional "umbrella" agency, a Family Court Advice Centre providing "in-court" services.<sup>35</sup> Another suggestion made was to expand the family division of the Service, giving it a measure of independence and providing it with adequate full-time personnel. We note that in England there is an increasing tendency for welfare officers to specialise within the probation and welfare service into teams, but this practice is not uniform country-wide.<sup>36</sup> It is not for us to comment in detail on the development or restructuring of the service. We acknowledge however its expertise to date, particularly in providing family assessments. It would seem sensible to channel such expertise into the system of reorganised support services which we envisage.

10.41 We confirm our provisional suggestions concerning the general principles which should inform any restructuring of court assessment services.

- (a) *The service should be readily available to every court which has jurisdiction to determine issues of child custody or access.*
- (b) *The service should be adequately staffed and resourced so as to avoid unnecessary delays; time is of the essence in cases concerning children.*
- (c) *The persons providing the service to the courts should have appropriate training and should operate within an appropriate professional supporting structure.*

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33 Probation and Welfare Service, *Annual Report 1992*, at p.13.

34 *Ibid.*, p.56.

35 See para. 7.06 *et seq.*

36 *Op. cit.*, 1.n. 11.

### *The Privacy Of Family Proceedings*

10.42 In our Consultation Paper we recognised that:

"[f]amily law cases are as a class different from other cases in that they frequently involve detailed discussion of personal and usually private relationships at a time when the parties concerned may be feeling hurt and vulnerable." (Para 7.43)

10.43 We reaffirm the importance of the right of privacy in this context. There are, of course, several interests which militate against it. Those mentioned in the Consultation Paper were the need for openness as a check on the judicial process, the need for public awareness of the deficiencies of the family law system, and the danger that false rumours about the legal process would undermine public confidence in the administration of justice. In addition it was pointed out in a submission to us that public knowledge - or lack of public knowledge - about family courts was important in the development of new policy.<sup>37</sup>

(i) *Access to hearings*

10.44 We took the view in our Consultation Paper that the present rules limiting access to family proceedings are too stringent. We therefore provisionally recommended a change that would make possible some minimal scrutiny for research purposes while yet respecting the privacy of the parties. This proposal was welcomed and met with no express dissent. We therefore confirm our provisional recommendation that *bona fide researchers and students of family law should be permitted to attend family proceedings*. This recommendation is of particular importance having regard to our recommendations concerning empirical research contained in Chapter 13.<sup>38</sup> In the light of these recommendations we further recommend *that access by a bona fide researcher to family proceedings should not be refused by a judge except on the basis of compelling and stated reasons. The attendance of students of family law should be at the discretion of the judge.*

10.45 We invited observations on a proposal in respect of an independent monitor who would gather statistics and report publicly on the functioning of family courts. A few submissions questioned whether the right balance was struck here. One submission suggested the appointment of such a representative by the press. Our provisional recommendation was that an independent person or persons, nominated by the Family Lawyers' Association and approved by the President of the Circuit Court, be permitted access to family court proceedings. Such person(s) would present statistics and outline trends in periodic reports to the public, and would be subject to the reporting restrictions set out below. We believe that this provisional recommendation is overtaken by the more specific recommendation which we have made in Chapter 13 concerning the

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37 See below, para. 12.04.

38 See para. 12.16 *et seq.*

establishment of a more comprehensive family law data base, and the development and funding of research. .

(ii) *Publication of details*

10.46 We provisionally proposed a general prohibition, applicable to family cases, on the publication of information about family cases tending to identify parties or their families. We point out here that this would change the present law in two main respects. In reports designated for the legal or medical professions, the current practice of deleting distinguishing features would be given a legal foundation. As for other publications, names of parties etc. could no longer be included, as is now permitted under section 14(2) of the *Censorship of Publications Act, 1929*. We have been careful to phrase our proposal in general terms so that it is appropriate for this jurisdiction. In a small country like Ireland, all it takes is a few details regarding occupation, residence, date of marriage and so on, in order to render the parties identifiable. *We therefore confirm our provisional recommendation that there should be a general principle, applying to all family proceedings, prohibiting the publication of information which tends to identify the parties and members of their families.*

10.47 One concern expressed at our Seminar was that a lack of knowledge of family cases has resulted in a dwindling jurisprudence in this area. In reply we would emphasise the crucial distinction between the evidence in, and the result of, a case. As stated in one submission, more written judgments, more reported judgments and more judicial conferences should compensate for the dwindling jurisprudence. At present for example there is no formal mechanism for reporting the decisions of the Circuit Court despite its important jurisdiction in family law. *We accordingly recommend that court staff be enabled to record more judgments in family cases and thereby make available more transcripts of final reports.* Judicial conferences are considered in Chapter 12 of this Report.

***The Physical Conditions***

10.48 Various commentators noted that the physical conditions of many courtrooms were appalling. However it was also stated that improvements should not take from the solemnity of proceedings. A certain formality was considered essential for the dignity of the court. For example, the position of the judge's bench should help to convey the judge's authority over the dispute.

10.49 We reiterate our praise for the model facilities in Dolphin House in Dublin and we commend the work that has been done in Cork to provide a new locus for the District Court by restoring an old building. Regrettably, a stark contrast is provided by the conditions of many other courtrooms around the country. A decent respect for the parties means that family courts should at least have facilities such as a waiting room and a telephone in the vicinity.

## CHAPTER 11: LEGAL EDUCATION AND JUDICIAL STUDIES

11.01 In Chapter 6 of our Consultation Paper we noted two common observations about the family law system:

- (a) that each group of professionals involved in family law operates within its own context with little knowledge or understanding of the work of the other professionals and
- (b) that persons becoming involved in family law should be suited to do so by reason of their personality and experience.<sup>1</sup>

### *Judicial Studies*

11.02 In Chapter 6 of our Consultation Paper we surveyed a range of jurisdictions all of which have some sort of judicial training programme in operation. We provisionally recommended that measures be taken expeditiously to enable the judiciary to organise judicial studies on a systematic basis. This met with widespread approval from judges and other commentators. One submission noted as follows:

"In particular, when major new family law legislation is being introduced, or where the Circuit Court jurisdiction is being extended in a major way, judges would gain from having additional information, discussions and communication."

11.03 As we observed in our Consultation Paper, updating knowledge of legislation and case-law is not the only objective of judicial education. We

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<sup>1</sup> Consultation Paper, para. 6.01.

reemphasise the importance of an interdisciplinary element. This would help the judiciary:

- (a) to understand the complex area of family disputes within an holistic framework and
- (b) to understand the approach and perspective of various professional groups and in turn to better evaluate their evidence.

Similarly, a training programme could eliminate another problem which has been brought to our attention, *viz.*, the fact that many judges do not seem to appreciate the taxation implications of the orders which they are empowered to make.

Further, instruction on effective case management should be included in any judicial training programme, as recommended in Chapter 8.<sup>2</sup>

11.04 The Judicial Studies Board in England, for example, has organised "travelling" seminars, whereby training is given by teams of academic lawyers, child psychiatrists, paediatricians, directors of social services and court welfare officers. In the words of Lord Mackay, this multi-disciplinary aspect represents "a major contribution to the lessening of island philosophies".<sup>3</sup>

11.05 In Ireland some members of the judiciary have made efforts to organise seminars etc. What they need now is a formal structure and the necessary resources in order to perform this task systematically. Submissions emphasised that judicial training would have to be organised under the principal aegis of the judiciary in order to preserve judicial independence. We welcome section 48 of the *Courts and Court Officers Act, 1995* which gives the Minister for Justice power, subject to the consent of the Minister for Finance, to provide funds for the training and education of judges. In addition section 19 of that Act provides:

"A person who wishes to be considered for appointment to judicial office shall undertake in writing to the [Judicial Appointments Advisory] Board his or her agreement, if appointed to judicial office, to take such course or courses of training or education, or both, as may be required by the Chief Justice or President of the court to which that person is appointed."

11.06 We confirm our provisional recommendations as follows:

*Measures should be taken as a matter of urgency to enable the judiciary to organise judicial studies on a systematic basis.*<sup>4</sup>

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2 See above, para. 8.54, recommendation 6.  
3 Extracts from speech by Lord Mackay L.C., [1991] N.L.J. 570.  
4 Consultation Paper, para. 7.58.

*We would envisage the key elements in the organisation of judicial studies to be the following:*

- (a) *Management by a Board, chaired by the Chief Justice (or nominee) and comprising a majority of judges.*
- (b) *Adequate funding on the basis of an annual budget.*
- (c) *Proper administrative and logistical support.*<sup>5</sup>

### ***Family Lawyers***

11.07 We invited comment on the possibility of special training and certification as a pre-requisite for family law practice. Several participants at our Seminar supported the notion of a mandatory training and accreditation system for practitioners of family law. One submission argued that certification of family practitioners is necessary if we are to expect any improvement in the present situation which is characterised by wide variations in aptitude and skill.

11.08 On the other hand strong opposition to an accreditation scheme was also voiced. Some commentators doubted the feasibility of compulsory training. The realities of private practice in Ireland are that in many parts of the country the lone practitioner cannot afford to concentrate on one branch of the law. Besides, courses might not be accessible to rural solicitors, although "distant learning techniques" could be employed. Other commentators cast doubt on the very goal of specialisation itself. It was suggested to us that it would represent:

"a dangerous development restrictive of the steady and stable [evolution] of legal principles of family law in the context of the legal system as a whole."

11.09 Some considered it anomalous to require extra qualifications only for family law practice. Others said that if there were any form of certification, it should depend on quality of practice as opposed to attendance at training sessions. An alternative approach mooted was to encourage all practitioners to be conscientious, and to provide a Code of Conduct for their guidance.<sup>6</sup>

11.10 Nevertheless there was overall agreement as to the importance of continuing education and the need for special skills and expertise in family law practice. Again we would emphasise the importance of interdisciplinary studies. These are essential if the practitioner is to form a comprehensive understanding of the dynamics of marital breakdown. They are also essential if the welfare of the child is to be safeguarded:

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<sup>5</sup> *Ibid.*, para. 7.59.

<sup>6</sup> These comments were made prior to the publication by The Law Society of Ireland of its Code of Practice: *Family Law in Ireland. Code of Practice*. Issued by the Family Law and Legal Aid Committee of The Law Society of Ireland (1995).

"to evaluate a child's physical, emotional and educational needs, the effect on him of change, or any harm he may have suffered or is at risk of suffering - these are complex questions, as complex as life itself. No one profession can provide the answer to all of them but by working in partnership, a better answer for the child may emerge upon which the court may then act."<sup>7</sup>

11.11 Our preference is for a scheme of voluntary participation in continuing education.

We therefore reaffirm the following provisional recommendation:

*Courses of professional legal education should address the special features of family law practice so that future practitioners should, as a minimum, become aware of the need for special skills and expertise. Specialist courses should be made available to practising lawyers, perhaps under the aegis of the professional bodies and the Family Lawyers' Association, in conjunction with appropriate third level institutions, offering training in the special skills and expertise appropriate in family law practice. Such courses should be inter-disciplinary, involving inputs from areas such as psychiatry, psychology, sociology, and social work. Heightening awareness of alternative methods of dispute resolution would be one purpose of such courses. Up-dating courses should be available for those already practising in family law.*

11.12 We note with satisfaction that a *Code of Practice* for family law in Ireland has recently been issued by The Law Society,<sup>8</sup> the introduction to which states:

"The practice of family law requires a special approach and the development of skills which enable the practitioner to assist the parties to reach a constructive settlement of their differences and places the welfare of children as a first priority."

11.13 Finally, with regard to training for both judges and practitioners, one commentator felt that our Consultation Paper was:

"perhaps unduly uncritical in dealing with this area and did not refer to the many complaints (justified or unjustified) about, for example, the lack of consistency by the judiciary in the application of family law, and the equal lack of consistency by lawyers representing family law clients, some of whom adopt a conciliatory approach while others adopt a very adversarial approach."<sup>9</sup>

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7 Lord Mackay, *op. cit.*, f.n. 3.

8 *Op. cit.*, f.n. 6.

9 B. Gallagher, 'L.R.C. Consultation Paper on Family Courts - A Practitioner Responds', *Law Society of Ireland Gazette*, October 1994, p.302 at p.303.



We respond as follows. Consistency among the judiciary will be advanced if, as recommended, the judiciary are enabled to organise conferences for and among themselves, and when more of their judgments are recorded.<sup>10</sup> As for lawyers, the new *Code of Practice*<sup>11</sup> as well as greater opportunities for continuing education should remove many grounds for complaint.

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<sup>10</sup> See Recommendations 62 and 63 in Chapter 13.

<sup>11</sup> *Op. cit.*, l.n. 6. The Code aims to set the tone of professional standards and states: "The underlying approach and attitude embodied in the Code is to encourage a conciliatory approach." (Conclusion, para. 1 at p.8).

## CHAPTER 12: RESEARCH AND STATISTICS

### *Policy-Making And The Need For Research*

12.01 The dearth of empirical data relating to the operation of the courts system in Ireland and, in particular, relating to the operation of the family law system has been mentioned in a number of the foregoing chapters.<sup>1</sup>

12.02 The information which can be gleaned from properly conducted research "can perform an important role in family policy by determining whether social action is needed, either by identifying social problems or by refuting contentions that a problem exists."<sup>2</sup> Research can "build the capability to address human problems ... [by generating] knowledge that has clear implications for action to advance family policy ..."<sup>3</sup> Such knowledge can "help towards an assessment of what it is realistic and what it is unrealistic to expect the law to achieve within the context of contemporary family life."<sup>4</sup>

12.03 The lack of any independent Irish empirical research on most aspects of the operation of our legal system is a serious flaw in the policy-making process. Similarly, although the Department of Justice collates statistics in respect of court business,<sup>5</sup> there are gaps in the information which render a comprehensive appraisal of the situation impossible. As a result, policy is formulated in what can only be described as a partial vacuum, and resources are allocated on this

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1 Note that the Commission is aware that there are a limited number of research studies into the operation of the family law system (e.g. P. Ward, *The Financial Consequences of Marital Breakdown* (1990, Combat Poverty Agency, Dublin); T. Fahey and M. Lyons, *Marital Breakdown and Family Law in Ireland - A Sociological Study* (1995, Oak Tree Press, Dublin, in association with the Economic and Social Research Institute). More generally, in the context of family policy, we note the establishment by the Minister for Social Welfare of a Commission on the Family, which has been charged with the preparation of a Report for Government by June 1997.

2 K. Bogenschneider (1995) 'Roles for Professionals in Building Family Policy', 44 *Family Relations* 5.

3 C. Pratt (1995) 'Family Professionals and Family Policy', 44 *Family Relations* 56 at p.59.

4 W. Duncan, 'Family Law and Social Policy' in W. Duncan (ed.) *Law and Social Policy. Some Current Problems in Irish Law* (1987, Dublin University Law Journal, Trinity College, Dublin), Chapter 9 at p.126.

5 See the annual *Statistical Abstracts* published by the Central Statistics Office, Dublin.

basis:

"Rational legal policy making ... requires knowledge of how laws are operating in practice, whether they are achieving their intended objectives and what unexpected side effects they have produced.

...

