



Post-Separation Parenting:

A study of separation
and divorce agreements
made in the Family Law
Circuit Courts of Ireland
and their implications
for parent-child contact
and family lives

The National Children's
Strategy Research Series

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contact and family lives**

January 2011

OFFICE OF THE MINISTER FOR CHILDREN AND YOUTH AFFAIRS

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In order to maintain maximum confidentiality and in compliance with ethical practices in the social sciences, we have not named any of the Judges in this report, but we extend our thanks to them and to the Family Law Court Clerks who supported and facilitated our continued access to Court sittings.

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While Family Law Courts are slightly less formal than other courts, they still exist in a veil of secrecy. Court attendance for an applicant or respondent can be quite daunting. We are grateful to those couples who became our case studies; their stories and case outcomes provided the data without which this report could never have been successfully completed.

Evelyn Mahon and Elena Moore

January 2011

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INTRODUCTION

The aim of this study is to investigate post-separation and divorce agreements made in the Family Law Circuit Courts of Ireland and their implications for parent-child contact and family lives. The study was commissioned and funded by the Office of the Minister for Children and Youth Affairs (OMCYA).

National Children's Strategy

The Department of Health and Children published a 10-year National Children's Strategy, *Our Children – Their Lives*, in 2000. The whole-child perspective underpins the strategy and it identifies 6 principles to guide all actions:

- child-centred;
- family-oriented;
- equitable;
- inclusive;
- integrated;
- action-oriented.

The strategy has 3 major goals:

- that children will have a voice in matters that affect them and their views will be given due weight in accordance with their age and maturity;
- that children's lives will be better understood; their lives will benefit from evaluation, research and information on their needs, rights and effectiveness of services;
- that children will receive quality supports and services to promote all aspects of their development.

The present study examines the implementation of legislation and divorce, and their implications for children's lives. In the past, because of the existence of the *in camera* rule, whereby family law proceedings were entirely private, there was little social science research available on Court proceedings and outcomes. Thus data on separation and divorce remained unknown. When initial requests to the Minister for Justice for access to the Family Law Courts were made in 2006, divorce legislation had been enacted in Ireland for 10 years. It therefore seems timely to take stock of legal practices in this area. While divorce rates remain low in this country, there is a small increase in numbers each year and thus an annual increase in the numbers of children affected by divorce.

This research is also timely in the sense that there is a growing awareness of children's rights of access to their parents post-separation and divorce. Such rights are clearly articulated in the UN Convention on the Rights of the Child (CRC) (UN, 1989). While the family is a private institution, there is an expectation of States to actively implement children's rights under the CRC, including in private law. Furthermore, the Council of Europe adopted a Convention on Contact concerning Children in 2003, which came into force in 2005 but which has yet to be ratified by Ireland. Thus, the present research is the first exploratory study into the role of the legal system in Ireland in implementing the contact rights of children (in particular, the child's right to maintain personal relations and direct contact with both parents on a regular basis, except when it is contrary to the child's best interests). The study provides a basis on which to assess the way in which contact is being addressed in the Family Law Courts.

The research is also timely given the increased demand for the recognition of fathers' rights to have contact with their children. Article 18 of the CRC states that both parents have common responsibilities for the upbringing of their children and that States should use their best efforts to ensure the recognition of that principle. International research has shown that many fathers lose contact with their children after marital separation and divorce. In the past, fathers have been recognised only as 'breadwinners' rather than 'carers'. This led to an exclusive focus on fathers as payers of maintenance to their ex-wives and children, rather than as active parents. The present research will explore the roles accorded to fathers in the procedures of the Family Law Courts of Ireland as seen in custody, residential care, maintenance payments and access negotiations.

Finally, this research is timely in the sense that the introduction of divorce in Ireland was preceded by an extensive public debate that raised fears about the negative effects of divorce on children. It raised concerns about the family home, spousal and child maintenance, risks of poverty and paternal desertion in the aftermath of divorce. This research will provide evidence on how these issues are addressed by the Family Law Courts through Court orders, agreements and legal judgments.

Outline of report

Chapter 1 provides the intellectual legal context in which family law operates in Ireland by examining the legislation on separation and divorce. The basic principles of the legislation were enshrined in an amendment to the Constitution, so the legal documents are theoretically prescriptive. As will be shown, separation and divorce legislation is primarily focused on the relationship between the couple and their uncoupling. Children are not specifically mentioned, but are simply embedded in the family. There are, however, a series of Acts relating to children that do address their needs. This legislation, outlined here, is implemented in separation and divorce cases relating to matters of custody and access. In addition, human rights legislation, and in particular the European Convention on Human Rights, is outlined to provide an international context for parental rights. Two important documents relating to this study – the UN Convention on the Rights of the Child (1989) and the Council of Europe’s Convention on Contact concerning Children (2003) – are also briefly described. Finally, a brief statistical profile of separation and divorce in Ireland provides a national context for this study.

Chapter 2 provides a brief selection of the extensive literature on the impact of separation and divorce on children, which has long been of concern to State policy-makers. Countries such as the USA and UK, which introduced divorce much earlier than Ireland and which have a much higher divorce rate, have set the research agenda in this area. For the present study, three major themes from the literature that permeate the policy research agenda were identified:

- **The rise of poverty among children and spouses in the aftermath of separation and divorce.** In practical terms, this has focused on family home ownership and spousal and child maintenance payments.
- **Parental conflict that can have a negative effect on children lives.** Early fault-based divorce systems exacerbated conflict by granting custody to a ‘winning’ parent, as contrasted with the second parent who was regarded as the ‘loser’. This negative legacy still permeates divorce in various countries, creating concerns for children. Many countries now try to reduce conflict between parents by focusing on the welfare of the children.
- **Parent–child contact post-divorce.** International research has shown that many fathers lose contact with their children after separation and divorce. The literature examines the causes and effects of this lack of contact and notes emergent policies in a number of countries that are expected to counteract it.

Chapter 3 describes the methodology of passive observation used in the present study. It also describes access negotiation to get Ministerial permission to do research on family law. The initial plan was to get access to Court files, but this was not feasible. Instead, permission was granted to observe and audit Court presentations and judicial decision-making in the Family Law Courts.

Chapter 4 provides an analysis of the data collected on the future of the family home, details of the residential arrangements made for children, and whether or not maintenance payments are made for children and their spouses.

Chapter 5 analyses the data collected on sole custody and joint custody cases. The Constitution of Ireland gives both parents equal rights to custody and joint custody is the norm in family law cases. This can lead to a variety of residential arrangements for children, with implications for contact with a non-resident parent. In addition, a number of access cases audited are analysed. For a minority of couples, post-separation conflict persists and spills over, centring on parental access to children. Parents can obstruct or inhibit or even prevent access. Thus parents apply to the Courts for a variety of reasons and the data show the way in which the Courts handle these cases.

Chapter 6 outlines the conclusions of the study and reappraises its findings in the context of both the prescriptions of legislation and of relevant research elsewhere. It also suggests further research and the collection of additional Court statistics, and proposes a longitudinal study of post-divorce children in Ireland. Several policy issues for consideration are also discussed and a proposed change in terminology for legal terms concerned with separation and divorce.

An extensive **Bibliography** completes the report.

1 LEGAL CONTEXT OF SEPARATION AND DIVORCE IN IRELAND

Article 41 of the 1937 Constitution of Ireland prohibited divorce. Accordingly, a Constitutional amendment was required before divorce legislation could be introduced. The first referendum to amend the Constitution in 1986 was rejected, but in 1989 the Government introduced the Judicial Separation and Family Law Reform Act. This enabled couples to separate legally. Many couples availed of the legislation. In 1989, there were 178 legal separations and the numbers increased each year until 1996, when there were 1,252 judicial separations funded by the Legal Aid Board (Burley and Regan, 2002, p. 206). The Act provided financial protection for women and children. It also paved the way for a 'Yes' vote in the subsequent second referendum (*ibid*), which proposed to amend the Constitution and permit divorce under certain conditions. This was held in 1995 and accepted by the electorate. By 1997, divorce was legally available in Ireland.

The social and legal debate on separation and divorce that took place over the late 1980s and '90s helped to shape legislation. In 1995, that debate included what Burley and Regan (2002, pp. 207-8) have described as a 'fear campaign', in which money, children, property, inheritance and the Irish way of life were all supposed to be under threat. This particular campaign made divorce a heated issue of public concern, with increasing concern about the problems generated for children by an adversarial system. The earlier Judicial Separation and Family Law Reform Act in 1989 was quite extensive in its remit: it prescribed the grounds on which a decree of judicial separation could be granted and it also enabled the Courts to make a range of financial and property orders for the benefit of dependent spouses and children. This initially regularised the position of many couples whose marriages had broken down. When divorce was introduced in 1997, many of these couples then applied for divorce. Currently, the majority of couples whose marriages have broken down seek a legal separation initially; after a requisite period of separation, some seek a decree of divorce.

Legislation on Judicial Separation

The Judicial Separation and Family Law Reform Act, 1989, introduced in that year, is quite extensive. An applicant for a judicial separation makes an application to the Court to hear his or her case on one or more of the following grounds, listed in Section 2 of the Act (Shatter, 1997, pp. 343-44):

- (a) that the respondent has committed adultery;
- (b) that the respondent has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent;
- (c) that there has been desertion by the respondent for a continuous period of at least one year immediately preceding the date of application;
- (d) that the spouses have lived apart from one another for a continuous period of at least one year preceding the date of application and the respondent consents to a decree being granted;
- (e) that the spouses have lived apart from one another for a continuous period of at least 3 years preceding the date of application;
- (f) that the marriage has broken down to the extent that the Court is satisfied in all circumstances that a normal marital relationship has not existed between the spouses for a period of at least one year preceding the date of application.

Grounds (a) and (b) above relate to separation due to inappropriate behaviour – or 'faults' – while the remaining grounds (c-f) indicate that the relationship between the couple has broken down to the extent that they no longer have a marital relationship.

As noted by Shatter (1997, p. 344), the Act 'empowers the Court determining an application for a separation decree to grant a decree on one or more grounds provided'. He notes that an overwhelming majority of decrees are granted on the basis of (f) since it is perceived by some as *ameliorating* family conflict, while decrees granted under (a), (b) and (c) are perceived as *exacerbating* family conflict.

The legal impact of having lived separately helps to ameliorate conflict because the Judge does not have to investigate why the couple are separating. More especially, it is the fact that the couple no longer have a 'normal marital relationship' (i.e. that they are not having sexual relations) that is used as an indicator of the marriage breakdown (Shatter, 1997, p. 367). A couple can be living in the same house, but if they are not having marital relations they satisfy 'the living separately' requirement. If *both* agree, a couple can get a legal separation after living separately for one year. If they have lived separately for 3 years (without any marital relations), one of them can apply for, and get, a separation even if the second party disagrees with the application.

Rescission of Decree of Separation

Section 8(2) of the 1989 Act provides that the applicant and the respondent can apply to the Court by consent to 'rescind a decree of separation granted'. An order of rescission is made by the Court only if it is satisfied that reconciliation has taken place and that the couple have resumed, or wish to resume, co-habitation as husband and wife.

Effect of Decree of Judicial Separation

A judicial separation extinguishes the legal obligation of spouses to co-habit. The person retains the legal status of a spouse (e.g. retains entitlement to spousal pension), but is not free to re-marry. It does not affect parents' rights as guardians, unless one spouse is deemed 'unfit' for custody. However, the Court has jurisdiction to grant ancillary relief that can resolve any financial or property issues between the spouses.

Judicial separation and the welfare of children

Section 3 of the 1989 Act seeks to protect any dependent children. When a separating couple have dependent children, the Court can refuse to grant a legal separation unless it is satisfied that they have made provision for the welfare of their children. This comprises the religious, moral, intellectual, physical and social welfare of the children concerned. When granting a judicial separation, the Court can make orders for the custody and right of access to children under the Guardianship of Infants Act, 1964. The Court can also order maintenance payments to be made for the benefit of a dependent spouse and children.

Guardianship

Guardianship, as defined by Shannon (2005, p. 46), concerns 'matters of overriding seminal importance to a child's upbringing, e.g. where he or she is educated, according to which religious belief he or she is to be reared, and whether the child should undergo serious medical treatment'. The natural mother is a guardian and a married couple are both joint and equal guardians of their children. A natural father, if he is not married to the mother of the child, can apply to be appointed as a guardian under Section 6A of the Guardianship of Infants Act, 1964 (as inserted by Section 12 of the Status of Children Act, 1987).

Custody

Custody, according to Shannon (2005, p. 51), comprises 'the right and duty of a parent to exercise, on a day-to-day basis, the physical care and control over a child'. A guardian is entitled to the custody of his or her child. The married parents of a child are *prima facie* entitled to the custody of that child, both jointly and equally. According to Section 11(4) of the Guardianship of Infants Act, 1964 (as added to Section 13 of the Status of Children Act, 1987), a father may apply for custody of his child despite his not having guardianship status. Also, Section 11 of the 1964 Act makes it clear that it is possible, where a couple are separated, to award custody to both the father *and* the mother jointly ('joint custody').

Joint custody can imply different residential arrangements for children. Some couples agree that one parent becomes the primary residential carer, while others share the residential care of the children. Joint legal custody, according to Justice McGuinness, cannot work satisfactorily if there is a high level of conflict (*EPcCP, November 1998*) or in cases of high degrees of hostility (*DFOs v. CA, 20 April 1999*). Yet Justice McGuinness actually granted joint custody in one such case because she was fearful that by granting sole custody to one parent, she would add to the bitterness and resentment that already existed (Kilkelly, 2008, p. 128). This view may indeed be shared by many Judges since joint custody is the norm in Irish Family Law Courts.

Access

Where a parent who is a guardian does not obtain joint custody, he or she may apply for access to the child. Access essentially permits a parent to meet and/or communicate with a child. It is a right of visitation. Shannon (2005, p. 54) notes that access 'should not be confused with joint custody which confers a right and a duty to care for the child'. Access and the care-giving functions involved in access rights are 'merely incidental and it is clear that the parent in question is neither obliged nor entitled to usurp the role of the primary care-giver' (*ibid*).

Alternatives to separation: Reconciliation and mediation

When legal separation was introduced in Ireland, the State wished to protect the family and to offer couples an opportunity to attempt reconciliation. Accordingly, the legislation includes several sections that all relate to making the applicant aware of alternatives to separation and to assist attempts at reconciliation.¹ To facilitate this, a Family Mediation Service was set up in 1986 by the Department of Justice (Conneely, 2002, p. 21).

In 2003, the Family Support Agency Act came into operation, establishing the Family Support Agency (see www.fsa.ie), and the Family Mediation Service then came under the umbrella of that agency. They are both now under the auspices of the Department of Social Protection (formerly, Social and Family Affairs). While initially set up with a focus on reconciliation, the Family Mediation Service now functions as a service to married couples who have decided to separate or divorce, or who have already separated (see www.fsa.ie/services/family-mediation-service/).

Under the legislation, a solicitor must discuss reconciliation with clients and give names of people who are qualified to help effect reconciliation. If reconciliation is not possible, the solicitor must also discuss mediation with clients with a view to separation on an agreed basis. There is no statutory obligation, however, on clients themselves to attend mediation or counselling prior to commencing separation or divorce proceedings. There is a low uptake of mediation as reported by Erwin (2007, p. 58) in *Family Law Matters* published by the Courts Service (see www.courts.ie), who said that although solicitors 'were obliged by statute to suggest mediation to separating couples, many were unfamiliar with the process or of the benefits that it can bring. They may even view it as competition'. In 2006, only 1,500 couples used the Family Mediation Service, as compared with 27,000 who went to the District and Circuit Courts (*ibid*).

The out-of-court independent mediation model that the Family Mediation Service offers facilitates collaborative negotiation and encourages disputants to work together to solve their problems. The goal of mediation is to reach an agreement. However, this agreement has no legal status, but it can be taken to a solicitor and drawn up into a legal Deed of Separation or a legally binding contract. Research conducted between 1997-99 indicated that more than half the couples who came to mediation reached an agreement, in many cases on all key issues (Conneely, 2002, p. 219). Further, according to mediators, approximately 15% of couples were returning to their marriages (the alternative figures from clients was 2.3%). Couples who reached a compromise intended to have a separation agreement drawn up by a solicitor, while those who failed to reach a settlement also returned to their legal representatives (*ibid*, p. 220).

¹ Section 5 of the Judicial Separation and Family Law Reform Act, 1989 and Section 6 of the Family Law (Divorce) Act, 1996.

Collaborative law in Ireland has received increasing attention as an alternative form of dispute resolution (Coulter, 2009a). In collaborative law, all parties, including legal representatives, focus on creating an agreement, having agreed not to take part in any litigation. All negotiations take place in '4-way' settlement meetings, which both the parties and their lawyers attend. In May 2008, at the 2nd European Conference on Collaborative Law, the then Minister for Justice, Mr. Brian Lenihan, TD, announced that his Office was seeking a detailed submission from the Association of Collaborative Practitioners on how family law legislation could be amended to include dispute resolution (Coulter, 2008c).

Introduction of divorce legislation

The Government returned to the issue of divorce in 1995 when it published the Fifteenth Amendment of the Constitution Bill, which proposed the deletion of the prohibition on divorce from Article 41.3.2 of the Constitution and its replacement by the following:

A Court designated by law may grant dissolution of marriage where, but only where, it is satisfied that:

- (i) At the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,
- (ii) There is no reasonable prospect of reconciliation between the spouses,
- (iii) Such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either of both of them and any other person prescribed by law, and
- (iv) Any further conditions prescribed by law are complied with.

The existence of judicial separation and the insertion of the actual conditions under which divorce would be granted to an extent allayed the fears of many who opposed divorce. Divorce legislation was built on existing separation arrangements. The Government opted for a 'no fault' divorce system, the proposed Constitutional provision prescribing 'that proof of a specific period of living apart be sufficient grounds for making a divorce application' (Shatter, 1997, p. 386).

The first divorce based on the new Article 41.3.2 was granted by the High Court in January 1997. In February 1997, the jurisdiction to grant divorce decrees was extended to the Circuit Courts. On that date, the substantive provisions in the Family Law (Divorce) Act, 1996 relating to the institution of divorce proceedings and the making of orders for ancillary relief became operative.

Awareness of alternatives to divorce

Prior to hearing divorce proceedings, 'the Court must be satisfied that there has been compliance with [Sections] 6 and 7 of the 1996 Act' (Shatter, 1997, p. 391). These sections specify that applicants must be made aware by their solicitors of alternatives to divorce, such as the availability of marriage counselling to effect reconciliation or the existence of mediation services to achieve a separation deed or agreement. This obligation on the part of the solicitor includes giving names of persons qualified to help effect reconciliation or provide mediation services. Certification that these sections have been complied with must accompany 'the originating document by which judicial separation or divorce proceedings are issued' (*ibid*, p. 124). In the absence of such certification, the Court may adjourn the proceedings.

Grounds for divorce

Section 5 of the Family Law (Divorce) Act, 1996 states three grounds for divorce. The first is:

- *At the date of the institution of divorce proceedings, the Court must be satisfied that the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years.*

Couples must be living apart for at least 4 years before they can be granted a divorce. The fact that they are separated is evidence that their marriage, for whatever reason, has broken down. Neither party is asked to prove that the other is to blame in any way, so 'fault' is not a requirement of divorce (although a fault could be the basis for the original separation). This was intended by Irish policy-makers to reduce personal acrimony and conflict.

The second condition for divorce is:

- *The Court must be satisfied that there is no reasonable prospect of reconciliation between the spouses.*

The fact that the couple have lived apart for the prerequisite number of years – 4 out of the previous 5 – will be taken as evidence by the Court that there is no prospect of reconciliation between them.

The third condition of divorce is the most difficult one:

- *The Court must be satisfied that such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent members of the family.*

Under the statutory provision in Section 2 of the Family Law (Divorce) Act, 1996², dependent members of the family are natural-born or adopted children of either or both spouses, or children in relation to whom either or both spouses are *in loco parentis*. Provision is made for a child up to the age of 18 if they have completed their education – otherwise, up to the age of 23 if in education. However, a child over 23 who 'has a mental or physical disability to such extent that it is not reasonably possible for the child to maintain himself or herself fully', is also a dependent. This condition is to ensure that the Court at the time of divorce considers what financial, proprietary or other provisions exist (as can be the case if the couple are already separated) or need to be made by orders for ancillary relief for the benefit of spouse or children. Now, the Constitutional Article 41.3.2 expressly states that '*only where*' the Court '*is satisfied*' that such provision as the Court considers '*proper*' will a decree of divorce be given. It is not surprising then that this Article forms a major part of mediation, legal division and discussion, and if not resolved constitutes a major area of disagreement in divorce proceedings.

Once divorced, each person is no longer a 'spouse'. They cease to be a spouse for the purpose of the Succession Act, 1965 and the Family Home Protection Act, 1976, and cannot initiate maintenance proceedings under the Family Law (Maintenance of Spouses and Children) Act, 1976 (Shatter, 1997, p. 398). The granting of a divorce decree does not deprive a divorced spouse of his or her public law entitlement to claim the Widow or Widowers Pension, One-Parent Family Payment or the Deserted Wives Payment³. A divorced spouse also retains his or her right to initiate proceedings under the Domestic Violence Act, 1996 against a former spouse (*ibid*).

