

**Report of the  
Family Law Reporting Project Committee  
To the Board of the Courts Service**

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## FOREWORD

The task entrusted to the Family Law Reporting Project Committee by the Board of the Court Service was one somewhat circumscribed and limited in nature. Its primary function was to consider the recommendations contained in the report made by Dr. Carol Coulter to the Board of the Court Service in October 2007 (“Family Law Reporting Pilot Project”) and to make proposals to the Board of the Courts Service in relation to recommendations contained in that report. In particular, the Committee of which I have had the honour to be Chairman was requested to oversee the Family Law Reporting Project for a period of some twelve months and to make a review of the project at the end of that period.

Thus the work of this Committee was primarily focused on administrative aspects of family law. This report does not purport to address issues of law reform or legislative change in the area of family law, although some of the recommendations of the Committee may involve legislative changes for effective implementation. Nor does it address case outcomes or problems associated with particular legal issues which arise in family law hearings. It is primarily concerned with measures and proposals which may enhance the efficient and rapid progress of family law cases through the courts.

Secondly, the Committee’s recommendations have necessarily been finalised in the context of what can only be described as a drastic change for the worse in the state of the public finances. It would have been foolish and unreal to bring forward recommendations which, rather than reassuring the general public that improvements in the area of family law were being sought on a realistic and practical basis, sought instead to superimpose new and expensive systemic changes when better management of scarce resources may yield equally positive results. Having consulted widely with all interested parties, the Committee ultimately concluded that family law courts in the year 2009 operate to a far more satisfactory degree than in the past, that waiting lists are not as great as had been feared, that advances in technology have greatly improved awareness about how access to the courts may be achieved and about developments in case law generally. This increased store of knowledge and awareness is due in no small measure to the ongoing publication of “Family Law Matters”, the publication piloted by Dr Coulter and continued by a dedicated team within the Courts Service itself. Running in tandem with these developments is the emergence and evolution of

new forms of dispute resolution in the area of family law, notably mediation and collaborative law, both of which provide a more immediate and less expensive form of redress for the parties involved and reduce the burden, to the extent that they prove successful, on the courts and the courts system generally.

Increased awareness of what goes on in family law courts was seen by the Committee as a crucial prerequisite for a greater level of trust in the judicial determination of family law disputes. From its consultation process, the Committee was left in no doubt that past restrictions on the reporting of family law cases has led to significant levels of suspicion and resentment, by men in particular, and a belief that hearings ‘behind closed doors’ meant that perceived injustices ran on unchecked by any requirement of transparency. In its recommendations the Committee has sought to bring forward recommendations which will hopefully eradicate such suspicions which, whether properly grounded or not, are inimical to the proper administration of justice. In this regard the provision of information about family law cases on an ongoing basis is essential and the Committee has looked at ways and means whereby this might be done.

If one were to sum up in a few sentences the key conclusions of the Committee, the first would be to recommend the appointment of a small number of additional Circuit Court judges and District Court judges to deal with current backlogs of work. In addition to such further publications of Family Law Matters for which funding might be provided, there should also be increased use of technology to disseminate information about all aspects of family law. Arrangements should be put in place to steer litigants towards mediated and collaborative law solutions before the parties end up in court. The Committee would also strongly support Dr. Coulter’s recommendations that restrictions on reporting family law cases should be reduced to the greatest extent possible, commensurate with the need to protect the identity of parties to any proceedings or any child to which the proceedings may relate.

The work of the Committee could not have progressed as it has done without the tireless efforts of its Secretary, Miriam O’Flanagan, to whom I wish to express the gratitude of both myself and the Committee. I wish also to thank Ms. Nuala McLoughlin, Director of Supreme & High Court Operations, who drew together many of the different strands of the material considered by the Committee and did vital work in preparing the structure of this

report. The work could not have been completed without generous contributions of time and effort from the various members of the Committee who uncomplainingly adhered to a schedule of monthly early morning meetings, often at great personal inconvenience.

On behalf of the Committee, I would also wish to thank the various groups and individuals who made presentations and lodged submissions. All of these were carefully considered.

**Nicholas J Kearns**  
**The Supreme Court**

## **Introduction**

The Family Law Reporting Project committee is a sub-committee of the Board of the Courts Service.

The Committee was established, and its terms of reference fixed, by the Board at its meeting of 19<sup>th</sup> October 2007 following its consideration of the report of Dr Carol Coulter on the Family Law Reporting Project.

### **Members of the Family Law Reporting Project committee**

The Hon. Mr. Justice Nicholas Kearns – Chairperson

The Hon. Mrs. Justice Catherine McGuinness – President of the Law Reform Commission

The Hon. Mr. Justice Henry Abbott - Judge of the High Court

His Honour Judge Michael White - Judge of the Circuit Court

Judge Gerard Furlong - Judge of the District Court

Ms. Olive Braiden - Courts Service Board Member

Ms. Esther Lynch - Courts Service Board Member

Mr. Kevin Fidgeon - Dublin Circuit Court, Courts Service Board Member

#### ***Courts Service Officials to attend meetings:***

Ms Nuala McLoughlin

Mr. Diarmaid MacDiarmada

Ms. Helen Priestley

Ms Margaret O'Neill

Ms. Miriam O'Flanagan - Secretary

## **Terms of reference of the Family Law Reporting Project Committee**

1. To consider recommendations contained in the Report on the Family Law Reporting Pilot Project in so far as they relate to the Courts Service and make proposals concerning their implementation.
2. To consult with the Presidents and Judges of the courts concerning the recommendations and make such proposals arising from the consultations as are considered appropriate.
3. To oversee the Family Law Reporting Project for 12 months from January 2008 and review the project at the end of that period.

The Committee met on fourteen occasions. It received and considered submissions from the persons and organisations set out in appendix 1 hereto. All submissions received were circulated to and considered by all the members of the committee.

### **The establishment of the pilot Family Law Reporting Project**

One of the statutory mandates of the Courts Service is the provision of information to the public on the court system. As Dr Coulter noted in her report to the Board of the Courts Service, this must include the family law courts. The provisions of the *Civil Liability and Courts Act 2004* have enabled the Courts Service to establish the Family Law Reporting Project and to publish a number of reports on the operations and jurisprudence of the District, Circuit and High Court in family law cases.

The Courts Service Board decided in 2006 to invite proposals for the provision of a Family Law Reporting Service on a pilot basis for a twelve month initial period. The contract for this project was awarded to Dr. Carol Coulter who commenced the pilot project on the 16<sup>th</sup> October 2006.

As the High Court hears only a small volume of family law cases and publishes its detailed decisions, while protecting the identity of the parties, Dr. Coulter's project gave priority to cases in the Circuit and District Courts, which deal with the majority of family law cases.



Her project involved collecting statistics, reporting on trends in family law cases and providing an overall view of the types of orders being made in family law courts, in order to provide information to the judiciary, legal practitioners and the general public in relation to family law matters.

During the pilot project Dr. Coulter published three volumes of a bulletin entitled *Family Law Matters*. The first volume of this bulletin was based on Dr. Coulter's analysis of all decisions, whether contested or made on consent, in the Dublin Circuit Family Court for the month of October 2006. It also contained reports of one week in the High Court family law court, a report of a day in the Circuit Courts of Cork, the Midlands and the Northern Circuit, and reports on the District Courts in Dublin.

Dr. Coulter's second report, published in June 2007 took as its focus child care cases. It also contained reports and judgments from courts throughout the country, an analysis of orders from a Circuit court outside Dublin for the month of October 2006, and a contribution from the Pensions Ombudsman outlining certain issues arising from pension adjustment orders.

The third issue of *Family Law Matters* looked at the District Court, which dealt with 21,000 family law cases in 2006. It also reported on case progression which was then being piloted by the Limerick County Registrar, and it contained an article by the President of the Mediators Institute on how greater use might be made of mediation in family law cases.

To assist in the preparation of her third report, Dr. Coulter had established a panel of legally qualified additional reporters. All of these reporters were persons entitled to attend family law proceedings under the *Civil Liability and Courts Act 2004* and they were all bound by a draft protocol on family law reporting designed to protect the anonymity of the parties while reporting on the jurisprudence. The Courts Service continued to use the services of these reporters for the continuation of the Family Law Reporting Project.

### **Dr. Coulter's Final Report to the Courts Service Board**

Dr. Coulter's final report to the Courts Service Board was in two parts, the first of which dealt with the reporting project itself and the second with the family law system in general.

There were eighteen recommendations in the first part of the report, fifteen of which called for action on the part of the Courts Service. They included:

- Seeking clarification of the legislative changes introduced by the *Civil Liability and Courts Act 2004*
- [Proposals for the](#) future of the family law reporting service
- Asking the Rules Committees to amend Rules of Court in relation to reporting family law cases
- Publishing selected family law decisions on the website and in *Family Law Matters* (if the Board decided it should be continued) or on the website if it is not to be continued
- Designing its civil case management system to capture data on the outcomes of family law cases and inviting the Central Statistics Office to examine its data needs for this system
- Publishing information on all remedies available, including ADR (alternative dispute resolution), in family law disputes
- If the Courts Service decides to continue publishing *Family Law Matters* it should produce three issues per year and thereafter should publish statistics and sample cases on its website
- Recruitment of a person to disseminate information on family law and liaison with academic institutions engaged in family law research
- Liaison with the Children Act Advisory Board on production of reports from child care and family cases.

