Editorial: Covid-19 and Our Children

As we all know, Covid-19 has had a major impact on society as a whole. It has affected us all in different ways, socially, emotionally and financially. How this plays out for each individual is dependent on our age, social class and gender. For Barnardos, our concern has been the impact on all children but, in particular, those exposed to adverse childhood experiences.

Barnardos works to support children through our frontline services across the country. We also engage through the court system in the context of providing evidence to the court to support the best interests of the child, and through our guardian ad litem service.

Coming to Terms with the Reality of Covid-19

At the outset of the pandemic our initial focus was to support parents in talking to their children about Covid-19. We developed resources in line with our trauma-informed approach, and encouraged families to take the time to connect with their heart, body and mind. Communication with children during times of uncertainty and massive change such as the first school closures became a priority, as did practical support measures and maintaining a connection with all the families and children that we were working with, particularly those whose protection and welfare was of concern.

We had no idea this was something that would still be with us a year later. As we continue to live with Covid-19, our priority to be there for children remains, and communication, from Government right down to family conversations, becomes more important than ever. How we absorb, share and speak about Covid-19 now will impact how we, and our children, heal in the future.

Impact on Families

The loss of employment has meant that many families have been unable to independently provide the basic needs for their children, particularly during the initial lockdown from March to July 2020. Others have struggled with addiction and poor mental health compounded by the crisis, while restrictions put many more at risk of domestic violence and abuse in the home. In September 2020, a snapshot survey of nearly 1,250 of our open cases over a one-week period highlighted the extent of these issues, with 44 per cent experiencing difficulties related to mental health, 25 per cent experiencing domestic violence in the home, and 21 per cent experiencing issues related to addiction. Overall 30 per cent experienced a combination of two or more of these issues. While these figures demonstrate the disturbing reality inside many households, it is their impact on children that is a major concern for us as the pandemic continues.

Children's Experience of Domestic Abuse

Reports from Barnardos projects across the country indicate a rising level of referrals to services this year related to domestic violence and abuse in the home. The survey above highlights the extent of the abuse, estimating that, over a one-week period, 317 open cases involved children impacted by domestic violence and abuse in the home.

Children's exposure to domestic abuse can have a prolonged and significant impact. The closure of schools in mid-March 2020 and again at the start of 2021 has exacerbated this and has meant the loss of social and emotional support, access to a trusted adult, and a reliable stable environment for many children who may have nowhere in their home to turn. Before the pandemic began these children were living in homes with many complex issues. The pandemic has heightened these issues.

It is important that we hear the voices of children impacted by domestic violence and abuse in the home and endeavour to understand what living in their home is like for them. The trauma of living with domestic violence affects a child in many ways, in how they think, feel and behave.

Barnardos provides support to children living with domestic violence across all our range of services including our early years and family support services; we work to prevent domestic abuse, support families through crisis and into recovery. Our TLC Kidz programme supports children to speak about, and process, their trauma.

> "It's a really bad feeling in our heart, it feels like it's broken. Sometimes we feel it in our bodies too, and our bones start to hurt."

Barnardos is calling on the Government to take the lead in 2021 and put plans in place which would support children through crises and prevent more children from experiencing domestic abuse. The Government must listen to children's voices and allow them to participate in the changes to systems and society needed to address domestic violence in a child-centred way.

Children in Care

The impact of the changes in work practices on the court system due to the pandemic has negatively affected some of the most vulnerable children in our care system. Most of the work of Barnardos guardian ad litem service is now office based. This means that direct work and engagement with children and families is very limited. Building and maintaining rapport with children is much more challenging online.

Access to court is more limited, meaning that there is less opportunity to raise and resolve issues relating to the provision of care to children, leaving some without an up-to-date care plan. For children who are old enough to understand the process, the adjournment of section 18 care orders has meant that they face prolonged uncertainty.

The lack of opportunity for the court to direct services that may be of benefit to the child as part of their care plan means that intervening early is no longer possible. Regularly, assessments that have been carried out in preparation for hearings have to be reviewed, leading to further delays. We

can therefore expect a backlog of hearings that will take time to work through, once the courts are in a position to do so. Behind each hearing is a child or children that require more immediate support.

Access

There have been mixed experiences in relation to access. For some children the break in access visits has proven somewhat beneficial. For others, being placed apart from siblings means that it is now harder to see one another. While all children are experiencing the loss of hugs and kisses from grandparents, relations and friends, this has been particularly challenging for those who are unable to have physical contact with their parents.

Given the contagious nature of Covid-19, some foster carers have needed to limit children's access with their parents due to other family members being vulnerable. Foster carers may not be able to accept new placements due to risk issues in their own families.

There are fewer placements available for children in care. Residential units are impacted by staffing shortages due to illness or requirement for isolation, meaning they may not be able to offer placements that would otherwise be available.

In the first lockdown we were aware of a number of cases where placements broke down as a result of Covid-19—for example, young people in residential care who were engaging in "at risk" behaviours, such as absconding, were deemed too high a risk and their placements were ended.

Children in secure care already have their liberty restricted, but in normal times would regularly go out to community and social activities. This is no longer possible due to restrictions, so they are now doubly restricted and their re-integration into the community is more challenging.

Children in care very often have additional educational needs as a result of the trauma they may have experienced. Services such as SNA support are not available to them. Older children who have experienced school disruption prior to coming into care are harder to hold in the education system, both during lockdown and on return to school.

School Closures

To further understand families' experience of the pandemic we conducted a survey in May 2020, which found that 84 per cent of children missed seeing their friends. Many parents responding to the survey reported problems with routines and managing emotions. One parent summed up the anxiety that children experience in the following quote:

> "The boys are extremely stressed … they are terrified I will be infected by them or others and will die. The total focus everywhere on the virus is really upsetting children, irrespective of their circumstances. It is adding stress. My grandsons wrote emails to me a week ago begging me not to go out or speak to anyone … children need reassurance at all levels".

Our annual Back to School survey further highlighted the concerns parents had about the impact of the first school closures. Over 90 per cent of parents felt it was important for children to return to school for their child's emotional and social development, and for their mental health. The survey also highlighted a lack of devices for families to engage in remote learning: "We have one laptop and between three children doing homework it was very stressful at times as a lot of the homework was online".

The ESRI also published research highlighting that children from disadvantaged backgrounds and those with special educational needs will be impacted the most. Through our work with vulnerable children across Ireland, we have seen first hand the devastating impact that the pandemic has had on these groups of children, with school closures being a key driver. For families from disadvantaged socio-economic backgrounds, access to wi-fi and devices for home learning has been a barrier to engaging in any form of home schooling. Children, whose home environment is unstable, are rarely offered the support required to engage with their class. Remote learning is not an option for these children and it remains to be seen, given the ongoing closures, how many of these vulnerable children will adapt to a return to school, let alone regain and reach the educational milestones many will have missed.

In the case of children where there is a welfare and protection concern, teachers are the first port of call to raise the alarm. Without school, this safety net has been whipped away from them. As the school debacle is played out by opposing sides these children are forgotten, and real ambition to do what is in the best interests of the child has been drowned out by the loudest voices.

Conclusion

In society, as adults, we must always be mindful of our responsibility to children. We have lived experience that helps us make sense of what is happening, and can manage uncertainty with a certain level of emotional understanding and a historical perspective. For children, their lives have been turned upside down. We must communicate with them to support their capacity to think through uncertainty and difficulty, and help lead them through these challenging times.

Through the many decisions being made during this pandemic, one thing is clear—we are not prioritising the young, nor are we prioritising the most socially and emotionally vulnerable.

Priorities and focus must shift to this group, decisive action needs to be taken, and planning must be put in place to support those who will have lost so much during this period—to re-learn, re-enter and re-take their rightful place at the heart of our society. Otherwise we should be concerned for what we may find when the dust settles.

Suzanne Connolly, CEO Barnardos

Case Progression in the Irish Family Law System

*James Seymour**

Compulsory case progression was formally introduced into the Irish legal system[1] when it was introduced into family law proceedings in the Circuit Court under S.I. No. 358 of 2008[2] which came into operation on 1 October 2008. Case progression was formally introduced into certain civil matters in the Circuit Court under S.I. No. 539 of 2009.[3]

At the time of its introduction (into family law matters) it was described as "a very welcome development"[4]; the commentary was, for the main part, very positive and optimistic:

> "The volume of pre-trial motions in family law cases in the Circuit Court is considerable, and it is hoped that the new regime will relieve Circuit Court judges of much of their pretrial applications caseload, freeing them up for trial work, while ensuring that cases coming before judges are better prepared for trial, with the prospect that trial lengths will be reduced."[5]

The introduction of case progression into the Irish court system was limited to the Circuit Court jurisdiction and, within that jurisdiction, it was further limited (for a year or so) to family law proceedings (i.e. proceedings brought under Ord.59 of the Circuit Court Rules), before it was extended to certain categories of civil proceedings.

The Circuit Court—Family Law

S.I. No. 358 of 2008 defines "case progression" as "the preparation of proceedings for trial" and further states that its purpose is

> "to ensure that proceedings are prepared for trial in a manner which is just, expeditious and likely to minimise the costs of the proceedings and that the time and other resources of the court are employed optimally."[6]

Under these rules, there is a specific time frame within which a case progression hearing is to take place, namely,

> "on a date which is not later than 70 days after filing by the Respondent of his Defence, his Affidavit of Means and, where required by this Rule, his Affidavit of Welfare."[7]

The case progression process is commenced by way of the issuing to each party (or their legal representatives on record) of a summons to attend at a case progression hearing on a specific time and date and a questionnaire is attached to each summons for the parties to complete and return in advance of the case progression hearing date. However, the rules do provide for any party to apply to the County Registrar for case progression and a judge in any such proceedings can refer a matter for case progression.[8]

The rules provide for the County Registrar to make whatever directions or orders as he/she deems appropriate to progress the case and get it ready for hearing. These orders can deal with anything from pleadings, discovery, exchanging of statements of issues, identifying the issues in dispute, interrogatories, inspection of documents or property "and any other issues which are deemed necessary or expedient".[9]

The rules governing the extent of the orders and/or directions that can be made at a case progression hearing provide significant scope for the County Registrar or judge to intervene in a case where the parties require direction, or where one or both parties are being obstructive or non-cooperative.

Indeed the rules provide the court with various sanction options such as punitive costs orders or the referral of the matter to the judge for sanction, and the County Registrar is obliged to prepare a report for the judge detailing the issue of non-compliance.[10] There is also a very important function, which to my mind is under-utilised, and that is in relation to the retaining of expert witnesses by the parties. The rules provide for the County Registrar to direct expert witnesses to consult with each other with a view to identifying the issues in dispute, and, once the issues are agreed, reaching agreement on the evidence to be given, and for the expert witnesses to provide a joint written memorandum to be filed on the court file setting out the details of their joint meetings and exchanges.[11]

The initial section of S.I. No. 358 of 2008 provides that in cases where there is a motion issued for judgment before the County Registrar, and the County Registrar is satisfied, having made the appropriate inquiries, that the reliefs being sought are being consented to, he/she can send the matter straight to the judge for ruling where the proceedings have been compromised on, thus removing consent cases from the backlog. As a County Registrar, it still surprises me how many practitioners seem to be unaware of how quickly a case can be ruled on (and finalised) where a compromise has been reached![12]

The rules also provide a precedent form of summons to case progression and a questionnaire to be completed and returned in advance by each party. The summons contains not only the required attendance at the case progression hearing scheduled on the face of it, but also an express requirement that the parties serve notice on their pension trustees where pension adjustment orders are being sought, and a further express requirement that all items in the parties' respective affidavits of means are fully vouched in detail for a period of one year prior to the date of the swearing of the respondent's affidavit of means.

The latter requirement is expressly detailed in its listing of the various types of vouching documentation which should be

disclosed and exchanged. The specifying of a period of one year preceding the date of the respondent's replying affidavit is clearly a practical measure as, in most cases, the applicant would have issued the proceedings within the preceding 12 months and, at the time of issuing said proceedings, the applicant would have been obliged to provide an affidavit of means covering the period of 12 months up to the date of swearing of the said affidavit.[13] The benefit of this requirement when entering the case progression process is that it does away with the need for the parties to issue multiple motions for discovery as the County Registrar can make ongoing discovery orders as the matter proceeds through case progression, "[t]he whole purpose behind this is to avoid lengthy discovery documentation applications that can delay a case by at least six months to a year."[14]

Unfortunately, it is my experience that these two requirements are often overlooked (deliberately or otherwise) even though it is expressly stated that they be complied with in advance of the case progression hearing. We will deal with this at a later stage, in my recommendations.