Absence of information about the operation of family laws gives rise to a series of problems of policy making. First and foremost there is the danger that policy making will proceed on the basis of assumptions or hunches about the efficacy of existing laws."<sup>6</sup>

12.04 In addition to the impact of this lack of data on the policy-making process, the lack of public awareness of the volume of family law work processed by the courts was identified in one reaction to the Consultation Paper. In the context of the Commission's provisional recommendation on publicity<sup>7</sup>, it was noted in the latter submission that:

"[t]his lack of knowledge can be very influential in the creation of new policy and new law .... Some degree of publication could have the desirable effect of raising public consciousness of the problem - as it has in the case of rape and sexual abuse. It might also be argued that if we are to achieve public and political acceptance of the need to spend taxpayers' money on better resources for family law courts we must show the public why these resources are needed."

12.05 In another submission, it was claimed that "[t]he present system in place for the collection of statistics on family proceedings, even allowing for recent improvements, is grossly inadequate." In the same contribution, the writer argued for an increase in resources "to ensure that the collection of data is seen as a crucial part of the court's work rather than a time-consuming irritant." The collection of detailed statistics should, in the writer's opinion, "form an integral element of the administration of family litigation" and should "come to be accepted as part of the normal administrative workload."

12.06 It is essential that the gathering, collation and interpretation of statistics and the conducting of empirical research into very many aspects of the Irish family law system is accorded the appropriate priority. In the words of one commentator, "Ireland has reached the stage where she can no longer afford to lumber on formulating legal policy with one hand tied behind her back."<sup>8</sup>

12.07 In an article on alternative dispute resolution, the authors Teitelbaum and DuPaix stress the experimental nature of law reform, arguing that in

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6 W. Duncan (1987), *op. cit.*, f.n. 4 at p.130.  
7 See Consultation Paper, paras. 7.45 & 7.46.  
8 W. Duncan (1987), *op. cit.*, f.n. 4 at p.131.

response to recurrent problems in the administration of family litigation, proposals for the introduction of a potentially far-reaching programme are often not regarded as experimental. As a result, "the meaning and implications of reform are obscured rather than made the centre of attention. This strategy leaves us unable to adequately assess what we have undertaken."<sup>9</sup> They maintain that "it is far from clear that any one procedural strategy will successfully resolve the problems inherent in family disputes."<sup>10</sup>

12.08 It is therefore imperative that procedural initiatives, such as those recommended in this Report, are introduced in an attempt to find a combination of measures which effectively address these problems. Accordingly, there is a need for a well-researched Irish database which will provide information enabling policy-makers and others to identify with accuracy *all* the problem areas within the existing system. Such information will also make possible the continual monitoring and assessment of the efficacy of any new initiatives such as those proposed here. Attempts to address the recurrent problems in the resolution of family conflicts can then be evaluated, and any necessary amendments or additions can be introduced.

12.09 More importantly, the continuation or otherwise of these initiatives can be decided upon the basis of sound empirical data. Teitelbaum and DuPaix remark that it cannot be assumed that "some relatively simple procedural solution to the economic and social consequences of [marital breakdown] waits only to be recognized"<sup>11</sup> but, rather, the implications of any experiment need to be evaluated "from a variety of perspectives and with as much clarity and imagination as we can muster."<sup>12</sup> In the words of Professor Campbell,<sup>13</sup> a responsible society should try out proposed solutions to recurrent problems, make "multi-dimensional evaluations of the outcomes, and where the remedial effort seems ineffective, [go] on to other possible solutions."<sup>14</sup>

#### *Areas In Which Research Could Prove Useful*

12.10 In the preceding Chapters, issues relating to the operation of the family law system which could benefit from further research have been identified, e.g. certain aspects of the mediation process, the effectiveness of existing family law provisions and remedies, issues relating to the enforcement of court orders and options for more effective methods of enforcement (with identification of the orders most often breached etc.), and issues relating to the organisation of the courts system and litigation process. In relation to the latter, we have recommended in Chapter 8 that a new system of case management should be

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9 L.E. Teitelbaum & L. DuPaix (1988) "Alternative Dispute Resolution and Divorce: Natural Experimentation in Family Law", 40 *Rutgers Law Review* 1093 at p.1129.

10 *Ibid.*, at p.1130.

11 *Ibid.*, at p.1132.

12 *Ibid.*

13 D. Campbell, *Application for a Grant to Support Research on Methods for the Experimenting Society*, submitted to the Russell Sage Foundation, 1970, quoted in Teitelbaum & DuPaix, *ibid.*, at p.1129.

14 *Ibid.*

considered by the Courts' Rules Committees,<sup>15</sup> and have suggested that a pilot scheme should be introduced with constant monitoring and evaluation of new procedures.

12.11 Assessment and evaluation studies would also prove useful in relation to current professional and court practices from the *litigants'* perspective, and the impact of such practices on litigants and on the public perception of the operation of the courts system.

12.12 In the context of mediation, there is no Irish information on the extent to which mediated agreements are complied with here.<sup>16</sup> Neither is there any empirical data on the long-term effectiveness of such agreements, or on the aspects of agreements which are particularly vulnerable to collapse. Further information is required on privately ordered, non-litigated settlements - in particular, the number of such settlements negotiated and entered into in Ireland, the nature of the issues agreed upon, and the extent to which such agreements are effective.

12.13 There is also a pressing need for research into the manner in which the courts exercise the very considerable discretion which they enjoy in several areas of family law. One example is that of financial provision and property disposition under the *Judicial Separation and Family Law Reform Act, 1989* (and now the *Family Law Act, 1995*). Another is the broad jurisdiction in respect of children given under section 11 of the *Guardianship of Infants Act*.

12.14 The research undertaken in these areas should be interdisciplinary, where appropriate. Furthermore, results should be made readily available and should be communicated in easily understood language.<sup>17</sup>

12.15 Finally, it is critical that decision-makers recognise the importance of empirical research and evaluation studies. It is not uncommon for such material to be ignored at policy making levels.<sup>18</sup> A modification of this mindset is essential. One of the main reasons for the absence of such research and studies is lack of funding. Again, a change of perception is required so that funding for such projects is regarded as a worthwhile and necessary investment in future policy.

### **Recommendations**

12.16 We wish to stress the necessity of research and of accurate statistical and other empirical data as a basis for rational policy making. The commissioning

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15 See above, para. 8.54.

16 There are, however, a number of U.S. studies on the point: see above, f.n. 9 & f.n. 10 in Chapter 9.

17 F.I. Nye & G. McDonald (1979) 'Family Policy Research: Emergent Models and Some Theoretical Issues', 41 *Journal of Marriage and the Family* 473 at p.483.

18 According to C. Pratt (1995), *op. cit.*, f.n. 3, '[t]he under-utilisation of research and evaluation information in policy making has been recognised for well over a decade' (at p.81). See also R. Rich, *Translating Evaluation into Policy* (1979, Sage, Thousand Oaks, CA.).

of research and the collation of data must be regarded as a priority and must be properly resourced.

12.17 *A comprehensive national statistical data-base in relation to family law cases is essential and we recommend that such a data-base should be established. This data-base should contain far more detailed information concerning the cases processed by the courts than is currently available. In compiling this data-base, and in addition to the information currently recorded, account should be taken of, inter alia, multiple applications, any history of litigation by the family, the assets and income level of the family (to enable a determination of how the family assets were divided by the court), as well as issues relating to enforcement of court orders.*<sup>19</sup>

12.18 The effective implementation of this proposal will require an increase in resources to provide for additional court officers as well as increased computerisation in the courts' administrative system generally.

We draw attention to the recommendation made in Chapter 8<sup>20</sup> for the establishment of a new Office of the Regional Family Court, with responsibility, *inter alia*, for the collation of the statistical information gathered.

12.19 *We recommend that increased funding be made available for empirical research into the Irish family law system. The research should be conducted independently.* The Law Reform Commission should itself play a role in helping to set an agenda for research, in commissioning research in certain areas, and in examining the implications of research findings for legal policy. Other bodies, such as the Economic and social Research Institute, and relevant University Departments, would have key roles to play. The Family Lawyers' Association should also have a consultative role.

12.20 In the context of the need for monitoring of and research into new procedures, *we also recommend the "piloting" of some initiatives.* For example, we have suggested that the system of pre-trial review of cases recommended in Chapter 8 should be tested and any pilot project should be adequately resourced to facilitate proper evaluation of its effectiveness.<sup>21</sup>

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19 See P. Ward, *op. cit.*, f.n. 1.

20 See above, para. 8.54.

21 *Ibid.*

## CHAPTER 13: SUMMARY OF RECOMMENDATIONS

### ***A Reformed Family Courts Structure***

1. *There should be established a system of Regional Family Courts located in approximately fifteen regional centres. The Regional Family Courts should operate as a division of the Circuit Court and in the context of a full range of family support, information and advice services. The Regional Family Courts should have a unified family law jurisdiction, wider than that of the present Circuit Family Court. The Regional Family Courts should be presided over by judges nominated to serve for a period of at least one year and assigned on the basis of their suitability to deal with family law matters.*

*In the event of a more radical restructuring of the courts, especially if based on a single-tier first instance jurisdiction below that of the High Court, we would recommend that the Regional Family Court should operate as a division of that Court. This would be the Commission's preferred option.*

### ***Number And Locations Of Regional Family Court Centres***

2. *In deciding on the precise number and locations of Regional Family Court Centres it will be necessary to take account of population density, geographical accessibility, as well as current levels of family law business. Proximity to relevant services, such as legal aid and advice, mediation and welfare services, will also be relevant.*

*Family Court Judges should be permitted to make use of other suitable venues apart from the Regional Centres where considerations of accessibility make this appropriate.*

***The Unified Jurisdiction***

3. *The Regional Family Court should have jurisdiction in the following matters:*

- (a) *Legal separation and ancillary relief under the Judicial Separation and Family Law Reform Act, 1989;*
- (b) *Child custody, access and other guardianship matters under the Guardianship of Infants Act, 1964;*
- (c) *Maintenance proceedings (without upper limits on awards) under the Family Law (Maintenance of Spouses and Children) Act, 1976;*
- (d) *Proceedings under the Maintenance Act, 1994;*
- (e) *Proceedings for safety orders (without limit of time), barring orders (without limit of time) and interim barring and protection orders under the Domestic Violence Act, 1996;*
- (f) *Proceedings under the Marriage Act, 1972;*
- (g) *Proceedings for matrimonial injunctions;*
- (h) *Proceedings under the Family Home Protection Act, 1976;*
- (i) *Proceedings under the Married Women's Status Act, 1957;*
- (j) *Proceedings under the Succession Act, 1965;*
- (k) *Proceedings (between family members) under the Partition Acts, 1868 to 1876;*
- (l) *Wardship proceedings;*
- (m) *Proceedings under the Legitimacy Declaration (Ireland) Act, 1868;*
- (n) *Proceedings under Part VI of the Status of Children Act, 1987;*
- (o) *Nullity proceedings together with ancillary relief;*
- (p) *Proceedings under section 3 of the Adoption Act, 1974, section 3 of the Adoption Act, 1988 and section 7 of the Adoption Act, 1991;*
- (q) *Proceedings under the Child Care Act, 1991 and the School Attendance Acts, 1926 to 1967;*



- (r) *Proceedings under the Child Abduction and Enforcement of Custody Orders Act, 1991;*
  - (s) *Proceedings under divorce legislation, if divorce is introduced.*
4. *The jurisdiction of the Regional Family Court should be comprehensive and include all emergency remedies, including emergency care proceedings under the Child Care Act, 1991 and the emergency relief provided by the Domestic Violence Act, 1996. This is without prejudice to any parallel jurisdiction in the District Court.*
  5. *If the system of Regional Family Courts is to operate successfully, the following are absolute prerequisites:*
    - (1) *there must be a sufficient number of Regional Family Courts and outlying venues to ensure a reasonable degree of geographical accessibility,*
    - (2) *there must be a sufficient number of judges assigned to the Regional Family Courts to cope with the major expansion of business which our proposals imply,*
    - (3) *provision will need to be made to ensure that adequate free legal aid and advice is available to those requiring such services,*
    - (4) *the Information Centres attached to the courts must be properly resourced,*
    - (5) *the administrative support structures for the Regional Family Courts (proposed in Chapter 8) must be properly resourced,*
    - (6) *application procedures must be simple and as expeditious as the nature of the case demands.*

*In short our recommendations are conditional upon the provision of the substantial additional resourcing necessary to support the establishment of a high quality and accessible family courts service.*

6. *A special scheme of costs should be devised for the new Regional Family Courts which would reflect the wide range of procedures included in its unified jurisdiction.*

#### ***The District Court***

7. *The jurisdiction of the District Court in family law matters should be limited to the making of emergency orders and interim orders especially in situations of emergency. In all of these matters the jurisdiction of the District Court would be parallel with the jurisdiction of the Regional*

*Family Court. What is envisaged is a system whereby all substantive decisions having long-term effect would be reserved to the Regional Family Court. Any extension of an interim order would be determined in the Regional Family Court.*

8. *The District Court's jurisdiction should include the following matters in particular:*
  - (a) *Jurisdiction to make a protection order under the Domestic Violence Act, 1996, where an application is made to the Regional Family Court for a barring or a safety order, and terminating with the decision in respect of such application, and jurisdiction to make an interim barring order under the same Act, where an application is made to the Regional Family Court for a barring order, and terminating with the decision in respect of such application.*
  - (b) *Jurisdiction to make an emergency care order under the Child Care Act, 1991, to make an interim care order under the Child Care Act, 1991, provided that an application for a care order has been or is about to be made to the Regional Family Court.*
  - (c) *Jurisdiction to make an interim order under section 11 of the Guardianship of Infants Act, 1964, ancillary to a protection or interim barring order, or in other situations of emergency, provided that an application for such order has been made to the Regional Family Court, and terminating with the decision in respect of such application.*
  - (d) *Jurisdiction to make an interim maintenance order under the Family Law (Maintenance of Spouses and Children) Act, 1976, ancillary to a protection or interim barring order, or in other situations of emergency, provided that an application for a maintenance order has been made to the Regional Family Court and terminating with the decision in respect of such application.*
  - (e) *Jurisdiction to make an order under section 9 of the Family Home Protection Act, 1976, subject to existing limits on the value of the chattels in question.*
9. *Where application for interim or emergency reliefs is made to the District Court, the procedure should be simple, involving the minimum necessary formality, and composite in the sense of automatically triggering proceedings in the Regional Family Court.*

***Judicial Appointments To The Regional Family Court***

10. *The Regional Family Courts should be presided over by specially assigned*

*Circuit Judges. The overall number of Circuit Judges will need to be further augmented in response to the increase in the Court's family law jurisdiction.*

11. *District Judges with expertise and experience in family law cases should be considered for promotion to the Circuit Court, with a view to their assignment to the Regional Family Court.*
12. *Further consideration should be given to the general question of temporary judicial appointments.*

***Suitability For Assignment To The Regional Family Courts***

13. *Only those judges should be assigned to preside over the Regional Family Courts who, by reason of training, experience and personality, are suitable persons to deal with matters of family law.*

***Assignment To The Regional Family Court***

14. *The selection and assignment of Circuit Court Judges to sit on Regional Family Courts should be made by the President of the Circuit Court together with the two senior ordinary judges of the Circuit Court.*
15. *Any one period of assignment to the Regional Family Court should normally be for not less than one year, with the possibility of renewal. Assignment for a shorter period should be permitted only in exceptional circumstances, and only if the judge so assigned has previous experience of family court work.*
16. *A judge should normally be assigned to preside over one or more specified Regional Family Courts. Provision should, however, be made for the possible appointment of "roving" Family Court Judges, as well as for the temporary transfer of a judge from his or her designated court(s) to another, if the volume and regional distribution of family court business so justifies.*