Ancillary relief orders

The necessary 'provisions' alluded to above are a series of what are termed ancillary relief orders, made in judicial separation and divorce proceedings under Part III of the Family Law (Divorce) Act, 1996. The following is a list of such orders that can be made in judicial and divorce proceedings:

- periodical payment orders;
- lump sum orders;
- property adjustment orders;
- orders for exclusive residence in or for the sale of the family home;

² Article 41.3.2 of the Constitution of Ireland refers to 'any children of either or both of them [the spouses] and any other person prescribed by law'. The statutory provision in Section 2 of the Family Law (Divorce) Act, 1996 includes the latter prescription.

³ Some qualified for this payment prior to its replacement in 1997 with a One-Parent Family Payment and so continue to receive it.

- miscellaneous ancillary orders under various Acts, such as Domestic Violence; Section 36; Family Home Protection; Guardianship of Infants; and Partition Acts;
- orders for the sale of property;
- financial compensation orders;
- preservation adjustment orders;
- succession rights' extinguishment orders.

The general principles relevant to the determination of ancillary relief cases on separation and divorce may be found in the seminal cases of *T v. T* in 2002⁴ and *K v. K* in 2001⁵. The Supreme Court ruled in *T v. T* that the best practice for Judges is to consider *all the circumstances* of each case in the light of each particular factor set out in Section 16 (1995 Act) and Section 20 (1996 Act) (see *Box 1, Chapter 4*), giving reasons for their relative weight in the particular case. These ancillary relief orders are primarily about the future of the family home; the division and distribution of property and other financial assets; and family maintenance and lump sum payments to spouse and children. Each marriage, and in turn each divorce, while having a uniqueness in Court, will be addressed in terms of legal decision-making.

Mr. Justice Murray wrote in his decision in *T v. T* that: *'Each spouse has a continuing obligation to make proper provision for the other and the resources which are available to each of them may be taken into account insofar as it is necessary to achieve that objective. Each case will necessarily depend on its own particular circumstances.'*

While these orders are separate orders, orders made under the 'Miscellaneous ancillary orders' heading (some of which might have been ordered while the couple were still together) can influence other orders for ancillary relief. For example, if a spouse is the full-time primary carer and is awarded custody of the children (and they are all under 18) under the Guardianship of Infants Act, this will have an influence on the periodic payments to be made to that spouse. A barring order of one spouse from the family home may eliminate the necessity for the Court to consider whether to grant a spouse a sole occupancy order (which is possible under the legislation).

Permission to live apart and future ownership of family home

The prime outcome of a legal separation and a subsequent divorce is that the couple are legally permitted to live apart and can regularise their affairs accordingly. In many cases, the future of the family home has to be decided and is sometimes controversial. At the time of doing this research (2007), family homes in many parts of the country had appreciated considerably in value from the time the couple had first married⁶.

The family home may once have been considered as having a particular significance and value for the children. In 1975, Justice C.J. Ó Dalaigh in *B v. B* observed that: *'After the separation of the parents, there remain two lessor points of unity around which one would wish, if possible, to build: the first of these is the unity or comradeship of the three children, and the second is the family home where these three children have grown up together'* (Shannon, 2005, p. 41). However, Ó Dalaigh's comments must be interpreted in the overall social and economic situation of the time; given that the marriage bar on married women's working was only removed in 1973, wives and children were very vulnerable unless their family home was protected. He also wished to keep the children of the family intact.

This view has since changed as the family home now constitutes a considerable financial asset. In the High Court case of *TF v. Ireland* (1995), Justice J. Murphy said that the family home has two important functions: *'First, it provides the ordinary residence for the family and, secondly, it represents or may represent an asset of significant value'* (cited in Shatter, 1997, p. 906). At

⁴ Supreme Court, 14 October 2002, [2002] 3 IR335.

⁵ Supreme Court, 6 November 2001.

⁶ See *B v. B*, High Court, O'Higgins, J., 8 December 2005.

the time of the present research in 2007, property prices were at their peak, having increased significantly since Justice Murphy's statement in 1995; they have, of course, declined significantly since then. Judicial precedence in Ireland now treats the family home as a major financial asset, so its retention by one or other party is no longer privileged. It may have to be sold and the proceeds of the sale used to fund alternative separate accommodation for the couple.

Property adjustment orders

A Judge can order that one spouse's interest in the family home be transferred to the other spouse and can also determine which spouse is to be excluded from residing in it. This is called a property adjustment order. In some cases, if one spouse is granted sole right of occupation in the house, the Court can make a property adjustment order transferring the other spouse's interest in the family home to the resident spouse, providing the latter pays a lump sum to the absent spouse to facilitate their getting alternative accommodation. The Court can then (taking into account the value of the home and the ability of the residential spouse) order a lump sum payment to the non-resident spouse.

In general, marital property is seen by the Circuit Courts as being jointly owned. It is important to note that in Ireland 'such an order can be made in respect of any property vested in a spouse, whether the property was purchased, inherited or otherwise acquired either before or after marriage' (Shatter, 1997, p. 896). These new powers of property transfer do not require the determination of exact ownership of property (as was the case earlier under the Married Women's Status Act, 1957). A property adjustment order can be made in favour of the spouse or in favour of dependent children. It can also be made in relation to other properties or assets, including household contents, shares, antiques, artworks, farm stock and even household pets.

Alternatively, the Court can confer a right to one spouse to reside exclusively in the family home for a lifetime, or a lesser specified period of time, or under further order of the Court. The latter can obtain until the children reach the age of 18, complete their education or attain the age of 23. The spouse could continue to live in the house until he or she re-marries or co-habits with another person, or until the spouse obtains other substantial funds or assets (via, for example, inheritance, redundancy, maturity of endowment policy). A property can also be put in trust for a spouse or children.

Once divorced, the parties cease to be spouses so any consent to the future sale or disposal of the house (under the Family Home Protection Act, 1976) no longer applies. A property adjustment order cannot be made in favour of a spouse who re-marries (Shatter, 1997, p. 897).

The Courts can also order the sale of the family home (or other marital property) and provide for the disposal of the proceeds of the sale between spouses and any other person having an interest in it. In 1996, Justice McGuinness noted that this new power to transfer property between spouses is there to achieve an *equitable* distribution of the family assets (cited in Shatter, 1997, p. 897). The granting of these ancillary powers can be quite extensive as, for example, some judgments made by Justice McGuinness illustrate (Shatter, 1997, p. 903) and in no way indicate that this constitutes a 'clean break' for the divorced couple. Even if a spouse is awarded money to purchase a new family home and lives alone there, the Court can still order that the new home is registered in joint names.

The Court can also order that the family home is not sold until the second spouse has found alternative accommodation or until their youngest child has completed their education. Equally, the Court can order that a home is given to an auctioneer to be sold and specify whether it is by private treaty or auction, and also specify the disposal of the proceeds, including discharge of any specified debts.

Welfare of spouse and dependent children

The Court is required to have regard for the welfare of the spouse and dependent children. Sole occupancy of the family home is often the only option possible when one has a dependent spouse who is granted custody of the children, if the family home is modest and the parties have no substantial savings or other assets, leaving the other spouse to get accommodation. Section 10(2) of the 1995 Act and Section 13(2) of the 1996 Act specify that 'proper and secure accommodation should, where practicable, be provided for a spouse who is wholly or mainly dependent on the other spouse and for any dependent member of the family'. This clause is of special importance where there exists between the couple a traditional 'breadwinner/housewife' domestic arrangement. This would have been typical in the past, but dual-earner couples are now increasingly the norm and may result in different practices.

Precedence and practice have also extended the concept of 'dependent' children. In 1995, Justice McGuinness argued that *'given the importance of the family unit in Articles 41 and 42 of the Constitution, it is permissible to take into account the continuing parent/child relationship, even where the children are technically adults'*. She also argued that in times of high unemployment, the Courts should not frown on the practice of parents providing accommodation for their children beyond the age set out in the maintenance legislation. In making a judgment in one particular case, she invoked the need for accommodation by adult children who suffered from 'long-term illnesses'. These extenuating factors can be taken into account by the Circuit Courts.

Life insurance policies

The Court can make financial compensation orders in relation to life insurance policies. Those who are separated still have the status of 'spouse' and so do not forfeit benefit under an existing pension scheme or life policy. Such entitlements are protected under the 1995 Act. However, a divorce can result in the automatic loss of benefit (if the policy or pension restricts entitlement and specifies 'wife', 'husband' or 'spouse' in the actual policy document), which is part of the financial settlement at divorce.

Pension adjustment orders

Either spouse may apply for a pension adjustment order for his or her benefit or for the benefit of a dependent child (i.e. while the child remains a dependent member of the family). The relevant pensions include contingent ('death in service benefit') and retirement benefit. A portion of one spouse's pension can be earmarked for payment to the dependent spouse.

Compensation for the loss of inheritance rights

Divorce automatically terminates a spouse's rights under the Succession Act, 1965. Consequently, financial compensation orders for the forfeiture of 'the opportunity or possibility of acquiring a benefit' are likely to be made more frequently in divorce than in judicial separation cases. In judicial separation cases, this may ensure that a capital sum is made available to the spouse on the death of the other spouse. This order can be made at the time of judicial separation or at any time thereafter. The order can only be made 'having regard to all the circumstances' and must be made 'in the interests of justice' (Shatter, 1997, p. 926). Furthermore, it must not jeopardise a spouse's future financial security.

However, the loss of inheritance rights is taken into account when ordering ancillary relief in divorce proceedings. Under the 1996 Act, a divorced spouse can apply for some provision out of an estate (under Section 18 of the 1996 Act or Section 15a of the 1995 Act). The Court cannot, however, make an order in favour of a spouse who has re-married. Section 18(10) of the 1996 Act similarly provides that on granting a decree of divorce or any time after that, the Court may order that on the death of either spouse, the other shall not be entitled to apply for an order under Section 18 since the spouse had earlier renounced succession rights.

Protection against domestic violence and implications for access

The Domestic Violence Act, 1996 can be invoked by spouses and their children, and by former spouses and persons at risk in other forms of domestic relationships. Orders under this Act can be sought directly under it or by way of preliminary and ancillary relief in judicial separation or divorce proceedings. This Act prescribes two principal forms of protection: barring orders and safety orders. It also facilitates the making of an interim protection order, whereby immediate protection is required pending a full Court proceeding. An application can be made by the person in need of protection by or for a dependent person or by a Health Service Executive (HSE) Local Health Office.

- **A barring order** can be made where there are reasonable grounds for believing that the safety or welfare of the applicant or dependent children requires that such an order is made. Such an order requires the respondent, if residing at a place where the applicant or dependent child resides, to leave that place; or if not residing, from entering that place until a further order of the Court or until such time as the Court will specify (Shatter, 1997, p. 843). In addition, a barring order may prohibit the use or threat of violence against the applicant or any dependent child; molesting or putting in fear the applicant or any dependent child; attending at or in the vicinity of, watching or besetting a place where the applicant or dependent child resides. (The latter forms of conduct are forbidden anywhere.) A barring order can, however, permit a parent to call to the home to collect children or to visit children in the home as part of an agreed access arrangement. The order can be made in relation to any property in which a spouse is resident.
- **A safety order** can be made where there are reasonable grounds for believing that the safety of the applicant or their dependents requires such an order. A safety order directs the person against whom it is made to 'not use or threaten to use violence against, molest or put in fear the applicant' or a dependent child on whose behalf the application is made, and if they do not reside where the person is, 'to not watch or beset' that place. This order was originally conceived as giving the Courts the power to protect an applicant against domestic misconduct not sufficiently serious to require the making of a barring order (*see above*).
- **An interim protection order** can also be made before the making of a safety order. It provides protection against assault or attack pending the full hearing of the applicant's case. Similarly, an interim barring order can be made in the same way.

The 1996 Act permits (unlike earlier legislation) former spouses (including those who are divorced or who have obtained a foreign divorce) to make applications for barring or safety orders under the Act. Spouses (and divorced spouses) are not required to be resident for any specified time with the respondent, nor do they need to have any legal or beneficial interest in the place from which it is sought to bar the other spouse. While either spouse can make an application for these orders, the majority of orders granted have been made against husbands. To have access to the provision of the Act, the applicant must be married to the respondent; a person whose marriage has been annulled cannot apply (Shatter, 1997, p. 846). Formerly married spouses are well protected from domestic violence under the Act.

However, co-habitees do not have the same access to the provisions of the 1996 Act. Application for a safety order can only be made by a co-habitee if she or he has been living with the respondent for at least 6 months in aggregate over the previous 12 months (Shatter, 1997, p. 848). Such a co-habitee can also apply for an interim protection order pending the hearing of a case, but cannot apply for an interim barring order.

In summary, upon judicial separation or divorce proceedings a spouse can seek preliminary Court orders (a safety order, a barring order, an interim barring order or a protection order) under Sections 2-5 of the Domestic Violence Act, 1996. As will be seen later in the examination of Court data, these orders can have implications for custody and access to children (*see Chapter 5*).

Parental separation and children's rights

As legal separation essentially permits couples to live apart from each other, this presents the question of where and with whom their children are going to reside. The majority of separating couples make these new arrangements themselves, some with the assistance of family mediation, therapy or/and family lawyers, as well as advice from family and friends. Those who cannot go to Court for a resolution. In addition to judicial separation and divorce, custody and access disputes form a large element of work in the Family Law Courts (see Chapter 5).

Guardianship of Infants Act, 1964 and the welfare of the child

Custody and access issues are governed by the Guardianship of Infants Act, 1964. Under Section 11 of the Act, any guardian of a child may apply to the Court for an order in any question relating to the welfare of that child. Welfare includes 'the physical and psychological welfare of the person in question' (Shatter, 1997, p. 859). There can be considerable divergence of judicial opinion as to what comprises 'welfare'. A broad interpretation was given by Justice Griffin, who took welfare to refer to health and well-being, and in the case of a spouse 'would include both physical and emotional welfare; in the case of a child, it would, in addition, include moral and religious welfare'. A narrower interpretation was taken by Justice O'Higgins, where the reference to welfare was 'intended to provide for cases of neglect or fear of injury brought about by the other spouse' (*ibid*).

Section 11(2)(a) of the Act outlines that the Court may make an order regarding the custody of the infant and the right of access to the infant by his father or mother. Such an order can be for a joint custody order or a sole custody order. Under Section 11(2)(b), the Court may also make an order that either the father or the mother make maintenance payments as it considers reasonable. In determining the level of payment, the Court must have regard to the means of the person making the payment (Shannon, 2005, p. 31).

The main consideration in the 1964 Act in relation to such applications is the welfare of the child – Section 3 calls it 'the first and paramount consideration'. The definition of the term 'welfare' given in Section 2 of the Act comprises the religious, moral, intellectual, physical and social welfare of the child. In his judgment, Justice Walsh in *G v. An Bord Uchtala* noted that 'paramount' did not imply exclusivity or that it should be the sole consideration; it 'indicates that the welfare of the child is to be superior or the most important consideration, in so far as it can be, having regard to the law or the provisions of the Constitution applicable to any given case' (Shannon, 2005, p. 33). The ostensible rule is that where there is a conflict between the welfare of the child and other considerations (such as the rights of parents), the welfare of the child takes precedence over all other matters. According to Shannon (*ibid*), this is sometimes known as the 'best interests test'. The principle that the best interests of the child must take precedence in all matters concerning the child's welfare is in line with the Convention on the Rights of the Child (UN, 1989).

Shannon (2005, pp. 34-37) outlines the religious, moral, intellectual, physical and social welfare dimensions of 'welfare'. However, as noted by Justice Walsh (1974) and quoted by Justice McGuinness, 'all the ingredients which the Act stipulates are to be considered globally. This is not to be decided by the simple method of totting up the marks which may be awarded under each of the five headings ... It is the totality of the picture presented which must be considered' (cited in Shatter, 1997, p. 546).

Research shows that over the last 30 years the Courts have transformed their views on how the best interests of the child are actually served. As evident in the 1970 case of *Cullen v. Cullen*⁷, the mere fact that a person seeking custody of a child is of a different religious persuasion cannot be an absolute bar to the granting of custody. In addition, the granting of custody is not dependent on the behaviour of the parent (unlike times in the past when partaking in an adulterous affair was not conducive to the moral welfare of a child⁸). Furthermore, the intellectual welfare of the child has developed to include both educational opportunities and psychological welfare.

⁷ Unreported, Supreme Court, 8 May 1970.

⁸ *JJW v. BMW* (1976) 110 ILTR 45.

The physical welfare of the child had been previously linked to the ‘tender years’ principle, but this no longer has the same effect. As Justice McGuinness states: *‘I do not entirely accept the old “tender years” principle; modern views and practices of parenting show the virtues of shared parenting and the older principles too often meant the automatic granting of custody to the mother virtually to the exclusion of the father’*⁹ (cited in Shannon, 2005, p. 39). This practice reflected the common law principle that the physical upbringing of a child of 7 years or younger was best catered for with the mother.¹⁰ Such a principle coincides with the mother’s Constitutional right to the guardianship and custody of the child, whereas the natural father has no such right.¹¹

The Courts have to ensure that in granting guardianship, custody and access, the parent has sufficient *parental capacity* and is manifestly capable of carrying out these roles. Sometimes severe mental illness, alcoholism or drug addiction can reduce parental capacity and provide grounds for not making a custody order to one or other parent.

The wishes of the child

Section 3 of the 1964 Act provides for the wishes of the child to be considered in relation to custody: *‘The Court shall, as it thinks appropriate and practicable having regard to the age and understanding of the child, take into account the child’s wishes in the matter.’* According to Shannon (2005, p. 40), this will only be done where the child is of sufficient age and maturity; he cites the case where the wishes of a 17-year-old girl played a significant part in the decision of the Court to award custody to her mother, while in another case refused an application for custody by the mother of a 13-year-old boy who expressed a preference to remain in the care of his father.

This recognition of the wishes of children is supported by a procedural right guaranteed by Article 40(1) of the Constitution, which states that *‘All citizens shall be held as equal before the law’*. However, it adds that there must be due regard to capacity of the citizen. Accordingly, it follows that children of a certain age and understanding have a right to have their wishes taken into account by a Court in making a decision under the Act of 1964 relating to their guardianship, custody or upbringing. This consideration also has important implications for how the Court should find out the wishes of the children concerned. Judges can, and do, see children in their chambers to ascertain their views. Some Judges express a reluctance or reticence to involve children in the proceedings. Findings from this research show that Judges rarely make orders for access to teenage children.

Keeping siblings together

Traditionally, the Courts tend to prefer not to split up siblings, as in *JC v. OC* where Justice P. Finlay refused to grant custody of two young boys to their father, partly on the basis that to do so would cause them to be separated from their sister, a factor that he considered ‘by no means insignificant’ (cited in Shannon, 2005, p. 41).

Joint custody

Section 11A of the 1964 Act (as inserted by Section 9 of the Status of Children Act, 1987) states that it is possible even where a couple are separated to award custody to both the father *and* the mother jointly. Joint custody involves a child residing with each parent for a stipulated period of time. According to Shannon (2005, p. 53), it tends to be ‘the exception rather than the rule’. His interpretation of joint custody in this instance related to joint physical custody, which is not the general use of the term in Family Law Courts. Such arrangements should not be such as ‘to cause a significant disruption to a child’s life: for instance, where one parent lives a significant distance from the school at which the children normally attend’ (*ibid*).

⁹ *DFOs v. CA*. Unreported, High Court, McGuinness, J., 20 April 1999.

¹⁰ *B v. B* [1975] IR 54, per Ó Dalaigh, C.J.

¹¹ *State (Nicolaou) v. An Bord Uchtala* [1966] IR 567.

International law on children's rights

The welfare of children and their need for protection has been the dominant approach to children for much of the 20th century. A more rights-based approach has developed since the 1960s that has led to a focus on the child's capacity for autonomy and responsible action, related to the evolving capacity of children.

The United Nations adopted a Declaration on the Rights of the Child in 1959 and in 1989 the General Assembly adopted the Convention on the Rights of the Child. In 1992, Ireland made a formal legal commitment accepting the Convention's obligations and undertaking to implement its provisions (Kilkelly, 2008, p. 1). This implies a long-term strategy of implementation, which includes the development of a rights-based infrastructure and a legislative framework. There are several pieces of legislation that are now part of this framework, including the Child Care Act, 1991; Children Act, 2001; Education Act, 1998; Education Welfare Act, 2000; and the Status of Children Act, 1987 (which eliminated the discrimination against children born outside marriage).

Convention on the Rights of the Child

Throughout the 54 Articles in the Convention on the Rights of the Child (CRC) (UN, 1989), emphasis is placed on both children's rights to contact and to have a relationship with both parents, and to a lesser extent on their right to have a voice in decisions in relation to their custody. These Articles in the CRC form a very important ideological context for the handling of separation and divorce cases, and even if they are not legally specified in the domestic legislation of States, they can influence judicial decision-making. They have had a major impact on divorce legislation in many countries and are of particular relevance to the rights of the child in relation to post-separation custody and access issues, as the following Articles illustrate (see <http://www2.ohchr.org/english/law/crc.htm>):

- **Article 3** of the CHC states: *'In all actions concerning children whether undertaken by public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'* Further, it imposes a duty on States to provide *'such protection and care as is necessary for his or her well-being ... and to this end, shall take all appropriate legislative and administrative measures.'*
- **Article 7** gives the child the *'right to know and be cared for by his or her parents'* and an imposition on States to implement these rights.
- **Article 9** imposes on the State an obligation *'to ensure that a child should not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by its parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.'*
- **Article 9.2** specifies that *'any interested parties shall be given an opportunity to participate in the proceedings and make their views known.'*
- **Article 9.3** says that States *'shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.'*
- **Article 10** addresses the obligations of the State in relation to Article 9.3 regarding applications *'by a child or his or her parents to enter or leave the State for the purposes of a family reunification.'* It states that this should be *'dealt with in a positive, humane and expeditious manner.'*
- **Article 10.2** notes that a child *'whose parents reside in different States shall have the right to maintain on a regular basis ... personal relations and direct contact with both parents ... so States shall respect ... the right of the child or his or her parents to leave any country including their own, and to enter their own country.'*

- **Article 12** is important in relation to a child's views on custody and access. It says that the State *'shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child'*.
- **Articles 13-15** accord more rights to children, such as freedom of expression, freedom of thought, conscience and religion, freedom of association and of peaceful assembly.