### **Consideration of the family law system**

While consideration of the family law system as a whole had not been part of Dr. Coulter's original terms of reference, it was added by agreement with the Chief Justice and the Chief Executive Officer of the Courts Service. The recommendations in the second part of the report dealt with the family law system. Government action would be required to implement the first four of the twenty seven recommendations, but the remainder, if accepted, were stated to be capable of being implemented in a short timeframe without legislation.

The first four recommendations relate to the establishment of a family court division of the Circuit Court, based on a network of regional courts and the introduction of compulsory mediation prior to litigation, with provision for the separate listing and ruling of cases ending in a mediated settlement.

The remaining recommendations in the second part of Dr. Coulter's report are addressed to the Judges and the Courts Service and they include:

- Building case management into the family law system
- Establishing a panel of District and Circuit Court Judges with a special interest in family law cases to be deployed on a rotating basis to hear such cases
- Publication of comprehensive information on remedies in family law cases; implementation of a uniform policy for Courts Service staff on assisting litigants in completing family law application forms; provision information advising lay litigants how to make and respond to family law applications
- Requiring parties to undertake mediation sessions prior to litigation
- Expansion of Family Mediation Service and closer liaison with courts, and greater use of collaborative law
- A recommendation that the Rules Committees redraft the template for the initiating document in family law proceedings
- Allocation of Judges for family law lists based on the waiting times in each county, and allocation of Judges to family law lists to ensure judicial continuity in dealing with cases
- Establishing separate lists for uncontested cases
- A recommendation that County Registrars should adopt a uniform policy on length of court day and adopt case progression as soon as Rules of Court are in place
- Consideration being given to making costs orders and interim orders capable of immediate execution to reduce delays
- Obtaining advice on best practice for obtaining the views of children and securing the welfare of children in family law disputes
- Liaison with relevant external agencies to ensure parties to family law disputes have access to appropriate ancillary services

- Considering mechanisms for recording and compiling District Court jurisprudence in family law cases
- Introduction of a Practice Direction requiring all Judges to seek an indication of the fees payable in family law cases before making a financial order
- The abolition or expansion of income limits for eligibility for civil legal aid in family law cases

Dr. Coulter presented her final report to the meeting of the Courts Service Board held on the 19<sup>th</sup> October 2007. Having considered her report the Board decided

- That Dr. Coulter's final report to the Board should be published
- That the Family Law Reporting Project should continue for a further 12 month period
- That this committee should be established with the terms of reference as set out above; and
- That the Judicial Studies Institute should establish a forum for Judges who deal with family law cases

In accordance with its terms of reference, the Family Law Reporting Committee has considered the recommendations contained in the Report on the Family Law Reporting Pilot Project in so far as they relate to the Courts Service. The Committee has consulted with the Presidents and Judges of the courts concerning these recommendations.

The Family Law Reporting Project Committee's detailed responses to each of the recommendations made by Dr. Coulter are contained in the body of this report.

The Committee considered all of Dr. Coulter's recommendations, paying particular attention to what it considered to be the most far-reaching of Dr. Coulter's recommendations, which were in the following areas:

1. Arrangements for reporting family law cases and providing information about family law courts generally
2. The creation of a family court division of the Circuit Court, based on a network of regional courts

3. The introduction of case management and case progression and the allocation of Circuit and District Court Judges for family law lists
4. The significant development in conflict resolution models which offer many challenging opportunities for family law matters, including options such as mediation, collaborative law and case progression.
5. Obtaining the views of children and securing their welfare in family law matters

Having regard to the gravity of these recommendations, the Committee has made a detailed response to them which is set out in this report.

### **The budgetary situation of the Courts Service**

In preparing its detailed response to Dr. Coulter's report, the Committee has been obliged to take account of the current economic climate which is very different from that which prevailed when Dr. Coulter presented her report to the Courts Service Board in October 2007. The Courts Service's budgetary allocation for current and capital expenditure in 2009 is significantly less than that for 2008. Payroll expenditure in 2009 will be reduced by over 4% compared with 2008. This reduction will be achieved by a combination of methods which should have minimum impact on frontline court offices and should not result in any reduction in court sittings. The reductions will, however, have an impact on the pace of our modernisation programme. Non-pay expenditure, which includes travel and subsistence for staff and for Judges and services such as stenography, interpretation and publications, will be reduced by over 10% which will be achieved by reductions across all expenditure headings.

# Chapter 1

## Reporting and providing information

### The family law reporting pilot project

The *in camera* rule has traditionally been seen as an essential protection for all parties involved in family law cases, and especially for children who are minors. Unfortunately the rule has over the years given rise to suspicions that injustices in the conduct and resolution of family law cases may have occurred from time to time, injustices which, because of the restriction, emerge only in an anecdotal way. This view is one which is held predominantly by interest groups representing the interests of husbands and fathers, though wives and mothers have also advanced similar complaints from time to time. The relaxation of this rule by Section 40 of the Civil Liability and Courts Act 2004 and the regulations made under that section<sup>1</sup> was therefore a welcome development. It enabled the Courts Service to undertake the pilot reporting project which addressed the need of parties and the public generally to be have access to information about proceedings in family law courts

As Dr. Coulter noted in her report, it is important that the public should be able to ascertain and understand the procedures in our family law courts in order to foster public trust and confidence in the court system. The Courts Service has sought to address these needs by publishing a series of booklets, *Family Law Matters*.

In conjunction with the Courts Service Information Office, Dr. Coulter played a key role in compiling and editing a number of issues of *Family Law Matters* during her participation in the Courts Service's pilot family law reporting service. She was therefore keenly aware of the importance of the reports, the range of the material to be reported, and of the resources required to produce reports.

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<sup>1</sup> Section 40 of the Civil Liability and Courts Act 2004 permits certain categories of persons, subject to rules of court (see the Rules of the Superior Courts (Section 40 Civil Liability and Courts Act 2004) SI 247 of 2005; the Circuit Court Rules (Section 40 Civil Liability and Courts Act 2004) SI 527 of 2005; and the District Court Rules (Section 40 Civil Liability and Courts Act 2004) SI 256 of 2005)) to prepare and publish a report on certain family law proceedings specified in the Section, provided that the report does not enable the parties to the proceedings or any child to which the proceedings relate, to be identified. See also Ministerial Regulations contained in The Civil Liability and Courts Act 2004 (Bodies Prescribed Under Section 40) Order 2005, SI 170 of 2005 and The Civil Liability and Courts Act 2004 (Section 40 (3)) Regulations 2005, SI 337 of 2005

In the first part of her report to the Courts Service Board, Dr. Coulter made a number of recommendations for the future of the family law reporting service and for the mechanisms the judiciary and the Courts Service might use to gather and disseminate relevant information.<sup>2</sup> These recommendations were considered at some length by the Committee and the detailed responses to them are contained in this chapter of the Committee's report.

### **Issues relating to the regulatory basis for preparation of family law reports**

The relaxation of the *in camera* rule referred to above led to some uncertainty among practitioners and academics as to the extent of the categories of persons who could lawfully attend family law proceedings to prepare and publish reports on them. In view of this uncertainty, Dr. Coulter recommended that the Courts Service obtain clarification of the legislative provisions in that regard.<sup>3</sup>

The Committee's view is that Section 40(3) (a) of the *Civil Liability and Courts Act 2004* as amended by Section 31 of the *Civil Law (Miscellaneous Provisions) Act 2008* permits any person qualified as a barrister or as a solicitor to report on family law cases without limiting the purpose for which proceedings may be reported, or the nature of the publication in which the report may be carried. Therefore the Committee sees no obstacle to a barrister or solicitor, whether employed by a media organisation or operating independently, reporting proceedings for publication in a newspaper or other media. The only constraint on such reporting relates to disclosure of the identity of the parties, any child to which the proceedings relate, and to any directions the Court may give under the subsection. The Committee thus believes that Dr. Coulter's "suggestion for change"<sup>4</sup> may be effected, subject to the conditions laid down in the Act and the protocols (see below) governing the Courts Service project, and subject to the reporter being legally qualified or meeting the criteria in the Regulations. Any development whereby a non-legally qualified reporter or a person not meeting the aforementioned criteria sought to be present for reporting purposes would require a change to the current legislation. The Committee did not feel it appropriate to recommend

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<sup>2</sup> Recommendations 3, 4, 9, 13 and 14 in part one of the report deal with the reporting project, and recommendations 8, 15, 16, 17 and 18 contain proposals for preparing and disseminating information about family law judgments, decisions, statistics and reports of cases.