***Appeals***

17. *Case management procedures should be introduced in relation to the conduct of appeals as well as in other areas of the litigation process. Such procedures should ensure, inter alia, that those aspects of a court decision which are being appealed are clearly and specifically identified in the notices of appeal and cross-appeal (if any). Pre-trial conferences and exchanges of documents should be required. Control should be exercised by the courts in respect of the speed with which an appeal is processed. Administrative responsibility for the pre-trial procedures, including the monitoring of the progress of appeals cases, should be assigned to the Family Court Office.*

18. *The relevant Court Rules Committees should introduce the necessary rules and procedures to ensure that the risk of abuse of the appeals process may be minimised.*
19. *A full re-hearing of a family law case on appeal from the Circuit to the High Court should, in general, be avoided.*
20. *Audio-tape recording facilities should be installed in courtrooms; all proceedings should be recorded without excessive cost or delay.*
21. *The Family Court Office should be assigned the responsibility of collating statistical information on notices of appeals lodged. In addition to the numbers of orders appealed, record should be kept of the number of cases which settle before the hearing, the number which are heard by the appellate court and the nature of the specific orders or aspects thereof which are appealed.*

***Diversion And Family Court Information Centres***

22. *Each Regional Family Court should have attached to it a Family Court Information Centre with responsibility for providing to those who have begun, or are considering the institution of, family law proceedings impartial, objectively presented information relating to available alternatives to litigation, implications of separation, court processes and case management information and information on available support services. Any legal information received should be information only, and not advice.*
23. *Where proceedings for judicial separation have been instituted, the parties should be required within two weeks to attend the Information Centre, if they have not already done so,*
  - (a) *to receive information as appropriate concerning the various family support services available, including welfare services;*
  - (b) *to receive information and advice concerning the availability and purpose of mediation.*

*This information should be given by an official who has appropriate knowledge and counselling skills and who would act under the auspices of the court. It should be augmented by an appropriate video, and by the provision of a full information pack. There should be emphasis throughout on the need to give priority to the interests of any dependent children and on the importance of avoiding any damage or distress to them.*

24. *In relation to other family law proceedings before the Regional Family Court, including custody, access, maintenance and barring and safety order applications, the opportunity should be presented to the parties to attend the Family Court Information Centre to receive similar information and*

*advice. This should not be compulsory, but the judge should be obliged to consider at the beginning of the hearing whether to adjourn proceedings, if appropriate, to require the parties to attend the Information Centre to receive the relevant information and advice. The judge should not, however, adjourn proceedings for this purpose unless he or she is satisfied that no additional risks are involved in respect of any family members whose safety or welfare is in issue.*

25. *The parties should not be required to attend the session together.*
26. *Attendance at information sessions should be free of charge.*
27. *Attendance should be certified by the Information Centre. In appropriate cases, (for example, for reasons of distance, imprisonment of either party, physical disability, recent conciliation counselling, the terms of a recent order of a court, the nature of the relationship between the parties or other relevant circumstances) the requirement of attendance at an information session should be waived. Written information should be sent to persons exempted from attendance and, where appropriate, additional assistance should be offered (for example, information could be given by telephone and videos could be given on loan).*
28. *Where the appropriate certificate of attendance, or waiver, has not been obtained the presiding judge should have the right, at his or her discretion, to adjourn the case until the parties have attended the Information Centre. Where one or both of the parties still refuse to attend, the Court should proceed with the hearing, but written information should be sent to the parties.*
29. *In all family proceedings before the Regional Family Court, it should be open to the judge, at any time during those proceedings, to recommend that the parties attempt to resolve any outstanding issue through negotiation or mediation and, in exceptional cases, to require that they attempt to do so, and to grant an adjournment for that purpose.*
30. *Further consideration should be given to the circumstances in which joint applications for matrimonial relief might be facilitated.*

***Pre-Trial Procedures And Case Management***

31. *A proper system of case management will be an essential ingredient in any new system of family courts. It is needed to prevent drift and delay, to promote economy, to give a further impetus to the resolution of issues by settlement or agreement, and to improve the efficiency with which cases are heard in court.*
32. *A comprehensive system of case management should be introduced and implemented by means of Rules of Court. The system should have regard*

*to the following general principles:*

- *the courts should, to ensure expedition and economy in family law cases, accept responsibility for the pace of litigation;*
  - *having regard to the interests of the parties and their children, realistic time limits should be set for the preparation of cases, and the progress of cases should be monitored and the time limits enforced by the courts;*
  - *the system should be consistent with the timely application of alternative forms of dispute resolution such as mediation.*
33. *An Office of the Regional Family Court should be established with administrative responsibility not only in respect of the Regional Family Court, but also in respect of the District Court (interim/emergency jurisdiction) and the High Court. As well as performing a co-ordinating role, the Family Court Office would actively monitor progress in all family law cases.*
34. *An office of Master of the Family Court should be established. The Master would be Head of the Family Court Office. The responsibilities of the Master, which should be carried out in consultation with the President or Chief Judge of the Family Court, would include initiating hearings, seeking particulars, drawing attention to delays and calling for compliance with rules and with any orders which have been made.*
35. *Consideration should be given to the introduction of a system of pre-trial review. The value of such a system should be tested by a pilot project or projects. The principal features of the system should be the following:*
- *the review should take place within a very short time after initiating documents have been served;*
  - *the review should be conducted by a judge (or possibly the Master of the Family Court) in the presence of the parties' legal representatives who will have charge of the case at hearing;*
  - *the review should consider what steps have been taken, and what steps should be taken, to settle the issues by means other than litigation;*
  - *where a hearing is to take place, documentation should be reviewed with a view to defining and if possible narrowing the issues which divide the parties;*
  - *the range of potential witnesses should be reviewed and an attempt should be made to achieve consensus on any expert witnesses who may need to be called or whose reports may be required;*
  - *the system would not be applicable to emergency or interim applications.*

36. *Tighter control on costs should be included as an element of a case management structure. In particular, consideration should be given to the English and Welsh "wasted costs orders" and the proposal in the Working Party Draft Rule in respect of regular monitoring of costs charged.*
37. *Judicial training should include instruction on effective case management. The use of modern technology should also be increased in the courtroom.*
38. *The system of case management should incorporate measures to improve the flexibility, and thus the effectiveness, of the case listing process. Further, any new system should be designed to ensure that, as far as possible, one judge is assigned to hear all aspects of the same case.*
39. *Extra resources should be provided to establish the necessary administrative structures to facilitate the effective operation of a system of case management. The reduction in delay would, in the opinion of the Commission, result in a more efficient and cost-effective judicial system in the long-term.*
40. *The operation of an effective case management system would require the alteration of the current administrative structures and some staffing increases, for example, the appointment of more clerical staff to assist Registrars.*
41. *Greater emphasis should be placed on the gathering of statistics in respect of the operation of the courts system. Such detailed information should be gathered on an on-going basis, recording the volume of cases being processed through the system and any delays experienced, and identifying problematic procedures. Responsibility for gathering statistical information should be assigned to a member of the Family Court Office.*
42. *Continuous monitoring of the new system is essential. Responsibility for this monitoring and on-going evaluation should be assigned to the Family Court Office.*
43. *All documents initiating family proceedings should, as far as possible having regard to the matters in issue, be non-confrontational and in a standard form. Their language should be clear and concise, and they should be set out in a format which inhibits the inclusion of inflammatory material. They should contain, where appropriate, information about the Family Court Information Centre and the requirements concerning attendance at the Centre. They should contain, where appropriate, information concerning pre-trial review procedures. They should also outline basic case management principles, impressing upon the parties and their legal representatives their duty to refrain from delaying or obstructing proceedings.*

### **Mediation**

44. *The balance of risk justifies a strong shift in emphasis away from the adversarial process and towards mediation. The Mediation Service should be viewed as complementary to the judicial process, and not as a replacement thereof. For mediation to form an integral part of this reformed family law system, a professional mediation service should be established with adequate numbers of trained mediators and proper facilities for consultation, and a supporting administrative framework. This service should be available countrywide, and must be adequately resourced. The service must contain sufficient safeguards to ensure that the allied goals of fairness and justice are achieved, and should develop a strict Code of Practice. The development of the mediation service should be linked with the establishment of the Regional Family Courts.*
45. *Mediation should be voluntary, unreasonable restrictions should not be placed on the parties' access to the courts and in some cases, for example where there has been family violence, attempts at mediation should usually be regarded as inappropriate.*
46. *A formal training course in mediation should be established under the auspices of a university, and this course should be at post-graduate level.*
47. *The following model for the training of mediators should be considered:*

*Eligibility criteria for the course could include an undergraduate qualification in a relevant discipline, such as law, psychology, social work, human resource management; relevant work experience and general personal suitability for the role of mediator. In some circumstances, the course might admit students who do not have a third-level qualification but who have an exceptional portfolio of relevant experience.*

*The course in mediation could be structured along the lines of existing post-graduate professional training courses. The course would comprise a formal academic component and supervised placements in mediation settings. The formal academic programme would provide teaching in those areas of psychology, family studies, law and accountancy as are relevant to mediation, as well as intensive teaching in dispute resolution and conflict management which constitute the core competencies of mediation. The course would be self-funded from the fees paid by students. However, the Department of Justice might be in a position to offer funded places to students who would undertake to work in the mediation service upon qualification or to provide a grant-in-aid to the university to help defray start-up costs.*



***Legal Advice And Review Of Agreements By Legal Advisers***

48. *Mediated agreements should normally be reviewed by the parties' respective legal advisers. The parties should be encouraged to seek independent legal advice before and, as necessary, during the mediation process. Where a party wishes to receive legal advice and is waiting for an appointment to consult a Legal Aid Board solicitor, mediation should be suspended until such advice becomes available. Provisions to this effect should be included in a Code of Practice.*

***Judicial Review Of Agreements***

49. *There should be no extension of the courts' powers to review agreed arrangements concerning custody of or access to children.*

50. *There should exist a more general power in the courts to review and, if necessary, vary, on the application of either party, the terms of agreements concerning maintenance and property on the following grounds:*

(a) *that facts have come to light since the agreement was entered into which, had either party been aware of them at the time, could reasonably be expected to have effected a material change in the terms of the agreement, or*

(b) *that the economic circumstances of the parties have altered since the agreement in a manner which could not reasonably have been anticipated by the parties at the time of the agreement, and which makes it unreasonable to insist on the application of the original terms of the agreement.*

51. *In the above circumstances, the court should have the power to confirm, cancel or vary any terms in the agreement, but should not disturb transactions which have already been concluded under the provisions of the original agreement.*

52. *In every case where an application is made to a court to have an agreement, which affects the parties' financial or property relationships, recorded or made a rule of court, there should be an obligation on the court not to grant the application unless it is satisfied that the agreement is a fair and reasonable one which in all the circumstances adequately protects the interests of the parties and of any dependent children.*

53. *Information arising during the course of mediation should, subject to a number of exceptions, be inadmissible as evidence in any subsequent court proceedings. Statutory provisions to this effect should be enacted.*

***Representing The Rights, Interests And Wishes Of Children***

54. *The court should, of its own motion or upon application to it, have power*

*to appoint an independent representative for a child whose welfare is in issue in family proceedings, where this appears to the court to be necessary in the interests of the child. Legislation should specify a list of non-exclusive factors which a judge should consider in deciding whether to appoint a representative. These factors might include the extent of hostility between the parents; whether there is a history of recurring resort to litigation; whether mental illness or disorder is relevant; whether child abuse is in issue.*

55. *The role of legal representative is to advise the child and act as advocate for the child in court. He or she should have power to conduct cross-examination, to appeal a decision, to call witnesses, to request particulars and discovery, and to participate in settlement discussions.*
56. *The court should have the power, in any proceedings which affect a child, to appoint a guardian ad litem where the court is satisfied that it is in the interests of the child and in the interests of justice to do so. An independent panel of social workers should be established, from which the court may appoint guardians ad litem.*

#### ***Family Assessment Services***

57. *Where an expert is requested by the court to make a family assessment, it should be clearly understood by all parties that formulating a report and recommendations to the court is the primary role of that expert.*
58. *The following general principles should inform any restructuring of court assessment services:*
- (a) *The service should be readily available to every court which has jurisdiction to determine issues of child custody or access.*
  - (b) *The service should be adequately staffed and resourced so as to avoid unnecessary delays; time is of the essence in cases concerning children.*
  - (c) *The persons providing the service to the courts should have appropriate training and should operate within an appropriate professional supporting structure.*

#### ***The Privacy Of Family Proceedings***

59. *Bona fide researchers and students of family law should be permitted to attend family proceedings. Access by a bona fide researcher to family proceedings should not be refused by a judge except on the basis of compelling and stated reasons. The attendance of students of family law should be at the discretion of the judge.*

60. *There should be a general principle, applying to all family proceedings, prohibiting the publication of information which tends to identify the parties and members of their families.*
61. *Court staff should be enabled to record more judgments in family cases and thereby make available more transcripts of final reports.*

***Judicial Studies And The Training Of Lawyers***

62. *Measures should be taken as a matter of urgency to enable the judiciary to organise judicial studies on a systematic basis.*
63. *The key elements in the organisation of judicial studies should be the following:*
  - (a) *Management by a Board, chaired by the Chief Justice (or nominee) and comprising a majority of judges.*
  - (b) *Adequate funding on the basis of an annual budget.*
  - (c) *Proper administrative and logistical support.*
64. *Courses of professional legal education should address the special features of family law practice so that future practitioners should, as a minimum, become aware of the need for special skills and expertise. Specialist courses should be made available to practising lawyers, perhaps under the aegis of the professional bodies and the Family Lawyers' Association, in conjunction with appropriate third level institutions, offering training in the special skills and expertise appropriate in family law practice. Such courses should be inter-disciplinary, involving inputs from areas such as psychiatry, psychology, sociology, and social work. Heightening awareness of alternative methods of dispute resolution would be one purpose of such courses. Up-dating courses should be available for those already practising in family law.*

***Research And Statistics***

65. *A comprehensive national statistical data-base in relation to family law cases should be established. This data-base should contain far more detailed information concerning the cases processed by the courts than is currently available. In compiling this data-base, and in addition to the information currently recorded, account should be taken of, inter alia, multiple applications, any history of litigation by the family, the assets and income level of the family (to enable a determination of how the family assets were divided by the court), as well as issues relating to enforcement of court orders.*
66. *Increased funding should be made available for empirical research into the*

*Irish family law system. The research should be conducted independently.*

**Miscellaneous**

67. *The Family Court should have a discretionary power, in any proceedings in which application has been made for a maintenance or other financial order, or a property order, to procure a report from a suitably qualified independent person on the financial or property status of the parties. The report should be furnished to the parties and their legal representatives before the hearing. The report should be received in evidence provided that its author is available for cross-examination by the parties. Where the author is not available, the reception of the report in evidence should be at the discretion of the court.*

## **APPENDIX A**

### **Submissions in response to the Consultation Paper were received from:**

Ms. Phil Armstrong, Solicitor  
Mr. Enda Brogan, County Registrar, Co. Clare  
Mr. Justice Declan Budd, Judge of the High Court  
Judge Matthew Deery, Judge of the Circuit Court  
Family Law Committee, The Law Society  
Family Mediation Service  
Mr. Brian M. Gallagher, Solicitor  
Judge Gerard Haughton, Judge of the District Court  
Irish Association of Social Workers  
Judges of the Circuit Court  
Judges of the High Court  
Mr. Justice Ronan Keane, Judge of the High Court  
Judge Thelma King, Judge of the District Court  
Mr. Lorcan O hAonghusa  
Mr. Eric A. Plunkett, Social Worker  
Probation and Welfare Branch, IMPACT, Public Sector Union  
Public Service Executive Union  
Mr. Richard J. Robinson, District Court Clerk, Ennis Co. Clare  
Judge Peter Smithwick, President of the District Court  
Ms. Delma Sweeney, Ms. Miriam Logan & Ms. Mary LLoyd, Mediators  
Mr. Peter Ward, Barrister  
Women's Aid