Kilkelly (2008, p. 28) gives special importance to the right of the child to be heard – 'as a defining principle of children's rights'. This, she claims, will 'raise the profile of children and will ensure that they are treated as individuals in their own right'. This issue has been critically reviewed and evaluated in terms of Irish Constitutional impediments (Shannon, 2000).

Parental Responsibilities and Rights

Article 5 of the UN Convention on the Rights of the Child (CRC) recognises the rights and duties of parents to provide appropriate direction to the child in the exercise of the child's Convention's rights – taking into account the child's evolving capacity. Article 18 says that States *'shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child'* and that *'the best interests of the child will be their basic concern'*. This Article places a clear emphasis on the *responsibilities* of both parents for their children, which has been increasingly incorporated by States in post-separation legislation.

Parental *rights* are recognised in the European Convention on Human Rights (ECHR), which was drafted in November 1950 and ratified by Ireland in 1953. Based on the Universal Declaration of Human Rights (1948), the ECHR contains 11 substantive provisions setting out rights of a mainly civil and political character. A European Court of Human Rights (ECtHR) was set up to supervise State adherence to its standards (Kilkelly, 2008, p. 38).

While none of these provisions expressly mention children, a number of cases have been brought before the ECtHR in relation to Article 8 of the ECHR (the right to respect for family and family life) and Article 12 (the right to marry and found a family).

The ECHR did not form part of Irish law until the European Convention on Human Rights was included in the Belfast Agreement in 1998. Section 3(1) of the Act provides that every organ of the State, including the Courts, must perform its function in a Convention-compliant manner since the enactment of the European Convention on Human Rights Act 2003. Kilkelly (2008, pp. 41-43) argues that the ECHR has the potential to strengthen the protection that Irish law currently affords children. She notes that the invocation of ECHR case law in children's cases is a development in itself and will in time lead to better outcomes for children. The ECHR did not lead to an accompanying Convention on Children's Rights. Instead, its focus on children's right to be heard and on their need for representation led to the adoption of the European Convention on the Exercise of Children's Rights (CECR), which was adopted by the Council of Europe in 1996. The CECR provides a mechanism for the 'further implementation of Article 12 in family proceedings, inter alia, by providing procedural mechanisms by which the voice of the child can be heard' (Kilkelly, 2008, p. 47). It is prescriptive since it means that a child – if considered as having sufficient meaning – can request the right to: (1) receive all relevant information; (2) be consulted and express his or her views; and (3) be informed of the consequences of compliance with these views and the consequences of any decision. Before a State can ratify the CECR, it must have taken positive and precise steps to implement its principles *prior* to ratification. Twelve European Member States have ratified it to date, but neither Ireland nor the UK have yet done so.

Convention on Contact concerning Children

The Council of Europe adopted the Convention on Contact concerning Children in 2003, which came into force in May 2005. It has not yet been signed or ratified by Ireland. It focuses specifically on maintaining regular contact between parents and children, as well as promoting international cooperation in cases of custody and transfrontier contact.

Kilkelly (2008, p. 49) notes that the Convention on Contact has been drawn from the CRC and case law of the ECtHR. It includes that parents and their children have a right to regular contact with each other and that the latter can only be restricted where necessary in the best interests of the child; where unsupervised access is not possible, then supervised or other kinds of access will be considered. The child has a right to have his or her views heard and to be consulted. The authorities must make parents aware of the importance of facilitating and establishing regular contact between each parent and their children in cases of separation and divorce. The judicial authorities must facilitate family members to make amicable agreements with respect to contact and ensure that parents have sufficient information at their disposal when making a decision in the best interests of the child (*ibid*). This Convention on Contact again, while not yet ratified by Ireland, does produce a form of best practice model context within which the judiciary and legal authorities operate. It remains to be seen in the data to be examined from the present study to what extent family law practices in the Irish Courts operate according to such guidelines.

Irish Court statistics on divorce and separation

In the year 2007, when this study was carried out, there were 3,658 divorce orders decreed by the Circuit Court and a further 26 by the High Court (*see Table 1*). In that same year, there were 1,167 separation orders granted by the Circuit Court and 18 by the High Court. These figures are an increase on the previous year. Table 2 gives the number of applications from 2001-2009 for divorce and judicial separations.

Table 1: Orders granted for divorce and judicial separations (2001-2009)

Orders granted	Divorce		Judicial separation	
	High	Circuit	High	Circuit
2009	20	3,302	20	1,080
2008	42	3,588	45	1,180
2007	26	3,658	18	1,167
2006	47	3,420	27	1,072
2005	20	3,391	23	950
2004	42	3,305	42	1,216
2003	41	2,929	26	1,206
2002	20	2,571	28	940
2001	20	2,817	27	1,018

Source: *Family Law: Statistics* section of Annual Reports, Courts Service

Table 2: Applications for divorce and judicial separations (2001-2009)

Applications	Divorce		Judicial separation	
	High	Circuit	High	Circuit
2009	33	3,683	35	1,592
2008	43	4,214	42	1,966
2007	28	4,081	52	1,687
2006	39	3,986	50	1,789
2005	30	4,096	49	1,658
2004	34	3,880	48	1,654
2003	42	3,733	53	1,802
2002	33	3,912	59	1,871
2001	31	3,459	76	1,845

Source: *Family Law: Statistics* section of Annual Reports, Courts Service

Tables 1 and 2 show an increase until 2009 in the number of applications and in the number of orders granted for both divorce and judicial separations. The figures for 2009 show a decline in both applications and orders.

Applications and orders by gender in 2007

In the year in which this research was conducted (2007), 47 applications for judicial separation were initiated by wives and 5 by husbands in the High Court. 17 applications for divorce were initiated by men and 14 by women. In the Circuit Courts, there were 1,190 applications for separation initiated by women and 499 by men. More women than men also applied in 2007 – 1,651 men as compared with 2,430 women. In 2007, 342 judicial separations were granted to husbands and 825 to wives, and 1,471 divorces were granted to husbands and 2,187 to wives.

Cases disposed of in 2008

The total breakdown of case settlements was not provided for the entire country in 2007 in the *Statistics* section of the Courts Service’s Annual Report for that year. Each year, the latter expands the range of statistics provided and the statistics presented for 2008 are the most extensive. They are provided here to give an overall context for the current applications of the legislation outlined in the first part of this chapter. They are the outcomes of the legislation in Court. They also provide a national context within which to locate the study’s findings.

Table 3 shows that a full hearing is most likely to occur in the High Court. However, this Court deals with cases in which couples are more affluent, so there are greater financial issues to be adjudicated between the parties, and it also hears cases that are appealed from the Circuit Courts.

Table 3: Case settlements in High Court (2008)

High Court	Judicial separation	Divorce	Circuit Court appeals
Settled out of Court	6	9	–
Settled in Court	14	2	–
Full hearing	25	32	72

Source: *Family Law: Statistics* section of Annual Reports, Courts Service

As Table 4 indicates, only one-third of separation and divorce cases are settled out of Court; a third are settled in Court, while another third go to a full hearing.

Table 4: Case settlements in Circuit Court (2008)

Circuit Court	Judicial separation	Divorce	Nullity	District Court appeals
Settled out of Court	449	1,231	2	16
Settled in Court	373	1,320	10	83
Full hearing	413	1,063	33	112

Source: *Family Law: Statistics* section of Annual Reports, Courts Service

Table 5 gives a breakdown of the orders made in the Circuit Courts during 2008 by gender. Four types of property orders are shown here – transfer, sale, residence and other property – which give a context for the more detailed account of settlements of the family home in Chapter 4.

Table 5: Circuit Court orders made in 2008

Order made	Judicial separation		Divorce	
	Male	Female	Male	Female
Pension adjustment	145	273	588	660
Transfer of family home	116	325	259	355
Sale of family home	58	174	151	345
Residence in family home	49	218	123	335
Other property order	21	116	69	120
Extinguish succession rights	331	727	1,444	1,995

Source: *Family Law: Statistics* section of Annual Reports, Courts Service

Table 6 gives the distribution of the kind of maintenance payments made according to the *Family Law: Statistics* section of the Courts Service's Annual Report for 2008 in terms of payment to spouse for child maintenance. These payments at separation are made predominantly to mothers or wives. The figures on divorce are not explained: it is unclear as to whether the distribution relates to the applicant or the recipients. The total numbers involved in these cases are not given.

Table 6: Percentage distribution of maintenance orders made in Circuit Courts, by gender (2008)

Order made	Judicial separation		Divorce	
	Male	Female	Male	Female
Periodic payment to spouse	17%	83%	42%	58%
Periodic payment to child	21%	79%	35%	65%
Lump sum payment to spouse	24%	76%	38%	62%
Lump sum payment to child	33%	67%	46%	54%

Source: *Family Law: Statistics* section of Annual Reports, Courts Service

Table 7 shows that more than half of separation orders may have included custody and access orders, whereas only one-fifth of divorces involved the making of such orders. As will be shown later in the report, the existence of judicial separation legislation and the separation requirement before a decree of divorce can be granted means that more couples have to sort out the custody and access concerns related to their children at the separation phase (*see Chapter 5*).

Table 7: Circuit Court custody and access orders made in 2008

Order made	Judicial separation	Divorce
Husbands	118	303
Wives	328	494
Total no. of orders made	446	797
Total applications/decrees	1,180	3,588

Source: *Family Law: Statistics* section of Annual Reports, Courts Service

Table 8 shows that custody and access orders are also made in the District Court.

Table 8: District Court custody and access orders made in 2007-2008

Order made	2008	2007
Granted	857	428
Refused	209	21
Withdrawn/struck-out	175	472
Total	1,241	921

Source: *Family Law: Statistics* section of Annual Reports, Courts Service

Summary

This chapter has described the extensive legislative framework in which judicial separation and divorce are embedded in Ireland. Also described is the relevant legislation used to deal with custody and access issues related to children. An outline is given of the development of European and international rights of contact related to both children and parents. Finally, a set of national statistics on legal separation and divorce in Ireland is presented in order to locate the findings of the present study of the Family Law Courts.

2 LITERATURE REVIEW: MARITAL SEPARATION, DIVORCE AND THE IMPLICATIONS FOR CHILDREN

The rapidly changing international context of family law and its focus on children's rights makes it important to have some access to and knowledge of the workings of the family law system in Ireland. Separation and divorce have been of concern to citizens and policy-makers alike, and the challenge for policy-makers has been to reduce the negative effects of divorce on children. Because many children are likely to be raised in post-separation and divorced families, it is also important for the State to be able to legally support new family formations and to protect the rights of children in new families.

There is a very extensive research literature on the impact of divorce on children. In the current international context and in terms of the issues raised in Ireland prior to the introduction of divorce legislation, this review will focus on the following three areas: (1) the increased risk of child poverty after divorce; (2) conflict between separating parents and its impact on children; and (3) parent-child contact after divorce, including the role of the custodial parent and the effects of parental separation on children post-separation. These three issues have had an impact on the framing of the Constitutional amendment in Ireland and are addressed in different aspects of Irish legislation, as outlined in Chapter 1.

After examining the relevant research in each of the three areas mentioned, we then turn to the workings and practices of the Irish Courts as they address them.

Risk of child poverty after divorce

In the debate leading up to the introduction of divorce in Ireland, the negative effects of divorce on families were extensively discussed (Burley and Regan, 2002). Chief among the issues was the high risk of poverty and its attendant effects on the 'first family'. In general, lone-parent families are more likely to experience financial difficulties and have higher risks of poverty than two-parent families. An association between financial hardship and divorce is widely recognised (Maclean and Eekelaar, 1997; Brannen *et al*, 1989; Thompson and Amato, 1999; Jarvis and Jenkins, 1998). Pryor and Rodgers (2001), in their analysis of the relationship between divorce and socio-economic status, noted the complexity of this relationship. Many families experience poverty before divorce and longitudinal studies in the USA and UK have identified poorer economic resources as a predictor of divorce (Pryor and Rodgers, 2001, p. 145). While the risk of poverty in many cases predates marital breakup, marital separation and divorce reduces the income available to families, especially in cases where the father is the 'breadwinner'.

Cohort studies in the UK showed a pattern of a large and sustained fall in the living standards for lone-mother families after divorce. In particular, hardship increased for separated families where the children remained with their mothers – their financial hardship increased from 19% to 39% after separation. The situation for families in which the children stayed with their fathers was less dramatic, but their hardship also increased from 15% to 22% over the 5-year period between 1969 and 1974 (cited in Pryor and Rodgers, 2001, p. 146). Later studies revealed that net household income of separated mothers fell by 17%, but increased for men by 5% (Jarvis and Jenkins, 1998). A study by Jenkins (2000) in the UK showed that the income of men rose by 25% after divorce, whereas women experienced a sharp fall in their finances after divorce. There were key differences between fathers and mothers (rather than men and women) since costs of rearing children fell more on mothers. Maintenance payments had little impact because only 31% of separated mothers in the UK got payment from the fathers of their children. The change in a mother's income was less if she had worked before divorce and if she returned to work after divorce. Re-marriage for the mother also had a positive impact on her income (Jarvis and Jenkins, 1998).

Tomlinson and Walker (2010), in a longitudinal analysis of UK households between 1991 and 2005, noted that separation and divorce had a negative financial impact on children and they recommended that targeting assistance in response to such family circumstances would be beneficial. While there is no comparable research in Ireland, lone-parent households have continued to be the most at risk of poverty according to the 2009 EU Survey on Income and Living Conditions (EU-SILC) (CSO, 2009). Again, children in one-parent families were identified as one of the groups at greatest risk of poverty in the 2008 EU-SILC.

Pryor and Rodgers (2001) noted that because of economies of scale, the requirements of lone-parent families are not simply reduced in proportion to the number of people in the household. There are the costs of overheads, particularly housing, that are there for all households irrespective of the number of people involved. This issue is much to the fore in Ireland where the future of the family home was a major concern in the public debate on divorce in Ireland. There were also fears expressed about the ability of family 'breadwinners' to support two families, as well as fears that child maintenance would not be paid.

Policy responses to the risks of poverty to children after divorce

Family law tries to minimise the harm that parental separation and divorce can cause in the lives of children by regulating to some extent the post-divorce family. The financial position of families was addressed in divorce legislation in the UK and USA by the imposition of alimony and maintenance payments to protect dependent spouses and their children. The Child Support Agency in the UK was established by the Child Maintenance and Enforcement Commission to look after the financial maintenance aspects of post-separation parenting. It was set up specifically to ensure that absent and non-residential parents pay child maintenance.

In Ireland, the extensive focus on 'proper provision' and its formal inclusion in the wording of the amendment to the Constitution on divorce both acknowledged the public importance of that factor and prescribed a political/legal obligation to protect families from such poverty. The legislation on separation and divorce, as outlined in Chapter 1, addressed these matters. As noted, the Courts have extensive powers in terms of financial orders, which can be exercised in order to ensure 'proper provision'. The data in Chapter 4 will show the legal outcomes of the exercise of these powers in relation to the future of the family home and spousal and child maintenance agreements.

Conflict between separating parents and its impact on children

Early studies of divorce emphasized the negative aspects of exposure to parental conflict on children. Furstenberg and Cherlin (1991) in an early US study found that the less parental conflict children are exposed to, the better will their adjustment be. Exposure to high conflict is associated with poorer child outcomes (Johnston, 1994, p. 19; Kelly, 2000; Maccoby and Mnookin, 1992; Harold and Murch, 2004). Some of this conflict was generated by an adversarial family law system and over time Family Courts in the USA and UK have tried to reduce conflict, with a 'no-fault' divorce system expected to do this. In addition to the conflict involved in the separating process, parental conflict is also publicly associated as a cause of divorce.

However, Pryor and Rodgers (2001) in their review note that divorce also occurs in families where there may not be a high level of conflict. Many marriages end following a period of low overt conflict, with boredom perhaps being a factor in precipitating separation (Amato and Booth, 1997; Booth and Amato, 2001). A couple's affection for one another may diminish (Wolcott and Hughes, 1999). Further low levels of marital conflict may reflect 'an emotional divorce' that might have taken place long before the separation itself (Hetherington, 1999). Some relationships will be withdrawn rather than hostile (Pryor and Rodgers, 2001).

At the other end of the divorce spectrum are violent relationships that involve verbal, psychological and physical abuse directed at the spouse and, in some cases, violence and abuse directed at the children. The denigrating of one parent by the other, the expression of rage towards a former spouse and asking children to carry hostile messages – all create intolerable stress and loyalty conflicts in children (Buchanan *et al*, 1991). Conflict between parents, which precedes, emerges or increases during the separation and divorce, was found to be an important factor in filial adjustment (Cummings *et al*, 2004; Johnston, 1994; Kelly, 2000). Anger-based marital conflict was found to be associated with filial aggression and externalising behaviour (Jenkins, 2000).

Lamb (2007) has found that children in high-conflict families who have frequent contact post-separation with their families are more poorly adjusted than those in low-conflict families. The 'high conflict' refers to repeated incidents of spousal violence and verbal aggression, which continued after divorce at intense levels for a long time, often in front of the children, between parents with substantial psychiatric problems and character disorders. In these cases, there were repeated instances of spousal violence and verbal abuse – estimated by Maccoby and Mnookin (1992) to be present in about 10% of the 25% of families where conflict was severe and intractable, and in which it was not beneficial for the child to have contact with their non-resident parent (Johnston, 1994). High conflict is more likely to be destructive post-divorce, when parents use their children to express their anger and are verbally and physically aggressive on the telephone and/or in person; by contrast, when parents continue to have conflict, but encapsulate it and do not put their children in the middle, children appear unaffected (Buchanan *et al*, 1991; Hetherington, 1999). Kelly and Emery (2003, p. 354) also noted that it was not uncommon to find 'one enraged or defiant parent and a second parent who no longer harbours anger, but has emotionally disengaged and attempts to avoid or mute conflict that involves the child'. This conflict can also have negative effects on the parenting practices of both mothers and fathers, especially when the parents have violent or very conflictual relationships with each other (*ibid*).

Thus conflict from which the children are shielded does not affect their adjustment. Conflict with physical violence is more pathogenic. Conflict that remains after divorce is of greater concern than pre-divorce conflict (Cummings *et al*, 2004; Harold and Murch, 2004). Harold and Murch (2004) also draw attention to the fact that there is a need to focus on the child's perspective in determining the impact of conflict on their lives.

Policy initiatives to reduce conflict

(1) No-fault divorce

Early divorce legislation in all countries was a fault-based system, which generated intense hostility and conflict leading to extensive legal battles between parents. This adversarial legal system was seen as part of the problem. Legal moves to a 'no-fault' divorce system were introduced and divorce was increasingly granted on the basis of the 'irretrievable breakdown' of the relationship between the couple for whatever reason. This change in approach was expected to reduce conflict.

(2) Focus on the welfare of children

According to May and Smart (2007, p. 65), it was hoped that the Children's Act, 1989 in the UK would also reduce conflict 'by affirming the paramount importance of the welfare principle and promoting a policy of negotiation between parents coupled with non-intervention by the Courts, the legislation would go some way to defuse conflict between divorcing parents'. The Act also abolished the terms 'custody' and 'access' since they conveyed 'winners' and 'losers', and replaced them with the concepts of 'residence' and 'contact'. However, there are still disputes on residence and contact taken to the Courts; the study by May and Smart (2007) shows that there were a complex array of issues underlying these disputes and in many cases conflict was not abated. They also claim that conflict may be impossible 'to resolve' in a number of cases where conflict is 'so deeply embedded in the parental and post-divorce identities of the partners involved'.

An organisation called the Children and Family Court Advisory Support Services (CAFCASS) was set up in the UK in 2001 as a public body accountable to the Secretary of State for Children. Its remit is to safeguard and promote the welfare of children, to give advice to the Family Courts, to make provision for children to be represented and to provide information, advice and support to children and their families. The UK system therefore adopts a multi-agency approach to separation and divorce.

(3) Mediation and non-adversarial settlement

In the UK's 1989 Children's Act, there is a view that no Court orders should be made unless they can achieve something for the child. The belief is that by not making orders joint and several, parental responsibilities will be preserved and conflict between parents will be reduced. There is also a presumption that any agreement that a couple themselves can make is better than anything that a Court can impose. However, Bailey-Harris (2001) claims that there is a misuse of the 'no order principle' and that some 'agreements' made by couples can be based on coercion or resignation.

The provision of mediation by family support agencies was also introduced in many jurisdictions, including Ireland, to reduce conflict and to reduce the numbers of people going to Court. In some instances, mediation is either mandatory prior to going to Court or is an alternative to Court. In the UK, mediation is not compulsory, but it is promoted. Cooperation between parents is also promoted by counselling and the involvement of external agencies where appropriate (Collier and Sheldon, 2008, p. 161).