<sup>3</sup> Coulter, Report to the Board of the Courts Service (October 2007), Recommendations 1 and 2 p. 29

<sup>4</sup> Carol Coulter, *Family Law in Practice: A Study of Cases in the Circuit Court* (Clarus Press, Dublin, 2009) p. 124

such a change, given that reasonable reporting arrangements for decisions and judgments already exist.

Having considered Dr. Coulter's point relating to proceedings under the *Guardianship of Infants Act 1964*, the Committee took the view that these proceedings are held other than in public on the basis of section 45 of the *Courts (Supplemental Provisions) Act 1961*, in so far as it relates to matrimonial causes or matters or minor matters. There is no such restriction in the 1964 Act, and the Committee is of the view that it is not necessary for the Oireachtas to specify it as a "relevant enactment" in section 40(1) of the *Civil Liability and Courts Act 2004*. Accordingly the Committee does not consider that the recommended clarifications are required.

Dr. Coulter's Report also recommended that the respective Court Rules Committees consider amending the rules to improve safeguards for the anonymity of parties in family law proceedings.<sup>5</sup> The Committee notes however that protocols were put in place for reporting in family law cases.<sup>6</sup> In view of these protocols and the substantial amount of information now available in respect of family law cases, the Committee does not consider that the Rules of Court require amendment as proposed.

A further amendment to the Court Rules was recommended in relation to the making of submissions by those reporting family law cases.<sup>7</sup> The Committee is of the view that Dr. Coulter's suggestion is eminently sensible: that the default position should be that the reporter, having notified the Judge of his or her intention to attend, should not be obliged to do more than indicate the purpose of the attendance, unless the Judge, in the exercise of his or her discretion, otherwise directs.

### **The future of the family law reporting project**

Dr. Coulter's findings were published in her Report to the Board of the Courts Service (October 2007) which can be accessed on the Courts Service website [www.courts.ie](http://www.courts.ie). Dr. Coulter proposed five different options for the future of the reporting pilot.<sup>8</sup> These options

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<sup>5</sup> Coulter, Report to the Board of the Courts Service (October 2007), Recommendation 6 p. 30

<sup>6</sup> Protocols published in full in *Family Law Matters* (Volume 1, No. 1, spring 2007, at pages 36-37).

<sup>7</sup> Coulter, Report to the Board of the Courts Service (October 2007), , Recommendation 7 p. 30

<sup>8</sup> Coulter, Report to the Board of the Courts Service (October 2007), Recommendation 3 p. 29



ranged from discontinuing the project; continuing it as it is indefinitely; continuing it as it is for a defined period; continuing it in a modified form, either indefinitely or for a defined period; and lastly providing information on the family law courts in another way.

The Committee first wishes to record its commendation of the high standard of the reporting work of the Courts Service's Information Office in producing *Family Law Matters*. The Committee considers that *Family Law Matters* has provided a very helpful insight into family law proceedings. The seven issues of *Family Law Matters* have comprehensively covered all topics relating to family law that are of interest to parties, practitioners and the public. However, the Committee considers that a commitment by the Courts Service to indefinite publication of such reports would impose an unfair burden on those members of the Court Service who have been assigned to this role. The Committee therefore decided that the reporting project should continue on the same basis as it had begun, but only for a defined period.<sup>9</sup> The Committee made an interim recommendation to the Courts Service Board, which the Board approved, that the Courts Service continue the reporting project for a period of six months from October 2008, in order to publish two final editions of *Family Law Matters*, and thereafter that the requirement on the Courts Service to produce further editions of *Family Law Matters* would only arise in the event of new or important developments in family law.

The Committee believes that in view of the statutory mandates of the Courts Service and its core functions, the production of a publication such as *Family Law Matters* is an activity that would be more appropriately undertaken by an external and independent expert or organisation. Ideally such a body or grouping would involve personnel with legal qualifications and some research experience. The Committee recommends that the Courts Service would facilitate any such person or organisation in that work, particularly at the start-up stage, and would lend such practical support as it could to enable it to operate successfully. Quite independently of any such initiative, the Courts Service will continue to provide the public with information and statistics on family law proceedings.

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<sup>9</sup> Coulter, (October 2007), Recommendation 3 (c)

## **Digital recording of family law proceedings**

Dr. Coulter recommended in her report that in the event of the Courts Service adopting the option of continuing reporting for a defined period only, it should then progress the digital recording of family law proceedings and the collection of statistics.<sup>10</sup>

Dr. Coulter noted in her report<sup>11</sup> that the Courts Service is installing equipment to enable digital audio recording of all court proceedings in all court rooms throughout the country, but expressed the view that digital recording would not of itself answer the need for publication of decisions. The Committee concurs with this view, as these recordings are to be made for the internal purposes of the courts. The value of digital recording is that it will ensure that Judges will have a complete and accurate record of what took place in every court room in which digital recording is installed. Recordings from this system are not intended for publication, and indeed the Committee would consider that publication of such material would be plainly open to abuse.

At the time of writing this report, digital audio recording is available in the Supreme Court, the Court of Criminal Appeal and in 38 court rooms including courtrooms in the Four Courts and in the Circuit Court in each county town. During the remainder of 2009 it will be made available in the new Criminal Court Complex and in as many as 28 more court rooms throughout the country. The final phase of the installation of digital audio recording will be in the District Courts, and the Courts Service envisages that, subject to the availability of funding, this will be completed during 2010.

The Committee also notes that while Judges of the District Court give reasons for their decisions as often as possible, and when required to do so by law, the volume of cases in that court is so high and the turnover of cases is so rapid that even with digital audio recording it would not be feasible to detail at length the reasons for each and every decision made.

As Dr. Coulter noted, the judiciary will continue to have a key role in selecting decisions and judgments that should, subject to redaction to protect the identity of parties, be published. The Committee agrees with this view and therefore recommends that in any cases where the

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<sup>10</sup> Coulter, Report to the Board of the Courts Service (October 2007), recommendation 4 p. 29

<sup>11</sup> Coulter (October 2007) page 26

trial Judge considers that the decision has relevance as a precedent, he or she would arrange for the collation and editing of the decision from material captured by the audio recording.

Judges of the Supreme and High Court already write reserved judgments which are published on the Courts Service website. The Committee notes that production of written judgments is not feasible in the Circuit and District Courts. However, it recommends that where a new or unusual point of law is decided by a Circuit or a District Court Judge, that Judge should also consider preparing a note of the judgment which could also be published on the website, after redaction to remove any information that could identify the parties. The Committee therefore recommends that the Courts Service provide all possible assistance to Judges of the Circuit and District Courts in this regard.

## **Statistics**

Dr. Coulter recommended that the Courts Service's civil case management system, which is currently being developed, should be designed to capture information on the outcomes of family law cases, and that the Central Statistics Office be asked to extend its examination of statistics in the Courts Service to include family law.<sup>12</sup> The Committee agrees that the statistical information on family law cases that is presently available needs to be improved. However the Committee does not consider that reliance on data extracted from digital recordings of family law cases would be an effective instrument for compiling statistics. The Committee is pleased to note that, in keeping with Dr. Coulter's recommendations, the Courts Service is presently standardising its processes in civil and family law within and across jurisdictions in preparation for the development of an integrated civil case management system, and that the Courts Service will be seeking the advice of the Central Statistics Office with regard to the capture of statistical information in that context.

## **Alternative proposals for publicising decisions in family law cases**

Dr. Coulter recommended<sup>13</sup> that the Minister for Justice Equality and Law Reform should amend the 2005 Regulations<sup>14</sup> to expand the classes of person authorised to attend family law

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<sup>12</sup> Coulter, Report to the Board of the Courts Service (October 2007), recommendations 10 and 11 p. 30

<sup>13</sup> Coulter, Report to the Board of the Courts Service (October 2007), Recommendation 5 p. 29

<sup>14</sup> The Civil Liability and Courts Act 2004 (Bodies Prescribed Under Section 40) Order 2005, SI 170 of 2005 and The Civil Liability and Courts Act 2004 (Section 40 (3)) Regulations 2005, SI 337 of 2005

proceedings to include *bona fide* members of the press. In the event of there being no ministerial decision in that regard, and in the event of *Family Law Matters* not continuing in its present form indefinitely, Dr. Coulter recommends that the Courts Service produce an information booklet on the considerations taken into account in family law decisions, and that a further three issues of *Family Law Matters* be published.<sup>15</sup>

The Committee does not consider that it would be appropriate for the Courts Service, having regard to its role, functions and statutory mandates to publish the recommended booklet. The Committee notes that while staff in court offices will provide information on procedures, they are absolutely precluded from providing advice, and the Committee approves of this approach. The Committee is pleased to note that the Courts Service Board approved of the publication by the Information Office of further editions of *Family Law Matters* in its present format, and notes that seven editions in all were produced. The Committee considers that continued and long term reporting on family law cases is not a function appropriate to the Courts Service, and that this is a function that should be performed by an external independent agency. However, the Committee strongly recommends that the existing editions of *Family Law Matters* continue to be available on the Courts Service website and that court offices will provide them in hard copy for persons who do not have Internet access.

The Committee notes that in addition to the information it has already placed in the public domain the Courts Service is preparing a booklet containing general information on divorce, separation, domestic violence, custody and access, and up to date information on the administration of maintenance payments.