It is also interesting to note that the rules provide for the solicitors for each party to attend at the case progression hearing without the need for the actual parties to attend. There is some merit in this, in that both solicitors would be able to openly discuss the issues in the case, within the case progression hearing, without the naturally emotionally-charged presence of their respective clients.

Often experienced family law practitioners can be clinical and succinct in respect of identifying the issues when they are free of the requirement to comfort or reassure their clients that "they are fighting their corner". I believe that the drafters of S.I. No. 358 of 2008 were very practical in their drafting of this provision and could see the merit in two experienced family law practitioners being able to identify the issues to be determined without external pressures.

Again it is interesting to note the contents of r.19 of S.I. No. 358 of 2008 which states:

> "Each representative of a party attending the case progression hearing shall ensure that he is sufficiently familiar with the proceedings and has authority from the party he represents to deal with any matters that are likely to be dealt with."[15]

I would hope that this provision is a reminder to practitioners rather than a remedial provision!!

Following on from its introduction into the Circuit Court system, further changes to family law case progression were introduced by way of the Circuit Court Rules (Family Law) 2017 (S.I. No. 207 of 2017).[16] S.I. No. 207 of 2017 introduced a consolidated set of rules for family law proceedings in the Circuit Court which came into operation on 14 June 2017. Again, S.I. No. 207 of 2017 reiterates (as already stated in S.I. No. 358 of 2008) that the purpose of case progression should be

> "to ensure that proceedings are prepared for trial in a manner which is just, expeditious and likely to minimise the costs of the proceedings and that the time and other resources of the court are employed expeditiously".[17]

S.I. No. 207 of 2017 extended the period for which disclosure of the vouching documentation supporting each party's affidavit of means from one year preceding the date of the swearing of the respondent's affidavit to a much longer period of one year prior to the commencement of the actual proceedings.[18]

The principal changes made to family law case progression by S.I. No. 207 of 2017 relate to proceedings in the Dublin Circuit.

First, where both parties have lodged a joint certificate of completion of the pre-case progression steps set out in the Rules, or where one party has lodged a certificate of completion of those steps by that party alone and has given 14 days' notice to his/her opposing party of this completion and his/her intention to apply for a case progression hearing, and calling on his/her opposing party to complete the pre-case progression steps, the County Registrar will list the case for a case progression hearing.[19]

Where neither party has applied for a case progression summons to issue within 12 months of the date on which the respondent filed his/her defence and affidavit of means,[20] the case is brought before the court for an explanation as to the delay in applying for case progression, and the court may make any orders or directions that it deems appropriate, including striking out the proceedings or the counterclaim or ordering the issue of a case progression hearing summons by the County Registrar.

There is also a "fast-track" option where both parties certify first that they have completed the pre-case progression steps; second that they have complied with any orders or directions already made (if any); and third that they are ready for trial; then the County Registrar may give the matter a hearing date and remove the matter from the case progression process.[21]

S.I. No. 207 of 2017 made these changes to cases only in the Dublin Circuit, whereas in all the other Circuits the original position remains the same (i.e. a case progression summons will issue for a case progression hearing date which is not later than 70 days after the filing by the respondent of his/her defence and his/her affidavit of means and his/her affidavit of welfare (where required)).

Finally, the Circuit Court Rules also introduced a requirement for the County Registrar to keep a record of the entire case progression process and to place this record on the court file.[22] While this in itself is a correct method of determining whether the case progression process has been effective, it also has an added purpose:

> "to discourage abuse of the case progression system as at the final hearing of the matter before the Court, the Court file will contain the record of the proceedings in case progression".[23]

As another commentator has put it:

> "These are entirely new rules which may be of benefit in assisting parties to progress their case and deter parties from seeking to delay or frustrate proceedings—the record kept by the County Registrar may well be persuasive when it comes to the court's decision on costs."[24]

The same commentator recommends that it might prove a useful exercise for the parties to take up a copy of the record when preparing their case for trial.[25]

Family law case progression in the Circuit Court was further upgraded by S.I. No. 427 of 2018,[26] by the extension of the case progression requirement to cases seeking relief under the civil partnership and cohabitation legislation. This extension came into operation on 31 October 2018.[27]

Overall, the introduction of case progression into family law proceedings in the Circuit Court has been welcomed, and especially the enhanced version in place in the Dublin Circuit Court:

> "The new case progression rules in the Dublin Circuit provide an incentive to parties to comply with the rules regarding pre-trial procedures and vouching. The rules outline the procedure in Dublin and provide the parties with the option of avoiding case progression entirely where both parties can certify compliance with pre-trial procedures and that the case is ready for hearing. If the defence has been lodged and no progress has been made within six months, the parties may find themselves in difficulty and on the receiving end of costs or have their claim struck out."[28]

Recommendations for the Further Development/ Reduction of Case Progression

I set out below a list of my recommendations as to the changes and new measures which would, in my view, make case progression more effective in progressing cases to conclusion and, at the same time, diverting to mediation and alternative dispute resolution those cases which would greatly benefit from such measures.

1. Time Limits

It is my firm belief that case progression should be available from the earliest opportunity in family law cases and, accordingly, I would recommend that in non-Dublin Circuit Court family law proceedings, the 70-day time limit within which to commence case progression should be either shortened or removed to allow parties to bring on case progression earlier. A case progression summons should issue at any time as the County Registrar or the judge sees fit.

For instance, if the applicant had brought a motion for judgment in default of appearance, and it appeared to the County Registrar that the respondent was dragging his/her heels, the County Registrar could then issue and serve a case progression summons to fast track the process and allow for the County Registrar or judge to issue various orders as to discovery, etc. without putting the parties to the further expense and time delay in issuing separate multiple motions.

2. Role of County Registrar

I would recommend that the office of County Registrar be considered and, if possible, modified to act as a mediator, in that the office of County Registrar is an independent office and exercises quasi-judicial powers.[29] There would naturally be a requirement for further training for the County Registrar as a mediator but it would allow the court to retain control of the proceedings and the mediation at the same time, and the County Registrar could produce his/her own report to the judge in respect of the progress (or lack thereof) with respect to the mediation.

3. Case Progression Summons Requirements

I believe that, in family law case progression, many parties and indeed family law practitioners fail to realise that the issue of a case progression summons requires the receiving party to vouch their affidavit of means and serve notice on their pension trustees in advance of the case progression hearing. I recommend that measures be taken to reinforce, with specific sanctions, the requirements in the case progression summons to serve notice on pension trustees and vouch fully the affidavit of means in advance of the initial case progression hearing. I would also recommend amending the format of the case progression summons to warn of, and specify, those sanctions.

4. Non-compliance with Case Management Directions

Non-compliance with case management directions/orders should be dealt with promptly and strictly. It is worth also considering whether the powers of the County Registrar (in respect of case progression in the Circuit Court) should be augmented especially in respect of non-compliance with case progression orders—some parties (and judges) don't take the process seriously! Or indeed, perhaps a judge should be presiding over case progression hearings in the Circuit Court.

> "I am satisfied that it is appropriate for a court in this jurisdiction to at least place some weight on the need to discourage significant non-compliance in the case management process. Otherwise there is no point in case management in the first place."[30]

5. Mediation

Mediation is a term bandied about by many commentators and experts and yet many legal practitioners see it as something which is a threat to their sphere of work. I believe that case management or case progression could commence at the very start of proceedings by ordering the parties to attend at a mediation and dispute resolution information session.

> "While acknowledging the effectiveness of the provisions of the Mediation Act 2017 in obliging legal practitioners to advise their clients of ADR options, the Committee is of the view that early and active case management by the judiciary would better highlight the advantages of ADR methods and actively encourage parties to choose a non-adversarial route from the outset".[31]

The term mediation is often misunderstood and often confused with arbitration. A proper information session would be useful to show the difference between mediation and other forms of dispute resolution, as there are two main misunderstandings about mediation. First, many parties are reluctant to go to mediation in the mistaken belief that once they go to mediation, they will be forced to agree to a settlement and that there is no turning back from mediation once commenced. It needs to be emphasised to all parties that

> "[u]nlike arbitrators, mediators cannot impose a solution on the parties, acting instead as facilitators, non-partisan third parties who foster an atmosphere in which the clients themselves will reach a settlement."[32]

Second, many parties confuse mediation as a "touchy feely" sideshow and that it is marriage counselling or reconciliation counselling by another name;

> "mediation practitioners have been careful to distinguish the practice from marriage counselling or therapy and from a legal advice service, although the parties can seek the opinion of their solicitors at any stage in the process."[33]

I would have concerns about the regulation of mediators as anyone can technically be a mediator and, to be frank, I have met many who were mediators in name only. I would recommend that the regulation of mediators be given priority. Many commentators have also raised the issue of the lack of regulation of what is a "mediator".

> "Concerns were raised regarding the regulation of mediators and others engaged in alternative dispute resolution, and ensuring that they are suitably qualified and properly trained in family law matters. The Committee therefore urges the Government to implement the provision within the Mediation Act 2017 to establish a Mediation Council in Ireland that will provide a code of conduct for mediators and provide users with information regarding the competency of mediators; set training Joint Committee on Justice and Equality standards for mediators; and put complaints procedures in place should issues arise with a mediator".[34]

Mediation is not the "one cure fits all" solution but it should be explained fully to the parties and explored fully. While I recommend that the information session as outlined above is implemented, I have to acknowledge that there are several measures already in place in respect of mediation and indeed there are many cases for which mediation or alternative dispute resolution will not be the appropriate route:

> "The Mediation Act 2017 imposes new obligations on the providers of legal services to advise their clients about the advantages of resolving disputes through alternative dispute resolution methods including mediation. This obligation has existed in the context of relationship and marital breakdown since its infancy and the passing of the Judicial Separation and Family Law Reform Act 1989 where safeguards were put in place to ensure a party's awareness to alternatives to legal proceedings and to ensure that legal practitioners discussed with their clients the possibility of engaging in mediation to effect a separation on an agreed basis. This was also provided for in the context of divorce pursuant to the Family Law (Divorce) Act 1996. Alternative Dispute Resolution should be encouraged in suitable cases. This can be done not only by legal practitioners but also, when litigation is in being, by Courts in the context of case management. Given the particular dynamics at play in family law proceedings, there will be some family law cases that are simply not suitable for the application of alternative dispute resolution processes".[35]

6. Amendment of Court Rules

I recommend that the court rules be amended to expressly state that the judge at the hearing of an action (especially in family law proceedings) could have regard to the case progression record on the court file.

> "Dr. Coulter recommended that case progression should conclude with an agreed

written statement outlining what has been agreed and what remained to be decided by the Court to facilitate the production of written judgments. However, the Committee notes that the Circuit Court Case Progression Rules do not contain a provision for such a statement. The Committee respectfully agrees with the Rules Committee in this regard as such a statement could have the effect of limiting the court's ability to exercise the judgment that it is required to make as to the suitability of the provisions for the parties or children affected in making its orders."[36]

7. Alternative Dispute Resolution and the County Registrar

Another recommendation would be that the issue of alternative dispute resolution be a question for the case progression questionnaire and something which should be raised at each case progression hearing by the County Registrar.

> "The Committee recommends that the County Registrar should satisfy himself or herself from the Case Progression process that alternative dispute resolution options such as collaborative law or mediation had been considered, and so certify before sending the case forward for trial."[37]

8. Unified Family Law Court System

My next recommendation is a hypothetical one in that I would hope that someday in the not too distant future, we will have a unified family law court system. Case progression could be modified to fit into that unified system as a process involving sorting through cases coming before the courts and allotting them to the appropriate court with various case management orders such as disclosure and exchange of documents and appointment of experts happening at the initial stage, so that the case goes pre-managed and prepared to the appropriate court.

> "Managing the 'type' of case which goes before each tier of the court also emerges as a key issue of importance. In England and Wales, they operate a very strictly run 'gatekeeping system' of ensuring that cases are allocated to the most appropriate tier within the system, a case management mechanism that would be suited to the Irish context. Family law applications in the UK are made to the 'Family Court', a specially designated family court system. The Family Court is a national court that sits in any location across England and Wales, generally in existent Magistrates and County Court buildings. Only judges with specialist experience and expertise hear family cases."[38]

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* James Seymour is the County Registrar for County Tipperary and is currently assigned as County Registrar for Counties Kilkenny and Wexford. Prior to his appointment as County Registrar, he was a solicitor specialising in litigation and family law, primarily in the Circuit Court. He is also qualified as a solicitor in England and Wales and in Northern Ireland and is a Notary Public. He recently completed a Masters Degree in Advanced Legal Practice at Northumbria University.