Parent-child contact after divorce

Post-divorce parental contact is now the most dominant issue in research and policy. A seminal study on divorce in the USA by Wallerstein and Blakeslee (1989) presented the negative effects of divorce on children and set the agenda for family law internationally. Their key finding on the negative effects of 'parental abandonment' on children raised awareness that divorce was not simply the breakdown of relationships between two people, but simultaneously was a breakdown of parent-child relationships. The sudden and unexpected departure of a parent led to acute anxiety in children that they might also be abandoned by their second parent. This research led to an initial emphasis on the 'good divorce', which stressed the importance of parents communicating with their children, parental management of the separation process and the necessity to try and maintain ongoing parent-child relationships even when their conjugal relationships were disintegrating.

Effects of parental separation and divorce on children

Lamb (2007, p. 13), in reviewing the psychological effects of parental separation and divorce on children, locates the issue within attachment theory: infants and toddlers need regular interaction with their attachment figures and need 'to interact with both parents in a variety of contexts (e.g. feeding, playing, soothing, putting to bed) to ensure that the relationships are consolidated and strengthened. The quality of both mother-child and father-child interaction remains 'the most reliable predictor of individual differences in psychological, social and cognitive development in infancy, as well as in later childhood (Lamb and Lewis, 2005).

Most research indicates that children in two-parent and one-parent families appear better adjusted when they enjoy warm positive relationships with two actively involved parents (Amato and Gilbreth, 1999; Hetherington, 1999; Hetherington and Kelly, 2002). Lamb (2007) notes that insecure attachments are better than none because these infant and childhood attachments play essential formative roles in later social and emotional functioning. Disrupted parent-child relationships have adverse effects on children's development and adjustment, with a linear relationship between the age of separation and later attachment quality in adolescents. The weakest attachments to parents are reported by those whose parents separated in the first 5 years of their lives (Woodward *et al*, 2000, cited in Lamb, 2007). Lamb also notes that while children in general benefit from being raised in two-parent (biological or adoptive) families (rather than in separated, divorced or never-married single-parent households), there is still considerable variability in children's outcomes and the differences between the groups are relatively small. The majority of children with divorced parents enjoy average or better social and emotional adjustment as young adults (Booth and Amato, 2001; Hetherington and Kelly, 2002; Kelly and Emery, 2003).

Custodial (residential) parents

Parents have to decide the residential and shared care relations for their children after divorce. The custodial (or now more commonly called 'residential') parent has traditionally been the mother, who becomes the 'lone mother'. Parents who are engaged in the emotional turmoil of separation have poorer psychological and physical health. This may reduce their capacity to look after their children (Lamb, 2007).

Kelly and Emery (2003, p. 356) noted that one of the best predictors of positive outcomes for children is 'the psychological adjustment of custodial parents (usually mothers) and the quality of the parenting provided by them'. Richards (1996) in the UK also claimed that the key factors for the long-term well-being of children appear to be the 'quality of the relationships' with their residential and non-residential parent and the 'economic position' in which the child lives: *'When post-separation arrangements are relatively stable, household income levels do not fall too far, and children maintain good relationships with their mother and their father and their wider kin, there seems to be the best chance of children reconverting from behaviour and health problems or reduced self-esteem, if these have been a problem around the time of separation.'*

Factors that influence custody decisions

The Fathers Rights movement in the UK (Collier and Sheldon, 2006) focused attention on the dominance of maternal custody and its implications for paternal contact with children post-separation and divorce. A series of studies showed that 'sole mother' custody was dominant in the USA (Maccoby and Mnookin, 1992), in Canada (Moyer, 2004) and in the UK (Blackwell and Dawe, 2003). Even in Sweden, which had a dominant model of joint custody, 84% of children resided with their mothers in 1999. Several factors have been advanced to explain this dominance.

Custody outcomes are influenced by:

- the 'primary caretaker' rule, which directs the Court to award custody to the parent who was the primary caretaker during the marriage (Atkinson, 1984; Emery, 1994);
- the 'child's preference' rule, which directs the Court to follow the child's preference, which applies to older children only (Buehler and Gerard, 1995);
- the 'approximation preference' rule, which directs the Court to arrange post-divorce custody to resemble the pre-divorce or intact family's living arrangements (Fohlberg, 1991).

The status of the plaintiff is important. According to Cancian and Meyer (1998), a parent is less likely to be awarded custody if he or she has been previously married or has children from a previous relationship. It was found that when husbands were plaintiffs, they were more likely to receive custody (Fox and Kelly, 1995; Cancian and Meyer, 1998). This may suggest that fathers have to 'seek' custody in Court. Equally, the 'sole mother' custody is also more likely when the mother is the plaintiff since she may 'want' custody (Fox and Kelly, 1995; Cancian and Meyer, 1998).

Economic responsibility for the children, such as maintenance contributions, are also important. A record of paternal child support arrears decreases the likelihood that the father would receive sole physical custody (Fox and Kelly, 1995, p. 704). Child support is seen as a sign of paternal support and interest in the child. US studies demonstrate that the probability of shared custody rises with total income (Cancian and Meyer, 1998, p. 150), while the probability of 'sole father' custody falls with income. Fox and Kelly (1995) also investigated the ways in which income level can affect the outcome of a custody order. They found that high-income fathers may be less interested in sole custody when compared with low-income fathers; this is because high-income earners have higher employment-related opportunity costs associated with child-rearing (Fox and Kelly, 1995; Teachman and Polonko, 1990).

The number and ages of children may also affect custody outcomes. Cancian and Meyer (1998) in Canada showed that the presence of young children reduces the probability of the father being granted sole custody, particularly in those families where the child is aged 0-2, but also if the child is aged 3-10. As regards the number of children, some US studies have found that in large

families it is likely that one spouse will specialise to a greater degree in child-rearing for efficiency reasons (Fox and Kelly, 1995). Since mothers traditionally rear the family, it is more likely to expect that maternal custody would be more likely in divorcing families with larger numbers of children (Teachman and Polonko, 1990).

Cancian and Meyer (1998) found that cases in which the father only worked were less likely to result in shared custody, compared to cases in which both parents worked. This seemed to reflect a division of labour between the couple. A 2005 study in Canada showed that egalitarian couples, where both parents were employed, were more likely to share the residential care of their children (Juby and Le Bourdais, 2005, p. 169).

Fathers' roles in post-separation families

The full effects of the absence of fathers and children's adjustment are, according to Lamb (2007), weaker than one might expect. The meta-analysis by Amato and Gilbreth (1999) revealed no significant association between the frequency of father-child contact and child outcomes, largely because of the great diversity of 'father-present' relationships. They found that children's well-being was greatly enhanced if their relationships with non-residential fathers were positive and when fathers were engaged in 'active parenting'. Children benefited when their non-resident fathers were actively engaged in routine everyday activities – for example, high parental involvement in children's schooling was associated with better grades and better behavioural adjustment. Lamb (2007, p. 16) concurs, saying that 'active paternal involvement predicts child adjustment'.

Another meta-analysis by Bauserman (2002) showed that children in joint custody arrangements were better adjusted than children in sole custody arrangements, and were as well adjusted as children whose parents remained married.

From a child's perspective, a study of children's responses to divorce described the lack of contact with their parent/father as the primary negative aspect of divorce; children also reported missing their fathers over time (Fabricius and Hall, 2000; Hetherington, 1999; Laumann-Billins and Emery, 2000).

Time distribution arrangements and parental contact

There has been a growing focus on parenting plans emanating from psychologists interested in children's development. They argue that in order for parents to have a positive impact on their child's development, parents must be an integral part of their children's lives. Lamb *et al* (1997, p. 400), for example, state: 'Time distribution arrangements that ensure the involvement of both parents in important aspects of their children's everyday lives and routines are likely to keep non-residential parents playing psychologically important and central roles in the lives of their children.'

The ideal situation is one in which children have opportunities to interact with both parents in a variety of functional contexts. Overnight and evening periods are especially important for the better adjustment of infants, toddlers and young children since they provide regular and important opportunities for social interaction and nurturing activities, such as bathing and bedtime rituals (Pruett *et al*, 2005). According to attachment theory, 'these everyday activities promote and maintain trust and confidence in the parents and deepen and strengthen child-parent attachments, and thus need to be encouraged when decisions about access and contact are made' (*ibid*). The benefits of overnight stays have, however, been disputed by other researchers: Lamb *et al* (1997) contend that where infants and children have established attachments to two involved parents prior to divorce, these relationships should be maintained after separation for the well-being of the children. They further contend that parenting schedules where younger children are concerned should involve more frequent transitions, rather than fewer, to ensure the continuity of both relationships and to promote the children's security and comfort (Lamb, 2007, p. 19). After the age of 3, children have the ability to tolerate longer separations from parents. If children are attached to both parents, separations from their mothers and fathers are stressful. Thus week-long separations are not advisable to maintain strong parent-child relationships after divorce.

The quality of the relationship between the non-residential parent and their children is crucial when determining whether or not to sever or promote relationships between divorced parents and their children. Lamb (2007, p. 21) notes that there are many families where non-resident fathers and children have poor relationships and in which the maintenance of involvement may not be a net gain for the children. He estimates that perhaps 10%-15% of parents do not have the commitment or individual capacity to establish supportive and enriching relationships with their children following divorce.

It is the focus *on both parents* that constitutes a new approach to family law in most jurisdictions. This model has been described as a shift from the 'clean break' and 'primary care-givers' to a model that simulates the intact family (Rhoades, 2002). It has been described as a re-working of the 'paramount principle' – the principle that the best interests of the child is the paramount consideration when determining parenting orders – and incorporates a belief that 'children suffer through lack of contact with parents' (Collier, 2001, p. 133).

There is now a growing consensus that fathers, notwithstanding separation, have an important role in the socialisation and future well-being of their children. Further, a lack of contact has implications for the closeness of the mother-child relationship, for the economic contribution of fathers to separated families and for the health of the fathers themselves (Collier and Sheldon, 2008, p. 154). However, the mere presence of fathers is not enough. Rather, it is the quality of the relationship with their children that counts – monitoring, encouragement, love and warmth from fathers, together with other 'active' positive parenting qualities, are consistently linked with children's well-being (Hunt and Roberts, 2004; Pryor and Rodgers, 2001).

Irish research study on parent-child contact

Only one Irish study has focused specifically on children's experiences of parental separation and divorce. The research by Hogan *et al* (2002) resonated with international research findings on the experiences and effects of divorce on children. The study is significant because it shows the importance of promoting parent-child contact post-separation and divorce from the perspective of the children involved, by drawing on their subjective experiences. A total of 60 children were recruited through schools and support agencies. The study divided the sample into two age groups – 8-11 year-olds (middle childhood) and 13-17 year-olds (adolescents).

The study found that almost all of the children were aware that their parents were having difficulties in their relationships; they were also aware of conflict between their parents, that their parents were spending less time together and that their parents were sleeping in different bedrooms. Six of the children described violence against a child or parent before separation. Most of the children were only told about the separation once the decision had been made.

Children experienced separation both as an event and as a process. A minority had not been told about it and only realised that the separation had occurred when a parent left the home. Adolescent children wished they had been told more and some (34 participants) felt resentment towards their parents. Yet some who were drawn into discussions felt they were over-exposed to their parents' interpersonal issues or it involved collusion with one parent. Children whose non-resident parent had left suddenly and without explanation were particularly confused and distressed. The large majority said that they had not been consulted about family arrangements concerning custody and visits with non-resident parents.

Most of the children in this 2002 study said that they did not want to be consulted or involved in family decisions about major issues; in some cases, this was because it might be seen as 'taking sides' (*ibid*, p. 35) or it was simply not a salient issue for younger children. However, children who had been invited to say what they wanted appreciated this involvement in making decisions about their time with either parent. In almost all cases, the arrangements for visiting non-resident parents were formal and regularised. Children were more likely to be dissatisfied if they were not

happy with the formal arrangements and tried to force their parents to take their preferences on board – teenagers, aged 15 and 16, for example, refused to visit the non-resident parent or reduced contact with them.

The children reported several feelings as a result of the separation: 'sadness', 'worry about parents' and 'worry about the future' were cited by almost half of them. Others mentioned loneliness, fear of loss, confusion and even surprise; 28 expressed anger, 22 were embarrassed and 26 expressed feelings of relief. Those who expressed relief related it to the distress they had felt when their parents were in conflict or fighting with each other. Some of the older children were in favour of the separation if the alternative was to be ongoing parental conflict. Children worried about their parents' well-being and experienced loneliness because of the absence of the second parent.

More than two-thirds of the sample believed that their parents' separation was permanent. They realised this when they saw no sign of reconciliation, when parents had little contact with each other or formed relationships with new partners. The children had expectations about custody, with all but one of the younger group saying that they knew from the beginning that they would be living with their mothers. The majority in the older group were also certain of their living arrangements as a result of parental communications with them or because they were involved in the decision and it reflected their preference.

Among the 17 children in the older group who chose to discuss the future of their families, 9 indicated that at least one of their parents had new partners. In the younger group, 4 indicated the presence of new family members. But 7 in the older group did not expect any change in their family composition in the future. Some had already experienced getting to know a parent's new partner and a number enjoyed meeting a parent's new partner. Others felt some resentment and anxiety about the implications of these new partnerships. On the whole, children were 'quite confident that their parents would continue to be their parents after the separation' (*ibid*, p. 51).

Children based their expectations on their previous experiences and knowledge of their parents. As Hogan *et al* observed, 'Those that had positive expectations were invariably children who had a close and trusting relationship with parents prior to the separation' (*ibid*, p. 52). Other children were 'profoundly disappointed by the loss of contact with parents and found it difficult or impossible to accept the loss'.

The study also examined the practical and social changes following parental separation. Most children continued to live in their family homes with their mothers, while 4 of the older children resided with their fathers and 2 lived with their aunts; 11 of the younger children and 5 of the older ones had changed residence, mostly still remaining in the same locality or city. Changing house was important and presented some adjustment difficulties for children. A small number of the younger children (3) moved to a different part of the country and changed schools, while none of the older ones did, thus affording them a certain stability in their everyday lives.

More than two-thirds of the children in this 2002 study by Hogan *et al* had contact with their non-resident parent at least once a week (half of those more than once a week). Three children only saw their non-residential parent once a month, 7 less than that but several times a year, and in one case just once a year (*ibid*, p. 57). This overall weekly rate of 68% contact is seen as high, but similar to that found in Northern Ireland (Fawcett, 1988). Hogan *et al* explain that the geographical proximity of the non-resident parents facilitated contact. For some children, it meant a regular commute within the country, which they saw as worthwhile. However, lower contact rates were more commonly found when non-resident parents lived outside the country. Children found the arrangements working well, especially if contact was regular and not subject to cancellations, but some children still wanted more contact with their fathers at holiday times and at weekends.

Hogan *et al* report that the importance to the children of maintaining contact with the non-resident parent was very evident: 'Children who experienced a sense of losing contact, or for whom there was no contact with their fathers, were markedly unhappy and in some cases distressed. It appeared that children could accept the separation, and even find it to be positive for their family, if positive contact with non-resident parents could be sustained.' It was also noted that children had a high level of awareness of how their own behaviour could affect their parents and they were concerned that they might hurt their feelings: 'They were especially concerned with issues of fairness and of equal treatment of their parents.'

Finally, the study indicated that when children were not happy with the arrangement, there was usually one of the following factors at play: the separation took place suddenly with one of the partners leaving unexpectedly; children did not have a clear sense of what was going on; they were worried about the welfare of the non-resident parent; and they had a sense that they were not a priority for the non-resident parent.

Policy and legislative changes to promote parent–child contact

UK legal system

The report by Trinder *et al* (2002), *Making Contact Work: How parents and children negotiate and experience after divorce*, called for a wider range of services for families not seeking Court interventions. The Children and Adoption Act 2006 now provides Courts with new powers to promote contact and enforce contact orders made under a new Section 8 of the UK's Children's Act, 1989. It is concerned with the facilitation and monitoring of contact, the enforcement of contact and compensation for financial losses incurred by a person where there was a breach of contact arrangements. This has taken the form of encouraging the development of parenting plans (quite common in Australia), ensuring that advice is widely available at all points in the divorce process and promoting in-Court conciliation. The Government does not plan to make mediation compulsory, but it does promote its use. Cooperation is also to be promoted by counselling and the involvement of external agencies where appropriate (Collier and Sheldon, 2008, p. 161). This has led to research on 'contact/shared residence' and its effect on child well-being in the UK (Gilmore, 2006).

US legal system

In the USA, joint custody has also increased in popularity since the 1970s, with many States having a preference or presumption for joint legal custody (Bender, 1994). The arguments in favour of joint custody have focused on the benefits for the child in maintaining relationships with both parents. But some opponents have argued that joint custody disrupts needed stability in a child's life and can lead to harm by exposing children to ongoing parental conflict. This has led to a research focus on 'joint custody *versus* sole custody' in the USA (Bauserman, 2002).

Australian legal system

The UN Convention on the Rights of the Child, adopted in 1989, has had an impact on family law in Australia. While the welfare of the child was always to the fore, the living arrangements that obtained post-separation were based on the idea that the welfare of the child was best promoted by ensuring a stable attachment to the mother. The non-residential parent should also remain in contact where there is a meaningful relationship that is beneficial to the child. The upshot was that non-custodial fathers lost contact with their children. However, the non-payment of child maintenance in the late 1980s, the obstruction of contact with fathers by mothers and the ratification of the UN Convention by Australia in 1990 – all put a greater focus on safe access. A Child Protection orientation in the 1990s meant that interpersonal violence was recognised as causing harm and distress to children. Access could be denied if it exposed children to a climate of potentially violent and dominating relationships between parents – hitherto, this had not been the case. The Courts also moved towards giving a new weight to children's views and to including them in the decision-making process.

However, there was a move away from the proprietorial concept of 'custody' to a 'right to contact' principle after the Family Law Council published its report on *Patterns of Parenting after Separation* in 1992. Just as the UK had replaced its terminology from 'custody' to 'residence' and from 'access' to 'contact', the Australian Government moved quickly to enact similar reforms to enfranchise non-custodial parents (Rhoades, 2007, p. 135). The Family Law Reform Act, 1995 provided children with a right to have contact with both parents. A pro-contact culture developed, which some feared neglected the risk of family violence to children (Rhoades, 2007, p. 136). The law was later amended and in 2006 the Family Law Amendment (Shared Parental Responsibility) Act was introduced. This gave priority to a child's best interests in judicial decision-making, which in some cases might preclude contact with a parent if a threat of violence was a factor.

However, the 2006 Act also promoted 'shared parenting', which eliminated the dominance of child ownership by parents. The legislation now provides for orders that describe where a child is to live and the time a child is to spend with each parent. Judges must now consider the matter of spending equal or significant time with each parent, with the emphasis on parenting or care work.

In addition, Australia has introduced a new system of compulsory mediation for disputes over children, which aims to encourage the making of agreements between separating parents. To foster this, 65 Family Relationship Centres have been developed and offer a range of non-adversarial dispute resolution services (Rhoades, 2007, p. 141). The behaviour of parents is monitored and belligerent parents can be asked to pay legal costs if they proceed to litigation in their dispute. This was seen as being over-zealous by some experts. Rhoades (2007, p. 142) claims that the State's over-emphasis on parent-child contact has led to a focus on maintaining contact regardless of parental capacity. It has led to a shift in the balance of power between resident and non-resident parents, in which mothers have lost their protective powers while fathers see themselves as entitled to contact. This reveals that Australia has moved very extensively towards adopting a legal response on contact as advocated by the ECHR (see Chapter 1).

UK and USA

The second main development over time in both the USA and the UK has been a new emphasis on the role of the father in the post-divorce family. In the UK, policy-makers and politicians became increasingly concerned about the social consequences of 'absent' fathers and post-separation fathering itself has been reframed as a social problem, with the maintenance of contact an increasingly important goal. While the desirability of law has not gone unchallenged, the question of what law can do to promote good post-separation fathering has become a central issue within family policy debates (Collier and Sheldon, 2008, p. 155). Accordingly, the UK's Children's Act, 1989 enshrined a co-parental role which requires that non-resident separated fathers engage in family life in such a way as to support the child's best interests, but there is 'no presumption of contact or shared parenting in the Children's Act' (*ibid*, p. 157). Contact remains a qualified right.

Coinciding with these changes, a new Fathers' Rights movement has grown up in the UK, with separated or divorced fathers seeking an active fathering role and generating a debate on the rights of non-resident fathers (Collier and Sheldon, 2006). Proponents have argued that shared residence should be the norm and that there should be a presumptive or automatic division of a child's time between both parents (Gilmore, 2006, p. 344). However, the British Government has rejected a statutory template for the division of children's time imposed on all families.

Summary

This literature review indicates the issues faced and the policies adopted by a number of countries seeking to develop effective child and parent rights-oriented policies for post-separation and divorce families. It provides an overall context in which to locate the present study focusing on these issues in Ireland. Irish family law practices have, to an extent, evolved from initial prescriptions in the legal framework in which separation and divorce were developed here. As noted in Chapter 1, as a late developer in this area, Ireland made a pre-emptive attempt to avoid the negative consequences of divorce elsewhere. In Chapters 4 and 5, the Irish data from this study will be examined.

3

METHODOLOGY

Design of study

The original research design for this study was based on a content analysis of Court records on legal separation and divorce cases. Separation and divorce agreements were to be analysed to see the decisions made on the custody of and access to the couples' children. This would give an insight into post-separation parenting. This proposal was acceptable to the Department of Justice, but the Family Law Courts Service refused access to the files because of working space restrictions. Thus the plan was revised and application was made instead for permission to audit Court proceedings and judgments.