A new section of the Courts Service website is currently being developed to bring together the various stands of information available to the public on family law. The expanded range of information leaflets will be posted to this dedicated area of the website, where they can be easily up-dated. However, the Committee recommends that, since many members of the community have no Internet access, a supply of these leaflets be maintained in hard copy and made available to the public in all court and court office venues dealing with family law cases.

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<sup>15</sup> Coulter, Report to the Board of the Courts Service (October 2007), Recommendations 13 and 14 p. 31

### **Information for court users**

**A number of agencies who provide information and support to users of the family law courts made submissions to this Committee<sup>16</sup>. Many of them, in doing so, drew the Committee's attention to the information leaflets they have produced for court users. The Committee notes that the Courts Service has a policy of making these publications available in its information displays in court buildings. In addition, the Courts Service website [www.courts.ie](http://www.courts.ie) has links to the websites of a number of these agencies to assist court users.**

### **Selecting and reporting decisions of precedent value**

Dr. Coulter recommended the establishment of a committee of Judges and appropriate Courts Service officials to select family law judgments and decisions from various jurisdictions for publication, subject to redaction to protect identities, on the Courts Service website. She also suggested that the use of fictitious names be considered as a mechanism for identifying cases for reference purposes without identifying parties to the proceedings or any child affected by the proceedings.<sup>17</sup>

As this report has already noted, all approved judgments of the Supreme Court and of the High Court, including judgments in family law cases which have been redacted to protect identities, are posted to the Courts Service web-site unless the presiding Judge directs otherwise. The Committee notes and commends the care that Supreme and High Court Judges have taken to ensure that their judgments protect the identity of parties and of children in family law and to protect the identity of parties and of victims in cases relating to sexual offences. The Committee is grateful to the Chief Justice and the Presidents of the respective Courts for supporting Judges in discharging their responsibility in this regard.

The Committee does not recommend the use of common fictitious names as this practice could create difficulties for persons who might happen to have those names. Every judgment posted on the Courts Service website is given a unique identifier in the form of a neutral citation number in an internationally agreed format which indicates the jurisdictional level of

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<sup>16</sup> See list of those who made submissions in Appendix 1

<sup>17</sup> Coulter, Report to the Board of the Courts Service (October 2007), recommendation 8 p. 30

the court in which the judgment was delivered. The Committee considers that this neutral citation number would be a more appropriate mechanism than fictitious names for reference purposes.

The Committee does not consider that the establishment of a committee to select family law judgments and decisions from the different jurisdictions for publication on the Courts Service website as recommended would be helpful to the public and practitioners, or an appropriate use of the resources of the judiciary and the Courts Service. Instead the Committee recommends, as outlined above, that any Judges who consider that a decision they have made deals with a new and interesting point of law, or may have precedent value, should either deliver a written judgment, or arrange for the collation and editing of the decision from material captured by the audio recording. In a related recommendation<sup>18</sup> Dr. Coulter suggested that the Courts Service should publish judgments, decisions, statistics and some reports or sample cases on the Courts Service website. The Committee noted that at present, Judges of the Circuit and District Courts do not produce written judgments, but has made a recommendation above that the Judges of those courts consider doing so in cases of exceptional interest or precedent value. The Committee notes that the Courts Service will publish any such judgments on its website.

The Courts Service has included decisions of the Circuit and District Courts in its final edition of *Family Law Matters* (Volume 3, Number 1, Spring 2009). The Committee recommends that thereafter the Courts Service should facilitate reporting of family law cases by suitable independent persons or organisations and that it should provide data on family law cases in its annual report. The Committee does not recommend that the Courts Service should divert resources over and above those outlined above to the publication of decisions of the Circuit and District Courts.

### **Reporting family law decisions and liaison with external institutions**

Dr. Coulter made a number of interconnected recommendations<sup>19</sup> for the collation and dissemination of information on family law, and for liaison between the Courts Service and

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<sup>18</sup> Coulter, (October 2007), recommendation 15 p. 31

<sup>19</sup> Coulter, Report to the Board of the Courts Service (October 2007), Recommendations 16, 17 and 18 p 31

institutions engaged in research such as academic institutions and coordinating agencies such as the Children Acts Advisory Board.

As already noted, this Committee does not consider it appropriate for the Courts Service to continue reporting on family law cases, and regards this as a function more appropriate to an independent body. The Courts Service has agreed to render all possible assistance to any such approved body.

Instead of recommending the recruitment of a person to have overall responsibility for collating and reporting decisions, this Committee would emphasise that resources should be directed to the appointment of additional Judges and court staff to ensure that all family law cases are dealt with fully and expeditiously. Further details of the requirements in this regard are set out in the chapter responding to Dr. Coulter's recommendations for the establishment of a regional Circuit Family Court.

The Committee does not consider it necessary to recommend that the Courts Service designate a liaison officer for external institutions. The Courts Service has a long-established practice of providing assistance for *bona fide* academic research in all areas, including family law. The representative of the Courts Service who is assigned to liaise with the external body, whether it is an academic institution or a Government Department or agency, is selected by the Chief Executive Officer on the basis of the nature of such research and the purpose for which it is being conducted.

## Chapter 2

### **A Regional Family Court Division for the Circuit Court<sup>20</sup>**

In the second part of her report (pages 33 ff) Dr. Coulter described the current operation of the family law system and makes proposals for improving it. This chapter deals specifically with the Report's recommendations for a family law division of the Circuit Court based on a network of regional family courts.<sup>21</sup>

Dr. Coulter's primary recommendation in part two of her report is for legislation to establish a Family Court division of the Circuit Court, based on regional family courts in ten to fifteen centres. These courts would be dedicated family law courts, dealing with no other types of cases, and Judges would be assigned to such a court for a minimum period of one year.

#### **The existing arrangements in the Circuit Court**

Existing legislation allows for a President and thirty seven ordinary Judges of the Circuit Court. Five of these Judges are assigned to tribunals, one position is currently vacant, leaving thirty two available for judicial work. A total of thirteen Judges sit in Dublin, of whom three are assigned to the Dublin Circuit Family Court to deal exclusively with family law cases.

Outside Dublin, all Circuit Court Judges deal with criminal, civil and family law cases. Three Judges are permanently assigned for criminal, civil and family law cases on the Cork Circuit, and one Judge is permanently assigned to each of the other six circuits to dispose of all criminal, civil and family law cases.

Sixteen Judges of the Circuit Court are permanent and unassigned. The President of the Circuit Court allocates unassigned Judges to Circuits that require additional sittings for all types of business. Criminal cases are prioritised as there are still some arrears in that area.

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<sup>20</sup> As Dr. Coulter made a specific recommendation for a regional family law circuit court, this chapter responds to that recommendation and the District Court is dealt with in a separate chapter

<sup>21</sup> Coulter, Report to the Board of the Courts Service (October 2007), recommendations 1 p. 61



Family law cases are usually listed for separate weeks, but sometimes are only allocated one or two days in a week in which other types of case are also listed.

### **Circuits, County Towns and venues**

The Committee considered the proposal for a regional Circuit Court network in detail. The first point the Committee would make is that the Circuit Court is already organised on a regional basis. The Circuit Court is divided into eight circuits: Dublin Circuit, Cork Circuit, Eastern Circuit, Northern Circuit, Western Circuit, Midland Circuit, South Western Circuit, and South Eastern Circuit. Within each circuit, the family law courts are organised on a county basis and urgent applications in any county in a circuit can be adjourned to any other county within the same circuit.

The management structure of the Courts Service outside Dublin is organised on a regional basis, and each Regional Manager is responsible for administrative matters in designated counties. The business of the Circuit Court within each county is managed by a County Registrar. This regional and county based management structure assists in coordinating the delivery of family law services in a variety of ways, including the provision of appropriate information to practitioners, parties and the public.

The Courts Service has addressed the need for a regional family law court system based in 10 to 15 centres through its policy of concentrating family law sittings in the county towns outside Dublin. This arrangement allows sittings to be held in appropriate surroundings which are both geographically proximate to the parties' place of residence while preserving a degree of anonymity. There are at present very good facilities in 16 of the county towns. Refurbishment work is under way in two other county towns, and work is due to commence in a further county town during 2009. While the courthouse in Wicklow town is closed at present, Wicklow family law cases are being heard in the excellent new facilities in Bray which are extremely suitable for that purpose. Facilities are inadequate for family law cases in five county towns at present, but plans are in place to develop these venues, subject to the availability of funds for the Courts Service's capital programme.

## **Requirement for additional Circuit Court Judges**

In Dublin there are permanent family law sittings in the Circuit Court and a dedicated Circuit Court family law office. However, in the remaining twenty five counties there are no specialised family law courts and family law cases are heard either as part of the scheduled sittings of the Courts or at special sittings.