1 Case progression (or case management) was introduced in the High Court in 2004 but is only compulsory where a party is successful in their application to have their case transferred into the Commercial List in the High Court. The volume of family law cases in the Circuit Court is far greater.
2 Circuit Court Rules (Case Progression in Family Law Proceedings) 2008 (S.I. No. 358 of 2008).
3 Circuit Court Rules (Case Progression (General)) 2009 (S.I. No. 539 of 2009).
4 "New Family Law Rules", *Augustus Cullen Law Update*, 22 October 2008.
5 "Case Progression in Family Law Proceedings", *Courts Service News*, Vol.10, Issue 2, July 2008.
6 Now Ord.59 r.64(2) of the Circuit Court Rules.
7 S.I. No. 358 of 2008, r.3(4)(a).
8 S.I. No. 358 of 2008 r.3.
9 S.I. No. 358 of 2008 r.14.
10 Order 59 r.75, Circuit Court Rules.
11 Order 59 r.73, Circuit Court Rules.
12 Order 59 r.68, Circuit Court Rules.
13 This requirement was introduced by S.I. No. 207 of 2017.
14 C. McLoone, "Family Law Applications in the District Court: A Practitioner's Guide" (2012) 15(3) I.J.F.L. 78.
15 S.I. No. 358 of 2008, r.19.
16 S.I. No. 207 of 2017.
17 Order 59 r.64(2), Circuit Court Rules (introduced by S.I. No. 207 of 2017).
18 Order 59 r.42(2), Circuit Court Rules (and also see amended Form 37L attached to the Rules).
19 Order 59 rr.65 and 74, Circuit Court Rules.
20 Order 59 r.65, Circuit Court Rules.
21 Order 59 r.65, Circuit Court Rules.
22 Order 59 r.72, Circuit Court Rules.

23 K. Walsh, *Divorce and Judicial Separation Proceedings in the Circuit Court—A Guide to Order 59* (Dublin: Bloomsbury Professional, 2019), p.111.
24 Dowling & Martin, *Civil Procedure in the Circuit Court*, 3rd edn (Dublin: Round Hall, 2018), p.495.
25 Dowling & Martin, *Civil Procedure in the Circuit Court*, 3rd edn (Dublin: Round Hall, 2018), p.495.
26 Circuit Court Rules (Family Law) 2018 (S.I. No. 427 of 2018).
27 Circuit Court Rules (Family Law) 2018 (S.I. No. 427 of 2018), r.1(1).
28 Dowling & Martin, *Civil Procedure in the Circuit Court*, 3rd edn (Dublin: Round Hall, 2018), p.492.
29 Court and Court Officers Act 1995, also Ords 18 and 19, Circuit Court Rules.
30 Clarke J. in *Moorview Developments Ltd v First Active plc* [2008] IEHC 274 at [3.6].
31 *Report on Reform of the Family Law System*, Houses of the Oireachtas Joint Committee on Justice and Equality, October 2019, p.47; available at: *https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/reports/2019/2019-10-24_report-on-reform-of-the-family-law-system_en.pdf* [last accessed 13 January 2021].
32 G. Shannon (ed.), *Family Law Practitioner* (Dublin: Round Hall Sweet & Maxwell), July 2000, Division C-001.
33 G. Shannon (ed.), *Family Law Practitioner* (Dublin: Round Hall Sweet & Maxwell), July 2000, Division C-001.
34 *Report on Reform of the Family Law System*, Houses of the Oireachtas Joint Committee on Justice and Equality, October 2019, pp.47–48; available at: *https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/reports/2019/2019-10-24_report-on-reform-of-the-family-law-system_en.pdf* [last accessed 13 January 2021]..
35 *Submission of the Council of the Bar of Ireland to the Houses of the Oireachtas,* Joint Committee on Justice & Equality, 4 March 2019; available at: *https://www.lawlibrary.ie/getattachment/News/reports-and-submissions/Submission-on-the-Reform-of-the-Family-Law-System.pdf.aspx* [last accessed 13 January 2021].
36 *Report of the Family Law Project Reporting Committee to the Courts Service 2009*, p.28; available at: *http://www.uspi.ie/attachments/File/Report_of_the_Family_Law_Reporting_Project_Committee_to_the_Board_of_the_Courts_Service.pdf* [last accessed 13 January 2021].
37 *Report of the Family Law Project Reporting Committee to the Courts Service 2009*, p.28; available at: *http://www.uspi.ie/attachments/File/Report_of_the_Family_Law_Reporting_Project_Committee_to_the_Board_of_the_Courts_Service.pdf* [last accessed 13 January 2021].
38 *Report on Reform of the Family Law System*, Houses of the Oireachtas Joint Committee on Justice and Equality, October 2019; available at: *https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/reports/2019/2019-10-24_report-on-reform-of-the-family-law-system_en.pdf* [last accessed 13 January 2021].

Reform of the Family Courts: An Interdisciplinary Approach

*Dr Connie Healy**

2020 represented a period of hope for reform of the Family Courts in Ireland. In September, the heads of a Family Courts Bill were published and a consultation process was initiated with key stakeholders which promised to examine best practice and make recommendations for a dedicated Family Court. In undertaking this reform, it is useful to look to other jurisdictions that have established Family Court Divisions to learn from their experiences. This article presents some of the results of research (funded by the Irish Research Council) into the Family Court Division in Baltimore, Maryland, USA. It examines the theoretical framework (therapeutic jurisprudence) upon which the Family Court was established, the processes and conflict resolution techniques used, and the lessons that may be learned in developing a model of best practice for this jurisdiction. It argues that much can be achieved by taking an interdisciplinary, holistic, stakeholder-engaged approach, resulting in better outcomes for family law litigants and users of the court system.

Introduction

After many years of discussion, debate and unimplemented proposals for reform, the publication of the Family Court Bill (General Scheme September 2020)[1] was a marker in the sand for the creation of a dedicated Family Court system in Ireland. The Bill sets out the heads of a scheme and a consultation process will now begin with key stakeholders. Many of the provisions address issues such as the jurisdiction and remit of the proposed District and Circuit Family Courts, the Family High Court and the appointment of judges. The focus of this article, however, will be on Head 5, i.e. the "Guiding Principles" that "any court when dealing with family law proceedings shall have regard to", namely: encouraging mediation or other alternative methods of dispute resolution (save in cases involving domestic violence or in matters under the Child Care Acts 1991–2015); and ensuring that processes are user-friendly, issues are identified, conflict is reduced, and active case management is promoted.[2] Acknowledging these principles as an important starting point, this article argues for a more ambitious approach. It challenges those involved in delivering the reforms to go beyond a purely legalistic approach and, instead, to underpin the new system on a theoretical foundation that embraces a more holistic, interdisciplinary and therapeutic approach. In doing so, it provides an insight into how a therapeutic approach works in practice in the Family Courts Division, Baltimore, USA, and argues that lessons can be learned from the experiences of those involved in establishing that system. It proposes that a similar framework could be adopted here to ensure that this long-awaited opportunity is embraced in the most comprehensive way possible, benefiting future generations of family law litigants and their legal representatives.

Concerns in relation to the operation of the Family Court system in Ireland have been ongoing for almost 50 years. Recommendations made by the Law Reform Commission (LRC) in a Report on the Family Courts in 1996[3] (the "Report") were comprehensive and wide-ranging and addressed all of what have now become the guiding principles for reform, 24 years later. Indeed, the LRC, in recommending mediation, proposed that it "should be viewed as complementary to the judicial process, and not as a replacement thereof", and should be "adequately resourced and available nationwide".[4] Mediation in itself, however, is not a panacea. The LRC also highlighted the importance of "sufficient safeguards to ensure that the allied goals of fairness and justice are achieved" and recommended a "strict Code of Practice".[5] The LRC was prescriptive in recommending the nature, length of training and qualifications required to practice as a mediator, and the benefits of "establishing a formal training course in mediation under the auspices of a university" at "post-graduate level".[6] Importantly, the LRC proposed "that legal advice should be available to the parties before and during the mediation process" and, taking a more comprehensive approach than the Mediation Act many years later in 2017, recommended that statutory provisions should be put in place to protect "information arising during the course of mediation", ensuring that such information would be, with some notable exceptions, "inadmissible as evidence in any subsequent court proceedings".[7]

The LRC recommended an onsite Family Court Information Centre providing information on court processes, case management and alternatives to the court process; and importantly, a Family Assessment Service, available to each court, providing support services and court reports.[8] Valuable recommendations were made that training for lawyers and members of the judiciary "should be inter-disciplinary, involving inputs from areas such as psychiatry, psychology, sociology, and social work".[9] Significantly, it was also envisaged that these centres would collate statistical data to inform further reform and improvements within the Family Court system.[10]

While all of these recommendations were important, a criticism of the Report could be that it lacked a wider vision of the resolution of conflict in family law cases. The Report addressed many of the concerns that had been raised in parliamentary debates in 1993 where Deputies had referred to the "judicial roulette" that separating parties faced when entering the court system due to the lack of uniformity of approach.[11] There was, however, less of an acceptance that the problem was not exclusively a legal one. While the Report acknowledged that family law cases "usually constitute only part of a broader set of problems arising from family disharmony" and that "it is perhaps time to consider how

reforms in our legal processes may help in the process of personal and family empowerment",[12] all that was suggested was that a measure of "informality" may be required. The LRC, however, specifically ruled out the adoption of a therapeutic approach. Instead, the Report 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 confrontation".[13]

Undisputedly, the role of the court system is to administer justice as per the rule of law. A court hearing through the traditional adversarial system can, in itself, prove therapeutic for people at certain times in their lives, e.g. where one has been the victim of a crime perhaps or where someone perceives a need for public vindication provided through a court hearing. A purely legalistic, adversarial approach is not, however, suited to all disputes and perhaps particularly not in family law. In his Eleventh Report as Special Rapporteur on Child Protection and Family Law, leading family and child law expert, Professor Geoffrey Shannon, highlighted the need for a change in approach and attitude to family law matters and noted the benefits of taking a therapeutic, interdisciplinary approach.[14]

Therapeutic Jurisprudence

Wexler, one of the proponents of therapeutic jurisprudence, describes it as "an additional lens" or "field of inquiry" that can be used to see if the law can be applied in a "richer way"; to "bring to the table some of these areas and issues that previously have gone unnoticed",[15] including the much "overlooked area of the impact of the law on psychological wellbeing".[16] A therapeutic approach, therefore, takes a more wide-ranging approach in aiming to understand a litigant's narrative. By enabling litigants, for example, to become more actively involved in working towards a resolution of their own problems, King notes that they develop an "intrinsic motivation" towards "self-determination".[17] Hearing their "story" ensures that litigants are treated with respect and empathy by the court system. But how does this work in practice, and have other courts adopted it?

Case Study: Family Division of the Circuit Court, Baltimore, USA

In considering taking an approach, it is insightful to examine a Family Court system established over 20 years ago, which is based on a therapeutic model. This article presents some of the results of a case study undertaken on the Family Courts Division in Baltimore City and County, Maryland, USA.[18]

As per Yin, case studies allow "how" and "why" type questions to be answered. The primary research questions were: how does the Family Court System in Baltimore operate?; how does it serve those that use the system: litigants, self-represented litigants, lawyers, and judges?; what services are available for families in transition?; what can Ireland learn from the experiences of those involved in the setting up, and operation of, the system?; and "why" might this system provide a model for the Irish Family Courts?[19]

The key proposition examined during this research was whether a therapeutic approach to justice provides a more holistic and inclusive means of resolving the legal and emotional issues that arise following conflict in families and whether this approach empowers those involved to move beyond these difficulties less damaged than going through the adversarial court system unsupported.[20] Liaising with Professor Barbara Babb at the University of Baltimore, who was instrumental in the initial set-up of the Family Court Division in Baltimore and who continues to monitor its progress, a number of data sources were identified. These included: reviews of existing reports on the establishment of the courts and evaluations undertaken since its inception; observation of the courts, and the use of purposive sampling to select and interview key stakeholders involved in the development of the Family Division and those who currently run the system.[21] Semi-structured interviews were undertaken with two members of the judiciary, both of whom had provided leadership in the early stages of the project. Interviews were completed with three current court administrators: one in Baltimore city; one in Baltimore County; and the overall Director of the Department of Juvenile and Family Justice with responsibility for the coordination of services across Maryland, Richard Abbott.[22]

Court observation took place to see how the process operates in practice and included sitting in on court hearings, observing the way cases were presented before the court and how the litigants (represented or self-represented) were dealt with. Observation also took place as to the intake process, what Babb refers to as the "triage" stage of the process,[23] at which a magistrate assesses the case and may refer the parties for support services.