Access negotiation

The researchers applied to the Minister for Justice to get permission under Regulation 2(b) of the S.I. 337 of 2005 to attend family law *in camera* Court proceedings, as provided for in Section 40(3) of the Civil Liability and Courts Act 2004. This permission was granted in December 2006. This is the first study of the Family Law Courts' proceedings by social scientists.

Field work

Data were collected over 15 weeks during the Hilary and Easter Sittings of the Family Law Circuit Courts in 2007. Three places of sittings were chosen for the study: a large inner city Circuit Court, a regional town Circuit Court and a rural town Circuit Court. The researchers observed and analysed 134 cases relating to separation, divorce, maintenance, custody and access heard in these Courts.

Ethical procedures

Ethical approval for the study was granted by the Research Ethical Approval Committee (REAC) in the School of Social Work and Social Policy, Trinity College, Dublin. At each Family Law Circuit Court sitting, the researchers had provided a detailed information sheet to the Judge and explained what the research was about, who was undertaking it, its funding, aims and objectives. The Judge obtained the consent of participants at the beginning of each case, outlining to the litigants and their legal teams the reason for the researcher's presence and ensuring that their consent was based on full knowledge of all material matters, including the purpose of the research, funding sources and intentions regarding dissemination. The participants were aware that they were free to object to the researcher's participation at any time and for any reason. The Judge stated at the outset that the researchers would protect the rights of those studied, their interests, sensitivities and privacy.

Confidentiality of the cases in this report has been ensured by making no references to any of the following: the Court's location, the names of Judges, the names of townlands or counties or countries, the names of schools or of residential areas. All cases are anonymised.

Purposive sample

The sampling procedure was a purposive one in that the cases were selected on the basis that they were being presented in Court, that they involved children and where matters of custody and access were part of the proceedings. Such cases thus provided in-depth information and knowledge of the phenomenon of interest (Patton, 1990). The cases examined were based on Family Law Courtroom presentations where applications were made for legal separation, divorce, custody and access. Each day's attendance provided a number of cases, the details of which were written up during and after attendance at the Courts. No sound recordings were made. The focus was on the case presentation, the key variables and the agreements or judgments made. It was not always possible to know at the start of a day in Court how many cases would be heard, what kind of cases (in addition to judicial separation or divorce cases) would come on the list or how many would require a full hearing.

Other cases (on land division or property) were also audited, but since they were not relevant to this study they were excluded from the analysis. There were also several cases at the beginning of each sitting in which couples got decrees of divorce. The only data made available at those decrees were the year of marriage and the year of separation. The Judge would then, based on legal documents, decree a divorce, the whole procedure only taking a few minutes. Such cases were also not included in the analysis.

Field work challenges

There were certain challenges in the field work since the researchers had to make a written record of the oral data presented, consisting of the context of the case, any elaborations made by the Judge and any interactions with plaintiffs or witnesses. The data required were not always supplied in the same sequence in each case, nor were equivalent data presented in each case. This made the codification of data on cases more difficult as well as the analysis of cases. Auditing cases was also found to be very time-consuming.

However, there was also an advantage to auditing cases. The data presented in Court revealed the relevant *core details* of each case, the judicial summary of the case and judicial judgment on the case. It subsequently transpired that if we had followed the original plan (of reviewing Court records), we would not have had so much data to analyse. Thus courtroom observations provided a valuable insight into the practice of family law.

Several cases listed for hearing at a particular sitting of the Court might never be heard since they were settled outside of the courtroom. Couples and their legal teams worked on the cases while the Court was sitting. If they came to an agreement, their legal teams presented the case and its outcome. In such cases, all matters were agreed between the parties, terms were written up and signed, and ruled by the Court. In other cases, matters were discussed in Court with the Judge outlining the matters under dispute and encouraging the couple and their legal team to come to a decision. If not, the Judge would have to make the decision for them based on the evidence presented by the applicant spouse and respondent spouse.

Some cases went to a full hearing. Some involved financial or property matters. In such cases, additional witnesses (such as home valuers or forensic accountants) could be called to give evidence. Judges may also summon other professionals to give evidence where there is parental unfitness due to a mental health issue or a child care issue. We did not audit cases related to children in care and we were also excluded from auditing a few cases that were ongoing but of a very private/intimate nature. The cases analysed in Chapters 4 and 5 of this report constitute a fairly typical sample of family law cases, rather than a focus on extreme cases which often attract media attention.

Data collected

The following key variables were usually presented in separation and divorce cases:

- type of application: divorce or judicial separation;
- gender of the applicant: mother or father;
- outcome of the future of the family home: this was classified under a number of typologies, including the financial adjustment orders (if relevant) that accompanied the family home agreement – a lump sum in lieu of transfer; whether that lump sum included maintenance provision;
- number and ages of the children in the cases observed;
- who the children in each case resided with;
- whether maintenance was paid to the spouse;
- whether maintenance was paid for any children and the amount paid (if revealed in Court);
- whether the mother was employed and any income (if given), or whether she was in receipt of One-Parent Family Allowance;

- the year of marriage and separation;
- nature of custody awarded: joint or sole;
- description of access agreed;
- whether either of the couple were in a second relationship (if presented).

As each case was different, identical data were not always provided for each case, either because it was not a feature of the application or specific data on it were not provided in the case observed. However, the overall aim of the research is to identify patterns in the key decisions either agreed or made.

This study is based on an examination of cases heard in Court. The data give an insight into the way spouses and parents present their cases, and also describe the way in which they organise and agree custody and access matters in relation to children. Several factors impact on the eventual Court outcome, including former parenting practices (e.g. whether or not there is a primary carer), the ages of the children, the employment of the parents and the geographical location of the parents post-divorce.

All the data collected in these family law cases were through a data collection technique referred to as 'passive observation'. This descriptive study is exploratory since there has been no previous sociological research on the topic. The study illustrates social patterns thought to be typical and representative of families going through the Court process.

Analysing the data

The data are examined under thematic headings. Chapter 4 analyses the future of the family home and characterises it in terms of a typology of financial arrangements. Each case is analysed in terms of whether there is any maintenance paid to either spouse or children.

Chapter 5 examines the issue of custody and residential arrangements made for children and presents the emergence of new types of shared parenting after separation and divorce. In addition, issues raised in access applications are explored, giving an insight into the many underlying issues that Courts have to address in such cases.

Reporting and ethical considerations

In presenting the data, the researchers have used appropriate and practicable methods for preserving the anonymity of data. Such methods include the removal of identifiers or the use of pseudonyms. This study strictly adheres to the set of draft guidelines for report-writing proposed by Coulter (2009a). The researchers present the analysis and findings in a way that will not permit the identification of the litigants. Individual case variables have not been included in the report. Accordingly, no names of Judges or specific quotations occur that might identify any of those involved in these cases. Maintaining such anonymity was necessary given the privacy of the current Family Law Courts.

Limitations of the methodology

This methodology had several limitations. Since it was the first sociological study of the Family Law Courts, this was a new field of research. To maintain privacy, the researchers did not sound-record cases, but took extensive written notes as ethnographers. As access had been denied to the Court files, Judges were not interviewed after their sittings or the litigants who presented in Court since this was not in the research plan. As researchers, we were present in Court as witnesses and observers of procedures. The cases observed were not randomly chosen. The data were analysed using a qualitative exploratory approach that developed typologies and identified key themes, which will assist further investigations into aspects of Family Law Court proceedings. This is not a prevalence study. In this regard, the findings need to be used as the starting point for further investigation and analysis to generate a comprehensive statistical portrait of family law decision-making.

In addition, there was a lack of children's voices in the study. Children are rarely present in Court and are not asked for their responses to parental arrangements. Judges can ask to see and consult with them in exceptional cases. There was also a lack of a children's perspective in a direct way since the needs of children are articulated under the aegis of the family and are discussed in relation to the roles of parents to the children after separation and divorce.

While mindful of these limitations, the existence of the *in camera* rule has limited our knowledge of the content and decision-making processes in the Family Law Courts. This research will add to our public knowledge of separation and divorce, and provide a starting point for further sociological studies.

4 THE FAMILY HOME AND FINANCIAL AGREEMENTS

As noted in Chapter 1, the public debate about divorce raised concerns about the material effects and risk of poverty that accompany divorce. To investigate this, data were collected on a number of variables that will affect the economic welfare of the post-separation or divorce family (see Chapter 3). Here, three of those variables are examined:

- **Housing arrangements and the outcome of the family home settlement.** This has implications for the custodial parent, the children and the non-resident parent.
- **Children's financial dependency on their parents.** The respective input of both parents in terms of subsistence and educational costs and their overall upkeep will all have an impact on the future social and economic well-being of the children. Maintenance agreements and ancillary relief orders are a key aspect of child provision in separation and divorce agreements.
- **Financial dependency of a spouse.** If he or she is not an income earner (or is disadvantaged in re-entering the labour market, especially as a result of extended time as the primary care-giver), they will need some spousal maintenance.

The unit of analysis in the present study is the individual family case since separation and divorce are negotiated on the basis of a 'package' agreed by the couple. All of the cases audited and analysed here consisted of couples with children who sought either a legal separation or a divorce. These cases involved the resolution of the future of the family home, transfers of equity or lump sum payments, and any other property divisions made. If presented in Court, details are also given on the number and ages of children, employment status of spouse, whether maintenance was ordered and where the children reside. Before analysing the empirical data, however, some characteristics of divorce legislation in Ireland will be examined.

No 'clean break' divorce in Ireland

One of the major characteristics of Irish divorce law is that it does not result in a complete and immediate termination of all interspousal obligations and duties, or, as Martin (2002, p. 226) puts it, it is not a 'clean break'. Many of the Court's orders can be discharged during the lifetime of a former spouse, particularly where that person has not re-married.

Martin (2002) presents three advantages of the 'clean break' divorce:

- it enables the couple to finalise entitlements, put the past behind them and avoid further litigation;
- it is regarded as psychologically beneficial;
- it has the advantage of making parties independent and self-sufficient where it is appropriate.

Martin (2002) argues that public policy favours finality in litigation. He offers several examples where a clean break divorce might obtain: where the couple are both employed and they have no children; where a couple are married for a long time, but with substantial capital for division; or where the parties are economically dependent on the State with no prospects of change. The current emphasis on joint parenting would seem to exclude a clean break approach.

Section 20 of the Family Law (Divorce) Act, 1996 was instituted to '*ensure that such provision as the Court considers proper having regard to the circumstances exist or will be made for the spouses and any dependent member of the family concerned*'. The factors that the Family Law Courts can take into account are described in Box 1 (see p. 43). However, what the Court deems 'proper' can vary from case to case and is constrained by the economic circumstances of both husband and wife.

Martin (2002) indicates that while the Court has a Constitutional duty to ensure that 'proper provision' for the spouse and any dependent children is made before a divorce is granted, the phrase itself is quite vague. Further, the Court does not have to make ancillary relief orders unless they are required in the interests of justice. Martin also notes that Judges have a great deal of discretion 'on the mechanism they adopt for the distributive process'. The absence of a prescriptive approach to defining 'proper' is intentional, so that it remains 'open to the Judges to determine subjectively its nature and scope' (*ibid*, p. 230). Judges in the Circuit Court do not generally articulate how they come to their decisions.

Box 1: Factors considered in legal settlements for separation or divorce

The following is the list of factors that the Family Law Courts need to take into account in determining a legal settlement for a couple getting a separation or a divorce:

- (a) the income, earning capacity, property and other financial resources that each of the spouses concerned has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities that each of the spouses has or is likely to have in the foreseeable future (whether in the case of the re-marriage of the spouse or otherwise);
- (c) the standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses commenced to live apart from one another, as the case may be;
- (d) the age of each of the spouses, the duration of their marriage and the length of time during which they lived with one another, and any physical or mental disability of either of the spouses;
- (e) the contributions that each of the spouses has made or is likely to make in the foreseeable future to the welfare of the family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family;
- (f) the effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each during the period when they lived with one another and, in particular, the degree to which the future earning capacity of a spouse is impaired by reason of that spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family;
- (g) any income or benefits to which either of the spouses are entitled by or under statute;
- (h) the conduct of each of the spouses, if that conduct is such that in the opinion of the Court it would in all the circumstances of the case be unjust to disregard it;
- (i) the accommodation needs of either of the spouses;
- (j) the value to each of the spouses of any benefit (for example, a benefit under a pension scheme) which, by reason of the decree of divorce concerned, that spouse will forfeit the opportunity or possibility of acquiring;
- (k) the rights of any person other than the spouses, but including a person to whom either spouse is re-married.

Models of post-divorce settlements

In terms of international models of post-divorce settlements, the earliest one advocated was a traditional **compensatory model**. Early fault-based divorces typically were negotiated between wives, who had been full-time mothers, with 'breadwinner' husbands. In the USA, post-divorce alimony for such wives (or maintenance in an Irish context) serves three distinct economic functions according to Posner (1998, cited in Tsaoussis, 2004, p. 222): (1) post-divorce alimony is a form of damages for breach of the marital contract; (2) it is a method of repaying the homemaker her share of the marital partnership assets; and, most importantly, (3) it provides the wife with a form of severance pay or unemployment benefit.

Compensatory models exist in France and in the Quebec province of Canada, and are fully described in the American Law Institute's *Principles of the Law of Family Dissolution* (2002). These *Principles* recognise that a spouse's alimony claim is an entitlement to compensation for financial losses as a result of past limited opportunities on future earnings and US law tries to allocate loss 'according to equitable principles that are consistent and predictable in application'. It is argued that compensation under divorce in a marriage is appropriate for three kinds of losses: (1) loss of marital living standard in a marriage of 'sufficient duration'; (2) earning capacity loss incurred by a primary caretaker of children; and (3) an earning capacity loss incurred by a spouse caring for a 'sick,

elderly, or disabled third party in fulfilment of a moral obligation'. There is also the principle of a reliance loss, which can be due to a parent who sacrifices career prospects to care for the children of the marriage and who relied on the other spouse's income.

International research has shown that 'women in long-duration traditional marriages have been hurt the most since the advent of no-fault legislation because they are in unequal financial positions relative to their husbands both during and after marriage' (Tsaoussis, 2004, p. 221). In the Irish pre-divorce debate, these women were presented as being the most vulnerable to poverty. However, their needs can be legally addressed by the Family Law Courts, which must take into account in their divorce settlement (1) the contributions they have made by looking after the home or caring for the family and (2) the extent to which they have relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family (*see factors (e) and (f) in Box 1, p. 43*).

The second international model is the **rehabilitative model**, in which the spouse (usually the mother) is maintained by her husband for a specified number of years after separation. This model now dominates in Greece since its shift from a fault-based divorce law to a no-fault one. In an examination of Greek data, it was found that in 85% of cases where alimony was awarded, it was for 3 years only (Tsaoussis, 2004, p. 233). Overall, few divorcing Greek women get alimony. The abandonment of permanent alimony in Greece coincided with the advent of no-fault divorce legislation. Thus women in lengthy marriages are not adequately compensated for their contributions as wives and mothers.

In their study of legal separation in Ireland, Fahey and Lyons (1995) found that alimony or maintenance was rarely paid to wives in Ireland. For this outcome, the Court must have concluded that the spouse has adequate income, earning capacity, property and other financial resources (*see factor (a) in Box 1, p. 43*). This is more in keeping with a rehabilitative or an egalitarian model, but not with the compensatory model. However, it is important to note that while the rehabilitative model is invoked in Ireland, a clean break separation or divorce is not an option since Section 22(4) of the Family Law (Divorce) Act, 1996 specifies the powers of the Court to vary settlements already made or to order the sale of a property to cater for a newly expanded variation order. Arrangements on separation (even if considered at the time once-off and final) can be revisited if the couple decide to divorce at a later stage. Martin (2002, pp. 233-37) also noted that spousal support obligations could persist, especially in cases where the husbands were in a position to support elderly spouses who were economically vulnerable. Pension adjustment orders and retirement benefits can also be varied, unless one applies for an order blocking such variation.

However, there are certain elements of divorce settlements that are similar to those invoked in a clean break model. The transfer of property from one spouse to another cannot subsequently be varied and is excluded from the remit of Section 22 of the 1996 Act. Inheritance rights are no longer available to former spouses under the Succession Act, 1965. Section 18 of the 1996 Act allows the parties to apply for additional financial relief after the death of their former spouse, but is likely to be successful only in cases where proper provision for the spouse was not made prior to death.

Property adjustment orders are final and the treatment of the family home can take the form of a compensatory, rehabilitative or egalitarian settlement. In the USA, the norm of equal sharing of matrimonial property was introduced in the Family Law Act, 1969 in California as part of the 'no fault' divorce. Formerly, property adjustments were linked to assessment of relative fault. Under this change in legislation, the proportion of mothers getting a greater part of the property decreased and some have questioned the equity of this given the likelihood that the children will live with the mother (Eekelaar and Maclean, 1986, p. 47).

The traditional dependency on one breadwinner in the family has diminished over time and parental responsibility for, among other things, finance is now generally shared. Two factors probably contribute to this in the Irish context – the absence of a judicial legacy of a fault-based

divorce system as in other jurisdictions (where the property adjustments were linked to the assessment of relative fault) and the very high labour force participation of wives and/or mothers. The latter factor empowers women to apply for a separation while also easing the financial burden of divorce on their husbands.

However, what also emerges from Martin's (2002) review is that couples themselves are not in a position to know what the future has in store for them. It must be noted that, in Irish family law, among the factors to be considered during divorce settlements are several references to the needs of spouses '*in the foreseeable future*' (see Box 1, p. 43). As will be seen in Chapter 5, this is the basis on which many separated and divorced spouses return to the Courts seeking maintenance or in relation to custody matters. Of course, given the existence of the *in camera* rule, there has been little information available until the present report on the number of couples who have recourse to the Courts post-separation or divorce.

ANALYSIS OF STUDY'S COURT DATA

It is evident from the present research that the immediate post-separation concerns of dependent mothers or husbands are centred on a home for their children. In making 'proper provision', the Court needs to take into account a number of factors (see Box 1, p. 43). An examination of the present data collected shows the extent to which Irish divorce has compensatory, rehabilitative or individualistic/egalitarian settlements. The data give an insight into the decisions actually agreed in Family Law Courts and also provide some evidence of what constitutes 'proper provision'.

Children and a clean break

It must be noted that Irish legal commentators' emphasis on a 'clean break' divorce has focused on a clean break for the spouse (usually the wife) from the other spouse (Martin, 2002). This, however, fails to consider that many divorced spouses have to look after their children and that this responsibility of childcare and child-rearing often persists after divorce. The absence of a clean break is very obvious in the freedom of spouses to request the Court to make ancillary relief orders 'on divorce or at any time thereafter ... or during the lifetime of the other spouse'. Only on re-marriage can the former spouse terminate the financial support duty. Maintenance obligations for children remain until the period of dependency ceases. The Judge has the power to vary or discharge any orders in the light of changing circumstances or in the case of 'any new evidence'. So the possibility of repeated applications means that, legally, finality can never be achieved. However, one would need a longitudinal study to see to what extent couples pursue issues after divorce.

The need to make 'proper provision' for dependent children, as expressed in the Irish Constitution, would appear to rule out a clean break financially. Further, the new rights of children to contact with both parents and the rights of parents to access to their children implies ongoing social and emotional relationships with children, which are at complete variance with a clean break model. The new 'child focus' approach to separation and divorce has greatly expanded the remit of the Family Law Courts and hence the increasing focus on access as well as maintenance. Fathers are now carers and nurturers, and mothers are also breadwinners. This study found these new realities visible in the Irish Courts. Yet, while this is an emergent focus, a focus on children tends to be *assumed* rather than made explicitly.

No explicit reference to children

The seminal study by Fahey and Lyons (1995), entitled *Marital Breakdown and Family Law in Ireland*, noted that while a focus on children was expected in family laws cases, this proved not often to be the case and that children's 'comparative absence' from the data collected 'proved to be a significant item of information in itself' (*ibid*, p. 4). The authors noted that the Court had not introduced any mechanisms through which the child's requirements or preferences could be directly expressed to the Court (*ibid*, p. 135). They concluded that a child's voice was only heard through that of their parents, sometimes in the context of a bitter dispute. Overall, this reflects the centrality of the family as a major private institution in Irish society with a right to privacy, which has influenced all legislation in the past.

More specifically, this absence of children in separation and divorce legislation is not too surprising if the factors considered in settlements are examined (*see Box 1, p. 43*). On inspection, one finds that children *per se* are not actually mentioned explicitly anywhere in this list of factors. Instead, they are presumed to be implicit in references to 'the family' The 'standard of living enjoyed by the family' in factor (c) comes closest to a reference to poverty, which might have an impact on children post-divorce. Otherwise, terms such as financial needs, needs and the responsibilities of each spouse have implications for children or are presumed to include children.

Post-separation life: Organising the future of the family home

Given that separation confers the right to live apart, the future of the family home is one of the most important costs and controversial issues that a couple have to decide upon. They have to decide either to sell it or to transfer it to one of them for the benefit of the children or to give a right of residence for one parent to reside in it with the children. Thus the decision on the future of the family home will be intertwined with the future residential arrangements of the children and their maintenance.

The price of family homes greatly increased during the 'Celtic Tiger' years (mid-1990s to mid-2000s) and for couples who bought before that period, the houses at the time they were divorcing had, in some cases, considerable equity. Many homes required contributions from both spouses to pay the mortgage. While the disposal of a family home could be analysed in social terms, in Irish law the family home is treated as a major financial asset and one that is generally jointly owned.