The Committee notes that in those venues outside Dublin where a sufficient number of Judges and Courts Service support staff are in place, the existing arrangements operate well. One such venue is the South Western Circuit. Here the presiding Judge and the County Registrars for each of the three counties comprising this Circuit meet three times each year to organise sittings of criminal, civil and family law cases. In this Circuit the lists for each type of case, criminal, civil and family law, are segregated to ensure that cases from one business stream do not impinge on another. In planning these schedules, there is close liaison with the President of the Circuit Court who allocates additional Judges to that Circuit insofar as such resources are available to do so. In this way family law cases are heard on the date for which they are listed. It is rare for a family law case on this Circuit to be adjourned solely because it has not been reached, and there are no arrears of family law cases in any of the county towns, but this is only possible because of the allocation of additional Judges by the President of the Circuit Court as the case loads require.

The Committee considers that the experience of the South Western Circuit demonstrates the value of proactively planning lists. It also shows that the principal reason for any delays in dealing with family law cases in the Circuit Court is not the number of venues in use, but a shortage of Judges and support staff to deal with these cases. For this reason the Committee does not support the recommendation that legislation be enacted to create regional family law courts, as it considers that concentrating family law cases in a smaller number of venues would not be an appropriate way to allocate judicial and staff resources.

The Committee recognises that the impact of demographic changes and changing patterns of family life has been particularly severe in new and existing centres of high population density. These changes have increased pressure on family law lists and added to waiting times, especially in venues on the eastern seaboard and those that are close to Dublin.

Accordingly the Committee's strong recommendation is that additional Judges of the Circuit Court, and appropriate numbers of support staff be appointed to enable the President of that Court to assign extra Judges to circuits with a backlog of cases, primarily for dedicated family law sitting days, but in other lists if required.

The Committee recommends that upon their appointment these additional Judges, instead of being assigned permanently to any particular venue would be made available to the President of the Circuit Court for assignment to such venues as the President shall determine so that they can be allocated to the venues with longest back logs. The Committee recognises the value of the recommendation that Judges be assigned to family law lists for a period of one year, but considers that Judges should be exposed to all types of work, and should not be assigned indefinitely to family law cases. The assignment of Judges to different venues and lists is by statute a function of the Presidents of the respective Courts, and the Committee recommends no change in the provisions in that regard.

### **Support staff**

Any additional Judges appointed will require the support of Courts Service staff. Having regard to the pre-court preparatory work that is required for family law cases, and the in-court and post-court work arising from such sittings, the Committee recommends that a ratio of two additional staff members be appointed for each additional Judge. Such staff members will be allocated to Regional managers' offices for deployment as required to court sittings in venues where additional sittings are to be held.

The Committee therefore makes the following recommendations:

1. Additional Judges should be appointed to the Circuit Court, together with appropriate numbers of support staff. Having regard to present economic and financial difficulties, the Committee limits its recommendation to the immediate appointment of three additional Judges and support staff but would hope that an improvement in the state of the public finances would allow for the appointment of three further Judges and appropriate staff as soon as circumstances permit.
2. Each provincial Circuit Court Judge together with the relevant County Registrars should designate specific periods of time to be solely dedicated to family law cases. This would enable the President of the Circuit Court to allocate additional Judges to

circuits as and when required to ensure that every family law case is heard on the date for which it is listed.

3. Where possible judges should be assigned to hear family law cases for a fixed period of time to be decided by the President, but for a duration of not less than one law term.<sup>22</sup>

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<sup>22</sup> The legal year starts in October each year and is divided into four terms, running from October to year end, January to Easter, Easter to Whitsun, and Whitsun to end of July, Rules of the Superior Courts Order 118 Rule 1 (SI 15 of 1986)

## Chapter 3

### Case management, case progression, case listing and waiting time for trials

#### Case Progression and Case Management

Dr. Coulter's report recommended that case management should be built into the family law system so that no case could be listed until all issues concerning vouching affidavits of means, discovery, and valuation of property had been dealt with, and that this should be done whether or not a family law division is established.<sup>23</sup>

#### Case management in the High Court

The Committee notes that the High Court operates the Family Law Practice Direction<sup>24</sup> to support the efficient progressing of High Court family law cases. This Practice Direction applies to all separation, divorce and maintenance cases, and its ethos has influenced the court's approach to other matters such as adoption, which do not come within its terms. The aim of the Practice Direction is to ensure that parties make full disclosure of assets and exchange their respective expert witnesses' professional reports and valuations. The Practice Direction is operated through the weekly directions list where interim maintenance and access orders are made. Detailed case management is done for more contentious cases in the dedicated case management list which is also held weekly. Once the parties have complied with all orders made in the directions or case management lists, and a certificate of readiness has been filed, cases are transferred to the list to fix dates where they are assigned a trial date.

The Committee notes Dr. Coulter's recommendation that opportunities for reducing delay and obstruction should be sought, including making interim and immediately executable orders for costs.<sup>25</sup> The Committee notes that in addition to the High Court's inherent jurisdiction to make such costs orders, the power to make such orders and the circumstances

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<sup>23</sup> Coulter, Report to the Board of the Courts Service October 2007, recommendation 5, p. 61

<sup>24</sup> Practice Direction HC40. This Practice Directions can be down-loaded from the Courts Service website [www.courts.ie](http://www.courts.ie)

<sup>25</sup> Coulter, Report to the Board of the Courts Service October 2007 Recommendation 18, p. 63

in which they will be made are set out in Rule 24 of the High Court family law Practice Direction. The Committee notes that the High Court has made such orders for failure to comply with the requirements of the Practice Direction. The Committee therefore is of the view that the High Court is using the Practice Direction in a manner designed to reduce delay and obstruction as recommended in Dr. Coulter's report.

The Committee also notes that the operation of the Practice Direction is currently being reviewed by a Committee of family law Judges and practitioners, whose terms of reference include up-dating the Practice Direction and ensuring that the provisions of the amended Practice Direction can be enshrined in new Rules of Court.

### **Case Progression Regime in the Circuit Court**

Dr. Coulter recommended that Case Progression by County Registrars be put in place as soon as possible.<sup>26</sup> The Committee is pleased to note that the Case Progression regime in respect of family law proceedings has been in operation since the 1<sup>st</sup> day of October 2008 pursuant to amended Rules of the Circuit Court.<sup>27</sup>

The purpose of case progression as stated in the rules 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. The rules assign to the County Registrar, through a case progression hearing or hearings, the functions of overseeing the preparation of family law cases for trial in the Circuit Court, generally monitoring the progress of the case pre-trial, and making final arrangements for the trial. The County Registrar is required to establish what steps remain to be taken to prepare the case for trial. The County Registrar can fix a timetable for the completion of its preparation for trial or adopt any timetable proposed by the parties if satisfied that it is reasonable. The County Registrar may also make a range of pre-trial directions, including directions to vouch items in an affidavit of means and the settling between the parties of the issues in dispute, and is empowered to award or disallow costs of the case progression hearing and refer cases of non-compliance with directions to the judge.

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<sup>26</sup> Coulter, Report to the Board of the Courts Service October 2007, recommendation 16, p. 63

<sup>27</sup> See Circuit Court Rules (case Progression in Family Law Proceedings) 2008 SI 358 of 2008.

County Registrars are empowered by the courts legislation to make a range of pre-trial orders, including discovery<sup>28</sup>. 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 a large pre-trial applications caseload, freeing them up for trial work.

Each representative of a party attending the case progression hearing would require to ensure that he or she is sufficiently familiar with the proceedings and has authority from the party he or she represents to deal with any matters that are likely to be dealt with. The County Registrar may, where it is considered necessary or desirable, direct that the parties themselves attend the hearing in addition to their representatives.

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.<sup>29</sup> 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. In this context the Committee notes that the said Case Progression Rules empower the County Registrar to give directions for the exchange of statements of issues, and to identify the issues that are in dispute between the parties.<sup>30</sup> The County Registrar is also empowered to direct expert witnesses retained by the respective parties to consult with each other, and to require that the outcome of their consultations be recorded in a memorandum to be submitted to the County Registrar and delivered to the parties, although the outcome of such consultations cannot bind the parties.<sup>31</sup>

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.

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<sup>28</sup> See Second Schedule, Courts and Court Officers Act 1995, (as amended)

<sup>29</sup> Coulter, Report to the Board of the Courts Service October 2007, recommendation 17, p. 63

<sup>30</sup> Order 59 rule 4(38)(14)(b) Rules of the Circuit Court

<sup>31</sup> Order 59 rule 4(38)(14)(i) Rules of the Circuit Court

## **Family law cases in the District Court**

The Board of the Courts Service has approved a three-phase programme to reorganise the District Court Districts. The second phase of this programme commenced in January 2009. As part of this programme court sittings are being concentrated in larger venues, and where possible family law sittings are being concentrated in venues with suitable facilities such as consultation rooms and dedicated court rooms. This reorganisation has enabled the provision of separate days for dealing with family law cases in courts outside Dublin. It has also, together with the introduction during 2008 of electronic funds transfer systems for family law maintenance payments made through District Court Offices, greatly improved the service to parties in family law cases.