## APPENDIX B

**The following persons attended a Seminar on Family Courts held at the Commission Offices on 10 December 1994:**

Ms. Jane Barron, Barrister  
Ms. Carmel Braiden, Senior Psychologist  
Mr. Robert Browne, Dept. of Equality and Law Reform  
Dr. Alan Carr, Dept. of Psychology, U.C.D.  
Ms. Inge Clissman, Senior Counsel  
Mr. Geoffrey Conroy, Family Mediation  
Mr. Eugene Davy, The Law Society  
Judge Matthew Deery, Circuit Court  
Judge Liam Devally, Circuit Court  
Ms. Catherine Forde, Barrister  
Mr. Brian M. Gallagher, Gallagher Shatter Solicitors  
Ms. Sabah Green, Free Legal Advice Centres Ltd  
Judge Gerard John Haughton, District Court  
Ms. Rosemary Horgan, The Law Society  
Judge Thelma King, District Court  
Ms. Mary Lloyd, Family Mediation Service  
Mr. Tom Lynch, Department of Equality and Law Reform  
Ms. Marian McDonald, Family Lawyers Association  
Ms. Marie McGonagle on behalf of Mr W.A. O'Malley, University College  
Cork  
Ms. Trish McKay, AIM Group  
Ms. Pamela Madigan, Family Lawyers Association  
Mr. Frank Martin, Lecturer, University College Cork  
Mr. Frank Murphy, Solicitor, Family Courts Working Group  
Judge Frank Murphy, Circuit Court and Family Courts Working Group  
Ms. Nuala Mulhern  
Ms. Una Ni Raifeartaigh, Barrister, Reid Professor of Law, Trinity College  
Ms. Monica O'Connor, Women's Aid  
Mr. David O'Donovan, Probation and Welfare Service  
Ms. Anne O'Loughlin, Irish Association of Social Workers  
Ms. Bernice O'Neill, Department of Justice  
Ms. Christina O'Rourke, Progressive Democrats  
Ms. Jennifer Payne, Office of the Attorney General  
Mr. Eric Plunkett, Social Worker  
Mr. Eoin Quill, University of Limerick  
Mr. Richie Ryan, Department of Justice  
Mr. Brian Sheridan, Solicitor, Legal Aid Board  
Judge Peter Smithwick, President of the District Court  
Ms. Carmel Stewart, Family Lawyer's Association  
Ms. Maura Wall-Murphy, Family Mediation Service

Ms. Muriel Walls, Family Courts Working Group  
Ms. Trish Walsh, Irish Association of Social Workers

## APPENDIX C

### *Some Issues Surrounding The Appointment, Promotion And Secondment Of Judges*

In order to qualify for appointment to the High or Supreme Courts, a candidate must be "a practising barrister of not less than twelve years' standing"<sup>1</sup> or "a judge of the Circuit Court of four years' standing"<sup>2</sup>. To qualify for appointment to the Circuit Court, a candidate must be "a practising barrister or a practising solicitor of not less than ten years' standing"<sup>3</sup>. Finally, to qualify for appointment as a District Court judge, a person must be "[a] person who is for the time being a practising barrister or solicitor of not less than ten years' standing..."<sup>4</sup>

### *Promotion*

A High Court judge is qualified for appointment as an ordinary judge of the Supreme Court or as Chief Justice, and ordinary judges of the High Court are also qualified for appointment as President of the High Court.<sup>5</sup>

For the purposes of Section 5(2)(a) of the 1961 Act, "service as a judge of the ... Circuit Court shall be deemed practice at the Bar."<sup>6</sup> Therefore, it is possible for a Circuit Court judge to be promoted to the High Court, provided he or she has twelve years' experience at the Bar or as a Circuit Court judge, or a combination of both.

Similarly, for the purposes of Section 17(2)(a) of the Act, in respect of appointment to the Circuit Court, "service, in the case of a barrister, as a justice of the ... District Court shall be deemed practice at the Bar"<sup>7</sup> and "service, in the case of a solicitor, as a judge of the District Court shall be deemed to be practice as a solicitor".<sup>8</sup>

### *Secondment*

There does not appear to be any provision under Irish law allowing for the secondment of members of a lower Court to a higher one, nor does there appear to be any practice of transferring judges from lower to higher Courts on a temporary basis, e.g. to deal with backlogs, delays etc..

### *England and Wales*

Under the system prevailing in England and Wales, certain persons may be

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1 Section 5(2)(a) of the *Courts (Supplemental Provisions) Act, 1961*.  
2 *Ibid.*, section 5(2)(e), inserted by section 28 of the *Courts and Court Officers Act, 1995*.  
3 *Ibid.*, section 17(2)(a), as amended by section 30 of the *Courts and Court Officers Act, 1995*.  
4 *Ibid.*, section 29(2).  
5 *Ibid.*, section 5, sub-sections (4) & (5).  
6 *Ibid.*, section 5(2)(b).  
7 *Ibid.*, section 17(2)(b).  
8 *Ibid.*, section 17(2)(c), as inserted by section 30 of the *Courts and Court Officers Act, 1995*.



requested to sit as High Court or deputy High Court judges.<sup>9</sup> Section 23(1) of the *Courts Act, 1971* provides that, if requested to do so by or on behalf of the Lord Chancellor,

"a Circuit judge or Recorder shall sit as a judge of the High Court for the hearing of such case or cases or at such place and for such time as may be specified by or on behalf of the Lord Chancellor."

When sitting as a High Court judge, a Circuit judge or Recorder shall be treated as and may perform all the functions of a puisne judge of the High Court.<sup>10</sup> However, in accordance with Section 23(3), he or she shall not be treated as such a judge in relation to, *inter alia*, enactments concerning "remuneration, allowances or pensions of such judges."<sup>11</sup>

Section 24 of the 1971 Act provides that:

"[where] it appears to the Lord Chancellor that it is expedient as a temporary measure to make an appointment under this subsection in order to facilitate the disposal of business in the High Court or the Crown Court he may appoint a person qualified for appointment as a puisne judge of the High Court under section 9 of the Judicature Act 1925 or any person who has held office as a judge of the Court of Appeal or of the High Court to be a deputy judge of the High Court during such period or on such occasions as the Lord Chancellor thinks fit."

Furthermore, where it appears expedient to do so in order to facilitate the disposal of business in the Crown Court or a county court, the Lord Chancellor may appoint as a deputy Circuit judge any of the following persons:

- (a) any person qualified for appointment as a Circuit judge under section 16 [of the 1971 Act];
- (b) any person who has held office as a judge of the Court of Appeal or of the High Court or as a Circuit judge;
- (c) any person who, before the day appointed for the purposes of section 20 [of the 1971 Act], had retired from office as an official referee or judge of a county court.<sup>12</sup>

A similar provision exists in Section 24 to that in Section 23, subsections (2) and (3) to the effect that a deputy High or Circuit Court judge appointed under

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9 Sections 23 & 24 of the *Courts Act 1971*, as amended. (The most recent amendment to the Act was effected by the *Supreme Court Act, 1981*, which was something of a consolidating measure, according to Mr. David Watts of the Lord Chancellor's Department, letter dated 22 March 1995, p.2).

10 *Ibid.*, section 23(2).

11 *Ibid.*, section 23(3)(c).

12 *Ibid.*, section 24(2).

Section 24 shall be treated as and may perform any of the functions of a puisne judge of the High Court or a Circuit judge, as the case may be. However, he or she shall not be treated as such a judge in relation to, *inter alia*, enactments concerning remuneration, allowances or pensions of such judges.<sup>13</sup>

It would appear from examination of the English model that concern about "judicial squabbles" over status and pay within a system which facilitates the secondment of judges is not justified. According to Mr. David Watts of the Lord Chancellor's Department:<sup>14</sup>

"...the Lord Chancellor regards acting as a judge of the High Court from time to time as one of the duties of an experienced Circuit Judge. Accordingly, the Circuit Judge continues to receive only his [or her] Circuit Judge's pay. Apart from the powers of a High Court judge, he [or she] does not receive any formal status or precedence. However, authority to act as a High Court Judge in this way is prized by Circuit Judges and informal status is conferred amongst their peers by being authorised to sit in the High Court."

However, it may be that the power to request suitably qualified persons to sit temporarily on a higher Court is being exercised in order to avoid incurring the further expense of actually promoting existing judges or Recorders, or in order to avoid appointing more judges to Courts with heavy workloads and backlogs. Again, Mr. Watts' letter is instructive:

"[The relevant provisions] originate from several Acts;...I am not aware of specific criticism when the original provisions were introduced. Some go back before 1925 in one form or another. ... [H]owever, ... the Lord Chancellor is sometimes the subject of criticism that cases in the High Court (particularly civil cases) are heard far too often by Circuit Judges or Silks and that more High Court Judges should spend the time hearing first instance civil cases."<sup>15</sup>

### ***Scotland***

In Scotland, the statutory provisions authorising the appointment and stipulating the jurisdiction of Temporary Judges are contained in the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1990*. Section 35(1) of that Act, in conjunction with paragraph 1 of the Fourth Schedule to the Act, provides that sheriffs principal and sheriffs who have held office as such for a continuous period of not less than five years, and solicitors who have had a right of audience in both the Court of Session and the High Court of Justiciary, shall be eligible for appointment as judges of the Court of Session.

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13 *Ibid.*, section 24, sub-sections (3) & (4).

14 Mr. David Watts, Judicial Appointments Section, Lord Chancellor's Department. Letter dated 22 March 1995, at p.2.

15 *Ibid.*

Paragraph 5 of the Fourth Schedule to the Act provides for the appointment of Temporary Judges: any person who is eligible for appointment to the Court of Session either under paragraph 1 of the Fourth Schedule or under "any other enactment" may be appointed as a Temporary Judge under Section 35(3) of the 1990 Act by the Secretary of State (after consulting with the Lord President) "for such period as the Secretary of State may determine".

As under the comparable English legislation mentioned above, the Scottish system provides that Temporary Judges "shall...be treated for all purposes as, and accordingly may perform any of the functions of, a judge of the Court in which he [or she] is acting".<sup>16</sup> Again, such "equal treatment" is limited: a Temporary Judge shall not be treated as a judge of the Court in which he or she is acting for the purposes of any enactment or rule of law relating to, *inter alia*, remuneration, allowances or pensions.<sup>17</sup>

Whereas in the English system, appointments "are very clearly temporary"<sup>18</sup> (although some judges may remain for many years on an authorised list of judges qualified to sit in a higher Court), Scottish Temporary Judges are appointed for a period of three years, and their appointments may be renewed.<sup>19</sup> According to Mr. Gordon Murray of the Scottish Courts Administration, six sheriffs are amongst those who have been appointed as Temporary Judges.<sup>20</sup> He also commented that while "there has been some, very limited, criticism of the policy relating to Temporary Judges", that seems to have disappeared<sup>21</sup> and the practice "now appears to be reasonably well accepted."<sup>22</sup>

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16 Schedule 4, para. 6 of the *Law Reform (Miscellaneous Provisions) (Scotland) Act, 1990*.

17 *Ibid.*, para. 7.

18 Mr. David Watts. *op. cit.*, f.n. 14 at p.1.

19 Mr. Gordon Murray, Scottish Courts Administration. Letter dated 2 February 1995.

20 *Ibid.*

21 *Ibid.*

22 Mr. Gordon Murray, Scottish Courts Administration. Letter dated 16 January 1995. It is noteworthy that in England, Wales and Scotland there is no provision for transferring judges "downwards". Mr. Murray has written, for example, that "[w]e have no arrangements in Scotland where High Court Judges sit in the Sheriff Courts other than when the High Court is on circuit and happens to be using courtrooms in the Sheriff Court."

## APPENDIX D<sup>1</sup>

### *Practice Direction (Civil litigation: Case management)*

Moves to speed up civil litigation and cut costs were announced by Lord Taylor of Gosforth, Lord Chief Justice, and Sir Richard Scott, Vice-Chancellor, in *Practice Direction (Civil litigation: Case management)* handed down by the Lord Chief Justice in the High Court on January 24, 1995.

1. The paramount importance of reducing the cost and delay of civil litigation made it necessary for judges sitting at first instance to assert greater control over the preparation for and conduct of hearing than had hitherto been customary.  
  
Failure by practitioners to conduct cases economically would be visited by appropriate orders for costs, including wasted costs orders.
2. The court would accordingly exercise its discretion to limit:
  - (a) discovery;
  - (b) the length of oral submissions;
  - (c) the time allowed for the examination and cross-examination of witnesses;
  - (d) the issues on which it wished to be addressed;
  - (e) reading aloud from documents and authorities.
3. Unless otherwise ordered, every witness statement was to stand as the evidence-in-chief of the witness concerned.
4. Order 15, rule 7 of the Rules of the Supreme Court (facts, not evidence, to be pleaded) would be strictly enforced. In advance of trial parties should use their best endeavours to agree which were the issues or the main issues, and it was their duty so far as possible to reduce or eliminate the expert issues.
5. Order 34, rule 19(2)(a)(b)(c) of the Rules of the Supreme Court (the court bundle) would also be strictly enforced. Documents for use in court should be in the A4 format where possible, contained in suitability secured bundles, and lodged with the court at least two clear days before the hearing of the application or a trial. Each bundle should be

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<sup>1</sup> This is a reported version of the Practice Direction which appeared in *The Times*, 25 January, 1995 at p.38.

paginated, indexed, wholly legible, and arranged chronologically and contained in a ring binder or a lever-arch file. Where documents were copied unnecessarily or bundled incompetently, the cost would be disallowed.

6. In cases estimated to last for more than 10 days, a pre-trial review should be applied for or, in default, might be appointed by the court. It should when practicable be conducted by the trial judge between eight and four weeks before the date of trial and should be attended by the advocates who were to represent the parties at trial.
7. Unless the court otherwise ordered, there must be lodged with the listing officer (or equivalent) on behalf of each party no later than two months before the date of trial a completed pre-trial check-list in the form annexed to the *Practice Direction*.
8. Not less than three clear days before the hearing of any action or application each party should lodge with the court (with copies to other parties) a skeleton argument concisely summarising that party's submissions in relation to each of the issues, and citing the main authorities relied on, which could be attached. Skeleton arguments should be as brief as the nature of the issues allowed, and should not exceed 20 pages of double-spaced A4 paper.
9. The opening speech should be succinct. At its conclusion, other parties might be invited briefly to amplify their skeleton arguments. In a heavy case the court might in conjunction with final speeches require written submissions, including the findings of fact for which each party contended.
10. This *Practice Direction* applied to all lists in the Queen's Bench and Chancery Divisions, except where other directions specifically applied.

***Pre-Trial Check-List***

[Short title of action]

[Folio number]

[Trial date]

[Party lodging check-list]

[Name of solicitor]

[Name(s) of counsel for trial (if known)]

***Setting Down***

1. Has the action been set down?

***Pleadings***

2. (a) Do you intend to make any amendment to your pleading?
- (b) If so, when?

***Interrogatories***

3. (a) Are any interrogatories outstanding?
- (b) If so, when served and upon whom?