It is important to note that the research was carried out over a defined period[24] and due to this time limit, it was not possible to interview litigants that had used the system.[25]

Findings of the Case Study

The Family Division in Baltimore was established in 1998. It is a court-based, court-connected system that aims to assist with the legal and non-legal needs of children and families centred on the principles of early intervention, less adversarial dispute resolution and case management.[26] It was established by means of a court rule, rather than legislation.[27] Central to its establishment was defining its approach and ethos. The mission of the Baltimore court is to:

> "Provide a fair and efficient forum to resolve family legal matters in a problem-solving

manner, with the goal of **improving** the lives of the families and children who appear before the court.

To that end, the court shall make appropriate **services available** for families who need them. The court shall also provide an environment that supports judges, court staff and attorneys so that they can **respond effectively to the many legal and non-legal issues of families in the justice system**".[28] [emphasis added]

Case Progression

The first step in establishing the Family Division was recognising that, in line with trends internationally, many of those seeking remedies before the courts are self-represented.[29] The Family Divisions of the Circuit Court at Baltimore City and Baltimore County therefore provide onsite assistance on a "first come-first served" basis where self-represented litigants may seek the help of a lawyer in completing court documents and obtaining procedural advices.[30] Through the Self-Represented Litigant Project, based in Baltimore City, two attorneys are employed by the courts and are available on a full-time basis to provide assistance to those who cannot afford a lawyer. In recognition of the increasingly diverse nature of their litigants, interpreters are also available, if required. Online tools are used to provide comprehensive legal information which is easy to access and these, and all required court forms, are available in five languages.

Once an application is lodged, it is assigned a unique identification number and a case manager.[31] Any further proceedings instituted or issues relevant to that family are linked to that number. A co-ordinated approach is taken to the resolution of the conflict. Instead of processes like mediation being "recommended" or "encouraged" and being viewed as "alternative", or outside of the system, all services are enshrined within the Family Court system. If an application is being contested, the disputing parties meet with a magistrate.[32] The magistrate talks to both litigants first and, if they are represented by lawyers, will then speak to the lawyers. If the magistrate determines that supports are required, the parties are referred, as appropriate.

The Key Services Provided

Being cognisant of the wider implications for litigants coming before the courts is essential when taking a therapeutic approach to the law. Brooks and Roberts note the importance of providing services early and in a "preventive and noncoercive fashion".[33] Richard Abbot[34] comments that "some courts don't pay any attention to social issues that are surrounding them, however these issues need to be addressed".[35] In accordance with their mission statement, therefore, much of the focus underpinning the Family Courts Division in Baltimore centres on the effective provision of supports:

1. Assistance with Parenting

Parenting classes offered to litigants are not focused on telling them "how to parent", but rather providing advice as to how to co-parent effectively, now that they are no longer in a family unit (COPE).[36] Separate classes are available for couples who did not have a pre-existing relationship, but may have a child together (SHAPE).[37] Sue German, Court Administrator, notes that while parents are "ordered" to attend these classes when custody is contested, there is no contempt attached to failure to attend. German advises that the feedback from these classes is very positive with comments being made such as: "Yeah, you know I went to this class and we realised that we needed to do things differently and we started to talk to each other and so this is what we came up with".

2. Court Reports

All court reports are prepared by onsite personnel. These are broken down into two main categories, a home study or a full custody evaluation. The home study involves an inspection of the place where the children live to ensure that it is safe and habitable. Where there are issues in relation to the standard of accommodation, some assistance may be provided by the State. A custody evaluation, in contrast, is more detailed and involves gathering information on school records, psychological evaluations of parents, prison records, if applicable, and assessments as to fitness to parent. German talks about the costs and benefits of this service. She comments that this service is: "[a] Godsend for us because it cuts the cost for our people [the litigants], it definitely cuts the cost for our court and they do a really, really, good job".[38] The assessments are carried out within a specified time and for a specified fee. Depending on their financial resources, litigants will be required to pay or contribute towards the costs involved. The reports are completed within a specific timeframe and are prepared in a standardised format that makes it easy for lawyers and the judiciary to ascertain the position. After services have been provided, as appropriate, the social worker who undertook the custody evaluation presents the results to both parties in the presence, if applicable, of their lawyers. This is effective as both the applicant and the respondent hear the findings at the same time and know what issues the social worker will reference before the judge. This enables them to make an informed decision as to whether to proceed before the courts or engage with mediation.

3. Counselling

Services are provided to assist victims of domestic violence to complete the necessary documentation for a protective order. Baltimore City runs a Protective Order Advocacy

Representation service, through which attorneys are available, free of charge, to represent abuse victims at the final hearing. If a protective order is granted, copies are furnished to a special unit in the sheriff's office who serve them on the respondent. Additionally, counselling for victims of domestic violence, drug and alcohol testing, and counselling for addiction issues is provided, as required. Obtaining access to children, be it full access or supervised access, can be the motivation in working towards rehabilitation. Counselling for the perpetrator of domestic violence is also important in attempting to break the cycle of abuse. Safe accommodation is available through the House of Ruth.

4. Supports for Children

Taking a therapeutic approach recognises not only the wider psychological impact of any court proceedings on the litigants themselves, but also on their children. Classes are provided for children whose parents are separating. German notes that the aim is to help children "understand what has gone on with your parents is not your fault. You didn't do it. There are other kids that have the same issues. You are not alone in the world". At these classes they meet other children who are experiencing similar issues and this peer support also proves helpful. For older children, the classes also focus on helping them to understand and develop conflict resolution techniques, helping not only in the family transition but also developing life skills, thus equipping them to perhaps avoid some conflict in their own adult lives. German explains that classes may also be recommended when a litigant comes in and says, for example: "I have got this 14-year-old that I don't know what to do with".

5. Maintenance

As often happens, many litigants are unable to discharge monies due on orders made for maintenance. To address this issue, one magistrate, out of the five that normally operate within Baltimore City Courthouse, is tasked with finding out why payments are not being made and providing assistance.[39] The magistrate has access to a series of programmes to assist litigants with Curriculum Vitaes and interview preparation and the programmes link in with local business to help find employment. In accordance with the therapeutic approach, the aim is to help the litigant avoid jail and get back into the workforce.

Additional important services provided also include onsite child care, permitting litigants to leave their child in a safe environment while they are attending court, rather than having to pay for child care or miss a court date. Certain rooms in the court buildings have been adapted and are used for supervised access in the evenings, after court sittings have concluded, three evenings per week. Additional costs are incurred because of the need for evening security, but it is an efficient use of the court building, providing a safe environment for supervised access.

In-built Dispute Resolution

Professor Babb believes that mediation and other less adversarial processes offered as "court-connected programs are likely to gain greater acceptance by the parties; they tend to view procedures in this setting as unbiased due to the affiliation with the court".[40] As an initial step, the parties are invited to take part in co-mediation.[41] Co-mediation also avoids concerns regarding gender balance.[42] The parties attend two hours of mediation at a set fee of $150.[43] In general, parties attend the mediation without their lawyers.[44] The mediators work with the couple to assist them to reach a solution, cognisant at all times that the parents are the primary decision makers and the ones often best qualified to make decisions that suit their particular needs.[45] The mediators are trained to screen the parties to ensure that they are suitable for the process. If any issues of concern arise with regard to the safety of any of the parties or the children of the relationship, these matters are addressed. If the case cannot be resolved through mediation, there is the additional option of participating in a court ordered settlement conference.

At the court ordered settlement conference, a retired judge will conduct what may be described as a "preliminary hearing" of the case.[46] This can help focus the parties as to the outcome likely to be achieved through a court hearing. If the court ordered settlement conference does not assist towards reaching settlement, a final hearing date will be given. All court proceedings are recorded. Parties can obtain copies of transcripts if they wish or, alternatively, audio files are available.

The Role of the Judiciary

According to Whitfill "how a judge exercises their discretion is a product of their life experiences".[47] A deficit in the system in Baltimore is that judges appointed to the Family Court Division are not experts in family law. German notes that "by and large the last interaction they (the judges) have had with family law was in law school".[48] The Family Court Division provides seminars on what German refers to as "the nuts and bolts of family law" for all of their newly-appointed judges, noting that this is central in helping the judges gain an understanding of what German describes as "the underlying issues" or "trauma informed stuff", namely, information:

> "about brain chemistry and the effects of growing up in a larger jurisdiction when you're poor, and everybody you know is in prison and you don't have a dad. All of that stuff, you know, goes to create this person who is now standing in front of you. And so, when you are making decisions about who should have custody, who's going to be the best mum or dad for these kids there are things that you need to take into account … when you have this person standing in front of you and they're acting in a

particular manner or they have a long history of acting in a particular manner, there may be a reason for it".

This training is of particular importance given the number of self-represented litigants coming before the courts. German notes that "it's very difficult for them [the judges], not only to hear the stories and to deal with the issues but they also have to sort of act as a pseudo lawyer and keep control of the flow and they're not accustomed to that. You know, trying to get somebody through cross-examination and explaining why you can't ask that question".

One of the judges who recognised the need for reform, Judge Albert J. Matricciani, Jr (ret.), highlighted the importance of taking a gradual approach with the judiciary. Many judges may be set in their ways and resistant to change. Judge Matricciani, Jr noted that it is best to begin with judges who have an understanding of the challenges presented in family law cases. From there, a policy that all incoming judges engage with the new model means that change, though gradual, will be effective and long lasting.[49] Judge Kathleen Friedman (ret.) was instrumental in ensuing that the courts provided litigants with supports rather than taking a purely legal approach. She liaised with a local hospital to develop counselling services and assistance with any underlying psychological or medical requirements litigants may present with. Richard Abbott notes that sometimes it can take "[a] little while to get judges to understand that this is better for you". Abbott stresses the importance of a support network of "professional staff to do those things" (court reports and assessments) as he does not want "judges being social workers, because they're not qualified to do that". Abbott acknowledges that "judges listen to other judges … it's always good to have follow-up with a judge who says, yeah, this works really good in our court".[50]

By approaching cases in this way, litigants are provided with the supports they need upfront and lawyers and members of the judiciary have timely access to the reports and information. The concept of therapeutic jurisprudence is not, however, without its critics. Arrigo, for example, argues that there are difficulties because it starts from a premise that assumes all substantive law is fair. This, he notes, may not always be the case. He raises concerns that "therapeutic jurisprudence promotes a moral, good, and docile individual in a one-size-fits-all law". [51] Ward too cautions against the promotion of the "good lives" model,[52] while some argue that it is merely "old wine in new bottles".[53] Questions have been raised about the definitional issues surrounding what is meant by "therapeutic". Who decides what is therapeutic and on what basis; and whether for lawyers, it possibly signifies "intellectual laziness, woolliness, a discomfort with conflict, or the realities of the adversarial system of justice".[54] Many assert that this is just what a good lawyer does anyway.[55]

Daicoff, in response to these criticisms, acknowledges good lawyering may well "implicitly or unconsciously take those concerns into account—whereas those involved in a therapeutic approach within the comprehensive law movement go a step further by explicitly valuing and promoting such factors".[56] Cameron describes the difference between practising as a litigator and working in a collaborative, therapeutic way as between that of "molding [sic] the story" to fit within the rules of the adversarial system and "helping [clients] to build a unified story",[57] taking all of their needs into account.

How Can This Be Achieved?

It is undeniable that the provision of infrastructure, including appropriately-designed court buildings, case management systems and support services will be expensive. In structuring the system in Baltimore, a community-wide approach was taken. The courts have developed collaborative links with universities. The Sayra and Neil Meyerhoff Center for Families, Children and the Court (CFCC) at the University of Baltimore, established in 2000 by Professor Babb, is committed to improving the practice of family law in Maryland. In accordance with its stated mission, it aims to help and strengthen those that come before the court and to improve the practice of family law and the operation of the family justice system in Maryland, nationally and internationally.[58] Recognising the importance of a therapeutic jurisprudential approach, it provides support for the Family Court system by educating law students in family law and specifically, the advantages of taking a more holistic and a comprehensive approach. In addition, the centre assists in the delivery of the courts service through the education of lawyers and judges. Recognising that part of taking a holistic approach involves engaging with children and young people and, in an effort to keep them in the education system, the centre established a Truancy Court Program. The aim of the programme is early intervention. If children are dropping out of the educational system, a programme is put in place through their schools to scaffold them in a framework that provides mentorship, education and support. This support is coordinated through the CFCC and engages law students and volunteer judges to assess progress and to work with these children and young adults. The statistics collated by the CFCC reveal that 75 per cent of the absentee students, who participated in the programme, decreased their unexcused absences by 65 per cent.[59]

In addition, law students gain valuable experience as law clerks providing free legal advice. Trainee mediators work within the court system and medical students from local hospitals assist with custody evaluations. Attorneys can fulfil part of their requirement for Continuing Professional Development by volunteering at the courts; and local businesses, as noted earlier, offer employment opportunities.