## **Existing Arrangements for family law cases in the District Court**

There are at the time of writing this report 64 Judges of the District Court, including the President of the District Court.<sup>32</sup>

Twenty of these Judges are assigned to the DMD (Dublin Metropolitan District). Each day two Judges are exclusively assigned to family law cases, and a third Judge is assigned to child care cases. These Judges sit in court rooms used exclusively for these cases in Dolphin House, where the DMD also operates a dedicated family law court office.

Outside the DMD, one Judge is assigned permanently to each of the 24 Provincial District Court Districts, and three Judges are permanently assigned to Cork City. The President of the District Court allocates unassigned District Court Judges to different courts throughout the country and to the DMD as case loads require. All of these Judges deal with criminal, civil and family law cases.

Where delays arise in hearing family law cases in the District Court, it is due to the volume of such cases. In 2007 the District Court dealt with more than 24,000 applications in family law matters including applications under the Domestic Violence Act, applications for

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<sup>32</sup> Sittings of the District Court are held all year with the exception of the month of August, the nine days commencing 23<sup>rd</sup> December, and the six days commencing on the Thursday before Easter. The DMD District family law court remains open at Dolphin House during these vacation periods for family law each day save on the 25<sup>th</sup> and 26<sup>th</sup> December, Good Friday, weekends and bank holidays. Outside the DMD area, urgent family law cases are dealt with by the arrangement of special courts when required outside the above vacation periods.



guardianship, custody and access to minor children, applications for maintenance orders and applications under the Child Care Acts.

The Committee would not consider that grouping the District Court family law courts into a regional structure would assist in the disposal of this large and growing case load.

The Committee does however strongly support an immediate increase in the number of District Court Judges to enable the President of the District Court to allocate five additional Judges to District Court Districts where family law case waiting times are increasing, together with appropriate numbers of Courts Service staff to provide the required support to those District Court Judges. The Committee is of the view that, the President of the District Court could make these assignments by monitoring family law case lists in all venues to ensure that cases are dealt with expeditiously.

In the context of the District Court, the Committee considered that there was considerable merit in the recommendation that a panel of Judges with an interest in and an aptitude for family law be established.<sup>33</sup> Such a panel would support the existing arrangements for the disposal of family law cases and the availability of specialised Judges would facilitate the allocation of additional family law sitting days in provincial areas.

The Committee also recommends that the Courts Service review the present usage of Dolphin House with a view to providing an additional District Court for family law cases that would otherwise be allocated to courts in outlying areas.

### **A Central Register for Joint Guardianship Agreements**

Among the many excellent submissions the Committee received in the course of its work was a recommendation for the establishment of a Central Register for Joint Guardianship Agreements. Many couples execute a statutory declaration, known as a Joint Guardianship Agreement, in accordance with the 1998 Regulations.<sup>34</sup> These agreements are essential for applications such as the issue of a passport, or in relation to adoption, and in their absence it

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<sup>33</sup> Coulter, Report to the Board of the Courts Service October 2007 Recommendation 6, p. 61

<sup>34</sup> Guardianship of Infants (Statutory Declarations) Regulations 1998 (SI 5 of 1998)

is necessary for an unmarried father to apply to the District Court to be appointed joint guardian of his child / children.

The establishment of a central registry for recording these documents would ensure that an official copy of an agreement could be obtained as and when required. The Register would also provide proof of the existence of the statutory declaration in the event of a parent's copy being lost or destroyed, and would also provide important information for policy makers on the number of fathers who have used this means of obtaining guardianship rights. The Committee therefore recommends that the Government give consideration to an amendment to the *Civil Registration Act 2004* (No 3 of 2004) so that such a register could be created and maintained by An tArd Chláraitheoir

## Chapter 4

### **ADR, mediation, collaborative law, lay litigants and ancillary service providers**

Dr. Coulter's report made a number of recommendations relating to mediation in family law disputes. The Committee considered each of these recommendations in detail, and also took cognisance of the Law Reform Commission's consultation paper on Alternative Dispute Resolution<sup>35</sup> which was published while the Committee was deliberating on Dr. Coulter's report.

#### **Alternative Dispute Resolution in family law disputes**

Dr. Coulter made strong recommendations in favour of mandatory mediation in family law disputes prior to the commencement of litigation or the listing of any family law cases.<sup>36</sup>

The Committee endorses the view expressed by the Law Reform Commission in its consultation paper that where appropriate, mediation should be considered by parties to a family dispute before litigation.<sup>37</sup> The Committee noted the extensive use of mediation in family law disputes in other jurisdictions. The Committee agreed that the principal advantage for the parties, for their children and for the court system from the use of mediation in appropriate cases is the possibility that it will encourage the parties to negotiate and settle their cases at the earliest opportunity instead of leaving any settlement discussions until the day of the hearing.

The Committee also noted that practitioners are already obliged by law to inform their clients in family law disputes of the availability of mediation<sup>38</sup>. Having considered the Law Reform

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<sup>35</sup> LRC CP 50 - 2008

<sup>36</sup> Coulter, Report to the Board of the Courts Service October 2007 recommendations 3, 8, pp 61 and 62

<sup>37</sup> LRC CP 50 – 2008, 5.44

<sup>38</sup> see Sections 5 - 7 of the *Judicial Separation and Family Law Reform Act 1989*; Sections 6 – 9 of the *Family Law (Divorce) Act 1996*; and Section 20 of the *Guardianship of Infants Act 1964*, as inserted by the *Children Act 1997*

Commission's consultation paper<sup>39</sup> and the wide range of submissions the Committee received from interested bodies and service providers in this area (see Appendix 1) the Committee does not support the introduction of mandatory mediation in family law cases.

The Committee is nonetheless strongly in favour of compulsory *information sessions* at which parties to family law disputes could be made aware of the full range of alternative dispute resolution models including mediation, conciliation and the collaborative law approach, any or all of which may be of assistance in securing an acceptable resolution in a family law dispute.

Dr. Coulter's report recommended that the President of the Circuit Court consider making a Practice Direction requiring the parties to participate in mediation, or some form of alternative dispute resolution mechanism, as a precondition for the listing of cases. It also recommended the holding of a preliminary hearing before the County Registrar or a judge to establish whether a case could be remitted for mediation, and for the making of an order for disclosure of assets where this was an issue.<sup>40</sup>

As outlined above, the Committee supports the introduction of a requirement that it be mandatory for parties to attend information sessions at which the full range of dispute resolution models, of which mediation is but one, would be outlined to them, but opposes mandatory mediation. The Committee is in favour of the recommendation for a preliminary hearing and agrees that the same could be held before the County Registrar. The Committee considers that this particular recommendation may have been overtaken by the introduction in the Circuit Court of Case Progression for all family law cases initiated on or after 1<sup>st</sup> October 2008. Case Progression is dealt with in more detail in the Committee's responses to the recommendations on case management in chapter 3 of this report.

### **Arrangements for ruling cases with mediated or other settlements**

The Committee also considered the recommendations for listing mediated settlements separately, ruling them to make them binding on the parties, and the proposal that

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<sup>39</sup> LRC CP 50 - 2008

<sup>40</sup> Coulter, Report to the Board of the Courts Service October 2007, Recommendation 8, p. 62.

consideration be given to the establishment of a court of limited jurisdiction presided over by a County Registrar, who could rule such consents.<sup>41</sup>

The Committee notes the existing and long-standing practice of the Courts that, where the parties so apply, any settlement, whether mediated or otherwise achieved, can be ruled to make it binding and enforceable. Having regard to the constitutional amendment permitting the introduction of divorce and subsequent related legislative provisions, the Court will always require to be satisfied, in ruling any settlement whether mediated or otherwise achieved, that the rights of the child are fully represented, that the settlement is based on full and mutual disclosure of assets, and that one party has not been overborne by the other in reaching the settlement. This being so, settlements should not, therefore, be ruled without the court having the opportunity to make such enquiries as it sees fit in that regard. Moreover, having regard to the foregoing, the Committee does not consider that such settlements can be ruled by a court of limited jurisdiction presided over by a County Registrar. Accordingly the Committee does not support that particular recommendation.

The committee expressed broad support for the recommendation of the expansion of the Family Mediation Service (now managed by the Family Support Agency), and the provision of a national system of accreditation for family mediators<sup>42</sup>.

The Committee also noted, from submissions it received, that an increasing number of legal practitioners, both barristers and solicitors, are now accredited mediators and that these practitioners are developing a mediation model for family law cases based on international best practice in this area. Under this model, legal practitioners who are experienced family law practitioners and accredited mediators, will attend and participate in all mediation meetings. Appropriate financial disclosure will be required to have been made prior to any mediation meeting so that it may be assessed in advance by the parties and their professional advisers, and in some cases mediation will be offered at a preliminary stage in the litigation process as an alternative to a court application for directions on discovery and disclosure.

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<sup>41</sup> Coulter, Report to the Board of the Courts Service October 2007 Recommendations 3 and 4, p. 61

<sup>42</sup> Coulter, Report to the Board of the Courts Service October 2007, Recommendation 9, p. 62

## **Outreach to lay litigants**

The Committee strongly supports Dr. Coulter's recommendation that the Courts Service should provide an information booklet for lay litigants in family law cases.<sup>43</sup> The Committee notes that the Courts Service is well advanced with a project to produce such a booklet (see page 19 above).