***Evidence***

4. (a) Have all orders in relation to expert, factual and hearsay evidence been complied with? If not, specify what remains outstanding.
- (b) Do you intend to serve/seek leave to serve any further report or statement? If so, when and what report or statement?
- (c) Have all other orders in relation to oral evidence been complied with?
- (d) Do you require any further leave or orders in relation to evidence? If so, please specify and say when you will apply.
5. (a) What witnesses of fact do you intend to call? [names]
- (b) What expert witnesses do you intend to call? [names]
- (c) Will any witness require an interpreter? If so which?

***Discovery***

6. (a) Have all orders in relation to discovery been complied with?
- (b) If not, what orders are outstanding?
- (c) Do you intend to apply for any further orders relating to discovery?
- (d) If so, what and when?
7. Will you not later than seven days before trial have prepared agreed paginated bundles of fully legible documents for the use of counsel and the court.

***Pre-Trial Review***

8. (a) Has a pre-trial review been ordered?
- (b) If so, when is it to take place?
- (c) If not, would it be useful to have one?

***Length Of Trial***

9. What are counsel's estimates of the minimum and maximum lengths of the trial? [The answer to question 9 should ordinarily be supported by an estimate of length signed by the counsel to be instructed.]

***Alternative Dispute Resolution***

(See *Practice State (Commercial Court: Alternative dispute resolution)* (*The Times* December 17, 1993: [1994] 1 WLR 14).

10. Have you or counsel discussed with your client(s) the possibility of attempting to resolve this dispute (or particular issues) by alternative dispute resolution?
11. Might some form of alternative dispute resolution procedure resolve or narrow the issues in this case?
12. Have you or your client(s) explored with the other parties the possibility of resolving this dispute (or particular issues) by alternative dispute resolution?

[Signature of solicitor, date]

**Note:** This check-list must be lodged not later than two months before the date of hearing with copies to the other parties.

## APPENDIX E

### *Practice Direction (Family Proceedings: Case Management)*

1. The importance of reducing the cost and delay of civil litigation makes it necessary for the court to assert greater control over the preparation for and conduct of hearings than has hitherto been customary. Failure by practitioners to conduct cases economically will be visited by appropriate orders for costs, including wasted costs orders.
2. The Court will accordingly exercise its discretion to limit-
  - (a) discovery;
  - (b) the length of opening and closing oral submissions;
  - (c) the time allowed for the examination and cross-examination of witnesses;
  - (d) the issues on which it wishes to be addressed;
  - (e) reading aloud from documents and authorities.
3. Unless otherwise ordered, every witness statement or affidavit shall stand as the evidence in chief of the witness concerned. The substance of the evidence which a party intends to adduce at the hearing must be sufficiently detailed but without prolixity; it must be confined to material matters of fact, not, (except in the case of the evidence of professional witnesses) of opinion; and if hearsay evidence is to be adduced, the source of the information must be declared or good reason given for not doing so.
4. It is a duty owed to the court both by the parties and their legal representatives to give full and frank disclosure in ancillary relief applications and also in all matters in respect of children. The parties and their advisers must also to use their best endeavours:
  - (a) to confine the issues and the evidence called to what is reasonably considered to be essential for the proper presentation of their case;
  - (b) to reduce or eliminate issues for expert evidence;
  - (c) in advance of the hearing to agree which are the issues or the main issues.
5. Unless the nature of the hearing makes it unnecessary and in the



absence of specific directions, bundles should be agreed and prepared for use by the court, the parties and the witnesses and shall be in A4 format where possible, suitably secured. The bundles for use by the court shall be lodged with the court (the Clerk of the Rules in matters in the Royal Courts of Justice, London) at least two clear days before the hearing. Each bundle should be paginated, indexed, wholly legible and arranged chronologically. Where documents are copied unnecessarily or bundled incompetently the cost will be disallowed.

6. In cases estimated to last for five days or more and in which no pre-trial review had been ordered, application should be made for a pre-trial review. It should when practicable be listed at least three weeks before the hearing and be conducted by the judge or district judge before whom the case is to be heard and should be attended by the advocates who are to represent the parties at the hearing. Whenever possible, all statements of evidence and all reports should be filed before the date of the review and in good time for them to have been considered by all parties.
7. Whenever practicable in any matter estimated to last five days or more, each party should, not less than two clear days before the hearing, lodge with the Court, or the Clerk of the Rules in matters in the RCJ in London, and deliver to other parties, a chronology and a skeleton argument concisely summarising that party's submissions in relation to each of the issues and citing the main authorities relied upon. It is important that skeleton arguments should be brief.
8. In advance of the hearing upon request, and otherwise in course of their opening, parties should be prepared to furnish the court, if there is no core bundle, with a list of documents essential for a proper understanding of the case.
9. The opening speech should be succinct. At its conclusion other parties may be invited briefly to amplify their skeleton arguments. In a heavy case the court may in conjunction with final speeches require written submissions, including the findings of fact for which each party contends.
10. This *Practice Direction* which follows the directions handed down by the Lord Chief Justice and the Vice-Chancellor to apply in the Queen's Bench and Chancery Divisions, shall apply to all family proceedings in the High Court and in all Care Centres, Family Hearing Centres and divorce county courts.
11. Issued with the concurrence of the Lord Chancellor.

## APPENDIX F

### *RULES COMMITTEE WORKING PARTY<sup>1</sup>*

#### *Draft Rule Reflecting Views Of Meeting Held On 28/06/93*

1. Upon the filing of an application for ancillary relief the court shall allocate a first appointment no less than six weeks and no later than 10 weeks after the date of the application. The date fixed for the first appointment, or for any subsequent appointment, shall not be vacated save with the leave of the court; and the court upon vacating any such date shall forthwith fix a fresh date.
  
2. Within 21 days of the filing of the application for ancillary relief the Applicant and Respondent shall each file with the Court and simultaneously exchange with the other party a statement signed by him containing the following information:
  - (a) his full name, age, date of birth and occupation;
  - (b) his state of health;
  - (c) the dates of marriage and separation of the parties;
  - (d) the full names, dates of birth and present ages of any children of the family, and with whom they live;
  - (e) details of his present residence and the occupants thereof;
  - (f) a concise statement of his assets, liabilities, income, earning capacity and other resources (including any resources that he may receive in the foreseeable future such as pension rights or inheritance);
  - (g) a concise statement of any loss of widow's (or widower's) pension that would be suffered by either party following a divorce;
  - (h) a concise statement of the present and future reasonable needs of himself and any children of the family;
  - (i) details of the present and proposed future educational arrangements for any children of the family;

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<sup>1</sup> This is the text of a *Draft Rule* prepared by an English Rules Committee Working Party consisting of representatives of the Family Law Bar Association (FLBA), the Solicitors' Family Law Association (SFLA), the Law Society's Family Law Committee and the judges of the Family Division.

- (j) details of any child support maintenance assessment made by the Child Support Agency, or of any agreement for child maintenance made between the parties;
- (k) a concise statement of the standard of living enjoyed by the parties during the marriage;
- (l) whether any contribution by either party is considered to be relevant, and if so, a concise statement of that contribution;
- (m) whether, exceptionally, the other party's conduct (financial or otherwise) during the marriage is considered to be relevant, and if so, a concise statement of the issues of conduct relied on.

The statement shall annex only such documents as are necessary to explain or clarify any of the above information.

3. Following the filing of the application for ancillary relief but prior to the first appointment no discovery of documents shall be sought or given save:
  - (a) insofar as documents have been annexed to the statement filed under Paragraph 2; or
  - (b) in accordance with Paragraph 4 below.
4. Not later than seven days before the hearing of the first appointment each party shall file at court and serve on the other party:
  - (a) a questionnaire setting out the further information sought of the other party;
  - (b) a schedule setting out the documents sought of the other party; and
  - (c) a concise statement of the apparent issues between the parties.

5 **The First Appointment**

At the first appointment the District Judge:

- (a) shall:
  - (i) determine the extent to which each such questionnaire shall be answered, and such documents produced, and shall give directions as to the production of future and up-dating documentation;
  - (ii) give directions as to valuations of assets (including, where practicable, the joint instruction of independent

- experts) and the obtaining and exchanging of experts' evidence (including directions as to the meeting of experts);
- (iii) give directions as to any evidence sought to be adduced by each party and as to any chronologies or schedules to be filed by each party;
  - (iv) direct, and in each case (where applicable) fix a date forthwith:
    - (1) that the case be fixed for a further directions appointment;
    - (2) that an appointment be fixed for an interim order;
    - (3) that the case be referred to a Financial Dispute Resolution ("FDR") appointment;
    - (4) that the case be fixed for final hearing (he determining the level of judge before which it should be heard);
    - (5) that the case be adjourned for out of court mediation or, exceptionally, generally;
  - (v) consider making an order as to the costs of the hearing having regard to all the circumstances including the extent to which each party has adhered to the rules;
- (b) may:
- (i) in a case of urgency, make an interim order
  - (ii) with the consent of both parties, treat the appointment, or part of it, as a FDR appointment to which Paragraph 8 applies, in which event the District Judge shall have no further involvement with the application other than to conduct any further FDR appointment.
6. Following the first appointment no party shall be entitled to seek further discovery of documents save pursuant to directions given under Paragraph 5(a)(i) above or with the leave of the court.
7. At any stage:
- (a) a party may apply for further directions or a FDR appointment;
  - (b) the court may, of its own motion, give further directions or direct that the parties attend a FDR appointment.
8. **The FDR appointment**
- (a) the judge hearing the FDR appointment shall have no further involvement with the application, other than to conduct any further FDR appointment;

- (b) evidence of anything said or of any admission made in the course of the appointment shall not be admissible in evidence in a court, save:
    - (i) upon the trial of a person for an offence committed at the appointment;
    - [(ii) for an unequivocal admission of fact made by a party, certified as such by the District Judge not later than the conclusion of the FDR appointment].<sup>2</sup>
  - (c) no offer or proposal made by a party, whether orally or in writing, nor any response to any such offer or proposal, may be excluded from consideration at the appointment by virtue of a claim of privilege;
  - (d) Not later than seven days before the appointment the applicant shall apprise the Court of details of all such offers, proposals and responses thereto, and at the conclusion of the appointment any documents containing the same or referring thereto shall be returned to the Applicant or Respondent as appropriate and not retained on the Court file;
  - (e) parties attending the appointment shall use their best endeavours to reach agreement on relevant matters in issue between them;
  - (f) the appointment may be adjourned from time to time, and at the conclusion thereof the Court may make such consent order as may be appropriate, but otherwise shall give directions for the future course of the proceedings, including, where appropriate, fixing a final hearing date.
9. Both parties shall personally attend every appointment unless the court otherwise orders.
10. **Costs**  
At each court hearing each party shall produce to the court a written estimate of the solicitor and own client costs hitherto incurred on his behalf.
11. **Open proposals**
  - (a) unless otherwise directed by the Court not less than 21 days before the date fixed for the final hearing of an application for

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<sup>2</sup> The provision in Paragraph 8(b)(ii) was not agreed by the Working Party, which was divided about equally as to whether it should be included.

ancillary relief the applicant shall file with the Court and serve on the other party to the application a concise statement setting out the nature and quantum of the orders which he proposes to invite the Court to make;

- (b) not more than seven days after service of a statement under Paragraph 11(a) above the Respondent to the application shall file with the Court and serve on the applicant a concise statement in answer setting out the nature and quantum of the orders which he proposes to invite the Court to make;
- (c) no privilege shall attach or be capable of attaching to either of the statements referred to in Paragraphs 11(a) or (b) above.

## APPENDIX G

### *Family Court of Australia*

## Case Management Guidelines

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*Glossary Of Terms*

**Attachment A**



## **I. STATEMENT OF CASE MANAGEMENT PRINCIPLES**

- (a) The court has a responsibility and a duty to those who approach it to facilitate the just resolution of disputes in a manner which is prompt and economical.
- (b) To do justice and to ensure promptness and economy, the court must concern itself with the pace of litigation, from commencement to disposition. Thus the court has made a firm decision to accept responsibility for the pace of litigation rather than allowing the parties or their legal representatives to undertake that responsibility.
- (c) Whilst accepting its responsibility for the pace of litigation, the court is also committed to ensuring uniform accessibility to its services through standardised practices and procedure. This will mean that particular practices arising out of local legal culture must give way to uniform practices.
- (d) The court, having regard to the interests of individual litigants, and where relevant, the interests of their children, must set realistic time limits for case preparation, monitor the progress of cases against those limits, be prepared to enforce those time limits, and ensure credibility for all scheduled events, especially for listed contested hearings.
- (e) The court's intervention, whether by conciliation, mediation or judicial hearing, must be timely from the perspective of the needs of clients. The disposition should be consistent with the circumstances of the individual case including the timely application of alternative dispute resolution techniques. "Timely" intervention is not necessarily intervention at the earliest moment.
- (f) In conciliation, mediation or adjudication and in the scrutiny of proposed agreements, the court is charged with promoting the welfare of children in matters where children are affected.
- (g) Litigants are entitled to a judicial determination. However, the resolution of disputes achieved by informed parties through negotiation has the advantage that negotiated agreements can be achieved at an early stage and can be tailored to meet the needs of the parties. A wider range of settlement options is available through negotiation and there is a potential benefit to the parties both in financial and emotional terms.
- (h) The administration of family law and of the case management system requires the commitment and co-operation of the court, litigants, legal representatives, the legal professional associations and other relevant agencies.

The guidelines are to be construed and applied and the processes and procedures of the court conducted so as best to ensure the maintenance of these principles.

## **II. ADMINISTRATION OF THE CASE MANAGEMENT SYSTEM**

### **A. Committees**

1. There is a National Case Management Committee, a Regional Case Management Committee in each region and a Registry Case Management Committee in each registry.
2. The National Case Management Committee comprises the members of the Chief Justice's Consultative Council. The Committee is responsible for the design and periodic review of the case management guidelines, for setting and monitoring performance standards for case management systems, and for determining and ensuring compliance with the case management procedures.
3. The Regional Case Management Committee comprises the Regional Judge Administrator, the Regional Manager, the Regional Registrar and the Regional Director of Court Counselling. The Committee is responsible for monitoring the implementation of and adherence to standard case management procedures, monitoring performance of case management systems and ensuring appropriate action is taken to address identified problems. Each Regional Committee is to report addressing the standard agenda each quarter to the National Committee on the operation of case management systems in the Region, identifying problems or issues and specifying action taken or proposed to be taken to address them.
4. The Registry Case Management Committee comprises a Judge and a Judicial Registrar (where applicable), the Registry Manager, the Registrar, the Director of Court Counselling, the List Registrar and, as required, the List Clerk. The Committee performs at the registry level a similar function to that performed by the Regional Committee at the regional level, and is to report quarterly to the Regional Committee on the operation of the registry case management system, identifying problems or issues and specifying solutions and actions taken or proposed to be taken to address them. In addition, the Registry Committee monitors the progress of complex cases.

The Registry Case Management Committee is to give particular attention to the development of strategies for increasing the level of compliance with the Rules of Court by the First Directions Hearing. The Regional Committees and the National Committee are to monitor levels of compliance, strategies and practices in use, and are to seek to ensure the ultimate adoption of effective, consistent practices across all registries.

5. Each Registry Case Management Committee shall develop a Case Management Plan for the implementation of the guidelines and for the integration of the guidelines into the existing Registry management plan. Registry staff should be educated about the overall goals of the plan and be involved in developing aspects of the plan that relate to their work area. These registry plans are to be co-ordinated at the regional and national levels by the Regional and National Case Management Committees.
6. The various Case Management Committees are to meet quarterly with representatives of the legal profession at an appropriate level to address case management issues.