As a result of all of the services being integrated within the system, "active case management" does not solely focus on managing cases towards a court hearing. It goes further than simply streamlining processes, procedures and timelines through the provision of the supports and tools required to help litigants move on from the conflict. The system is monitored and assessed by reference to a set of Performance Standards developed by the University of Baltimore and changes are made as issues are identified. Those involved in the reforms highlight the importance of the fundamental change in ethos from a fire-fighting, piecemeal approach to one that is holistic.

It is to be welcomed that the proposal under the Irish Family Court Bill 2020 is that judges will be chosen because they are "by reason of his or her training or experience and his or her temperament, a suitable person to deal with matters of family law" and will be appointed for three years. This will assist in the smooth running of the court. It is noted that these judges will also be required to undergo additional training and education "as required by the Judicial Studies Committee". [60] It is hoped that such training will include what German refers to as the "trauma stuff", an interdisciplinary approach. Head 18 of the Bill refers to the setting up of a Family Law Rules Committee regarding court documentation, pleadings, and practice and procedure, including rules for service outside the jurisdiction, costs etc. It is submitted that part of the remit of this group should be in educating all stakeholders, i.e. mediators, counsellors, those involved in preparing evaluations for the court, and lawyers, to understand fully and respect each other's role and foster collaborative working relationships. The scheme provides that Head 18 shall commence once the Rules Committee is established and sets out the parameters for the Committee to include members of the judiciary, the professions, and members of the Courts Service.

The consultation process will now begin. In considering the "Guiding Principles" it is submitted that making processes user-friendly should include providing education and support to potential family law litigants. Much could be achieved through online resources and the availability of onsite legal assistance. Issues should be identified, but once identified, supports should be put in place. With regard to alternative methods of dispute resolution, consideration should be given to making these processes an integral part of the court system with the built-in safeguards of accredited mediators operating a common standard. Case management should be less about "maximum word counts for submissions"[61] and more about active management towards services and conflict resolution. The aim should be to enable litigants to become more involved in the resolution of their problems in a way that is supportive and educational rather than viewed as obligatory or imposed. It is important that all stakeholders are consulted to include family law litigants and children. What services do they feel should be incorporated and how? What best serves their needs? What information do they need to make informed decisions as to how they are going to resolve this conflict and move on with their lives? Will it be possible to: "[p]rovide a fair and efficient forum to resolve family legal matters in a problem-solving manner, with the goal of improving the lives of the families and children who appear before the court"?[62] Time will tell, but this should be the aim.

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* Dr Connie Healy is a lecturer in Law at National University of Ireland Galway. Her research into the Family Court Division of the Circuit Court in Baltimore was funded by the Irish Research Council (New Foundations, 2019). A further publication on this research will be published in the *Family Court Review* (July, 2021)

1 Family Court Bill (General Scheme September 2020); available at: *http://www.justice.ie/en/JELR/Family%20Court%20Bill%20General%20Scheme.pdf/Files/Family%20Court%20Bill%20General%20Scheme.pdf* [last accessed 14 January 2021].

2 Family Court Bill (General Scheme September 2020), Head 5.

3 Law Reform Commission, *Report on the Family Courts* (LRC 52-1996); available at: *https://www.lawreform.ie/_fileupload/Reports/rFamilyCourts.htm* [last accessed 14 January 2021].

4 Law Reform Commission, *Report on the Family Courts* (LRC 52-1996), para.9.22.

5 Law Reform Commission, *Report on the Family Courts* (LRC 52-1996).

6 Law Reform Commission, *Report on the Family Courts* (LRC 52-1996), para.9.32: "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".

7 Law Reform Commission, *Report on the Family Courts* (LRC 52-1996), para.9.54.

8 Law Reform Commission, *Report on the Family Courts* (LRC 52-1996), at recommendation 57. It is notable that at that time in Ireland, the Probation Service was providing an investigation and reporting service under the auspices of the Probation and Welfare Service of the Department of Justice. The service investigated and reported in private child access/custody disputes. This service was discontinued, leaving litigants with little option but to request these services/reports on a private basis, leading to increased costs and delays within the family justice system.
9 Law Reform Commission, *Report on the Family Courts* (LRC 52-1996), para.11.11.
10 Law Reform Commission, *Report on the Family Courts* (LRC 52-1996), para.12.17.
11 *White Paper on Marital Breakdown: Statements*; available at: *https://www.oireachtas.ie/ga/debates/debate/dail/1993-03-26/3/* (Deputy Alan Shatter) [last accessed 14 January 2021].
12 Law Reform Commission, *Report on the Family Courts* (LRC 52-1996), quoting Law Reform Commission, *Consultation Paper on Family Courts,* (Law Reform Commission, Dublin, March 1994).
13 Law Reform Commission, *Report on the Family Courts* (LRC 52-1996), para.3.06.
14 *Eleventh Report of the Special Rapporteur on Child Protection A Report Submitted to the Oireachtas Professor Geoffrey Shannon 2018*, p.116; available at: *https://assets.gov.ie/27444/92175b78d19a47abb4d500f8da2d90b7.pdf* [last accessed 14 January 2021]. Professor Shannon noted the benefits gained from using this approach in Israel and the possibilities it provides for assisting the courts to take the views of children into account in a more holistic way.
15 D. Wexler, "Therapeutic Jurisprudence: An Overview" (2000) 17(1) *Thomas M. Cooley Law Review* 125–134 at 125.
16 D. Wexler, "From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part" (2011) *Arizona Legal Studies,* Discussion Paper No. 10–12 at 1.
17 M. King, "Should problem-solving courts be solution-focused courts?" (2011) *Monash University Research Paper*, Victoria, quoted in B. Babb and D. Wexler, "Therapeutic Jurisprudence", *University of Baltimore Legal Studies Research Paper*, Paper No. 2014–13 at 3.
18 For further details of this research see Connie Healy, "Reform within the Family Courts: Lessons from Baltimore", *Family Court Review* (forthcoming, July 2021).
19 This research was funded by the Irish Research Council (New Foundations). A full report of the study is forthcoming in the *Family Court Review*. See C. Healy, "Reform within the Family Courts: Lessons from Baltimore", *Family Court Review* (forthcoming, July 2021).
20 This research was funded by the Irish Research Council (New Foundations). A full report of the study is forthcoming in the *Family Court Review*. See C. Healy, "Reform within the Family Courts: Lessons from Baltimore", *Family Court Review* (forthcoming, July 2021).
21 This research was funded by the Irish Research Council (New Foundations). A full report of the study is forthcoming in the *Family Court Review*. See C. Healy, "Reform within the Family Courts: Lessons from Baltimore", *Family Court Review* (forthcoming, July 2021).
22 This research was funded by the Irish Research Council (New Foundations). A full report of the study is forthcoming in the *Family Court Review*. See C. Healy, "Reform within the Family Courts: Lessons from Baltimore", *Family Court Review* (forthcoming, July 2021).
23 B. A. Babb and J. D. Moran, *Caring for Families in Court: An Essential Approach to Family Justice* (London; New York: Routledge, Taylor and Francis Group, 2019).
24 Three weeks in May 2019.
25 Performance data that reflects the impact that the services are having on families was not possible to assess within the time-limits of the study (three weeks). When questioned on this, Sue German noted that the number of repeat cases had decreased, while acknowledging: "I mean there are always going to be that core people that are in such high conflict that they're going to come back no matter what". See also her comments further on, where she notes that the parenting classes can be transformative in helping potential litigants to understand the conflict and the changes they need to make.
26 The concept of a Family Court was first envisaged in Rhode Island in 1961, spreading to New York in 1962 and Hawaii in 1965 and culminating in an American Bar Association Summit on the Unified Family Court entitled "Exploring Solutions for Families, Women and Children in Crisis" in 1998. Following on from this, the Coordinating Council of the Unified Family Court showcased the model developed by The Sayra and Neil Meyerhoff Center for Families, Children and the Court, University of Baltimore in 2002.
27 Maryland Rules, r.16-307. The 1998 Rule was a statewide reform and permitted the creation of Family Divisions in Baltimore City and Anne Arundel, Baltimore County, Montgomery County and Prince George County.
28 *Performance Standards and Measures for Maryland's Family Division*, p.6; available at: *https://www.courts.state.md.us/sites/default/files/import/family/publications/performancestandards.pdf* [last accessed 14 January 2021].
29 Interview with Sue German—89 per cent of persons coming before the courts in Baltimore city are *pro se* (self-represented).
30 Details of the population of Baltimore City and Baltimore County available at: *https://www.census.gov/quickfacts/fact/table/baltimorecitymaryland,US/PST045219* [last accessed 14 January 2021].
31 This is similar to the Family Court system in England and Wales, a single point of entry with a "gatekeeping" team who allocate cases. Section 31A of the (UK) Matrimonial and Family Proceedings Act 1984 (inserted by the Crime and Courts Act 2013) established a single Family Court from April 2014 with exercises jurisdiction in the majority of family proceedings. Consideration will have to be given as to what should be included in the remit of "family proceedings".
32 Magistrates are appointed by the courts under Maryland Rules, r.9-208. In family law matters, magistrates have jurisdiction to hear applications for uncontested divorce, child support pendente lite, etc. If the matter is uncontested, consent orders or rulings can be made once the appropriate time periods have elapsed. They can also refer the parties to social services for assessment of need for support services.
33 S. L. Brooks and D. E. Roberts, *"Social Justice and Family Court Reform"* (2002) 40 *Family Court Review* 453, 455.
34 The Department of Juvenile and Family Services is incorporated within the Maryland Administrative Office of the Courts. The department works with all the Circuit Courts to promote effective Family Court reform through the Family Divisions. Each Family Division of the Circuit Court is separate, governed by separate local governments and much deference is given to the administrative judge in each jurisdiction. The Maryland judiciary as a whole does, however, promote uniformity and there are no local rules.
35 Interview with Richard Abbott, 21 May 2019.
36 Co-parenting Education Classes under Maryland Rules r.9-204 and r.9-205.
37 Shared Parenting Education Classes under Maryland Rules r.9-204 and r.9-205.
38 Sue German advises that the fee for a full custody evaluation which would include an inspection of the home/homes in which the children do or will reside costs $600. If the parties are unable to pay, they can apply for a fee waiver and this will be granted, based on their financial circumstances.
39 Once ordered, this is a requirement under Maryland law and is punishable by imprisonment.
40 B. Babb, "Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court" (1998) 71 *Southern California Law Review* 469 at 522.
41 Mediation is mandatory in Maryland for all custody cases (with a few noted exceptions to include cases where there is an allegation of domestic violence) under Maryland Rules, r.9-205.
42 The mediators used in Baltimore City are employed on a contract basis. In Baltimore County, there are court-employed mediators onsite. There does not appear to be any specific regulatory body for mediators.

43 In Baltimore City, the court has a panel of mediators that they call upon and they mediate based on a set fee. In Baltimore County, there are mediators onsite. Compliance in terms of attending the mediation sessions is an issue but the court statistics indicate that where parties attend, 50 per cent of cases are settled through the mediation process—Interview with Sue German. If litigants are not in a positon to pay the mediator's fee, they can apply for a fee waiver and this will be granted, depending on their financial circumstances.

44 This was observed at Baltimore County Courthouse. The applicant and respondent wished for their lawyers to attend the mediation but were advised that this was not permitted. They were advised that if they wished their lawyers to negotiate, further settlement negotiations should be arranged at the offices of one of the lawyers.

45 Sue German advises that 50 per cent of those who attend mediation settle their disputes within the mediation process.

46 Incentives are offered to retired members of the judiciary, through, for example, more generous pension packages if they work a certain number of hours.

47 R. Garon and Judge C. Whitfill, "A Mental Health Professional and a Judge's Journey: Providing Responsible Parenting, Giving Children a Voice" (2003) 37 (3) *Family Law Quarterly* 459 at 472.

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50 Interview with Richard Abbott, 21 May 2019.

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55 M. Quinn, "An RSVP TO Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged" (2007) 48 *Boston College Law Review* 539–595.

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57 N. Cameron and S. Gamache, *Collaborative Practice: Deepening the Dialogue* (Vancouver: Continuing Legal Education Society of British Columbia, 2004), p.106.

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Support for Families in Crisis

*Helen Salmon**

This article seeks to ascertain if it is possible to give greater support to families in crisis, thus avoiding the trauma and division of court decisions.