Dr. Coulter also recommended that the Courts Service should commission or prepare comprehensive information booklets on the various options available for the resolution of family law disputes, including the option of alternative dispute resolution, and the reliefs available in the District and Circuit Court and how to apply for them, and that there should be a uniform policy throughout the Courts Service on the assistance staff can give to litigants in filling in family law forms.<sup>44</sup> The Committee has noted above that the Courts Service is preparing a range of information leaflets on family law. The Committee agrees that all of these leaflets should be available in every court office dealing with family law cases. The Committee does not consider however that it would be properly within the remit of the Courts Service to commission a publication describing the various options available for the resolution of family law disputes and how to apply to court for them. The Committee considers that the obligation and duties of Courts Service staff in assisting litigants, whether in family law or other cases, should be confined to assisting in completing court forms (if necessary) and that staff should not give legal advice under any circumstances.

## **The Courts Service and ancillary service providers**

The Committee considered Dr. Coulter's recommendation that family courts should have an information office providing information on all options for the resolution of family law disputes; mediation facilities; an office of the Legal Aid Board; family support and child assessment services<sup>45</sup>.

The Committee strongly favours having the full range of Courts Service information packs and leaflets on family law available in all venues where family law cases may be heard. Where accommodation is available the Committee recognises the value of having Legal Aid

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<sup>43</sup> Coulter, Report to the Board of the Courts Service (October 2007) Recommendation 20, p. 63

<sup>44</sup> Coulter (October 2007), Recommendation 7 p. 62

<sup>45</sup> Coulter, (October 2007) Recommendation 2 p. 61

Board offices located in Courts Service buildings. The Committee notes that the Legal Aid Board, which is an independent statutory body, has its own offices in every county and in major population centres.

The Committee does not favour the location within court buildings of other services. The Committee considers that such an arrangement would place unsustainable accommodation demands on the Courts Service. Moreover, locating such services in a court building could be distressing for the parties and undermine the protection of the anonymity of parties and any children affected by the proceedings.

Dr. Coulter's report also recommended that the Courts Service should initiate discussions with agencies such as MABS, the Legal Aid Board, and the Family Mediation Service to consider increasing access to appropriate ancillary services for those coming to the District Court with family law disputes.<sup>46</sup> The Committee notes that the Courts Service is preparing the leaflets referred to above in consultation with support groups active in the area of family law in order to identify the type and quality of information litigants require as they engage with the courts system. All of the support groups mentioned above have produced information leaflets which are displayed in courthouses dealing with family law cases. In addition, the Courts Service website has a link to that of the Legal Aid Board and further links are being added to the website to increase the availability of access to ancillary services for parties to family law disputes.

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<sup>46</sup> Coulter, Report to the Board of the Courts Service (October 2007) Recommendation 21, p. 63

## **Chapter 5**

### **Issues relating to children**

In a recommendation addressed to both the Department of Justice Equality and Law Reform and the Courts Service, Dr. Coulter proposed that urgent consideration be given to the establishment of a court-based service to provide expert and impartial advice to the courts on both the views and the welfare of children in family law disputes. She also suggested that consideration be given to expanding the role of the Probation Service to provide such a service.<sup>47</sup>

While this proposal is not solely within the remit of the Courts Service, the Committee considered it in some detail as the welfare of children in family law cases is of paramount importance to the courts, and Judges are keenly aware of their obligations in this regard.

#### **The views of the child**

There are a number of situations in which a court will consider it appropriate to ascertain the views of children whose welfare is affected by family law proceedings. In addition, the Committee notes that Ireland has ratified international instruments that impose obligations on courts in this regard.<sup>48</sup>

There is a specific obligation on the court to hear the views of the child in making an access order which may later require to be enforced in another EU member state. If, in such a case, the trial judge in the state of origin does not certify that (subject to age and maturity conditions) the child has had an opportunity to be heard by the court, the access order cannot

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<sup>47</sup> Coulter, Report to the Board of the Courts Service (October 2007) Recommendation 19, p. 63

<sup>48</sup> Article 12 of the United Nations Convention on the Rights of the Child (UNCRC) requires states to allow children who are capable of expressing views to do so, and to give weight to those views according to the age and maturity of the child. Ireland has ratified this Convention and while it does not enjoy direct effect in this jurisdiction there is authority for a presumption of compatibility as a tool for statutory interpretation of domestic legislation. Article 8 of the European Convention on Human Rights also appears to require courts to elicit the wishes of children



be upheld.<sup>49</sup> Children's views are also routinely sought in all other types of family law proceedings.

However, in divorce proceedings there is neither any legislation nor a practice direction requiring the court to elicit the views of the child. In any proceedings in which the court does decide that it is appropriate to obtain the views of the child there is no prescribed manner of doing so. The options open to the court include taking the direct evidence of the child, or obtaining a statutory report.

### **Direct evidence by the child**

Courts may be reluctant to resort to the statutory report mechanism (see below) due to concerns that it is cumbersome, costly and slow. Judges are also conscious that in certain cases it may be less intrusive for the child to give direct evidence than to undergo the processes required for a statutory report.

Therefore, while acknowledging that there are risks in doing so, some Judges have heard the direct evidence of children. There are no statutory or other guidelines for Judges in taking this evidence and the Committee would recommend that clear procedures be developed in this regard.

The judicial practice in taking this type of evidence is that it is heard in the presence of the court registrar and a stenographer. The parties are asked to agree the terms of reference for hearing the child, and are informed that the court is willing to consider the option of a written social report if they prefer. The children are also informed that their wishes are not determinative of the issues between the parties, and that they cannot be given any assurance of confidentiality.

The Committee notes the absence of any training programme for Judges in this area, and recommends that the Judicial Studies Institute consider requesting its committee on judicial training in this area to address this issue.

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<sup>49</sup> The certificate prescribed by Annex 3 of the Brussels II Bis Regulations (Reg EC No 2201 of 2003) is issued by the judge who made the original access order in the state or country of origin and this certifies, inter alia, that the child has had an opportunity to be heard, subject to age and maturity considerations.

## Statutory Reports

The most frequently used type of statutory report is the written social report (generally known as a Section 47 report)<sup>50</sup> which allows the court to gather the relevant views of all interested parties. The courts, other than the District Court, have power to procure a Section 47 report of its own motion or on the application of any interested party, including the child. The court is entitled to use the report as evidence and the author of the report may be called to give oral evidence by either party or by the court. The Committee recommends that the power to procure a Section 47 report be extended to Judges of the District Court.

The Committee was informed that when the High Court is dealing with child abduction cases<sup>51</sup> the court requests a Section 47 report to establish the views of the child in order to exercise the courts discretion under article 12 and 13 of the Hague Convention on

- The degree of maturity of the child
- Whether the child/children object to being returned to the jurisdiction of habitual residence
- The grounds of the objection
- Any matter the child wishes brought to the attention of the court
- Whether the objections expressed have been independently formed.

The Committee also noted that a pilot project is in place whereby the Probation Service is providing a limited number of Section 47 reports to the Dublin Circuit Family Court. The Committee would recommend that this arrangement be continued and, if possible, expanded.

The Committee notes that other courts requiring Section 47 reports obtain them from child psychiatrists and child psychologists, with one or both parties bearing the cost of the report. However, the Committee notes that the majority of children who are the subject of these reports are not suffering from any psychiatric or psychological disorder, but are simply caught up in contentious custody disputes. The Committee therefore supports the view, which was also put forward by a number of agencies who made submissions to the

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<sup>50</sup> Section 47 of the Family Law Act 1995 empowers the court to seek such a report from the Probation Service, a person nominated by a health board (now the HSE) or any other person the court shall specify in its order. The social report facility was extended to divorce proceedings by Section 42 of the Family Law (Divorce) Act 1996

<sup>51</sup> Applications under the Hague Convention and Council Regulation 2201 of 2003 (Brussels II)

Committee in this regard, that Section 47 reports be prepared by a suitably qualified professional such as a social worker, who could be directed by the court to ascertain objectively a child's living arrangements and seek the child's views on a range of issues.

The Committee therefore recommends that a panel of trained persons be established who could interview children in cases where the voice of the child is to be considered by the courts.

### **The Welfare of Children**

The Committee noted that under Section 20 of the Child Care Act 1991, a Judge of the District Court who considers that a child is at risk has power to order an investigation with a view to determining whether a care or supervision order is appropriate in respect of that child. The HSE is responsible for carrying out the investigation, but the Committee notes that relatively few applications under this section are made each year.

The Committee noted Dr. Coulter's concerns for the welfare of children who are involved in family law proceedings, and agrees that repeated and intractable court proceedings involving a child are potentially very damaging to him or her. This concern is one of the reasons for the Committee's general support for the use of non-mandatory ADR mechanisms.