**B. *Listings***

**1. Judicial Calendar**

The judicial calendar (including the appeal calendar) will be prepared on a financial year basis. The judge administrators are to prepare judicial calendars at least 6 months in advance for each registry and region. Regional calendars and any amendments are to be forwarded to the Deputy Chief Justice.

**2. List Judge**

Judge administrators are to designate a list judge in each registry to monitor the progress of contested matters set for hearing and ensure that the goal of commencement of hearings on the scheduled date is met in most cases. The list judge will nominate individual judges to preside over lists, will re-allocate matters and allocate duty matters to individual judges. The position of list judge may be a fixed or rotating appointment.

**3. List Registrar**

The regional registrar is to appoint a list registrar in each registry. The list registrar is to supervise the Pending Cases List and the listing of matters for hearing, liaise with the list judge, manage and co-ordinate the operation of the defended lists, liaise with the Director of Court Counselling to co-ordinate the conclusion of s.62(1) counselling and the scheduling of pre-hearing conferences, and the preparation of s.62A reports. The list registrar will also prepare reports for and attend Case Management Committee meetings.

**4. List Clerk**

The registry manager is to appoint a list clerk. The list clerk is to be responsible for the allocation of trial dates and is to liaise with the list

judge and list registrar in respect of the management of the defended lists.

**C. Case Management Data**

The Management Information Unit (M.I.U.) is to incorporate in the general management information system, management information specific to the case management system. In particular the M.I.U. is to design and put in place an information system which will enable periodic review of the case management guidelines, the setting and monitoring of performance standards for case management systems, and for determining and ensuring compliance with the case management procedures. There should be periodic meetings involving judge administrators, list registrars and list clerks to discuss case management issues.

**D. Training**

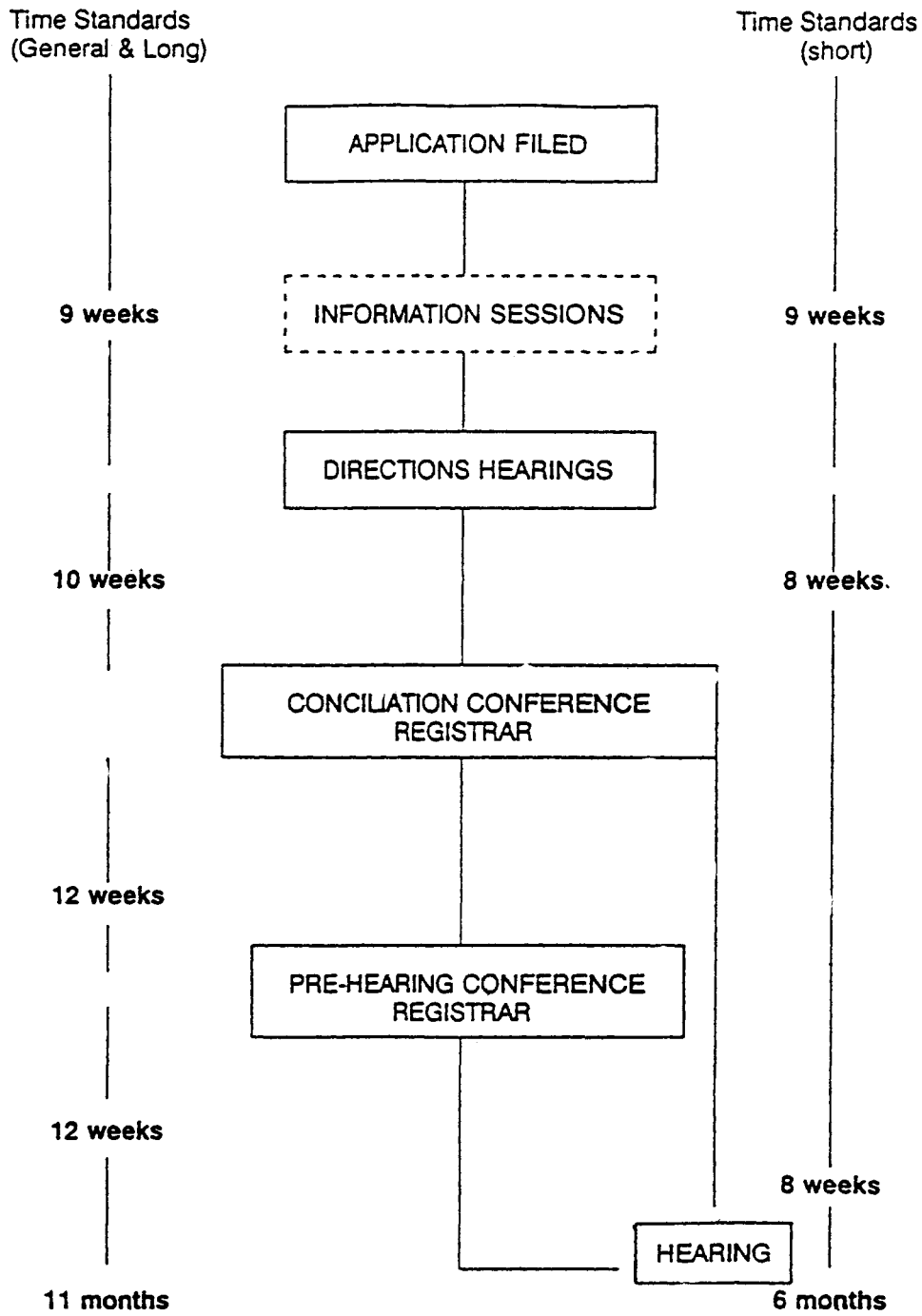
All registry staff are to be trained to an appropriate level in relation to case management principles and practices generally, and in detail on their own work area. Such training is to emphasise the broader context of the court's case management policies to place in context the specific tasks of each staff member.

**E. Standardisation**

- (1) The memorandum provided to the court at the conclusion of ordered conciliation counselling is standardised. The form is prescribed by the Rules.
- (2) A national standardised form of directions and checklist have been prepared for use in all registries by registrars conducting directions hearings, conciliation conferences and pre-hearing conferences. The standard directions are to be made at the directions hearing. If the court makes the directions sought the directions will be initialled, the original placed with the court file and copies returned to each solicitor or party.

CASE MANAGEMENT IN FAMILY COURT

Financial Matters

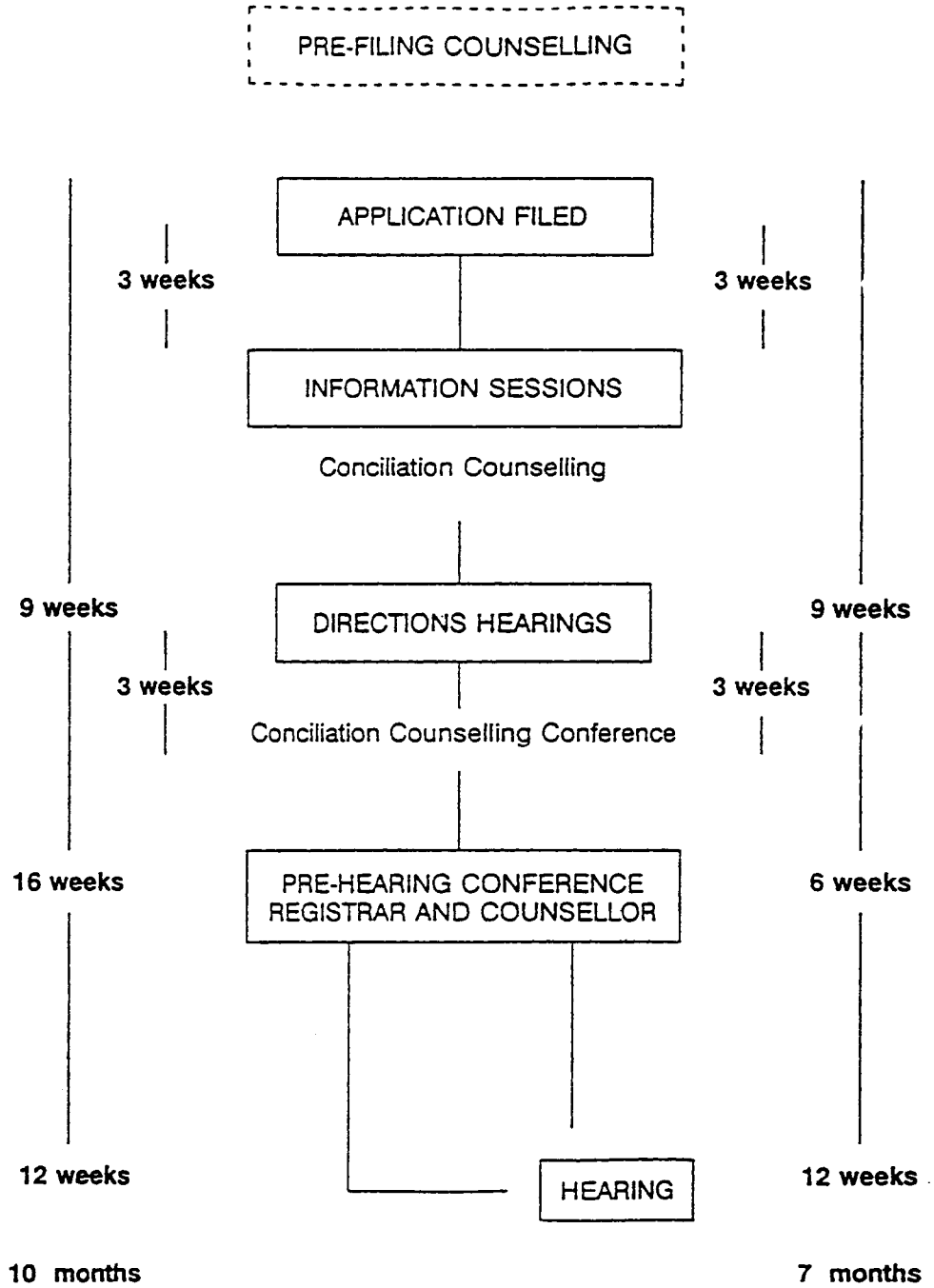


CASE MANAGEMENT IN FAMILY COURT

Children's Matters

Time Standards  
(General/Long)

Time Standards  
(Short)



### III THE GUIDELINES

*It is to be noted that within the context of the Guidelines individual matters will be dealt with on their facts and, where there is good reason, the court may permit deviation from the Guidelines.*

#### **1.0 Pre-Filing**

1.1 Wherever practicable prospective litigants are to be encouraged to attend counselling or other court-based dispute resolution programs before applications for ancillary relief are filed, unless prevented by the need to seek urgent orders from the court.

#### **2.0 Information Sessions In Property And Children's Matters**

2.1 In all applications concerning property, the welfare of children, non-molestation, exclusive occupancy and other injunctive relief parties will be required to attend an information session.

2.2 The information session will be conducted by a registrar and a counsellor and will address four principal areas:

- . children's issues,
- . reactions to separation,
- . court processes and case management information and
- . information on property and maintenance matters.

2.3 All parties will be required to attend that part of the information session that deals with reactions to separation and case management information. Attendance at the other sessions will depend on the nature of the application.

2.4 At the Information Session, the registrar or counsellor will record the attendance of all parties. At the first directions hearing, the court will enquire as to attendance at an Information Session and will make further directions as are appropriate.

2.5 In appropriate cases, for reasons of distance, physical disability, recent conciliation counselling, the terms of a recent order of a court, the nature of the relationship between the parties or other relevant circumstances the requirement of attendance at an Information Session may be waived.

#### **3.0 Conciliation Counselling In Children's Matters**

3.1 In applications concerning the welfare of children, non-molestation, exclusive occupancy and other non-financial injunctive relief, conciliation counselling will be ordered. In appropriate cases, for reasons of distance, physical disability, recent conciliation counselling, the terms of a recent order of a court, the nature of the relationship between the parties or other relevant

circumstances such an order will not be made or if made on an earlier occasion the order may be vacated.

3.2 Where an exemption has been granted because of recent conciliation counselling, the Counsellor will, in respect of pre-filing counselling, complete a memorandum to the court. (Form 69).

3.3 In cases where physical attendance is not practicable, telephone conferences may be ordered.

3.4 Parties will be informed at the time and date of conferences by a standard letter from the Director of Court Counselling to the parties with a copy to each solicitor.

3.5 At the conclusion of the counselling conference a Counsellor will complete a memorandum to assist on the directions hearing.

#### **4.0 Pending Cases List**

4.1 Each registry will maintain a Pending Cases List (PC List) comprising all cases which proceed beyond the first directions hearing. Applications for principal relief will not be entered on the PC List unless otherwise ordered. Except when it is inappropriate to do so, applications should be consolidated and given priority on that list in accordance with the date of filing of the oldest outstanding application.

4.2 The PC List is a queuing device which ensures that the progress of all cases is supervised and that matters are dealt with in priority order. It shows the length of time matters have been on the list.

4.3 Matters will not be removed from the PC List until determined by final orders or by the dismissal or discontinuance of all outstanding applications. It is essential that matters be removed from the PC list when finally determined and to this end practitioners should file a notice of discontinuance.

#### **5.0 Sequence Of Calling The Duty List**

Subject to the discretion of the court in a particular instance duty lists will be called in the sequence prescribed in this paragraph.

##### **5.1 Registrar's Duty List**

- . matters falling outside the registrar's jurisdiction which are to be determined that day are to be transferred at 9.45am. This included matters which are not immediately ready to proceed,
- . unopposed adjournments (e.g. matters not served or where inadequate notice has been given or matters not requiring further orders at that stage),



- . consent "final" orders which have been reduced to writing (this does not include procedural orders),
- . consent orders (excluding directions made at direction hearings),
- . unopposed matters and direction hearings,
- . short opposed matters (less than 20 minutes),
- . opposed matters.

5.1.1 Where necessary during the course of a duty list the registrar may conduct a call-over of the matter remaining in the list for the purposes of giving parties and legal representatives an indication of when their matter will be dealt with and to assist in the management of the list.

5.1.2 Matters transferred to the judicial duty list will be accompanied by a sheet completed by the representatives which deals with time estimates and contentious issues and sets out the following information for all matters to be transferred (Attachment A):

- . proceedings number,
- . proceedings name/s,
- . appearances,
- . issues for determination that day,
- . whether the matter is ready to proceed or has been stood down to allow counselling,
- . whether the matter needs to be referred back to the registrar for directions. (A suitably endorsed copy of the registrar's duty list may be used for this purpose).

Any matters requiring directions may be referred back to the registrar's duty list.

## 5.2 *Judicial duty list*

- . consent orders,
- . unopposed matters,
- . short opposed matters (20 minutes),
- . opposed matters.

Lists will continue until all matters are dealt with. This is subject to the discretion of the court to allocate matters a "not before" marking.

## 6.0 *Directions Hearing*

This guideline does not apply to urgent or interim matters.

6.1 It is expected that the Rules as to the service and filing of documents will have been complied with by the first directions hearing at which time appropriate procedural directions will be made including orders for conciliation

or further conciliation.

6.2 In the event that the Rules have not been complied with an inquiry will be made as to the reason for than non-compliance and in appropriate cases the question of awarding costs (including making an order that a legal representative pay or repay the costs) will be considered.

6.3 In those cases in which the Rules have not been complied with, directions will be made and the matter will be adjourned to a date fixed to ensure compliance with those directions.