Geoffrey Shannon advises, from a policy perspective, emphasising family support, and stresses the need to "develop increased, effective and flexible services to support children and families experiencing difficulties".[1] Conor O'Mahony et al, who are in favour of this approach, state that "better family support and earlier intervention may help to limit the cases that make it as far as a court application".[2]

The importance of intelligent planning in child protection is emphasised by Helen Buckley, who states that it is "an amalgam of information about an identified problem, knowledge about known solutions, and the use of logic to calculate the costs and benefits".[3] She affirms a lack of cohesion between the different services dealing with health, addiction, mental health and domestic violence,[4] and quotes Eileen Munro, who advocates for greater accountability "from the health, justice and education sectors".[5] Buckley also advocates for a role for local "Safeguarding Boards"[6] and outlines that other jurisdictions have called for community bodies to be more involved in this area, to promote "a whole of government" approach to child protection.[7]

The International Approach

Buckley mentions the system in the US known as the "differential response model", where families who do not meet the threshold for intervention are diverted to community agencies or a needs assessment is carried out. Essential elements of this system are well-trained staff and "good relationships between statutory and community agencies … in addition to sufficient funding".[8]

In Australia, research has called for "more holistic service planning and coordinated provision to meet the diverse needs of children and young people across early childhood, school, health, community based family services and specialist services".[9]

The Irish Response

In discussing the implementation of community-based, non-statutory services, Buckley and Burns suggest: '"Family support, as envisaged by Pinkerton (2000), needs to challenge traditional welfare policies and accommodate the changing nature of families and their needs".[10]

Buckley and Burns point out that the inability to "get disciplines and agencies to work together has been at the root of child protection system failures".[11] The Irish Government, with their policy framework, *Better Outcomes Brighter Futures: National Policy Framework for Children and Youth Affairs, 2014*, addresses the need to coordinate policy across Government thus ensuring better outcomes for children.

As a solicitor who has worked in the area of child welfare for many years, the link between families, poverty and child welfare has become very evident. Brid Featherstone, a qualified social worker and sociologist who works in the UK, spoke about this link,[12] stating that social workers needed to "stop pointing the finger"[13] at families living in poverty. While it is acknowledged that it is vital to have foster parents and that they carry out an immeasurable service for children in Ireland, each foster parent receives €352 per week per child. Instead, the expenditure of this sum on attempting to keep families together is worth considering. Families would greatly benefit from the payment of oil bills, stocking fridges, organising outings for children, paying for buses, or even taxis, where necessary, to bring children to and from school, assisting where necessary in proper housing.

It is unfortunate that even though Tusla may be involved with a family, and a relative is prepared to look after the child where there is no care order or voluntary care order in place, the relative is only entitled to receive the sum of €186 as a guardian's payment from the Department of Social Protection. Given that the child is being raised by a family member, it is vital that we support this person financially, as affirmed by Junior Minister Tracey: "Where children are placed with relatives by the Health Board … the Board should be liable to contribute".[14]

The Relationship between Poverty, Child Abuse, Neglect and Inequality

In exploring the relationship between poverty, child abuse, neglect and inequality, Featherstone and Mirza argue for a "re-engagement with poverty and inequality in order to understand the contribution to child abuse and neglect and in order to shape child protection responses".[15] They outline a need to engage "not only with the issues arising from poverty but also from inequality and being poor in an unequal society".[16] They discussed a report carried out on behalf of the Scottish Government and found the "huge impact that housing costs can have in exacerbating poverty and inequality".[17] Poverty, they ascertained, leads to feelings of shame which in turn lead to lack of self-confidence.[18] Managing a household on a low income requires "considerable skill, inventiveness and fortitude".[19]

Featherstone et al suggest that social workers' investigations be expanded to "foreground consideration of children's social material circumstances".[20] They also advocate "learning about poverty and inequality" and incorporating these concepts into children's services strategies.[21]

Despite a significant increase in children living in poverty, with huge delays in accessing social housing for families and with inappropriate accommodation in some cases,[22] Shannon has noted that the Committee on the Rights of the

Child has observed a "lack of specific budget allocation for the implementation of the UNCRC objectives".[23]

Better Outcomes, Brighter Futures

At a conference in the Law Society on the Government's approach to child protection, the Minister for Children and Youth Affairs, James Reilly, stated that: "[t]he First 'transformational goal' identified in Better Outcomes, Brighter Futures is to support parents, and in that context we committed to developing a high-level Policy Statement on Parenting and Family Support".[24]

At the same conference, Justice McGuinness cogently summarised the importance of "inter-disciplinary and multi-disciplinary work",[25] and Dr Carol Coulter outlined that social workers needed to understand constitutional law, child protection law and international human rights conventions. She advised that: "[t]he constitutional presumption in favour of a child's birth family, bolstered by international human rights jurisprudence, needs to be integrated into social work training",[26] together with an understanding of the concept of the term proportionate in child care law.[27]

Efforts By Other Jurisdictions

The Family Drug And Alcohol Court

At a conference in Belfast, which was hosted by the Northern Ireland Guardian Ad Litem Agency, Judge Nick Crichton discussed a problem-solving court, the Family Drug and Alcohol Court (FDAC).[28] FDAC consists of a multi-disciplinary team of social workers, psychiatrists, and parent mentors (such as experts in domestic violence and drug issues), working together to help families. In this new court, the family returns every two weeks to outline how they have progressed; the parents voice their concerns; lawyers and guardians attend. Judge Crichton outlined that the court was seeing results and that it is a more cost-effective way of dealing with child welfare. One parent said of this court: "I have never been heard so clearly as I am now".[29]

This approach is truly one worth considering as it gives families feelings of inclusiveness and a sense of having a part to play in their own lives, with expert assistance on hand.

Court Orders and Pre-proceedings in Northern Ireland

A social worker, who has worked in Northern Ireland and now works in this jurisdiction, provided me with a copy of *Court orders and pre-proceedings* for local authorities which was drawn up by the Department of Education in England in 2014 and is also operational in Northern Ireland. The approach taken in this document is as follows:

1. Local authorities are required to work closely with families to help address problems in a timely way.[30]
2. If it is not possible for children to remain with parents, the local authority is required to source family and friend placements. This may then negate the need for court proceedings. Inter-agency assessments are to be carried out where necessary. Services should be available in each area, "[t]hese services may also focus on improving family functioning and building the family's own capability to solve problems".[31]
3. Where parents are not able to fully comprehend the process, they should be afforded an advocate. Family group conferences can be held, which include extended family and the child concerned if the child is of sufficient age and understanding and is supported by an advocate.[32]
4. A letter may be sent to parents at a later stage informing them that proceedings are likely and outline what parents need to do to prevent proceedings. When families receive this letter, they are entitled to legal aid for a consultation with a legal adviser, who can also negotiate on behalf of the parents with the local authority.[33]
5. If the authority decides to issue proceedings, a letter is forwarded to the parents.[34]

As a consequence of this approach, families are being given greater protection and assistance including legal advice, at a much earlier stage than in this jurisdiction.

Attachment: Helping to Understand the Child and the Adult

Johnnie Gibson, at a conference in Omagh hosted by Irish Attachment In Action, described attachment as relating "to bonds, safety and the basic need to be in relationships and to attach".[35] He advised the attendees "we cannot parent children whose hearts we do not have".[36]

At the same conference, Kieran Downey outlined the need for a "[t]rusted adult in a person's life and that this leads to resilience in a child to overcome trauma"[37] and Diane Hanly spoke of "[a] need to focus on the family as a whole".[38] Tina Henry commented on the need to keep the adult emotionally available, and spoke of regulating the helpers to help the children and of "[s]ystems that build the scaffolding that helps".[39]

Efforts In This Jurisdiction: Signs Of Safety

The Signs of Safety model has now been adopted by Tusla in this jurisdiction, and social workers are being trained in the methods used in this approach, which was set up by Andrew Turnell and Steve Edwards in Western Australia in the 1990s.

At a discussion on this area, Deirdre Malone of Tusla explained the approach as being one where "[t]hey looked at what works best in difficult cases".[40] She further expanded that the social work approach in the past was to look at the problems but that this had changed and Tusla now looks at the strengths each family has.[41]

Signs of Safety, she explains will be used "with children, families and networks to create effective safety plans".[42] The aim is to give "children and families … the support from TUSLA (CFA) that they need when they need it".[43] The aim of Tusla is to ensure and strengthen relationships with children, families and the community, together with support from statutory and voluntary agencies.[44]

In commenting on the Signs of Safety approach, Dr Coulter outlines that *Case J* was brought under s.18 of the Child Care Act 1991, regarding two children.[45] The parents had dealt with their addiction issues, and reunification was being considered by the Agency (now Tusla). Allegations of sexual abuse against the parents were raised by two older children while in care. One of the children withdrew the allegation and a finding of fact regarding allegations was never made. The foster parents, with the support of the guardian ad litem, brought the matter to the High Court and the court returned the matter to the District Court to consider a risk assessment. The Signs of Safety model was being utilised in parallel with court proceedings.[46]

Dr Coulter defined "[t]he 'Signs of Safety' model as non-blaming and future-focused, though all parties have to accept that the children have been abused before they can move on to address possible risk and the reunification of the family".[47]

She outlined that court proceedings, on the other hand, "are focused on past events and what past behaviour tells us about likely future behaviour, and usually require findings of fact in relation to past behaviour, which contains an element of blame absent from the 'Signs of Safety' process".[48]

In this case, the children returned home under the "Signs of Safety" programme.

The programme evidently has tremendous potential. The assistance at an early stage of a legal adviser for the family in tandem with this programme would be beneficial to families.

Specialist Courts

Mr Justice White, at a conference held by the Legal Aid Board, said that Ireland's family law courts were "too adversarial".[49] He highlighted the need for specialist courts and outlined that the Department of Justice was engaged in drafting legislation to establish a "separate system of family courts".[50]

The news that such courts are to be established is to be greatly welcomed and it is anticipated that successive governments will carry out this work.

Mediation

Mr Justice Johnson states that "[m]ediation offers a non-adversarial 'interest based' dispute resolution process. It focuses on the interests of the parties as opposed to their respective rights and by doing this it can avoid conflict".[51] He describes the function of the judge as a mediator; not administering justice but assisting the parties in reaching agreement.[52] He outlines that there is no constitutional bar to judges being mediators and believes that there should be a statutory framework, which would clearly outline the judge's mediator obligations and responsibilities.[53]

Mediation in child care cases is certainly worth considering. Whether it is operated by judges or by the Family Mediation Service or an amalgamation of both, greater resources would be required.

Advisory Committees

Shannon refers to Child Care Advisory Committees which are set up by the CFA.[54] He notes that members of the Committee do not receive remuneration, other than expenses. The consequence of this is that the Committee will consist mainly of CFA/HSE employees. Experts working in the private sector may be hesitant to take part without any remuneration for their expertise and time.[55] How unfortunate that a golden opportunity was not availed of to seek out different experts in the community, and pay them for their expertise and their time to enable them to assist in a multi-disciplinary approach to the raising of our children safely and adequately in each county. It is certainly worth considering adopting this Advisory Committee approach to include addiction councillors, experts in domestic violence, housing executives, psychologists, psychiatrists, social workers, psychiatric social workers, outreach workers, youth workers, attachment experts and guardians ad litem to assist our children and their families.

* The views put forward in this article are those of the author and in no way reflect the views or beliefs of the publisher.

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* Helen Salmon is a solicitor with the Legal Aid Board in Donegal, comprising of seven hard-working, efficient and caring members of staff. She attended Scoil Mhuire in Ballinasloe, Co. Galway where the teachers instilled a sense of social awareness. This was built upon by studying Sociology in NUI Galway with Chris Curtain and Michael D Higgins. It is said that "knowledge is power" and, in an effort to effect better outcomes for families in Donegal, and with the assistance and guidance of Geoffrey Shannon, she completed and received a Master of Laws with commendation in Child Care. Upon commencement of the thesis for the Masters, she recalls commenting at the Law Society that it would be so beneficial to families to finally have researched this topic so thoroughly that better outcomes could now be possible.

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Case Reports

William Quill BL

ADOPTION – DISPENSING OF CONSULTATION WITH NATURAL FATHER – WELFARE OF CHILD – ADOPTION ACT 2010 s.30

Re Proposed Adoption of X [2020] IEHC 493; High Court, Barrett J, 5 October 2020

Background Facts

The child's stepfather had applied to adopt him. His stepfather had been married to his mother for a number of years. The child, described as a near-teenager, had met his natural father five times. His natural father was living in another jurisdiction. The Adoption Authority (the "Authority") and the Child and Family Agency took the view that it was in the child's best interests that the adoption order be made. The Adoption Authority had made multiple attempts to hear evidence from the natural father in relation to the proposed adoption and to give him an opportunity to apply for custody or guardianship, which he had not done.

On 10 August 2020, the Authority sought an order from the High Court under s.30(4) of the Adoption Act 2010

> "approving the making of an order for the adoption of … X without consulting the Natural Father in circumstances where the Adoption Authority … is satisfied that it would be inappropriate for it to consult with the Natural Father in respect of the proposed adoption".