The Family Law Courts also recognise that both parents – irrespective of their earnings or financial or individual 'parental gifts' or contributions to its purchase – are joint owners of the family home when it comes to divorce. There is no guarantee that a wife who is a primary carer with dependent children will be awarded the family home (as a compensatory asset) because her husband has a right to his asset share of it when they separate or divorce. In terms of public perceptions, the transfer of the family home to the wife and children, who typically resided with her, was seen as a 'good divorce' settlement for wives. It fits into the traditional compensatory model. The partial transfer of the family home (50%-70% of its value) can be seen as located between the compensatory and partnership models. In more recent times, the family home might be sold and its proceeds divided equally between the spouses in cases where both are employed.

These data from the study's courtroom observations are especially interesting in providing a snapshot of the way couples address the issue of the future of the family home and come to an agreement. As already noted in Chapter 3, the data collection procedures used in the study were restricted and identical information for all couples getting divorced was not always presented in Court. Nevertheless, essential information derived from courtroom presentations was gained in 87 cases of couples divorcing. Based on these data, it was possible to identify a number of patterns or financial models used by couples (and by Judges in the small number of cases contested) to deal with the future of the family home (*see Table 9, Column 1*). These patterns were quite similar to those found by Fahey and Lyons (1995, p. 93; *see also* Coulter, 2009b, p. 68). Given the importance of the 'home' for children, the arrangements made for those who were not actual home-owners were also noted.

Where data were available, each case was also analysed in terms of whether maintenance was paid to either spouse or children (see Table 9, Column 2). The Court often treats the transfer of the family home and maintenance payments together, as an agreed ‘package’.

Table 9: Frequency distribution of models for transfer of family home and payment of child maintenance

Financial settlement model	Transfer of family home No. of cases	Child maintenance payments No. of cases
1a. Mother gets family home (usually with children)	16	9
1b. Father gets family home	1	0
2. Mother buys out family home, with payment to father	14	7
3. Family home is sold and proceeds divided	17	14
4. All family property assets are divided	6	4
5. Father buys out family home, with payment to mother	6	3
6. Spouse (usually mother) retains right to reside while children are dependent	3	3
7. Mother gets tenancy of Council home	7	5
8. Private rented accommodation	9	4
9. No information or mention in case of family home	8	5
Total number of cases	87	54

The 8 types or models of financial settlement typical in the transfer of the family home (see Table 9) are described below. They show the variety of arrangements that can be made and indicate the flexibility required in case adjudication to satisfy the ‘proper provision’ requirements. Generally, in Models 1-3 and 5, a ‘package’ is agreed between the parties on the transfer of the family home and maintenance payments. These arrangements settle home ownership between the divorcing couple in a slightly more compensatory way than do Models 4, 6, 7 and 8.

Model 1a and 1b – Transfer of family home to spouse (mother or father)

The first model in Table 9 involved the transfer of the family home to the spouse (the majority of whom were mothers/wives) as primary care-giver so that she or he can look after the children there. This was the decision in 17 of the 87 cases. In all of these cases, there were dependent children under the age of 21, with an additional older child attending third-level education in some cases. There was one father in this category. This model is consistent with a compensatory arrangement, providing some continuity for the dependent spouse and minimum disruption to the children’s lives.

- In two of these cases, the mother got the family home by default.
- In Case 84, the father had a Court order for maintenance which he never paid; he lived in the UK and had never made contact with his children, so his wife was in effect ‘deserted’, but was left the family home.
- Similarly, in Case 69, the father had been deserted by his wife, but was left the family home.

Maintenance payments in conjunction with property settlements

As Fahey and Lyons (1995) speculated, some property settlements might have a quasi-maintenance effect. This was found to be so in some of the cases examined in the present study. For example, the family home transfer included a maintenance effect in three specific cases:

- In Case 2, the husband did not pay maintenance, but his wife should have paid him €60,000 (his share) when the house was transferred to her; she was willing to pay that, but he waived it.
- Case 21 is similar in that while the house was valued at €340,000 and transferred to the wife, the remaining mortgage was only €25,000; thus the equity in the house was transferred to her in lieu of maintenance.
- In Case 30, the wife was always the main breadwinner and also paid the mortgage; thus she waived the maintenance payment due from her husband.

However, in 9 of the other 84 cases, the father paid child maintenance in addition, so that in those cases 'proper provision', was more extensive and involved additional separate maintenance payments. Where children are no longer dependent, no maintenance is ordered.

Model 2 – Transfer of family home to wife, but with some compensation paid to husband

The second model in Table 9 involved the transfer of the family home to the wife, but with some compensation paid to the husband for the transfer of his interest or share in the value of the house (effectively, the wife buys out the husband). In total, 14 out of the 87 cases observed settled for this option. This was usually done by raising equity on the house, which the wife would then pay off in a mortgage. These couples also had dependent children. The amount to be transferred to the husbands (in equity release) varied from €60,000 to €300,000.

In some cases, it was difficult to see how the mother with resident children could afford these re-mortgage repayments, even in cases where she was employed or self-employed. This issue was, in fact, raised by the Judge in Case 35, in which the wife had been awarded 60% of the value of the family home in lieu of maintenance, but she still had to pay her husband €300,000; she was self-employed with three dependent children living with her and the Judge was apprehensive that she could manage this. In Case 80, the wife, who had paid her husband €15,000, had one dependent child and three other older children, all residing with her; she was on social welfare and had sole custody of the younger child. This woman would appear to be at high risk of poverty after her divorce, unless her older children assisted her financially.

In other cases, a transfer of money was agreed to assist the second parent set up a second home. In Case 44, the wife was the primary breadwinner; she paid €60,000 to her ex-husband, who was setting up a second home. One of their children had a disability and their arrangements would facilitate the father spending time with the children in his home. Similarly, Case 51 had planned shared residential custody – the wife had paid the husband €145,000; she herself was on Disability Benefit and their two children, aged 15 and 10, would spend equal time between both parents.

Maintenance payments

In 7 of these Model 2 settlements, the fathers paid child maintenance (and in some cases, college fees). In one other instance (Case 12), the father paid college fees only. In cases of shared residential custody, maintenance payments are generally not required. A number of cases (7) made no reference to maintenance and it is likely that some of these spouses might have to return to the Courts at a later stage to claim maintenance payments.

Model 3 – Sale of family home and 50:50 division of it as an asset

Model 3 in Table 9 involved the sale of the family home. This situation was more likely to occur when the house was of a high value, approaching €1 million or over. In 17 out of the 87 cases observed, the family home was sold. The exact division of the proceeds varied. In most cases, they were divided 50:50, but in Cases 36, 58 and 62, they were divided 60:40, while in Case 41 they were divided 55:45.

The presence of dependent children did not make any difference to the sale of the family home as these cases had dependent children and one had an older disabled son. The advantage here is that the division of a large asset would give each spouse a significant deposit so that each could purchase another cheaper house. It is an equal division of a financial asset.

Child maintenance

Among this typology of home settlement, child maintenance was paid by fathers to mothers with whom children resided in 14 cases, while a mother paid maintenance to the father in another case. No child maintenance was paid in Case 20, where a mother cared for her adult son who was disabled; she was going to seek the Carer's Allowance. Maintenance was not mentioned in Case 32, while in Case 63 the husband looked after the dependent son and no maintenance was paid by his wife.

Model 4 – Division of all family property assets to achieve an overall financial split of 50:50

Model 4 in Table 9 involved the division of all family property assets, with the proceeds being split 50:50 between the spouses. This type of settlement was generally achieved by more affluent couples and there were 6 such cases out of the total of 87 observed.

- In Case 16, the couple had several properties and, in addition to the family home, it was agreed to transfer two other properties to the wife from which she could derive a rental income. She was in ill-health with two dependent children.
- In Case 34, the couple had an investment home as well as the family home, so the wife got the latter plus a lump sum.
- Case 37 involved a business and a family home. The couple had four children, the youngest being 23 years of age and in college. The husband had paid his wife €278,000 in a separation settlement. He was now proposing to pay her €35,000 as a final settlement, which the Judge did not consider sufficient given his property assets. The wife's Counsel did not agree with the sum, even though the wife herself did. The Judge refused to grant a divorce and sought to get further evidence. This is one example of a case where the Court did not accept that 'proper provision' was being made and a decree of divorce was refused.
- In Case 50 (another affluent couple), the husband transferred two properties plus €1.6 million to his wife.

Child maintenance

Maintenance was paid in 4 out of the 6 cases categorised as Model 4:

- In Case 50, a maintenance payment of €3,000 per month was agreed; the couple's three dependent children lived with their mother.
- In Case 34, maintenance was also agreed, but the amount was not stated.
- Maintenance was also paid in Cases 76 and 77.
- In Case 16, the wife was given rental property and no maintenance was paid.
- In Case 37, their only dependent son lived with his father and his mother paid no maintenance.

Model 5 – Buyout of family home by father

A variation on Model 2 involved the buyout of the family home by the father, who paid his wife her equity share of the property in a lump sum. This settlement was chosen in 6 cases out of the 87 observed.

- In Case 10, the father paid his wife €50,000 and their only child (an 18-year-old daughter) lived with her father in the family home. The mother was employed and paid no maintenance.
- In Case 25, the father paid €150,000 to his wife, who bought another house. She had four children living with her, aged 16 to 20, and was employed. The father paid €1,200 maintenance per month and their health insurance.

- In Case 43, the wife was paid €31,250 and she purchased another house. She was employed, with two teenage children, and her husband paid €200 a month in maintenance by District Court order. They now share residential care of their children on a 50:50 basis. The father continued to live in the family home with his new partner and their child. This is a good example of new 'blended' families being formed.
- In a similar arrangement, the husband in Case 60 paid his wife €54,000 for her share of the home; she is now financially independent and has a new partner and home. The divorced couple currently share residential care of their 13- and 15-year-old children on a 50:50 basis – another example of new 'blended' families.
- Case 53 is an interesting variation of Model 5. In this case, the father bought the mother out of the family home, which enabled her to buy a chalet in another part of the country near her parents. Their teenage daughter lived with her mother, to whom the father pays maintenance. However, the father now rents out the family home, which is now a source of income for him so that he can pay off his share of it to his wife. Meantime he rents a smaller place for himself.
- In Case 15, the father bought the mother out of the family home and she bought a house under a share purchase initiative. They had three children, none of whom were categorised as dependent, the youngest being 20 and living with her mother.

Model 6 – Spouse retains right to reside in family home while children are dependent

Model 6 involved the retention of the family home, which is usually in joint names, but to give one spouse (usually wives) the right to reside in it until the children have attained the age of 18 or are no longer dependent. There were 3 such cases among the 87 observed.

- In Case 24, the father had deserted the family home, where the mother resided with their three children. Two of the children, aged 21 and 20, contributed to the family income, while the father paid €600 per month maintenance towards their 8-year-old child. The wife was in receipt of a One-Parent Family Allowance. The husband had applied for a divorce, with an interim settlement of a 'right to reside' arrangement. The Judge disapproved of the settlement, which he advised was not in the wife's best interests. He asked her what would happen if she met a new partner; the wife rebuked this suggestion and against his advice accepted the settlement.
- In Case 49, the initial separation agreement was for the wife to remain in the family home until the children were aged 18. However, a few years later, her new partner bought out her husband's share of the family home. Meantime, her separated husband also had a new partner and a child. In settling their divorce, the father offered an insurance policy worth €90,000, €60,000 of which he offered to his wife in lieu of maintenance for their two children, aged 9 and 5, who reside with their mother during the week and spend weekends with him. The father was paying €300 per month maintenance at the time of the case. The Judge ordered that the €90,000 be given to the wife towards a settlement in lieu of maintenance payments. These arrangements seem to approximate the 'clean break' model required by their new relationships.
- Case 52 is a very different case, in which the separated wife had resided in the family home since the couple separated in 1999. They have two children, aged 17 and 13, who reside with their mother, but stay four nights every second weekend with their father. The father pays €800 per month in maintenance for the children. He claims that the children spend only 40% of their time with him and he wants to sell the family home, claiming that he and his wife could both be re-housed under the affordable housing scheme. The wife has been a primary carer. The Judge ordered that the wife be permitted to reside in the family home until the children were independent.

These cases illustrate the way in which this type of ‘right to reside’ settlement can be arrived at while a couple are separated. It is the postponement of a final decision on the disposal or sale of the family home that will probably have to be made at a future date and is very explicitly not a clean break. This option is not ideal for either spouse, but it gives the carer/residential spouse and children a better interim deal. The standard of accommodation for the second spouse is usually lower since they tend to move into cheaper rented accommodation. Neither spouse is in a position to buy out their share of the family home nor can they afford a second mortgage. But the settlement does offer some interim compensation for the caring parent who resides with the children, similar to the traditional compensatory model. Child maintenance was paid in all cases.

Model 7 – Mother gets tenancy of Council home

Many couples were not owner-occupiers of any property. For some, the retention of the tenancy of their rented accommodation was an issue that needed to be resolved and it tended to be awarded to the primary/residential carer. This happened in 7 cases, which were quite diverse.

- In Case 9, the father left the family home and was seeking a divorce now that their children were grown up. By then, he had three other children with a new partner, while his wife was also in a new relationship with one child living in their original tenancy home.
- In Case 82, the husband had a tenancy transferred to his wife, who has had sole custody of their children (twins aged 18 and a 14-year-old) since he left her 10 years earlier. He has not had any contact with his older children and has moved in with a new partner. In granting a divorce, the Judge urged him to try and promote contact with his daughters.
- In Case 26, the mother was an applicant for divorce. She got tenancy of a new Council home, while her older son had got tenancy of their original family home. She was employed and her children, aged 23 and 17, resided with her. The father paid some maintenance towards their upkeep. Both ‘have moved on in their lives’ and the father has a good relationship with the boys, who go to stay with him at times.
- Case 79 was another divorce application from a mother. Her husband, who when ‘very depressed’, deserted his wife and family of 7 children, aged 5-21. His sister helped pay his maintenance bill of €1,000 per month since he could not afford to do so. He currently had supervised access on Sundays. The Judge reduced his maintenance payments to €400 per month.
- In Case 85, the tenancy was in joint names. The couple had two adopted children, aged 25 and 20. The wife sought a legal separation and the Court agreed to transfer the tenancy to her name and ordered the father to pay €600 per month in maintenance.
- In Case 8, the wife sought a divorce. She has the tenancy of their Council home since her husband left 14 years earlier. They had two children, aged 21 and 15, and while the father paid some maintenance from an inheritance, it was all spent by the time of the divorce application. He was unemployed and not in a position to pay maintenance. His wife was in receipt of a One-Parent Family Allowance.
- In Case 67, the applicant wife was in Local Authority housing. She had sole custody of their 8-year-old child, who resided with her. The father, although ordered to pay maintenance, had not done so and owed arrears of over €3,000. The wife was granted a judicial separation, a permanent barring order, sole custody and retained the tenancy of their home.

These families in Council tenancies were in poorer financial circumstances than many other couples in the Family Law Courts. However, having a Council house protects families to an extent from the loss of their family home, which might happen in cases of private ownership. But these families were more likely to be financially dependent on maintenance payments and in many cases these payments were not made.

The spouse who retained tenancy in these cases did not have to make any payment to their spouse for surrendering their interests in the tenancy. Coulter (2009b, p. 97), however, observed that in one case she audited, €10,000 in compensation was paid to a wife who surrendered a tenancy to her husband.

Model 8 – Private rented accommodation

Model 8 involved the case of those living in private rented accommodation. Since nothing was commonly owned, nothing had to be divided. In total, 9 such cases were observed.

- In Case 33, the father applied for a divorce. He lived in rented accommodation with his two children. His wife was in a new relationship and had two new children, but also had regular access to the children of her 'first' family.
- The couple in Case 45 had a rented home in which three children resided with their mother, who sought a divorce. The father contributed maintenance towards the children and the children stayed with their father every second weekend.
- In Case 57, a husband who applied for divorce had a daughter who lived with her mother and to whom he contributed €400 maintenance a month. While they had joint custody and liberal access, the father's apartment was too small for the daughter to stay overnight.
- In Case 68, a wife sought divorce. Both parents had rented accommodation and their daughter spent a few nights a week with each parent since they lived close to each other. The father paid maintenance of €140 per month.
- The applicant father in Case 62 lived in rented accommodation, as did his wife. The children resided with their mother. He sought a divorce and owed €1,750 in maintenance arrears. They had joint custody and the children saw their father two afternoons a week and at weekends. His wife gave consent to the divorce and did not seek an ancillary relief order for maintenance. The father was about to retire and his maintenance payment was only €180 per month at the time, which he wanted to reduce further.
- In Case 16, the father was in receipt of an invalidity pension and did not pay maintenance.
- In Case 67, the maintenance order made was not complied with.

Barring orders

In two further cases illustrating Model 8, the mothers had got barring orders against their husbands.

- Case 65 was a divorce application from a wife who rented accommodation and had a barring order on her husband. She had sole custody of their three children since they legally separated. She received a One-Parent Family Allowance.
- Case 66 was another applicant wife in the same position, with two children residing with her. Although her husband was ordered to pay €400 per month in maintenance, he never did. She had sole custody and received a One-Parent Family Allowance.

Model 9 – No information

There was one final category in this study's typology of financial settlement models on the future of the family home. This Model 9 was categorised as 'No information'. This could have meant that the couples applying for divorce never owned a home or that the data on the family home was no longer relevant to their case. In total, 7 such cases were observed: in 5 of them maintenance was paid, while in another 2 maintenance had been ordered, but was not paid.

Diversity of post-divorce arrangements

The variety of housing settlements (*see above*) and their relationship to income and social class indicate the diversity of arrangements among separated and divorced families. Yet they also show how couples within their own contextual lives try and work out a form of post-divorce family life. This reflects their individual arrangements as married couples. The examples ranged from compensatory to egalitarian models of settlement. The mother-child dyad was the most common. It also dominated in families in lower income groups. In the latter, families are very dependent on the residential mother and maintenance payments were a crucial element in avoiding poverty. Couples in rented accommodation are spared the decision-making and division related to equity. But they are often poorer and likely to find it difficult to afford to subsequently rent two places suitable for children.

Maintenance payments

The provision of maintenance is an important aspect of divorce legislation in Ireland. Accordingly, maintenance payments were included in the discussion and analysis of treatment of the family home (*see above*). This reflects the way in which the settlement can be seen as a package. Not all cases observed stated the maintenance sum paid – just that it was agreed and being paid.

To summarise the maintenance payments in the 87 cases examined in this study, maintenance is only payable when there are dependent children (defined as under the age of 18) or older children (up to the age of 23 if attending college). Child maintenance payments were made in 54 cases out of the total of 87 observed. Payments ranged from €140 per month to €3,000 per month. Coulter (2009b, p. 64) noted that where maintenance was specified, the amounts varied from €60-€100 per week per child, along with educational and medical expenses. There is no payment actually stipulated by any statutory agency, but it is related to the willingness of parents to pay it. A typical lower income level payment would be €75 or €80 per child per week. This is expected to contribute to the child's living costs, housing, clothes, food, education, mobile phone and other sundry expenses. The residential parent will also receive a Child Benefit Allowance. If a husband was unemployed or ill, the amount of maintenance ordered was lower. There were 6 cases of unpaid maintenance 'arrear', which can be a source of conflict between couples. Furthermore, in the District Court¹² the non-payment of maintenance can result in fines and imprisonment. This may explain why some mothers do not pursue maintenance claims. Maintenance arrears were more likely to occur in lower income families, where the husband was unemployed, and in cases of paternal desertion.

No maintenance was paid in 4 cases where the children were living with their fathers since the mothers did not pay maintenance. There was no maintenance paid in the 3 cases where the divorced parents shared residential custody of their children. In 3 cases where the 'children' were independent and in 5 other cases, there was simply no reference made in judgments to paying maintenance.

Spousal maintenance and 'proper provision'

The payment of maintenance to a former wife has always been a controversial topic, especially in the USA where divorce is in existence for a long time. In the era of fault-based divorce, wives were seen as entitled to maintenance or alimony. The debate centred on whether a husband or former spouse was expected to be, as one commentator expressed it, 'an insurer'. While the marriage vows might say 'for better or for worse, and for richer or for poorer', a more egalitarian individualism has tended to replace any notion of 'persistent obligations' towards spousal support (Eekelaar and Maclean, 1986, p. 11). The latter seems to be dominant in contemporary Family Law Courts in Ireland.

In the present study, there were only 2 cases of maintenance payments specifically to wives (Cases 42 and 50). The couple in Case 50 were affluent, with three children who resided with their mother full time, who was their primary carer; her husband paid €3,000 per month for child maintenance, consistent with her current standard of living. In Case 42, €600 per month was awarded to the wife. However, the mother in Case 16 had rental income from properties secured in her divorce agreement; she did not get any child maintenance payment, even though her children lived with her. This could mean that as her husband had a rental income too, he simply shared his source of income equally with her, making maintenance payments unnecessary. None of the other cases referred to any maintenance being paid to the wife.

Coulter (2009b, p. 64) also noted that maintenance for spouses 'was infrequent and very rare where there were no dependent children, though there were a few cases where wives in long marriages that came to an end, and who were past working age, received ongoing maintenance'.

¹² This study was confined to the Family Law Circuit Court and did not include a study of cases in the District Court. However, judgments in the latter can be appealed to the Circuit Court.

Absence of spousal maintenance and risks of poverty

The question must be asked – does this absence of maintenance payments have negative effects on the financial situation of the ex-wives in question? The answer is ‘Yes’, it appears to be the case. For example, 6 of the wives in the cases examined were on One-Parent Family Allowances (Cases 8, 21, 24, 65, 66 and 84) and 3 were in receipt of Disability Benefit (Cases 1, 51 and 67).