6.4 The directions hearing is usually the first occasion on which proceedings come before the court. The parties must attend if the initiating application has been properly served and the matter has not settled prior to the directions hearing. The directions hearing is to be attended by a solicitor or counsel having the conduct of the matter or being otherwise fully conversant with the matter.

6.5 The attendance of the parties facilitates settlement negotiations and may result in the disposition of some or all of the issues at an early stage. Their attendance also enables the parties to appreciate the impact of procedural directions and the steps along the Case Management pathway and in particular to appreciate their obligations and those of their legal representatives for the timely preparation of the case.

6.6 If it is impracticable for one or both of the parties to attend for reasons of distance, physical disability, the terms of a recent order of a court, or other appropriate reason the court may excuse the non-appearance.

6.7 When an application is made for the adjournment by consent, the court will investigate the merits of the application and make an assessment before proceeding to make an order.

6.8 Generally, the parties will be allowed to extend or adjourn the directions hearing date by consent to enable conciliation options to be explored fully.

6.9 If the court considers that a party or solicitor has not pursued or defended the application with due diligence the court may:

- (a) strike out a pleading;
- (b) make an order for costs;
- (c) direct that the matter lose priority in the PC List, or
- (d) refer the application to the judicial duty list for consideration of dismissal of the application, or for the determination of the application as undefended.

6.10 Immediately prior to the directions hearing the solicitor for each party shall deliver to that party a memorandum in writing setting out:

- (a) the approximate costs of the party up to and including the directions hearing, and
- (b) in children's matters, the estimated future costs of the party up to and including the pre-hearing conference, or
- (c) in financial matters, the estimated future costs of the party up to and including the conciliation conference.

6.11 The solicitor shall at the request of the court at the directions hearing provide to the court a copy of the said memorandum. If such a request is made and complied with, the memorandum is to be returned to the solicitor at the conclusion of the hearing.

## **7.0 Conciliation**

### **7.1 Children's matters**

7.1.1 Directors of Court Counselling will develop procedures to ensure all reasonable avenues of conciliation and/or mediation are exhausted, having regard to the particular needs of the family and the time frame available, before the case progresses to the pre-hearing conference.

7.1.2 In all children's matters which have not been resolved at the first directions hearing, a conciliation conference will be ordered under s.62(1). There should be sufficient flexibility in the directions hearing timetable to enable counselling to be fully explored and to permit further counselling.

7.1.3 Apart from pre-hearing conferences, co-conferences with registrars and counsellors should occur only when other methods of conciliation have been exhausted and have not resolved the matter or when there are enmeshed children's and property issues.

### **7.2 Financial matters**

7.2.1 A conciliation conference in financial matters will not be appointed until the requirements of the Rules for the filing of pleadings have been complied with. In making the appointment consideration shall be given to the time required for the completion of any necessary interlocutory steps.

7.2.3 By holding conferences under O 24, the court provides the parties with an opportunity to reach agreement on relevant matters and parties are expected to make a bona fide endeavour to reach agreement and to provide at the conference all relevant and significant documents as required under O 24 r 2.

7.2.4 Each party is to lodge with the senior registrar's secretary and exchange with the other parties a list of assets and liabilities not later than 48 hours prior to the conciliation conference.

7.2.5 Where a registrar has presided at a conciliation conference in a matter

that registrar may thereafter:

- (a) make procedural orders from the bench in that matter;
- (b) make procedural orders in chambers, or
- (c) conduct a pre-hearing conference and make procedural orders at that conference.

7.2.6 If one party fails to attend the conciliation conference the registrar may:

- (a) make an order for costs,
- (b) request that an explanation be provided either by letter, affidavit or in person for failure to attend;
- (c) list the matter in a registrar's duty list for further directions, or
- (d) adjourn the conference with directions.

7.2.7 If neither the parties nor their solicitors appear at the conciliation conference the registrar may refer the matter to the duty list for consideration of the dismissal of the application. The legal representatives and the parties are to be notified that the matter has been listed.

7.2.8 Where there has not been sufficient compliance with O 24 r 2, or with directions in respect of interlocutory procedures, or if for any other reason the conference is unable to proceed, a registrar may:

- (a) adjourn the conference with directions;
- (b) make an order for costs;
- (c) list the matter in a registrars' duty list for further directions;
- (d) list the matter in a judicial duty list for consideration of the dismissal of the matter or orders in default, or
- (e) adjourn the conference to a pre-hearing conference with directions.

7.2.9 Immediately prior to any conciliation conference the solicitor for each party will deliver to that party a memorandum in writing setting out:

- (a) the approximate costs of the party up to and including the conciliation conference, and
- (b) the estimated future costs of the party up to and including the pre-hearing conference.

7.2.10 The solicitor shall, at the request of the registrar conducting the conference, provide to the registrar a copy of the said memorandum. If such a request is made and complied with, the memorandum is to be returned to the solicitor at the conclusion of the conference.

### 7.3 *Mediation*

7.3.1 Where court-based mediation is available and proceedings have

commenced the same general time standards set out in paragraph 12 will apply according to the type of case.

## **8.0 *Complex Cases***

Complex cases need to be identified and given particular attention.

### **8.1 *Definition***

For the purposes of case management a case may be identified by the Case Management Committee as complex if it possesses one or more of the following features:

- . has not been finalised despite a previous defended hearing,
- . is a long defended case,
- . involves voluminous and/or complex issues or evidentiary material,
- . involves complicated psychological or emotional issues, or
- . involves complex social dynamics.

Classification of a matter as complex may take place at any stage of the proceedings.

### **8.2 *Strategy***

Complex cases will be specially identified on the PC List and on the file cover and the progress of those cases will be monitored by the Registry Case Management Committee. The Committee will supervise the management of all complex cases and of the complex case procedure. The Committee will ensure that complex cases are properly identified and that they are individually managed by assignment to a judge, judicial registrar, registrar and counsellor. The Committee will provide advice and guidance for the management of complex cases.

As far as possible complex cases will be listed before the same judge, judicial registrar or registrar for interim and interlocutory procedures.

## **9.0 *Child Abuse Cases***

In light of legislative requirements special management is needed of cases in which there has been a notification. These guidelines will be subject to revision when national protocols have been negotiated with all State and Territory welfare authorities.

9.1 Policy guidelines exist which cover the mandatory reporting of child abuse and liaison with State welfare authorities and other appropriate agencies.

9.2 The following guidelines are confined to the court's management of child

abuse cases. These guidelines are directed at promoting the welfare of children by ensuring that the management of such cases is appropriate to the nature of the abuse, the urgency of the case and the need, if any, for urgent orders.

9.3 In cases where a notice is filed under s.70BA the registrar and in respect of a notification under s.70BB the registrar, counsellor or mediator should inform the State welfare authority of the date of the first directions hearing with a request that the authority advise the court at or before that listing whether it:

- . intends to intervene in the proceedings,
- . is agreeable to the matter proceeding in the Family Court and does not seek to be heard further in the matter,
- . seeks further time to consider its position.

9.4 In cases where an allegation of child abuse has been made before a directions hearing it is normally appropriate for a conciliation conference to be ordered under s.62(1) or O 24. While conciliation counselling may be inappropriate as a means of resolving the dispute it can be used for case management purposes with the memorandum from the counsellor providing information about notification under s.70BB and recommendations as to the need for a Family Report with priority and the need for a separate representative for the child/ren.

9.5 Where the court makes a request under s.91B:

- . the parties to the proceedings will be advised of the request, and
- . the registrar will formally advise the State welfare authority of the request.

The registrar or his/her nominee (excluding any person involved in conciliation counselling) will advise the local/regional office of the State welfare authority of the request and give such information and/or assistance as appropriate including furnishing copies of court documents. The information and documents so provided shall not include information or documents emanating from privileged counselling.

In making a s.91B request the court will take account of the need to set a return date which allows the State welfare authority sufficient time to respond adequately to the request. This will usually be a minimum of three weeks.

9.6 Prior to or upon a case involving an allegation of child abuse reaching a directions hearing consideration should be given to the appointment of a separate representative for the child/ren under s.65.

Consideration should be given at such time to:

any orders necessary to promote the welfare of the child/ren,

- . the ordering of a Family Report,
- . clarification of the position of the State welfare authority, and
- . the timely hearing of the matter by either fixing a second directions hearing or a pre-hearing conference.

9.7 A subsequent directions hearing should be set down no later than four weeks after the previous directions hearing.

At the subsequent directions hearing the separate representative:

- . may seek an order for a Family Report under s.62A or an assessment under s.65A or equivalent;
- . should give some indication of the evidence that he/she will be calling;
- . should indicate any other orders sought on behalf of the child/ren.

The matter should be set down for a pre-hearing conference and a decision made about the timing of the completion of the Family Report or the report under s.65A and arrangements made for the timely hearing of the matter.

9.8 Consideration of the best interests of the child will underpin any exchange of information between the Family Court and the State welfare authorities. In those States where there is an existing protocol with a State Welfare Authority, the case will be managed in accordance with that protocol.

#### **10.0 Family Reports**

10.1 Family reports should not be ordered at the first directions hearing except in exceptional circumstances or in child abuse cases.

10.2 When family reports are ordered this will normally occur at the pre-hearing conference. The order for a family report should be made no earlier than 12 weeks and no later than 8 weeks prior to a hearing.

10.3 Save in exceptional circumstances, the practice of ordering family reports for interim hearings (sometimes referred to as "duty" reports) has been discontinued.

10.4 The practice of preparing "split" reports, has been abandoned. (Split report occur where a family report in a matter involving parties living considerable distances apart is prepared in two parts by two different counsellors neither of whom has seen and assessed all the children and significant adults). Instead, reports are prepared by arranging for the parties to attend for interviews at the registry where the hearing is to take place. These interviews can be scheduled just prior to the hearing or at other times at the discretion of the Director of Court Counselling. Alternatively the counsellor will interview the parties in their respective localities.

10.5 In all cases where a counsellor proposes to make a recommendation for a family report the counsellor will discuss the recommendation with the casework supervisor or the Director of Court Counselling, as appropriate.

10.6 Family reports may be ordered where one or more of the following apply:

- (a) There is a dispute as to the wishes of a child and the child is of sufficient maturity for these to be significant;
- (b) There is a dispute about the relationship between a child and either or both parties or other significant persons;
- (c) The circumstances are such that a report is the best method of obtaining evidence significant to the welfare of the child which requires expert assessment within a counsellor's field of expertise;
- (d) If there is a child at risk, that is, where there are allegations of neglect or child abuse, either physical (including sexual), or emotional.

If the preparation of a family report is not ordered at the pre-hearing conference, a party seeking the preparation of a report must file and serve a Form 8 supported by an affidavit as to the reasons for such a report. That application shall be returnable at least 2 and not more than 5 days after filing.

10.7 Counsellors preparing family reports in matters involving allegations of child abuse will not conduct a forensic investigation into the truth of such allegations.

#### **11.0 *Pre-Hearing Conferences (PHC)***

11.1 Pre-hearing conferences will be held in all unresolved defended matters.

11.2 Pre-hearing conferences will be ordered by a registrar pursuant to O 24. A further attempt at conciliation and negotiation will be made in appropriate cases. The conference will comprise two phases - a conciliation phase and a directions phase. At the conclusion of the conciliation conference a directions hearing will be conducted in the matter. All reasonable avenues of conciliation and/or mediation are to be exhausted before matters progress to a pre-hearing conference. In implementing this guideline in children's matters regard will be had to the particular needs of the family and the timeliness of judicial intervention.

11.3 In short matters the pre-hearing conference will be conducted at the conclusion of the conciliation conference. In other matters, and in matters in which there is no conciliation conference with a registrar, a separate pre-hearing conference will be ordered and the legal representatives of the parties will be advised of the date by notice in writing.



11.4 In general and long matters the registrar conducting the conciliation conference shall appoint a date for a pre-hearing conference and make necessary directions. The directions should take into consideration the provisions of O 11 r 20 and ensure that all interlocutory procedures are completed prior to the anticipated pre-hearing conference date. The registrar may, if appropriate, list the matter in a registrars' duty list to ensure that the directions made at the conciliation conference have been complied with.

11.5 The pre-hearing conference in child welfare matters will be appointed following consultation between the List Registrar and the Counselling Section. It is intended that the Counsellor who conducted the conciliation counselling conference will normally attend the conference.

11.6 The pre-hearing conference is to be attended by the parties and their legal representatives and, in particular, a solicitor or counsel having the conduct of the matter or who is fully conversant with the matters set out in 11.7.1. If it is not practicable for one or both of the parties to attend for reasons such as distance, physical disability or other acceptable reason the registrar may excuse that non-appearance.

11.7.1 At the pre-hearing conference, the legal representatives for the parties are to be able to satisfy the registrar as to matters such as:

- . the nature of the relief sought,
- . the issues of fact and law,
- . whether any amendment to the pleadings is anticipated or required, including the consolidation of applications,
- . compliance with relevant Rules, and any previous directions or orders of the court,
- . completion of all necessary interlocutory matters, including discovery and inspection,
- . completion of any steps that need to be undertaken prior to hearing including, if appropriate, the preparation of a s.62A report or the appointment of a separate representative,
- . the number of expert witnesses and their availability,
- . the accurate assessment of the likely duration of the hearing,
- . the prospect or likelihood of settlement,
- . any other matter which might affect the readiness for trial or scheduling for trial (e.g. interstate, distant country or incapacitated parties or witnesses, the need for interpreters etc.).

11.7.2 The registrar will allocate a "not before" date for hearing and, in consultation with the legal representatives, make directions prescribing a timetable in respect of matters which may affect the readiness for trial. In particular, consideration will be given to:

- a timetable as to the filing of amended pleadings if required,

- . the filing of affidavits of evidence in chief and in reply of the parties and witnesses,
- . the exchange of reports of expert witnesses and, if appropriate, the holding of a conference of experts pursuant to O 30A,
- . the filing and service of any further procedural applications. Any such application is to be listed before the trial judge for determination,
- . the provision of information to the list clerk in accordance with Guideline 11.9,

And in matters where a family report is to be ordered:

- . the preparation of the report by a specified date, such date to be at least 3 weeks prior to the trial date,
- . the delivery of any request for the counsellor preparing the report to be available for cross examination to the Director of Court Counselling no later than 7 days prior to trial.

11.7.3 Unless otherwise directed by the registrar or by the court all parties are to file and serve a list of pleadings and affidavits to be relied upon not later than one clear working day prior to the commencement of the hearing and are to hand up a chronology of events at the commencement of the hearing.

11.7.4 Except when it is inappropriate to do so, all matters at issue between the parties should be consolidated and heard together.

11.8 If a solicitor, counsel or party who has been notified to attend a pre-hearing conference fails to attend, or the conference is unable to proceed because of non-compliance by a party with directions or for any other reason, the registrar may:

- (a) adjourn the conference with directions;
- (b) make an order for costs;
- (c) list the matter in a registrars' duty list for further directions, or
- (d) list the matter in a duty list for consideration of dismissal of the matter or orders in default, the court to notify the parties and their solicitors.

11.9 Approximately 21 days prior to the trial date the list clerk will telephone the legal representatives and confirm that they have complied with the directions made at the PHC. In the event that the directions have not been complied with, the list clerk will appoint a time for the holding of a compliance conference which the legal representatives of all parties will attend and at which they will provide the following information:

- (a) whether the matter is ready to proceed and, if not, why;
- (b) name of counsel briefed (if any) or the advocate,
- (c) the number of witnesses to be called;

- (d) whether all directions have been complied with and all relevant documents filed;
- (e) whether there is likely to be an application for an adjournment, and
- (f) whether there is any likelihood of settlement.