The Authority gave evidence by affidavit that it had invited the natural father to present evidence on several occasions and that the Board of the Authority had made efforts to facilitate his attendance, and that they had received no response. In a report from the Child and Family Agency appended to the affidavit grounding the application, the child became upset when the adoption application was discussed with a social worker, as he did not remember any previous contact with his natural father, and his only memory was of his stepfather as his father.

Law

The Adoption Authority of Ireland was established under s.94 of the Adoption Act 2010. Section 19 of the Act provides that in any application or proceedings under the Act, "the court … shall regard the best interests of the child as the paramount". Section 30 of the Act provides for the role of the Authority in consulting with the father prior to an adoption, what steps the Authority should take, and the circumstances in which the Authority may apply to make the adoption order without consulting the natural father.

In relation to the question of the duration of the relationship between the child and the natural father, Barrett J considered the judgment of Jordan J in *Adoption Authority of Ireland v X (a minor)* [2019] IEHC 946, which in turn cited the judgment of Ó Néill J in *WS v An Bord Uchtála* [2009] IEHC 429, [2010] 2 I.R. 530. Although *WS* had been decided before the enactment of the Adoption Act 2010, under the Adoption Act 1952 the duration and nature of the relationship between the natural father and child was a matter to be considered.

Following the guidance of Jordan J in relation to art.8 of the European Convention on Human Rights (ECHR) and Art.42A of the Constitution of Ireland, Barrett J held that the application was clearly being made in accordance with law and in pursuit of a legitimate aim, and, as in *Adoption Authority v X*, family life did not exist in a way which engaged the rights of the natural father.

Barrett J considered *Keegan v Ireland* (1994) 18 EHRR 342, in which the European Court of Human Rights found that Ireland had been in breach of art.8 of the ECHR, when the Supreme Court (in *JK v VW* [1990] 2 I.R. 437) held that the father's rights should not be taken into account when the child was being placed for adoption. Barrett J distinguished the case before him from *Keegan* on three grounds. First, the Authority had gone to great lengths to consult with the natural father. Second, once the natural father said that he wanted to apply for custody of X, the Authority had set out clearly in correspondence that it would give the natural father a period of eight weeks to issue that application, and, in reality, he was granted a great deal more time. Third, there was a clear welfare issue regarding the child and it was in the child's best interests that the adoption order be made.

Conclusion

The court considered the factors which it was required to address under s.19 of the Adoption Act 2010 and found them to have been comprehensively dealt with by the affidavit evidence of the Adoption Authority and the reports of the Child and Family Agency. It accepted the evidence, and was satisfied to accede to the application made. The order sought was granted.

DOMESTIC VIOLENCE – INTERIM BARRING ORDER – APPEAL FROM CIRCUIT COURT – IMMEDIATE RISK OF SIGNIFICANT HARM – RELEVANCE OF SEXUALITY IN DOMESTIC VIOLENCE PROCEEDINGS

X v Y [2020] IEHC 525; High Court, Barrett J, 21 October 2020

Introduction

This was an appeal against the granting of an interim barring order sought by Ms X, the applicant wife, and granted by the Circuit Court on 25 November 2019 against Mr Y, the respondent husband.

Facts

A marriage between Ms X and Mr Y legally subsisted, but otherwise, for all intents and purposes, had ended. By the end of 2016, it was clear that the marriage had broken down. By mid-2017, the parties had told their children of their intention to separate.

The facts detailed by the court include a series of confrontations between the parties. A solicitor acting for Ms X wrote to Mr Y in March 2019, requesting him to cease being verbally abusive. While Ms X made breakfast and prepared the children for school, Mr Y would sit silently in the room. The court accepted her evidence "that she found this silent staring discomfiting".

After aggressive behaviour on 3 June, Ms X sought the advice of Women's Aid, and went to the District Court on 4 and 5 June, where she obtained a protection order on the second date. This was served on Mr Y by the Gardaí. Two breaches of the protection order became subject to criminal prosecutions.

Mr Y subsequently sought a safety/barring order against Ms X. At the return date hearing, Ms X indicated that she was going on holiday abroad with the three children. Mr Y indicated to the court that he had no objection to this. On her arrival, Ms X received an email from Mr Y informing her that he too was abroad, staying not far from where she was, and that he wished to have access to the children. Ms X facilitated this access on ten of the days of the holiday.

After further incidents, Ms X applied for a barring order before the District Court. The District Court struck out the summons for lack of jurisdiction and discharged the protection order. Ms X then applied to the Circuit Court, which granted an interim barring order. This was appealed by Mr Y to the High Court.

Favouring Ms X's Evidence

The court favoured Ms X's evidence, finding from her evidence in the witness box that she had experienced very real fear at times in her dealings with Mr Y that he would or, on occasion was going to, attack her. Ms X's employment and promotion record indicated that she was not prone to sensationalism or strange behaviour. While she may have wanted Mr Y out of the house, the court considered that this was because the atmosphere in the family home was toxic and his behaviour repeatedly had her in fear of her safety, rather than that Mr Y was the victim of some contrived concatenation of lies.

Section 8 of the Domestic Violence Act 2018

The interim barring order had been granted under s.8 of the Domestic Violence Act 2018 (the "2018 Act"), which provides that such an order shall be granted where "there are reasonable grounds for believing there is an immediate risk of significant harm to the applicant or a dependent person". Barrett J held that it is the "risk of significant harm" which must be immediate, and not the harm, and that it was appropriate to give the widest possible interpretation to what is immediate in any one case.

In interpreting the word "significant", he found that it could "exclude harms that are so utterly and completely trivial and/or contrived in nature or substance that a reasonable-minded person would conclude that in truth no harm had been suffered at all" and that the scale of harm should not just be

> "measured by a discrete act complained of but rather is informed by all the behaviours and circumstances that surround and inform that act, as well as the fear of future reoccurrences of same".

In interpreting the word "harm", he found that it should be given the widest possible reading, so as to embrace any "evil (physical or otherwise), hurt, injury, damage, or mischief".

Barrett J found that the existence of an order under s.15 of the 2018 Act is not a prerequisite to granting an order under s.8, although it is a consideration where such order exists.

The Circuit Court order envisaged a limited degree of interaction between the parties, specifically to cover childcare arrangements between school and Ms X's return from work. Mr Y contended that the Circuit Court could not have made an order finding that there was an "immediate risk of significant harm" where some interaction was contemplated. Barrett J rejected this analysis, as the Circuit Court could reasonably have concluded that there was less risk of a flare-up during these interactions than in the pressure cooker environment of their shared home and that, although it might be preferable that there was no interaction between them, given their respective availability after school hours, this had been the best solution.

In considering the relevance of Ms X's experience with martial arts and boxing (which on the evidence were limited enough), Barrett J found that line of argument to be objectionable; the fact that a spouse/partner might be able to hit back was rejected as there was no context in an intimate relationship where domestic violence was permissible.

Relevance of Sexuality

Barrett J cautioned against a reference to a party's sexuality where not relevant to the proceedings. It was not appropriate for Mr Y to emphasise the fact that Ms X's new partner was a woman.

In *obiter* remarks for the benefit of practitioners, Barrett J gave reasons to be careful when raising issues relating to sexuality as:

(1) it is "an inherently personal and private matter";
(2) court proceedings ought not to be "a vehicle through which to expose/discuss a person's sexuality and/or the sex life or practices of consenting adults"; and

(3) "all litigants are entitled to assume in coming to court that they will not be required to reveal more of themselves before strangers than is necessary for the due despatch of whatever application the court has been asked to adjudicate upon; one does not squander all entitlement to privacy on entering a courtroom, even if it is for *in camera* hearings".

Barrett J emphasised that relevant issues can always be raised, and that there should be no cause for concern or shame in discussing sexuality or consensual adult sexual relationships; however, "individuals should retain the right, *at their election*, to reveal the details of inherently personal and private aspects of their lives".

Order

For all the reasons summarised above, the High Court found there was abundant evidence before the Circuit Court and that there had been no flaw in the Circuit Court order.

IMMIGRATION – MARRIAGE OF CONVENIENCE – NULLITY – VOID *AB INITIO* – DISCRETION IN JUDICIAL REVIEW – EUROPEAN COMMUNITIES (FREE MOVEMENT OF PERSONS) REGULATIONS 2015

MKFS (Pakistan) v Minister for Justice and Equality Supreme Court, McKechnie J, 27 July 2020

Introduction

In July 2016, the Minister for Justice and Equality (the "Minister") refused an application by the first applicant/appellant for a residency card under the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015) (the "2015 Regulations") on the basis that his marriage was a "marriage of convenience". This finding was upheld on review in March 2017, whereupon the Minister took steps to issue a deportation order, which was issued on 30 June 2017. This was challenged by judicial review and dismissed by Humphreys J on 6 February 2018 ([2018] IEHC 103), who also refused leave to appeal ([2018] IEHC 222). The applicant sought leave from the Supreme Court, with the following proposed question:

> "Is a marriage entered into in the State pursuant to the provisions of the Civil Registration Act 2004 (as amended) rendered a nullity at law as a result of a decision reached by the executive after the marriage has taken place that the marriage is one of convenience or may rights still emanate from the marriage depending on the facts and circumstance of the individual case?"

The Supreme Court granted leave in a determination dated 26 February 2019 ([2019] IESCDET 54). The Irish Human Rights and Equality Commission participated in the appeal as *amicus curiae*.

Legal Framework

Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77 (the "Free Movement Directive") defines the right of citizens of the Union and their family members, as so defined but irrespective of nationality, to move and reside freely within the territory of the Member States. Article 35, titled "Abuse of Rights", provides that "Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience". The 2015 Regulations give effect to the Free Movement Directive. Regulation 2 qualifies that "'spouse' does not include a party to a marriage of convenience". Regulation 27 provides:

> "(2) Where the Minister suspects, on reasonable grounds, that a right, entitlement or status of being treated as a permitted family member conferred by these Regulations is being claimed, or has been obtained, on the basis of fraud or abuse of rights, he or she shall be entitled to make such enquiries and to obtain such information as is reasonably necessary to investigate the matter …
>
> (4) In this Regulation, 'abuse of rights' shall include a marriage of convenience or civil partnership of convenience".

Regulation 28, titled "Marriages of Convenience", provides, inter alia,

> "28. (1) The Minister, in making his or her determination of any matter relevant to these Regulations, may disregard a particular marriage as a factor bearing on that determination where the Minister deems or determines that marriage to be a marriage of convenience."

The Civil Registration Act 2004 (the "2004 Act"), as amended by the Civil Registration (Amendment) Act 2014, in s.2(1) provides:

> "'marriage of convenience' means a marriage where at least one of the parties to the marriage —
>
> (a) at the time of entry into the marriage is a foreign national, and
> (b) enters into the marriage solely for the purpose of securing an immigration advantage for at least one of the parties to the marriage".

Section 3(1) of the Immigration Act 1999 provides that the Minister may make a deportation order of a non-Irish national who does not have permission to be in the State to leave the State within such period as may be specified and thereafter to remain out of the State, while s.3(6) provides that one of the factors which the Minister must consider is "the family and domestic circumstances of the person".

Background Facts

M.S., the first appellant, is a national of Pakistan. A.F. and N.F.J., the second and third appellants, are nationals of Latvia, who are lawfully resident in the State on foot of their European Union citizenship. M.S. and A.F. are a married couple. A.F. is the mother of the third appellant, N.F.J., who is biologically unrelated to M.S.; however M.S. has been appointed guardian of the child by the District Court.

M.S. came to Ireland on 12 June 2009 on a valid visa, although he overstayed the visa as granted. On 9 February 2010, he applied for asylum in Ireland. On 12 February 2010, M.S. and A.F. married. He applied for a residence card on the basis of his marriage to a Union citizen. On 22 October 2010, he was granted a five-year permission to reside in Ireland on the basis of his being a spouse of an EU national. On 14 February 2011, his application for asylum was deemed withdrawn because of his failure to complete the asylum questionnaire or to attend for interview.

In March 2011, M.S. and A.F. separated. A.F. began a relationship with another man, with whom she bore a child, N.F.J., who was born on 18 May 2012. The child's father later died. In April 2015, M.S. and A.F. reconciled, and in October 2015, they began living together again. On 21 October 2015, M.S. applied for a renewal of his residence card. He did not inform the Minister that he and his wife had been living apart for a substantial period during the previous number of years.

On 3 October 2016, M.S. was appointed by the District Court as a guardian of N.F.J., although doubts were raised in the High Court as to the validity of the order. On 4 May 2016, M.S. was informed that the Minister was considering refusing his application on the basis that his marriage was a marriage of convenience; this decision was made on 9 June 2016. On 29 July 2016, M.S. submitted representation for a review of this decision, which was upheld on 20 March 2017. This decision was not challenged.