- Among those on One-Parent Family Allowances (OPFA), the mothers in Cases 21 and 66 had got the family home transferred to them. In both cases, there had been attempts to procure child maintenance, but neither father had paid up. The wives were in effect ‘deserted’ by their husbands and were granted sole custody of their children.
- The mother in Case 24 accepted a ‘right to reside’ arrangement in her family home (although the Judge advised her against this poor settlement, to no avail) and her husband agreed to pay her child maintenance of €600 a month on divorcing her. But she herself relied on the OPFA.
- In Case 8, a child maintenance order was granted, which was paid for a while by the father from an inheritance. However, when the inheritance ran out, the payments ceased. At the time of divorce, the father was unemployed so could not afford to pay maintenance.
- In Case 65, the mother was in effect a one-parent family since there was a barring order on the husband and she had been awarded sole custody of the children, in whom he had no interest.

All of these wives and mothers were deprived of child maintenance payments. If child maintenance was not paid, then any other spousal maintenance is even more unlikely to be paid, even if desirable, especially if the mother is the residential carer and the breadwinner for the children.

As regards the cases of women on Disability Benefit, the post-divorce couple in Case 51 share the care of their children and she hopes to pay for her share of the family home (otherwise it will be sold). In Case 1, the wife is recovering from cancer and on Disability Benefit; however, it transpires that she is being financially assisted by a friend of hers. Her husband has refused to pay her any maintenance.

In summary, maintenance payments to wives are very rare and a degree of self-sufficiency, later if not sooner, is expected of them, even if they have been full-time carers of their children. Of course, many of the women worked either in full-time or part-time employment and so were supporting themselves and their resident children, as the data illustrate.

Proper provision

The main focus for wives in divorce cases, initially at least, seemed to be on the family home (if the couple jointly owned one). These wives were in employment or had returned to employment when their marriage broke down. Wives who were primary carers were disadvantaged, unless supported by their former husbands. In some of these cases, their divorce settlements took some account of their position. Since housing probably represents a large proportion of total living costs at present, many divorce and judicial separation agreements resulted in the retention of the family home or procurement of another home, as found in this study. Thus the family home (rather than maintenance payments) provided a great security to the wives and children.

However, in cases where there were younger children, one would have expected that maintenance payments, irrespective of the division of the family home, should be paid. Interestingly, this was more likely to be the case in egalitarian divisions of the family home, where child maintenance payments continued – a more egalitarian post-divorce approach. Finally, a shared approach to post-separation parenting makes the payment of child or spousal maintenance redundant.

Post-separation maintenance cases observed in Family Law Courts

In addition to the 87 separation and divorce cases already analysed, another 9 cases were audited on specific maintenance applications. They illustrate the way in which the ‘no clean break’ separation/divorce operates. Seven of these cases were taken by women and 2 by men.

- In Case 1, a wife sought a lump sum from her ex-husband's savings to relieve her of her debts. She currently got €2,445 maintenance per month but her outgoings were €4,500, which included car loan, Credit Union, mortgage and other debts. The Court ordered that an interim lump sum of €10,000 should be granted to her from a full settlement of €76,000.
- In Case 2, a wife sought €340 per month for mortgage and €400 per month for child maintenance. The couple had 5 children, although only one was dependent. The maintenance order was granted.
- In another 3 cases, the mother sought an increase in the maintenance allowance. Two increases were granted, while in the third case affidavits of means were requested from both parties to assess the maintenance to be paid (the case was adjourned).
- In 2 other cases, the mother wanted the father to pay school fees. In one case, the father was ordered to pay school fees, but his wife was also ordered to trim her other expenses; in the other, the case was ill prepared and adjourned.
- 2 cases were taken by fathers who sought to vary an existing order. In one case, the father wanted to use the couple's joint savings to pay maintenance of €75 per week for two children; the Judge ordered that the savings (of almost €4,000) be split between them, but in addition the father had to continue to pay maintenance of €90 a week indefinitely. In the second case, the father wanted to vary maintenance and sell the family home as agreed, now that both children had finished secondary school. The father paid the mortgage, his own accommodation costs and €1,000 in maintenance each month. The Judge refused to reduce the maintenance sum, but suggested that the father seek a moratorium of the mortgage repayment until the house was sold.

Cases reported in the Courts Service's *Family Law Matters* for Winter 2009 (Vol. 3, No. 2) also reveal a variety of maintenance cases being presented in the Circuit Courts. In one case, a father was in arrears of €5,000. He claimed his wife had a good job, while his property assets had taken a downturn. The wife's barrister argued that he had €700,000 in the bank, which he denied. The Judge ordered him to produce a vouched affidavit of means and to pay his arrears (*'You have to pay them and that's it. Your first priority is to your children. It is unbecoming for people to fight out disputes and get their children involved'*). The Judge also added that once the affidavit of means was examined, he could review the payments (*ibid*, p. 39).

In another case, a wife's income was €907 per week, composed of €250 weekly maintenance, State benefits of €562 (including OPFA and children's allowances) and her work yielded another €96. She had five children and was paying off the Credit Union loan on their house. She wanted to increase her weekly maintenance to €400 and wanted €15,000 to buy a 5-seater van. The husband claimed a lower income of €500 a week from his business. He had savings of €25,000. His wife argued that his business earned €72,000 in one weekend alone. The Judge increased the maintenance to €350, specifying €150 for the wife and €40 for each dependent child. The husband also agreed to give her a lump sum of €12,500 towards a new car. The husband has no interest in the family home (*ibid*, p. 38).

These reports indicate the variety of cases that can be taken by couples after separation and divorce. Each case is considered on its merits and related to the data presented in Court.

Collection of statistics required

The actual number of maintenance orders made by the Circuit Court is not currently recorded in the *Family Law: Statistics* section of the Courts Service's Annual Reports. In the 2008 report under 'Circuit Court Orders', it gives the gender distribution of the 'periodic payment to spouse' and 'periodic payment to child', but it does not give the actual numbers in each case (*see Table 6, Chapter 1*). Furthermore, those figures are compiled in the context of divorce decrees or judicial separations and do not include the subsequent applications to the Courts for maintenance when separated and divorced couples return to the Courts. Reports in *Family Law Matters* for Winter 2009 (Vol. 3, No. 2) indicate that such cases constitute a significant amount of Family Law Court time and carry out an important role in ensuring post-separation and divorce 'proper provision'.

Spousal maintenance and taxation implications

This lack of spousal maintenance as found in the Court data was not expected and yet seems to be a prevalent aspect of divorce settlement cases in Ireland. The data audited in actual maintenance cases and the cases reported in the Family Law Courts give a clearer picture of the ongoing nature of post-separation parenting and maintenance. The data also show the important role played by the Courts.

However, the taxation aspects of these maintenance payments for separated and divorced couples do offer some explanation for this finding. As Shannon (2007, pp. 172-77) noted, the taxation implications of the payment of child maintenance and spousal maintenance are different.

In the case of child maintenance, the following provisions have applied since 1983. If a payment is made for the sole use and benefit of a child (the payments must be annual or periodic, can be school fees, holidays, sports for child), the payments are paid gross, with no deduction of tax to the child or parent. There are no tax allowance deductions for such payments by the payer and as they are not considered income, the child is not liable for income tax. In such cases, the residential parent can claim the one-parent tax credit and/or incapacitated child tax credit subject to certain conditions.

All other maintenance payments are deemed to relate to the spouse and if payments are made directly or indirectly by one spouse for the benefit of the other spouse, then the payment must be considered as gross, so the payer is entitled to a tax deduction for the maintenance payments and the payee spouse is taxable on the maintenance receipts. This provision also extends to maintenance arrangements made under any jurisdictions. Each spouse is treated as a single person, with their tax credit and single rate tax bands.

However, legally separated or divorced couples can still continue to be treated by the Revenue Taxation Office as if they are married. They can do so if both reside in Ireland, if neither has re-married and both must agree in writing to their joint treatment. While each spouse makes their individual returns and is entitled to their respective tax rates and bands, a higher earning spouse can transfer any unutilised tax allowances or tax credits to the lower income earning spouse. The main consequence of this is that there is no deduction for any maintenance payments paid and no liability attaching to the maintenance received (Shannon, 2007, pp. 172-77).

These taxation arrangements are only likely to promote spousal maintenance payments in cases where the spouse is dependent, without any earnings or on a low income, and where the income-earning spouse has a higher income. Given these taxation conditions, child maintenance payments directly to or for the children are likely to be more favoured by the paying parent (who often resents making spousal maintenance payments), while the fact that it is not *taxable* income (unlike spousal maintenance) simultaneously helps to make it more acceptable for the receiving parent than would otherwise be the case. Further research is required to see the impact of these fiscal arrangements on post-divorce families.

5 CUSTODY AND ACCESS DISPUTES IN COURT

Role of the Family Law Courts

Parental separation and divorce has an immediate effect on the family lives of children. Generally, one of the parents initially leaves the family home and the children are left there with the residential or custodial parent. But eventually the couple have to legalise their parenting arrangements or agree their 'custody' and 'access' arrangements. In the UK, these two terms have been changed to 'residence' and 'contact' respectively – which are probably more accurate terms, certainly more user-friendly. The Law Reform Commission of Ireland, too, has suggested changes in terminology for Irish Family Law in its *Report on Legal Aspects of Family Relationships* (2010).

The legislation as outlined in Chapter 1 places the welfare of the children as the first and paramount consideration in settling issues of custody. Justice Walsh, in talking about the application of this principle in the Supreme Court, said: *'Welfare was not ... to be decided by the simple method of totting up the marks which may be awarded under each of the five headings ... all of the ingredients which the Act [Family Law (Divorce) Act, 1996] stipulates are to be considered globally. It is the totality of the picture presented which must be considered'* (cited in Shatter, 1997, p. 546).

There is also an emphasis on alternatives to custody, access and guardianship proceedings. Indeed, Court proceedings can be adjourned to enable the parties to reach an agreement (Section 22 of Children Act, 1997). Any written or oral communication between the parties concerned for the purpose of seeking agreement (in counselling and mediation sessions) regarding access and custody is not admissible as evidence in Court (Section 23 of Children Act, 1997). Thus the Children Act, 1997 tries to reduce the need for Court orders in relation to custody and access by promoting counselling and mediation.

A similar orientation is taken in Court procedures. At the beginning of a Court sitting, the Judge does a call over of cases likely to be presented and the legal teams for the litigants give an update on progress between parties in their particular cases. The listing of a case makes an impact on the couple in terms of their need to come to an agreement; if they do not or cannot, the Judge will 'do it for them'. This explains why many final agreements are made 'on the steps of the Court'.

The Children Act, 1997 specifies that if the Court makes such an custody (residence) order or access (contact) order, it must be satisfied that the agreement is a fair and reasonable one, which in all the circumstances adequately protects the interests of the parties and the child. Further, Section 16(2) of the 1997 Act specifies a fitness requirement for custody: *'Where the Court grants a decree of judicial separation, it may declare either of the spouses concerned to be unfit to have custody of any dependent member of the family who is a minor'*. However, Justice C.J. Ó Dalaigh in *B v. B* (1975) stated that even when the welfare of a child requires that one or other parent should by reason of character or conduct be excluded from consideration, as being a person unfit for custody, *'the Courts should always be reluctant to reach such a conclusion, because the welfare of the children will rarely be advanced by a verdict or condemnation of one or other of the parents'* (Shatter, 1997, p. 547).

The Court can also in its proceedings for a care order or a supervision order adjourn the proceedings and direct the Children and Family Social Services of the Health Service Executive (HSE) to undertake an investigation into the child's circumstances.

Marital behaviour and custody

Historically, a spouse responsible for marital breakdown was unlikely to get custody of the children. But this has changed since 1964. As Justice C.J. Finlay said in the *S v. S* case (1983), custody is *'not a prize for good matrimonial behaviour ... there can be no suggestion of custody being awarded on the basis of reward or punishment to either of the parents'* (cited in Shatter, 1997, p. 546). Any evidence as to which of the parents contributed to the breakdown of the marriage is only relevant *'to the character of the respective parent with a view to deciding whether the welfare of a particular child would be best served by its being left in the custody of one parent rather than the other'* (*ibid*, p. 547).

This shows that the Irish legal system has always shown respect for the parent–child relationship and does not consider fault as a basis for denying custody. The marital conduct will only be regarded as relevant in so far as it ‘relates to an estranged spouse’s parenting capacity, impacts on a child’s development and affects the relationship between parent and child’ (Shatter, 1997, p. 547). In effect, custody is only denied if a parent is deemed unfit to parent due to a violent or unstable personality (*see below*).

Evidence from children

Section 26 of the Children Act, 1997 permits the Court to take into account the child’s wishes in the matter of custody. Section 27(1) says that it is not necessary for the child to be present in Court. However, Section 27(2) says that if a child requests to be present, the Court should grant the request unless it appears to it that ‘*having regard to the age of the child or the nature of the proceedings, it would not be in the child’s best interests to accede to the request*’. Section 21 of the 1997 Act covers the giving of evidence through a live television link. There is also a provision for the appointment of a guardian *ad litem* for the child, if required. Hearsay evidence of a child’s alleged statement may be admissible in such proceedings (Shatter, 1997, p. 546).

Residence arrangements

While ‘custody’ is the legal term used in Ireland, there is no legal distinction made between ‘legal’ and ‘physical’ custody. There is no statutory definition of the term ‘custody’. While joint *legal* custody is the norm, we will show that residential arrangements for children are a second aspect of separation and divorce arrangements. In Irish Courts, joint custody does not actually tell us about residential arrangements since it is compatible with a number of residential situations, from shared care to monthly access visits by the non-resident parent.

Physical welfare of the child

In the past, a ‘tender years’ principle was maintained as mothers had long been regarded by the Courts as *prima facie* the best people to minister to the physical and emotional needs of their young children and thus were normally given custody of children under 12 years of age. The availability of mothers during the day in the past was a factor, but as children get older Courts can take the view that children may need their fathers. As Shatter (1997) points out, there are no hard and fast rules and each case will depend on the circumstances. He also notes that welfare and responsible care are more important than happiness. A parent’s financial status is not important in that one parent can pay child maintenance to the primary carer as required. Courts try and encourage parents to cooperate as parents and are critical of those who try to deliberately set out to turn a child against another parent. If such allegations are proven, the abusing parent may be denied custody and even contact. Currently, it is the case that while custody is joint, residential care is more likely to be undertaken by the mother in a majority of cases. The primary legal disputes are between sole and joint legal custody. But even when joint legal custody is given, there can still be further disputes about access and contact.

Factors considered in making custody orders

In Ireland, unlike in the UK, there are no factors that are formally provided to Judges in relation to the making of custody orders. There are several factors in the UK’s Children’s Act, 1989 that are considered when making custody orders (Bainham, 2005, p. 41). They are all child-centred and may indeed be implicitly used by many Irish Judges in family law cases. These factors are listed below, not in any order or given any particular weighting, but they are interesting to note in the Irish context:

- the ascertainable wishes and feelings of the child concerned (considered in the light of his or her age and understanding);
- the child’s physical, emotional and educational needs;
- the likely effect on the child of any change in his or her circumstances;
- the child’s age, sex, background and any characteristics that the Court considers relevant;

- any harm which the child had suffered or is at risk of suffering;
- how capable each of the child's parents (and any other person in relation to whom the Court considers the question is relevant) is of meeting his or her needs;
- the range of powers available to the Court under this Act in the proceedings in question.

Sole custody orders in Ireland

Irish custody legislation is quite progressive. As noted from the brief historical review above, joint custody is the post-separation/divorce norm for married couples in Irish Family Law Courts. Before examining the data collected in this study, it is instructive to give the details of custody as found in a recent family law reporting project conducted by Coulter and her report entitled *Family Law in Practice: A Study of Cases in the Circuit Court* (Coulter, 2009b). Coulter's review of 168 national data cases indicates that in 48 out of the 168 examined, sole custody was awarded to 38 mothers and 10 fathers (*ibid*, p. 68).

Coulter's (2009b) content analysis of Court files revealed some variation between Circuit Courts around the country:

- **Western Circuit Court:** In 27 cases where children were involved, 4 mothers and no fathers were granted sole custody.
- **Eastern Circuit Court:** Out of 29 cases where children were involved, one mother and 2 fathers were granted sole custody.
- **Northern Circuit Court:** Out of 21 cases where children were involved, 8 mothers and one father were awarded sole custody.
- **South-Eastern Circuit Court:** Out of 13 cases where children were involved, 2 fathers and 2 mothers were awarded sole custody.

It is not possible to get accurate or representative data on the gender distribution of custody awards from any form of convenience sampling, including in the present study. Regrettably, while the *Family Law: Statistics* section of the Courts Service's Annual Reports gives the number of custody/access orders made, it does not give a breakdown of custody as distinct from access orders, or a breakdown on how many sole custody orders are awarded and their gender distribution.

Coulter (2009b) found that the basis for awarding sole custody orders was in the 'best interests of the child'. They are generally made on the grounds of 'unfitness' of one of the parents to be granted custody. This can be due to some personal characteristic displayed (such as violent behaviour towards the spouse or child), severe mental illness, alcoholism or drug addiction. However, sole custody orders can also be made because a parent did not exercise parental access to children as agreed and ordered by the Courts (*ibid*, p. 63). Custody orders will only be made in cases where there are dependent children. These findings by Coulter are replicated in the present study.

ANALYSIS OF STUDY'S COURT DATA

Of the 87 cases of separation and divorce analysed in the present research, joint custody awards were made in 70 cases and sole custody orders in 11 cases. In the 6 remaining cases, there was no order made since the children were older and free to make a decision for themselves. The most common judgment recorded in the Courts was 'joint custody and liberal access', the time details of which were not necessarily specified, but had been agreed by the parents. In addition to the separation and divorce cases, 3 post-separation custody cases were audited.

Findings on awarding of sole custody orders

In several cases examined, sole custody orders were awarded to one parent on the basis of the exclusion of the second parent on two major grounds – violent behaviour posing a physical threat and a failure to maintain contact with children or avail of access rights. These cases are described below.

(1) A physical threat to spouse or child

- In Cases 70, 65 and 67 and in one of the post-separation custody cases, sole custody orders were made on the basis that one parent was seen as constituting a physical threat to the spouse or to the children.
- In Case 70, the 'unfit' parent was a mother. The couple had a 4-year-old boy who lived with his maternal grandparents abroad. It was agreed between the parents when they separated that the child would be looked after by them. The father kept sending money to the grandparents. His wife was mentally unstable and had attacked him. He was concerned about the welfare and education of his son and so applied for a judicial separation and custody of the child. His wife did not respond to the application. Sole custody and a legal separation were granted to the father, with liberty to the respondent mother to apply.
- In Case 65, the father left when the mother had served a barring order on him for violent conduct. She was granted sole custody of the three children, aged 21, 19 and 15. Having been separated for over 14 years, she applied for a divorce and a sole custody order for the 15-year-old only. At the time of the separation, the father had been granted access to the children, but he had never availed of it and there had been no contact between him and the children since he left. However, in the last 2 years preceding the Court case, the older children had got in contact with him (the youngest child had not). The mother was granted a divorce and the sole custody order remained. Had the father availed of access, he may have been able to contest the sole custody order.
- In Case 67, the wife had left the family home after a particularly violent attack by her husband, which left her quite incapacitated and on the basis of which she had been granted a permanent barring order. She secured a judicial separation on the basis of Section 2.1(6) of the 1989 Act, which relates to the conduct of parties. The couple had one young girl. In addition, the father had not complied with a maintenance order that was in operation. The wife had a current safety order in place, but she sought a permanent barring order because of her disability and a judicial separation, which she obtained. She was also awarded sole custody. The respondent father was ordered to pay maintenance of €65 per week.
- In Case C1 (audited as one of the 3 post-separation custody cases), domestic violence was also involved. The applicant wife with two children, aged 11 and 4, sought a sole custody order. There was a history of domestic violence and she had to resort to a women's aid refuge in the past when she sought a barring order. She also feared that the father would take her children out of the country. The Judge awarded her a barring order and an interim sole custody order. There was no order in relation to access made in this case.

In all of these cases, there was a legal record of serious violence and this was the major reason for awarding a sole custody order. In such cases, even supervised access is not always agreed, although fathers can always return to the Courts later to seek access.

(2) Failure to maintain contact or to continue access to children

Another major reason for awarding a sole custody order was a parent's desertion of the family or a failure to maintain or continue contact with the children. In this study, 8 mothers became sole custodians since their husbands had deserted them and their children; 6 of their husbands lived abroad; and 2 other fathers had left, found new partners and formed new families.

- In Case 66, the wife was granted sole custody at the time of her separation since her husband lived abroad. The couple had two children, aged 13 and 10, neither of whom the father had made any attempt to see. He was supposed to pay a maintenance order through the Courts, but never did. She was granted a divorce and sole custody of the children. The Judge ordered that the applicant wife was entitled to make an application in respect of the respondent's estate (due to his unpaid maintenance obligations). But her husband will have no claim on her estate. In the eyes of the law, fathers' financial responsibilities towards their children can live on, while their failure to stay in contact and to pay maintenance deprives them of their custodial rights. However, in this instance the father showed no interest in contact with the children.