The Committee also recommends that the statutory provisions which have been enacted for the appointment of a *guardian ad litem*<sup>52</sup> be brought into force so that a panel of qualified and accredited *guardians ad litem* can be put in place. In the meantime, the Committee recommends that the appointment of a *guardian ad litem* remain a matter for the discretion of the Judge. The *guardian ad litem* is not intended as a substitute for the professional who will write the Section 47 report on the welfare of the child, but as a mechanism to allow the child who is considered to be at risk to be represented in proceedings concerning him or her.

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<sup>52</sup> Section 26 of the Child Care Act 1991 provides for the appointment of a guardian ad litem for a child who is the subject of proceedings under part IV or VI of that Act

## **Enforcement of access orders**

While Dr. Coulter's report did not make any specific recommendation in this regard, concerns relating to the enforcement of access orders were raised with the Committee in a number of the submissions it received. Concerns were expressed that where an access order is made in a case in which orders have also been made under the Domestic Violence Act 1996 the contact that parents are required to have for this purpose may lead to threats, intimidation and physical abuse of one parent by the other with children forced to witness this behaviour. There is therefore grave concern about the lack of coordination between the civil and criminal law systems in domestic violence cases which may expose a parent and children to risk of violence or abuse by the other parent.

Conversely, other agencies expressed concern that where the custodial parent does not abide by the terms of an access order, the parent relying on that order is unable to obtain any immediate relief. In these circumstances these agencies would wish An Garda Síochána to be given power to enforce access orders and to arrest any party in breach of them.

The Committee notes the concerns expressed. The Committee further notes that at present the only remedy open to a party who has been denied rights under a court order is to seek the committal for contempt of the person who has been in breach of the court order. The Committee would emphasise that a person who has custody of a minor and who fails to comply with an access order is guilty of a criminal offence and is liable on summary conviction to a fine not exceeding £200 (now €254) or, at the discretion of the Court, to imprisonment for a term not exceeding six months, or to both fine and imprisonment.<sup>53</sup>

The Committee notes that Courts are reluctant to commit the custodial parent (usually the mother) in such circumstances, especially where that court has already made protection orders against the parent seeking access.

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<sup>53</sup> Courts (No. 2) Act 1986, Section 5(2)

## Chapter 6

### Miscellaneous Recommendations

*The Courts Service should establish a committee of judges and appropriate Courts Service staff to consider mechanisms for the recording and compiling of the reasons for District Court decisions.*<sup>54</sup>

This recommendation is very similar to an earlier recommendation which the Committee addressed in chapter one of this report.<sup>55</sup> Judges of the District Court, as they are obliged to, give reasons for their decisions, as far as possible. Having regard to the volume of work and the burden of cases in the District Court the Committee does not favour this particular recommendation

*The Government should consider making more resources for Judicial conferences and training, especially in the area of family law, to ensure that expertise can be developed in areas such as the international law relating to children, and family and child welfare and so that a judicial consensus can grow on the interpretation of Irish family law.*<sup>56</sup>

The Committee considers that the existing arrangements made through the Judicial Studies Institute meet the training needs of Judges. However the Committee considers that it is essential that the Courts Service continue to receive a budget to maintain this level of support.

*In relation to the costs of family law, the Law Society and the Bar Council should consider whether their guidance on fees is appropriate for family law, particularly in relation to the premiums on the value of the family home and the urgency of the matter.*<sup>57</sup>

The Committee considers that this recommendation does not come within its remit.

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<sup>54</sup> Coulter, Report to the Board of the Courts Service (October 2007) Recommendation 22, p. 63

<sup>55</sup> See the Committee's response to Dr. Coulter's recommendation No 8

<sup>56</sup> Coulter, Report to the Board of the Courts Service (October 2007) Recommendation 23 p. 64

<sup>57</sup> Coulter, Report to the Board of the Courts Service (October 2007) Recommendation 24 p. 64

*The practice of some judges of requiring an indication of what the fees in a case will be before making final financial orders should be considered as appropriate for a Practice Direction.*<sup>58</sup>

The Committee notes that this issue has been referred to a Courts Service Committee which is considering the revision of the High Court Practice Direction in family law (HC 40).

*The Rules Committee should consider changing the rules to permit solicitor and client costs to be taxed by the county registrar; alternatively, the Presidents should consider a Practice Direction that would include a routine order in family law actions providing for solicitor and client costs to be taxed in default of agreement.*<sup>59</sup>

The Committee considers that this recommendation does not come within its remit.

*The Government should consider abolishing or expanding the income limits for civil legal aid, combined with increasing the amount payable by clients to the amount normally paid to solicitors dealing with family law for the Legal Aid Board in the Private Practitioners Scheme. This should be combined with an expansion of the Legal Aid Scheme rather than expanding the Private Practitioners Scheme as the most cost-effective way of providing an enhanced service.*<sup>60</sup>

The Committee strongly supports the increase of income limits for civil legal aid.

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<sup>58</sup> Coulter, Report to the Board of the Courts Service (October 2007) Recommendation 25 p. 64

<sup>59</sup> Coulter, Report to the Board of the Courts Service (October 2007) Recommendation 26 p. 64

<sup>60</sup> Coulter, Report to the Board of the Courts Service (October 2007) Recommendation 27 p. 64

## Appendix 1

The following groups and individuals made submissions to the Family Law Reporting Project Committee:

Amen

Mr Eugene Davy, Solicitor

Family Lawyers Association

Family Support Agency

Irish College of Psychiatry

Legal Aid Board

Parental Equality

Treoir

Women's Aid

## Appendix 2

The following groups attended before the Committee and made oral submissions:

Amen

Family Lawyers Association

Parental Equality

Treoir



## Appendix 3

### WAITING TIMES IN THE CIRCUIT COURT– 31<sup>st</sup> JANUARY, 2009

	<b>Divorce</b>	<b>Nullity</b>	<b>Appeals</b>
<b>CARLOW</b>	8 months	8 months	8 months
<b>Carrick on Shannon</b>	6-12 months	6-12 months	3 months
<b>CASTLEBAR</b>	3 months	3 months	3 months
<b>CAVAN</b>	9-12 months	6-12 months	6 months
<b>CLONMEL</b>	18-24 months	18-24 months	18-24 months
<b>CORK</b>	3-6 months	3-6 months	Next Sittings
<b>DUBLIN</b>	3 months	6 months	3 months
<b>DUNDALK</b>	3-6 months	6-9 months	6-9 months
<b>ENNIS</b>	3 months	3 months	5 months
<b>GALWAY</b>	Next Sittings	Next Sittings	Next Sittings
<b>KILKENNY</b>	6 months	6 months	6 months
<b>LETTERKENNY</b>	6-9 months	6-9 months	3-6 months
<b>LIMERICK</b>	3 months	3 months	3 months
<b>LONGFORD</b>	3-6 months	3-6 months	3-6 months
<b>MONAGHAN</b>	6-12 months	6-12 months	6 months
<b>MULLINGAR</b>	12-18 months	12-18 months	9-12 months
<b>NAAS</b>	24 months	24 months	9 months
<b>PORTLAOISE</b>	3-12 months	3-12 months	3-6 months
<b>ROSCOMMON</b>	3-9 months	3-9 months	3-6 months
<b>SLIGO</b>	3 months	3 months	Next Sittings
<b>TRALEE</b>	3 months	3 months	3 months
<b>TRIM</b>	12-18 months	12-18 months	12 months

	<b>Divorce</b>	<b>Nullity</b>	<b>Appeals</b>
<b>TULLAMORE</b>	12 months	12 months	6 months
<b>WATERFORD</b>	18-24 months	18-24 months	Next Sitings
<b>WEXFORD</b>	12-15 months	12-15 months	Next Sitings
<b>WICKLOW</b>	6 months	6 months	6 months

## Appendix 4

### AVERAGE WAITING TIMES IN THE DISTRICT COURT – 31<sup>st</sup> JANUARY, 2009

Location	Family Law Waiting times (months)
ATHLONE	1
BALLINA	No Delay
BALLINASLOE	1
BRAY	2
CARLOW	1
CARRICK-ON-SHANNON	No Delay
CASTLEBAR	2
CAVAN	1
CLONAKILTY	1
CLONMEL	1.5 - 2
CORK	2
DERRYNEA	1
DONEGAL	10 weeks
DROGHEDA	No Delay
DUNDALK	No Delay
ENNIS	6 weeks
FERMOY	2
GALWAY	No Delay
KILKENNY	6 weeks
KILLARNEY	No Delay
LETTERKENNY	6
LIMERICK	2
LISTOWEL	1
LONGFORD	1
LOUGHREA	No Delay
MALLOW	1
MONAGHAN	No Delay
MULLINGAR	Up to 3
NAAS	2
NENAGH	1
PORTLAOISE	2
ROSCOMMON	No Delay
SLIGO	No Delay

<b>Location</b>	<b>Family Law Waiting times (months)</b>
TRALEE	1
TRIM	up to 1
TUAM	No Delay
TULLAMORE	1
WATERFORD	2
WEXFORD	1
YOUGHAL	3
Dublin DMD	2
Dun Laoghaire	2
Blanchardstown	n/a
Swords	1