By a separate letter on 20 March 2017, the Minister wrote to M.S. issuing a proposal to deport him under s.3 of the Immigration Act 1999. The Minister did not consider that any substantive constitutional or ECHR rights derived from the marriage of M.S. and A.F; they were not living together at the time of the appeal, although they stated an intention to do so again.

Judgment of the High Court

On 11 October 2017, Humphreys J granted the applicants leave to seek judicial review. He subsequently heard the application, and delivered judgment on 6 February 2018.

Humphreys J dismissed the application for judicial review, rejecting the proposition that there is an obligation on an administrative decision-maker to go back and review previous decisions when a later decision is made in the process, as "[a] decision-maker is entitled to act on the premise that a course of action taken for fraudulent purposes remains fraudulent notwithstanding the passage of time". He held that it was not open to the parties to challenge the finding that the marriage was one of convenience, where it had not been challenged after the review in March 2017. He further held that where a marriage is one of convenience, no rights arising out of the relationship can be asserted, which would be the case whether or not the marriage is technically valid in law. Humphreys J rejected the decision in *Izmailovic v Commissioner of An Garda Síochána* [2011] IEHC 32, [2011] 2 I.R. 522 and went on to conclude that a marriage of convenience is a nullity in law. He found that he would in any case refuse relief on discretionary grounds, upholding a statement in an affidavit for the respondent that the applicants had "been guilty of an egregious lack of candour and wrongful conduct in their interactions with the respondent".

Supreme Court Decision

Whether the Minister can rely on his decision that the marriage is a marriage of convenience, made in the context of the 2015 Regulations, when considering the deportation of the first appellant?

The appellants had contended that, in the deportation process, the Minister had foreclosed his function by failing to properly consider anew the quality, nature or extent of family life for the purposes of the proposed deportation decision, but instead imported into that process his finding made under the 2015 Regulations that it was a marriage of convenience.

McKechnie J in the Supreme Court considered the passage of time between the actions, and took the view that there is no general obligation to revisit a previous decision every time a further step is required to be taken in the process. He was satisfied that at a factual level, as the proposal to deport referred to a decision on the same day under the 2015 Regulations, the two processes in question were interlinked in the sense that they were based on the same factual matrix, and clearly the two decisions were made within quite a narrow and confined timeframe. It further seemed to McKechnie J that, there was an inextricable link and direct relationship between the various legislative measures dealing with the right to enter and remain in this jurisdiction, and being refused that right or being removed from the State, as the case may be, and to suggest that a finding under the 2015 Regulations could apply to the granting of a residence card, but not to the deportation process, would be an incoherent and disjointed interpretation. Therefore, he concluded that the Minister was entitled to carry into the immigration process the decision previously made by him under the 2015 Regulations.

Whether a marriage of convenience is a nullity and/or is void ab initio and who can so declare?

The second issue was whether a marriage of convenience, as deemed or determined by the Minister under the 2015 Regulations and as applying to the deportation process, can be so described and can have no consequences or give rise to no rights.

The formal requirements to enter a valid marriage in the State were observed as part of the ceremony and no issue of it being a marriage of convenience was raised at the time of or immediately before the marriage.

McKechnie J considered the high constitutional standing granted to marriage and the right to marry in Arts 40.3 and 41 of the Constitution. Taking social and constitutional changes into account, he considered the judgment of O'Malley J in *HAH v SAA (Validity of marriage)* [2017] IESC 40, [2017] 1 I.R. 372, as well as the judgment of Barrington J in *RSJ v JSJ* [1982] I.L.R.M. 263, who observed that people marry for a range of motives.

McKechnie J then considered the law of nullity in general, with a distinction between a marriage that is void *ab initio*, which is considered never to have had legal effect; and a voidable marriage, which is regarded as valid until a decree annulling it has been pronounced by the courts. A decision to consider a marriage a nullity is not simply a declaration *in personam*, but rather is a declaration *in rem*.

The Minister, in the determination under consideration, had not made any finding of fraud under reg.27. In making a determination to disregard a marriage as one of convenience, there are three constraints on the Minister. First, the finding only comes into play when he is making a determination of any matter under the 2015 Regulations, including operating the provisions of s.3 of the Immigration Act 1999. Under reg.27, the matters involved relate to a right of residence in this jurisdiction. Second, reg.28(6) defines a marriage of convenience as a marriage entered into for the sole purpose of obtaining an entitlement under the Free Movement Directive, any transposing measure, the 2015 Regulations, or any domestic law dealing with the entry and residence of foreign nationals in the State. Accordingly, in both situations the consequences of such a finding are strictly tied to the narrow context of residency matters and the overall immigration process. The 2015 Regulations do not provide for any further consequences or effects outside of that setting: in effect, these are all what might loosely be described as "immigration issues". Third, the sole consequence of the Minister taking this view of a marriage is that he "may disregard" it as a factor bearing on his determination. The word "disregard", in its ordinary and natural meaning, has the effect that the Minister may discount it in any assessment or consideration which he may have to undertake as part of the 2015 Regulations, or under the immigration process as described. That is the sole and exclusive purpose for which the "disregard" provision exists.

McKechnie J was satisfied that the Minister's competence to deem a marriage to be one of convenience for the purposes of disregarding it from his consideration of the residence application does not carry with it any statutory justification for him to deem such a marriage as a nullity, and that to "disregard" for a particular purpose cannot be elevated to pronouncing upon the general validity of a marriage, or the issuance of a declaration that such a marriage is a "nullity", much less that such a marriage is devoid of all rights in all circumstances. Given the strong protections afforded to marriage in the Constitution, McKechnie J questioned whether a purported delegation to declare a marriage a nullity by statutory instrument could be valid.

McKechnie J considered the two views of the validity of marriage. In *Vervaeke v Smith* [1983] 1 A.C. 145, the House of Lords determined that if a marriage is conducted in accordance with the *lex loci celebrationis*, it is valid. The marriage had been entered into by the applicant solely to obtain British nationality. The court in that case acknowledged the alternative view, where the circumstances of the marriage may be looked into, i.e.: (i) where it was agreed that the parties would not cohabit and where the marriage had not been consummated, it was held that there was no consent to enter the marital relationship and that no marriage had been effected; (ii) for a marriage to be valid the parties "must assent to enter into the relationship as it is ordinarily understood, and it is not ordinarily understood [where the marriage is] merely a pretence or cover to deceive others"; or (iii) where it can be established that the marriage was only designed as a sham, that it should be set aside. In considering the range of viewpoints internationally, McKechnie J considered that the issue must be approached from an Irish point of view, and so emphasised the judgment of Barron J in *Kelly v Ireland* [1996] 3 I.R. 537, which favoured the second approach. This was contrasted with *Izmailovic*, in which Hogan J favoured the first approach, albeit after making an imperfect factual comparison with *HS v JS* unreported, Supreme Court, 3 April 1992, as the finding in that case was that it was not in fact a marriage of convenience.

On considering the amendments made in the Civil Registration (Amendment) Act 2014 to the Civil Registration Act 2004, McKechnie J held that these concerned prospective marriages only, providing the grounds and the procedure for objecting to a marriage before it happens, but do not purport to regulate, or provide for the dissolution of, marriages that have already taken place. In this respect, he disagreed with the view of the High Court judge expressed in the judgment under appeal that "the Civil Registration (Amendment) Act 2014 provides that a marriage of convenience is a nullity". While the Oireachtas had signalled its view of such a marriage, it had not chosen to legislate for a decree of nullity based on a finding that a marriage is one of convenience.

Ultimately, McKechnie J concluded that this was not the appropriate occasion to consider whether a marriage of

convenience is a legal nullity for all purposes and whether this arises only from the common law or also from the 2014 Act, and that the Minister's finding that the marriage was one of convenience was confined to the immigration/deportation context.

Whether the Minister must take into account any family/private rights of the parties?

The Minister had determined that no family or private rights arising from their relationship may be asserted by the appellants. McKechnie J referred to the requirement in s.3(6) of the 1999 Act to consider "the family and domestic circumstances of the person", reflecting the requirements under art.8(1) ECHR. Therefore, where some evidential basis exists for engaging these rights, an assessment must be conducted having regard to the matters specified in art.8(2) ECHR. While it may be that the applicant is not entitled to invoke the protection of marriage guaranteed by Art.41 of the Constitution, the applicant's rights under art.8 ECHR are not so confined and when invoked will require to be balanced in the mix by the Minister. The Minister remains under an obligation to take the family and private rights (particularly those under art.8 ECHR) of applicants into account even where he has found that there is a marriage of convenience, though of course those rights will fall far short of the full panoply of rights which could be invoked by the parties to a genuine marriage.

Accordingly, while it may not be possible to assert strict "marital" constitutional rights as such, that is not to say that the relationship between the appellants (including as between the first and third appellants) did not give rise to certain rights which must be factored in by the Minister as part of his consideration under s.3(6)(c) of "the family and domestic circumstances of the person". Assessing the decision of the Minister, McKechnie J found that the Minister had failed to engage in a proper analysis under art.8.

Discretion

McKechnie J referred to remarks made by himself in *PNS v Minister for Justice and Equality* [2020] IESC 11 on the power of the High Court to refuse relief on a discretionary basis, in which he had observed that the jurisdiction to dismiss an application for judicial review must be exercised sparingly and only where that conduct can be considered serious and significant in the context of the system as a whole. Given the points of principle raised in the appeal, and where the first and second appellants had consistently maintained that theirs was not a marriage of convenience, this case did not appear to McKechnie J to be a typical abuse of process situation, and he was not satisfied that the conduct of the appellants reached the high threshold for disentitling them to the reliefs sought on this basis.

Conclusion

McKechnie J answered the three questions raised as follows:

> "(i) the Minister's determination (made in the context of the residence application under the 2015 Regulations) that a marriage is one of convenience, may be relied upon by the Minister in the context of the subsequent deportation process;
> (ii) that the said determination made by the Minister under the 2015 Regulations does not have the effect of rendering that marriage a nullity at law; rather, such determination is limited to the immigration/deportation context the sole consequence thereof is that it entitles the Minister to 'disregard' the marriage in the very specific context as set out above; and
> (iii) although the Minister is entitled to import the earlier decision into the deportation process, he must nonetheless have regard, in operating that process, to the Article 8 rights of the Appellants as founded on the underlying relationship between the parties; it does not appear that he did so here".

The appeal was allowed in part.

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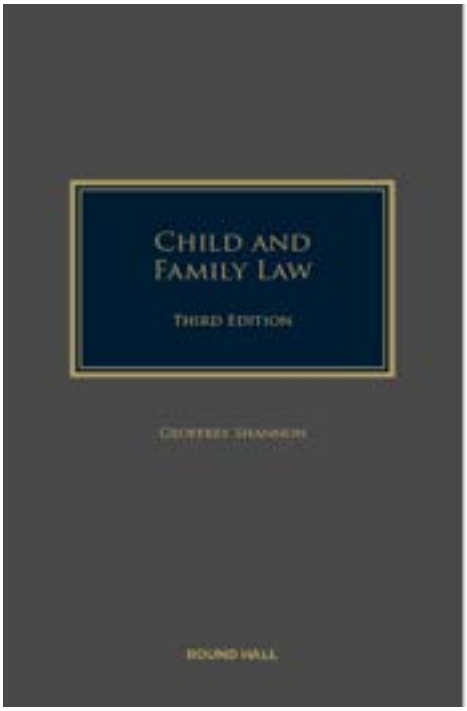

3rd edition

by Dr Geoffrey Shannon, Solicitor

The third edition of *Child and Family Law* provides a comprehensive narrative of the law and practice of child and family law in Ireland while also considering international and European Union law in an Irish context. This practitioner-led text tracks the rapid changes in Irish family law and the emergence of new assisted reproductive technologies, which challenge settled assumptions around parentage and biological relationships. The subject matter contained in the book provides an opportunity for examining the relationship that exists, or ought to exist, between child welfare and parental rights, and examines the rights and duties of parents and children in respect of each other. It considers how best to balance the welfare of children who may require care, with the right of children—and their families—to protection from unwarranted State intervention.

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About the Author

Dr Geoffrey Shannon is a solicitor and leading authority in child law and family law. He is the current Chairman of the Adoption Authority of Ireland and held the role of Special Rapporteur on Child Protection for the Irish Government from 2006 to July 2019.

Dr Shannon is the recipient of several awards for his work in the areas of national and international family law. These include the 2005 JCI Outstanding Person of the Year Award, the 2006 Canon Maurice Handy Award and the 2013 Irish Law Award. On 23 June 2017, Mr Justice Peter Kelly, the former President of the High Court presented Dr Shannon with the Dublin Solicitors Bar Association Award for outstanding contribution to legal scholarship for his entire work to date.

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