If it appears at that compliance conference that the matter may not be ready to proceed on the scheduled hearing date, upon consultation with the list judge the matter will be listed for directions as soon as practicable before the relevant trial judge or before the list judge.

11.10 Immediately prior to any pre-hearing conference the solicitor for each party shall deliver to that party a memorandum in writing setting out;

- (a) the approximate costs of the party up to and including the pre-hearing conference, and
- (b) the estimated future costs of the party for the preparation of the defended hearing and the actual hearing.

11.10.1 The solicitor shall, at the request of the registrar conducting the conference, provide to the registrar a copy of the said memorandum. If such a request is made and complied with, the memorandum is to be returned to the solicitor at the conclusion of the conference.

## **12.0 Listing**

12.1 A uniform listing system and standardised listing practices will be adopted in the court as follows:

- (a) Dates for direction hearings will be allocated at the time of filing and, as a general principle, will be approximately 9 weeks after filing. This is intended to give applicants time to serve and respondents sufficient time to answer the application in accordance with the Rules.
- (b) Unless otherwise directed by the court, all applications will be listed in the first instance before a registrar.
- (c) Pre-hearing conferences will be appointed by direction made either at the conclusion of the conciliation conference, at a directions hearing or in chambers. In the event that the direction is made in chambers and in the absence of the legal representatives, the solicitors on the record for the parties will be notified by letter.
- (d) All registries are to adopt listing practices which ensure that very short matters (under 2 hours), especially undefended matters, are not listed in the defended lists, but are dealt with in duty lists. Urgent matters should, with the leave of the court, be referred to the list clerk, or where appropriate, the listing judge for special fixture.

- (e) All matters are to be identified as short, general or long defended at the first direction hearing on the basis that the hearing of a matter is estimated to take 1 day or less, in excess of 1 day but no more than 4 days, and more than 4 days respectively, and that matters are to be so endorsed on the PC List. The categorisation is subject to review as the matter proceeds.
- (f) All registries in which a judicial registrar is available to hear contested matters are to implement procedures to identify matters within a judicial registrar's jurisdiction in the PC List, and where appropriate to list those matters before a judicial registrar for final determination.
- (g) The commencement dates for each matter are to be calculated on an overlisting basis as determined by the judge administrator of each region having regard to the needs of the individual registry. The overlisting ratios should be reviewed from time to time in the light of experience, the number of judges available and the requirements of individual matters.
- (h) As a general rule, matters should be listed for hearing no more than 8 weeks in respect of short matters and 12 weeks in other matters from the date of the pre-hearing conference so as to preserve maximum flexibility in the listing system.
- (i) Defended matters are to be set down in individual judge lists (referred to as "Judge Specific Lists") which are to be prepared in listing cycles of 4-5 weeks. The judge administrator or a nominee on his behalf with the assistance of the list registrar and list clerk will assign the matters for hearing to those lists 4 weeks before the commencement of each listing cycle.
- (j) The matters are to be allocated to a Judge Specific List, listed in sequence and given a "not before" commencement date. The aim will be to ensure that so far as practicable the date assigned is the date on which the matter commences.
- (k) Matters involving issues of particular urgency or significance or parties and witnesses who have to travel long distances or which otherwise require certainty of listing are to be listed so far as possible at the commencement of a list.
- (l) Following the commencement of a hearing, the matter should proceed to a conclusion without an adjournment except in exceptional circumstances. The practice of adjourning cases part-heard is to be avoided.
- (m) Any matter in which the hearing cannot be commenced at the scheduled time is to be reallocated by the list judge and listed before any other available judge. If no other judge is available the matter may be stood down in the list until 2.15pm. If it cannot be commenced at that time it is to be referred to the list judge so that consideration may be given to listing the matter on the following day, the allocation of a special fixture or such other order as is deemed appropriate.

- (n) Any matter not heard by the end of the list is to be allocated a date in the next available list with priority.
- (o) Listed cases which do not proceed to hearing for any reason will, in the absence of any other direction, be referred to the list registrar,
- (p) The judge's associate is to liaise with the list clerk and give the legal representatives and/or the parties, where unrepresented, the maximum possible notice of the likely commencement time.
- (q) It is the general policy of the court that adjournments of listed cases be limited to those instances in which unforeseen and exceptional circumstances require diligent legal representatives to request an adjournment. Thus applications for the adjournment of matters which have been listed for hearing will be granted sparingly and, if granted, may result in orders for costs. The decision is one for the court.
- (r) In the event that liberty is granted to apply in respect of matters arising out of orders made, an application to restore the matter to the list for that purpose must be made by letter to the registry manager.
- (s) At the commencement of the final defended hearing of any application (other than an interlocutory application) the solicitor for each party shall deliver to that party a memorandum in writing setting out:
  - . the approximate costs of the party up to and including the first day of the hearing,
  - . the cost per day of the hearing, and
  - . the estimated length of the hearing.

## 12.2 *Sitting hours*

This guideline includes small registries and circuits.

12.2.1 Normal sitting hours will apply in all registries subject to the discretion of the court hearing a particular case and to arrangements which may be made in respect of circuit sittings. For example circuit sitting hours may be adjusted on the first and last day of the sittings to ensure that each is a full day's sitting. It is within the discretion of the judge administrator to determine appropriate sitting hours for circuit sittings.

### 12.2.2 *Registrars' duty lists*

The registrars duty lists will commence at 9.45am and continue to 12.45pm, re-commence at 2.15pm and continue to 4.15pm.

### 12.2.3 *All other lists*

All other lists including dissolution lists, duty lists and contested hearing

lists will commence at 10.00am and continue to 1.00pm, re-commence at 2.15pm and continue to 4.15pm.

### 12.3 *Cross vested matters*

It is not appropriate for cross-vested matters to be dealt with pursuant to O 31 r 8. Such matters should be listed no more than 4 weeks from the date of filing in the registrars' duty list on a day when a judge is sitting in a judicial duty list or is otherwise available to hear the matter.

## 13.0 *Appeals*

### 13.1 *Appeals and transfers from courts of summary jurisdiction*

Upon the transfer of proceedings from a court of summary jurisdiction the papers will be forwarded to a registry of the court. When the papers are received the registry manager will list the proceedings in a registrars' duty list in approximately 4 weeks and notice of the date will be sent to the parties at their respective addresses for service. Appeals from a court of summary jurisdiction are to be referred to the registry manager and allocated a date for hearing within 4 weeks from the date of filing.

13.1.2 The matter will then proceed as if it was instituted in the Family Court but shall have priority in the Pending Cases List from the date the proceedings were instituted in the court of summary jurisdiction.

### 13.2 *Applications for review of decisions of Judicial Registrars and Registrars*

Applications for review will be returnable in a registrars' duty list 14 days after filing.

13.2.1 In the case of urgent, interim or interlocutory proceedings any necessary directions will be made and the matter will be referred to the list clerk for the allocation of a hearing date in the next available list. In the case of contested property orders or any review deemed to be a general or long cause, the matter may be referred to a pre-hearing conference.

### 13.3 *Appeals to the full court*

13.3.1 It is the court's policy to minimise the opportunities for an appeal to be used as a negotiating tool and/or a delaying tactic on behalf of one party. The aim of the court's appellate system is to afford parties full and fair access to the due processes of the law, to ensure that the court's standard of judicial decision-making are maintained and to resolve in a consistent manner questions which are novel, difficult, the subject of conflicting authorities or of importance in the general public interest or in the administration of the Family Law Act 1975.

13.3.2 The general standard of expedition which the court has set for the

disposal of appeals is 6 months from filing of a notice of appeal to the delivery of judgment. This will not be possible for every case, for example, where the complexity of the issues requires the reservation of the judgment, but it is the aim for the bulk of cases. In any event, no more than 6 months should elapse between filing and hearing. To achieve this aim it is necessary to set a timetable to which parties and their legal representatives should adhere. Progress of this timetable should be monitored by the Deputy Registrar (Appeals) in the appeals registry.

13.3.3 The provisions of O 32 r 18 may be used, although not exclusively, to dispose of cases which are not prosecuted with reasonable diligence, and where there appears to be no good reason for the delay.

13.3.4 *General timetable*

- (a) Notice of appeal filed and appointment made to settle the appeal book index within 2-3 weeks (conciliation conference may be appointed to take place on the same date);
- (b) Appellant to file draft index 7 days before the appointment to settle the index to the appeal books;
- (c) Appeal book index settled and earliest available hearing date allocated. Solicitors should advise estimated length of hearing and current state of preparedness (i.e. whether any problems anticipated, e.g. legal aid appeal pending, previous solicitor holding lien on papers, client in financial difficulties, etc.). The general time standard for the disposition of appeals is 6 months from the filing of the notice of appeal to the delivery of judgment;
- (d) Appeal books to be filed 6 weeks prior to hearing date;
- (e) The appellant (and cross-appellant) to file and serve outline of argument and list of authorities not less than 7 days before the hearing date. The respondent to file and serve outline of argument and list of authorities not less than 2 clear working days before the hearing date.
- (f) Orders
  - (i) If ex tempore judgment given, result noted on records and orders sent out within 1 week after hearing.
  - (ii) If judgment is reserved, await Full Court's decision and orders sent out within 1 week;
- (g) Application for costs and/or costs certificate to be made orally at time judgment is delivered or application to be filed in accordance with form 42A within 1 month of the making of the decree.
- (h) Reasons for judgment handed to parties when judgment delivered and ex tempore judgments forwarded to parties after being settled by the Full Court.

- (i) In matters where an order has been made for rehearing, the matter is to be referred by the regional appeal registrar to the judge administrator or the nominee on his behalf to make necessary directions and, if appropriate, list the matter for hearing.

Any problems with the listings, preparation of appeal books, withdrawal of proceedings, etc., must immediately be communicated to the regional appeal registrar. It is essential that the regional appeal registrar knows at all times the state and progress of the matter.

The normal, but not exclusive, method for the court to finalise appeals where the parties do not show reasonable diligence in ensuring the appeal progresses is to use the provisions of O 32 r 18. Parties expose themselves to this possibility if they fail to conform without good cause to the timetable which has been set down by the regional appeal registrar. (Notice of the intention of the court to dismiss the appeal must be given at least 21 days before the making of the order).

13.3.5 Regional appeals registrars are responsible for monitoring the progress of all appeals to ensure timely progress and take appropriate action in accordance with the appeals manual when appeals do not proceed within an appropriate time frame.

13.3.6 Conciliation conferences have been introduced on a trial basis in appeals.

#### **14.0 Time Standards**

The following time standards will apply to the completion of the key stages of the litigation process covered by these Guidelines. Registries are expected to meet the following time standards; however, the judge administrator may authorise some departure from the intermediate time standards in small registries and for circuit sittings. The standards are as prescribed in this paragraph.

14.1 *Financial matters estimated to take up to 1 day to hear (short matters):*

- a. Filing to directions hearing - 9 weeks;
- b. Directions hearing to commencement of conciliation conference (incorporating pre-hearing conference) - 8 weeks;
- c. Commencement of conciliation conference (incorporating pre-hearing conference) to hearing - 8 weeks,
- d. Total elapsed time from filing to hearing for matters not earlier resolved - 6 months



14.2 *Financial matters estimated to take more than 1 day to hear (general and long matters):*

- a. Filing to directions hearing - 9 weeks;
- b. Directions hearing to commencement of conciliation conference - 10 weeks;
- c. Commencement of conciliation conference to pre-hearing conference - 12 weeks;
- d. Pre-hearing conference to hearing - 12 weeks;
- e. Total elapsed time from filing to hearing for matters not earlier resolved - 11 months.

14.3 *Child welfare matters estimated to take less than 1 day (short matters):*

- a. Filing to pre-directions hearing conciliation conference - 3 weeks;
- b. Filing to directions hearing - 9 weeks;
- c. Directions hearing to s.62(1) conference - 3 weeks;
- d. Directions hearing to pre-hearing conference - 6 weeks;
- e. Pre-hearing conference to hearing - 12 weeks;
- f. Total elapsed time from filing to hearing for matters not earlier resolved - 7 months.

14.4 *Child welfare matters estimated to take more than 1 day (general and long matters):*

- a. Filing to pre-directions hearing conciliation conference - 3 weeks;
- b. Filing to directions hearing - 9 weeks;
- c. Directions hearing to s.62(1) conference - 3 weeks;
- d. Directions hearing to pre-hearing conference - 16 weeks;
- e. Pre-hearing conference to hearing - 12 weeks;
- f. Total elapsed time from filing to hearing for matters not earlier resolved - 10 months.

14.5 *Delivery of judgments*

Save for cases involving particular complexity, reasons for judgment for both trial matters and appeal matters should be delivered as soon as reasonably practicable and in normal circumstances not later than three months after the last day of sitting.

***Glossary Of Terms***

**Directions hearings** These hearings are usually conducted by registrars for the making of directions on the first or subsequent

	return dates of applications other than applications for principal relief
<b>Dissolution lists</b>	Lists usually conducted by registrars for the determination of applications for dissolution of marriage
<b>Enforcement lists</b>	Lists usually conducted by registrars for the enforcement of orders and assessments for the payment of money including child support
<b>Judicial duty list</b>	Lists conducted by judges and judicial registrars wherein urgent and interlocutory relief is sought in respect of issues which are outside the jurisdiction of a registrar
<b>Registrar duty lists</b>	Lists conducted by registrars including directions hearings, interlocutory matters and consent orders.
<b>Short matters</b>	Matters in which the trial is estimated to take 1 day or less
<b>General matters</b>	Matters in which the trial is estimated to take between 1 and 4 days
<b>Long matters</b>	Matters in which the trial is estimated to take more than 4 days
<b>Conciliation Conference</b>	A conference held in the presence of a registrar pursuant to O 24 of the Rules or s.79(9) of the Act
<b>Conciliation Counselling Conference</b>	A conference held with a court counsellor or welfare officer to discuss the welfare of the child and, if there are any differences between the parties as to matters affecting the welfare of the child, to endeavour to resolve those differences. [s.62(1)].
<b>Conciliation Counselling</b>	Counselling to assist parties to a marriage or parties to proceedings and their children to adjust to the consequences of marital breakdown. These conferences involve procedures for the resolution by conciliation of matters arising both prior to and after the commencement of proceedings [s.16A].

Conciliation counselling can be voluntary (initiated by the parties, their solicitors or other welfare agencies) or court ordered (ordered by the court under O 24, s.62(1), s.64(1AA) or s.112AD). Evidence of what was said by the parties at such conferences is not admissible in any court. In practical terms, there is no distinction between a conciliation counselling conference and conciliation counselling.

Attachment A

*DUTY LIST*

Matter name: \_\_\_\_\_ Number: \_\_\_\_\_

Issues requiring determination:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Time Estimates of Each Party  
(Including the reading of material, cross-examination, and submissions)

1. APPLICANTS CASE

Time \_\_\_\_\_

\_\_\_\_\_  
Counsel/Solicitor  
for Applicant

2. RESPONDENT'S CASE

Time \_\_\_\_\_

\_\_\_\_\_  
Counsel/Solicitor  
for Respondent

3. SR/INTERVENOR'S CASE

Time \_\_\_\_\_

\_\_\_\_\_  
Counsel/Solicitor  
for SR/Intervenor

TOTAL TIME: \_\_\_\_\_  
(Applicant to complete)

THE LAW REFORM COMMISSION

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111 St Stephen's Green  
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Fax No.: 671 5316

*LIST OF LAW REFORM COMMISSION'S PUBLICATIONS*

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