- In the other 7 ‘failure to maintain contact’ cases (Cases 72, 78, 80, 82, 83, 84 and 87), mothers were awarded sole custody because the fathers effectively had not exercised their access to their children, paid no maintenance and had lost contact with their children. The mothers were, in effect, ‘deserted wives’. In these cases, the wives were the plaintiffs since the husbands generally did not turn up in Court to seek custody.
- In Cases 78 and 82, despite their long absences and no contact, the husbands did turn up for their divorce cases. Both case histories revealed that the men had left years earlier. Both were residing with new partners and divorce would finally acknowledge their positions. Sole custody remained with the mothers in both cases.

In these cases, if sole custody (e.g. through desertion) has been the default practice, then at the divorce hearing the status quo was legally recognised on that basis. This was articulated by the Judge in Case 78, where although the father had returned, his son had lived alone with his mother until he was 12 years of age. In Case 87, the father’s whereabouts were unknown so sole custody was the only option. These couples had been separated or ‘deserted’ for years without any legal agreements and the fathers had lost contact with their children. These findings are consistent with other studies where if contact is lost at the initial separation stage, then ‘no contact’ becomes the status quo (see Chapter 2).

Joint custody and residential care arrangements

Joint custody of children does not necessarily mean shared residential care or, what might be called in the USA, joint *physical* custody. Coulter (2009b, p. 68) noted that there were 18 shared residence cases in the 168 national trends figures she analysed; the most dominant category was residence primarily with the mother (74 cases).

In the present study, in the majority of cases where joint custody was awarded, ‘liberal access’ was generally agreed as well. However, in the majority of cases, it was noted that the dependent children would reside with their mothers (see Table 10). This was not usually contested by the parents. This situation may be a continuation of the status quo, where mothers were seen as primary carers. These agreements also suggest that the majority of couples who separate may not be especially ‘conflict-ridden’ or can at least agree on custody issues.

Table 10: Residential care arrangements for children (2007)

Residential care arrangement	No. of cases
Reside with mother	63
Reside with father	6
Shared residential care with each parent	8
Weekends with one parent	4
Children are allocated between parents	2
Child free to choose residence	3
Child with maternal grandmother	1
Total	87

Residence primarily with mother

In 63 of the cases audited, it was agreed that the children would reside primarily with their mothers (see Table 10). This is the most common agreement in all countries and reflects the dominant role of mothers as primary care-givers during the marriage. In Ireland, many women leave the workplace for an interim period when they have young children. In some cases, this gives their husbands a greater freedom to devote more time to their careers. The residential parent is also, to an extent, related to the parent who remains in the family home and, as seen in Chapter 4, mothers predominantly were the spouses to remain on in the family home. This facilitates continuity for the children.

Residence primarily with father

In 6 cases, it was agreed that the children would reside primarily with their fathers.

- In Case 18, the children (aged 23, 16 and 11) were residing with their father. Their mother was in a new relationship with children and her 'first' children visited her each week.
- In Case 33, the wife was also in a new relationship with two children, while the children of her first family (aged 18 and 16) lived with their father. She visited them regularly.
- In Case 10, the father remained in the family home and his 18-year-old daughter continued to live there with him.
- In Case 37, the father also remained in the family home and one child, aged 23, who had special needs lived with him.
- In Cases 63 and 77, the sons resided with their fathers since, in both instances, the mothers have mental health problems and limited access to their children.

Primary residence with fathers is rarer in all countries. However, these findings replicate those of other studies, such as that of Maccoby and Mnookin (1992) who found that children often remained with their fathers when the mother had left the marriage. They also found that children were more likely to stay with their fathers if they owned the family home or in cases of maternal deficit, such as mental health problems.

Shared residential care

There were 12 cases out of the 87 audited where parents agreed to share residential care and whose parenting arrangements were detailed in Court. This constitutes a departure from the traditional primary residence with one parent, which is still the norm. This new, more egalitarian division of childcare probably suggests that since both parents are joint breadwinners, some joint parenting care may have been in place before they parted, which they will try to continue in their lives post-separation and divorce.

The form of shared care varied, with 8 of the couples sharing residential care of their children during the week. It is notable that the majority of these children were teenagers.

- The couple in Case 43 shared joint custody of their two children, aged 13 and 14, with a week on/week off arrangement running from Friday to Friday. Both of the children attend the same school and holiday access is agreed on a fortnightly basis. The father pays a monthly maintenance of €200 towards the children. He bought his wife out of the family home and she had re-housed herself. Both were financially independent of each other. He now had a new partner and another child.
- A similar time share was in place for Case 60, with shared joint custody of two children, aged 15 and 13.
- Case 48 was a divorce application, involving two children, aged 13 and 10. The father sought increased access after the parents had separated and by the time they had divorced, they shared the care on an equal basis.
- The parents in Case 52 shared the residential care of their children, aged 13 and 10.
- In Case 44, the mother was the breadwinner, while the father was at home. They had five children, aged 7-19. The youngest children would stay with their father during the week.

In 2 other cases, the shared residential time was not quite equal:

- In Case 68, the 16-year-old daughter spent a few nights a week with her father. In this case, the Court noted that the parents lived close to each other.
- In Case 42, the children, aged 22 and 15, spent at least one night a week and every weekend with their fathers.

In one case, the parents shared the residential care of different children on an agreed schedule:

- In Case 51, the eldest child, aged 15, stayed with his father Mondays to Fridays and with his mother over the weekends. The younger son, aged 10, spent one week with his mother and the next week with his father. Alterations were often made to the schedule, but there were no problems – each parent was responsible for the child when they were with them.

In 4 cases, the shared residential arrangements were based on weekends with the fathers:

- In Case 44, the wife, who was the primary breadwinner, sought a judicial separation, having been separated from her husband for 3 years. She was buying her husband out of the family home and they had five children. The husband paid no maintenance. They were setting up two separate homes and it was agreed that the younger children would 'spend the weekends with their dad'.
- Couple 55 sought a judicial separation. They had two boys, aged 15 and 13, and they spent Saturday night to Sunday night with their father and the rest of the time with their mother. Access was flexible and would not be inhibited by either party.
- Similarly, in Case 54, the children, aged 15 and 13, spent every weekend with their father.
- In case 49, the mother sought a divorce. Her new partner bought out the family home for her and her two children aged 5 and 9 lived with them during the week but spent the weekends with their father.

As noted in Chapter 3 on the methodology used in the study, it was not possible to collect data by socio-economic group and thus there is no valid basis on which to compare custody outcomes by social class. However, Juby and Le Bourdais (2005) found that couples where both parents were in the labour force were more than twice as likely to share custody of their children when they separated. This finding is replicated in the present study, albeit on a small sample size. Juby and Le Bourdais also found that shared custody became increasingly likely as family income grew and when mothers had a third-level education. Work schedules were also found to be important: if fathers were working during the hours when their children were most likely to be at home (e.g. evenings and weekends), couples were significantly less likely to opt for shared custody. This was not the case in the present study, where weekend care was found to be a central aspect of shared residential care between separated parents.

In 2 further cases of shared residential care, the parents operated a type of 'child share':

- In Case 74, the couple agreed that their two sons would live with their father, while the daughter would live with her mother.
- A similar decision was taken in Case 76, where one daughter lived with her mother and the son lived with his father.

In one case, the child involved lived with her paternal grandparent:

- In Case 70, the father had got sole custody of his young daughter, who resided with his mother abroad.

Variety of post-separation family types

The above residential arrangements show the emergence of new and different kinds of family life in Ireland. Both parents wished to continue to parent actively. The agreed provisions seem to emerge from cases where the parents have financial independence from each other and lived their lives together as joint earners with shared childcare arrangements. While divorce is very upsetting, it is important to note that the majority of couples sort out their affairs without needing to have full Court hearings. It also shows that couples can adopt a variety of post-separation/divorce parenting arrangements. No details were obtained on the time spent with the non-resident parent in the majority of joint cases with agreed access, so the form such contact takes is not known.

Negotiating access after separation and divorce

The discussion above covered separated or divorced couples who share joint custody of their children. But in the majority of cases, the children reside primarily with only one parent – the residential parent – while the second non-residential parent has access to the children.

Overall, in 2008 there were 1,180 judicial separations granted and 446 custody and access orders, while 3,588 divorces were granted and 797 custody and access orders made in the same year. From these figures, it might be deduced that more orders may be made at the time of separation since

that is when the actual issue of childcare and access initially arises. But such matters can also arise several years later when the same couple divorce or when one or other of them starts a second relationship. However, access issues increasingly occupy a high proportion of Court time.

Since these are snapshot figures, it is hard to estimate how many couples have to return to Court for further orders after they separate or divorce. International research indicates that couples with children are more likely to do so, but it equally depends on whether couples are in a position to move on with their lives or whether some aspects of their relationship linger on for a solution. Overall, in Ireland the majority of parents are probably unlikely to have to go to Court again.

Custody cases are fewer, but have clearer outcomes for parents. It was noted in this study, however, that joint custody and agreed access was the most common outcome in the cases audited. However, legal separation or divorce does not resolve all matters. In some cases, the Court orders made for maintenance or access are not implemented by one or other party to the agreement. If the matter is not sorted out between them and their solicitors, they return to Court. Not surprisingly, some couples find it hard to initially imagine their post-separation and divorce lives. For fathers, in particular, it constitutes a very big change for them not to see their children. They find that they now have to plan to see them. Sometimes this changes their past orientations to their children and, much to the surprise of their wives, they want to be involved.

Research in the UK shows that although parents are expected to put the interests of their children first and that their relationship with their children should not be affected by divorce and that they should act responsibly, a multitude of issues (such as the amount of child support received and the unresolved anger between the parents) remain central to the parents' concerns (Smart and May, 2004). While parents are supposedly going to Court about legitimate concerns for their children, Smart and May found that other 'illegitimate' factors also surfaced in many cases examined, access issues being chief among them (*see below*).

Access cases take up a large amount of time in the Family Law Courts and constitute a considerable caseload. In the present study, 34 cases were examined, all concerning parental access to children *after* the legal separation agreements or divorce. Court decisions on access can be made relatively quickly (by granting interim access) and couples may be asked to return in a few weeks or months for another review or a full hearing. Other cases can give rise to issues of custody rather than access, as detailed in Access Case 16 (*see p. 66*). Access issues are always more controversial since, for example, one or other parent has got sole custody or access times and conditions may be very detailed and specific. The access issues examined in this study were categorised under a number of headings to illustrate the variety of ways in which access cases are raised by parents, with the Court responses to their cases detailed below.

Underlying issues in access cases

Smart and May (2004), writing on legislative changes in British family law, said that when custody issues were reduced to practical issues (e.g. where a child should live), it was expected that emotional issues (e.g. jealousy, fear and emotional pain) were to be deflected by the overarching issue of the paramountcy of the welfare of the children. In that process, particular issues became legitimate, while others were redefined as atavistic and unhelpful (*ibid*, p. 348). There was a view that to persist in adult-focused arguments was to engage in behaviour that was harmful to children (Kaganas and Day-Sclater, 2004). This new etiquette of post-separation/divorce parenting called for major cultural and normative transformations in a short space of time (Day-Sclater, 1999) This was even expected of couples whose marital relationships might have been built on different normative and emotional practices. Thus, according to James (2003), people's expectations of the law were not met by the Courts. The legal framework was too narrow to solve the many non-legal problems associated with disputes over children. Couples still constructed their own view of fairness, rights and justice.

It is claimed by some researchers that one of the reasons why parents go to Court is that they wish to allocate blame and achieve vindication (Pearce *et al*, 1999). Rhoades (2002) found that conflicts over contact were underpinned by a host of other issues, not directly related to the welfare of the child. Smart and May (2004) found that such disputes unfolded a complex picture of animosity and anger. There were underlying disputes over money and new relationships, recrimination and couples' normative expectations of families, as well as domestic violence and child abuse.

Trinder (2007) claimed that contact disputes are gendered. In the UK, fathers are often construed as 'dangerous', while mothers are construed as 'malicious' (Trinder, 2007). This may reflect the gendered dimension of post-separation families, where the mother is most likely to be the residential parent. For example, in 2001 in the UK, 91% of children in lone-parent families lived with their mothers (*ibid*, p. 83). The 2007 research by Trinder shows that more complex issues underlie disputes over contact, such as reliability, children's reactions to access, parenting quality and competence, the presence of new partners and a relationship between money and contact. The author also found that mothers acting as gatekeepers were more likely to report that children were upset by the transitions around access or were refusing contact. But fathers did this as well: they were more likely to accuse mothers of blocking contact, while mothers were more likely to raise concerns and fears about violence. The cases observed in the present study are now analysed.

Results of access cases

From an access to a custody case

Case A16 revealed how an original access case was changed to a sole custody order. The divorce proceedings were underway in another jurisdiction where the husband resided. The husband sought a variation in the access agreement, but his wife did not agree with the proposed changes. The respondent wife moved back to Ireland with her three children, aged 7, 5 and 2, when her husband left the family home and went to live with another woman. As the divorce was being settled in another jurisdiction, the Judge would not deal with any matters relating to finance. The husband claimed that his wife was not adhering to the terms of the consent order on access. The father was in a new relationship and his partner had two children, aged 8 and 5, from a previous marriage. He wanted his children to get to know them and his new partner. To help this process, he wished to travel with the children and wanted holiday access to them, including 5 nights at Easter and Christmas and a minimum of 10 nights in the summer. He also wanted to take his children to visit their paternal grandparents, who lived abroad.

At the time of the Court hearing, the mother was allowed to keep the children in Ireland and retain their passports (this was the outcome of previous proceedings). The father also wanted to have direct telephone contact (rather than mobile contact) to the house phone so he could communicate with the children on a more regular basis. His wife refused to facilitate telephone calls, claiming that she did not want any calls after 6pm so as not to affect the children's routine. She also claimed that while the father had access at weekends on Saturdays, he had never taken the youngest child out. Since he had left the family home when the youngest child was born, he had never developed a relationship with that child. The mother questioned his parenting skills, claiming that he had not seen his children for a full year.

Under Section 11 of the Guardianship of Infants Act, 1964, the Judge granted sole custody of the children to the applicant mother, with their place of residence in Ireland. The father retained guardianship rights and she must keep him informed of their progress at school. He will be entitled to attend all functions and events and she must notify him of any health or religious issues. The Judge ordered telephone contact to take place between the hours of 5-6pm on two evenings a week. He can have access to the children every second weekend in each month and travel to Ireland to see the children on a Saturday. This access shall not initially be in the presence of his partner, not until the children make their first access visit abroad to his place of residence. The Judge also ordered that the mother take the children to the respondent father, who lived abroad, for three nights at Easter and at Christmas, and the father should be permitted to take the children

on holiday for a week in the summer. Telephone access to the mother should be provided while the children are on holiday with their father. The children may be taken abroad on a holiday, but adequate notice must be given at least 4 weeks in advance of this. Both parties must promote the welfare of the children by speaking positively of the other parent. All letters, gifts and cards sent by the respondent father should be given to the children by the applicant mother. This was a complex case, but illustrates the difficulties that can arise between estranged couples.

However, in this instance, the welfare of the children was put to the fore. A balance was drawn by the Judge, who granted the mother sole custody while he also extended the father's access to the children. The presence of a new partner is often unsettling if one parent blames the other for the breakup of the marriage. In this instance, it seems that the Court was not interested in the past nor in the father's earlier limited contact with his children, but rather was restructuring the paternal relationship in terms of the welfare of the children and ensuring paternal access (Davis, 1998, p. 126; Rhoades, 2002). The Judge suggested that initial access and negotiation be mediated and supported by the separated wife. There were geographical distances involved in this case and the financial aspects of the actual divorce were being heard in the UK. Nevertheless, the mother and children had returned to Ireland after the separation and so this aspect of the divorce was being settled in Ireland. By granting the mother sole custody of the children in Ireland, the Court increased her control over the children while making her simultaneously responsible for facilitating ongoing access.

No access because the children 'do not want to see' the other parent

Typically in this type of case the non-residential parent complains that they are denied access to the children. In response, the residential parent claims that the children do not want to see the other parent. This raises the issue of whether parent-child contact can be forced or encouraged through the Courts and how such issues are addressed by the Judges. The following cases illustrate the workings of the Court in these access issues. In both cases, mothers were the plaintiffs.

- In Case A11, the applicant divorced wife claimed she had been refused access to her 9-year-old daughter. The father responded that their daughter did not want to spend time with her mother so he did not force her to do so. The Judge ordered that access should take place as agreed on Sunday afternoons, emphasizing the importance of the mother-child relationship. It was agreed a full hearing on the matter would take place the following month.
- Case A32 also featured a divorced wife who had been denied access to her 9-year-old daughter. The father claimed that the daughter did not want to see her mother. Under their divorce agreement, the mother was supposed to have the child from Friday to Sunday, and for 3 days at mid-term and at Christmas. However, the child had not seen her mother since Christmas. Further, the father claimed that the daughter rang him all night when she last stayed with her mother. The Judge ordered the father to bring the child to see the mother in a designated shopping centre and said that the mother was to have the child from 2-6pm each Sunday. He also told the father to encourage the child to see her mother.

In these cases, the Judges ordered that access be resumed immediately, usually on a limited time basis initially. They assume in most cases that access should be promoted by both parents for the welfare of the child. The Court upheld the rights of parents to access their child and the right of a child to have access to their parents. It imposed a legal framework for the child's welfare, which might seem at odds with the parents' reports on the children's viewpoints.¹³

¹³ While the Judge ordered access as beneficial for all, the recent report by One Family (2010) proposed that contact centres be established in Ireland to facilitate contact between parents and children among estranged couples. The report also provides some valuable insights into the difficulties that some parents have if they see the second parent as a less experienced or effective parent. Further, the parent who is 'absent' may find it harder to look after the child than the parent who parents continuously. This is especially the case when younger children are involved. It will be noted later in this report that the Judge often suggested a grandparent might facilitate these initial access visits.

Parents claim that access is not in 'the best interests of the children'

Some residential parents refuse to provide access to the other parent, citing that it is not in the best interests of the child. There may have been allegations of abuse, fear of abduction, domestic violence or drug and alcohol abuse relating to the non-residential parent. In effect, the claim is that the parent is an 'unfit' parent. Section 20 of the Child Care Act, 1991 confers extensive jurisdiction on the Court to give interim direction as to the care and custody of a child. The Court can request a Section 20 report into the child's circumstances and welfare. These reports can help the Court to form some objective view of the effect of parental contact on the child, rather than believe the allegations of a separated parent who may simply wish to obstruct access. In some cases, these reports can lead to a care order or, more typically, to a supervised access order in the case of separation and divorce.

- In Case A6, a separated husband sought mid-week and overnight access. The couple separated by consent, but only the father was in Court and represented. They had three children, one of whom has severe dyslexia. His wife maintained that the access visits were not helping their 8-year-old, who had behavioural problems. She did not respond to the medical reports and access queries. This case was called to mention the following month, when a psychiatrist could examine the evidence. Cases like this can continue over several weeks, with repeated returns to the Court for guidance with an expectation that eventually the matter will be resolved.
- In Case A42, a separated applicant claimed that her husband has made 7 weekly visits for a hour on Tuesdays, but that only one visit went well. The child became distressed during the visits. A Section 20 report was being undertaken. The Judge was reluctant to suspend access without hearing the views of the respondent father, who was not in Court. The couple were asked to return to Court two months later. The wife's construction of events was not accepted by the Judge.
- In Case A21, the applicant mother wanted to alter her access arrangements because she claimed they were not working in the best interests of her 7-year-old son. The respondent argued that the arrangements were made in association with a psychiatrist and a psychotherapist, who gave evidence at the hearing. The Judge informed the applicant that the present interim access arrangements were made in the best interests of the child and that they should continue. He also informed the applicant that she 'was taking out her problems with the marriage on her son' and urged her to continue to have psychotherapy and to facilitate access.

Voice of children invoked in one case

The children were not consulted in the above cases; Section 20 reports were requested instead. However, in one case (*see below*), the Judge did consult the children to get their views on the matter of contact with their father:

- In Case A43, the separated mother was denying access to the father because she claimed it was not in the children's best interests. However, a specialist report claimed that the children were being coached into a negative stance on their relationship with their father. The Judge interviewed the boys (off the courtroom) and concluded that they did not want access. He directed that the children should be left alone for two months. The boys felt that their present counsellor was not impartial and the Judge appointed another counsellor, who was asked to produce another report for the Court. The Judge also ordered the mother to cooperate with the access agreement and not to be negative in relation to the children's relationship with their father. This couple will have to return to the Court, when the Judge will adjudicate again on what is in the children's best interests.

Unfit to parent

Parents can refuse access on the basis that the other parent is 'unfit' for access. They can make this claim either verbally in Court or they can obtain a professional Section 47 report, which can relate to the welfare of either the adult or child involved in the proceedings. These reports – which are expensive, with the costs borne by the applicants – are most frequently ordered where there is a dispute over guardianship, custody or access, or over the *kind of access* that should be permitted.

A Section 47 report is carried out by an independent expert, who can also be required to give evidence in Court. Their independent evidence can be used to facilitate decision-making by the Judge.

- In Case A25, the couple had two children, who spent every second weekend and every Tuesday evening with their father. However, the mother claimed that the children no longer wanted to see their father. In response, he had requested a Section 47 report. The consultant who was preparing the report was in Court and proposed an interim contact plan for 4 weeks until the final report was completed. The mother, who got legal aid, agreed to the plan (she and the children were anxious to sort out these matters before the summer holidays). She may not have realised that the father and children have rights of contact with each other or that her husband would respond to her claim by seeking a Section 47 report.
- In Case A20, the applicant mother sought increased access to her children, aged 9, 13 and 18. She had been barred from the home because of drinking and assaulting the children. This restriction was in place since 2004. A medical report showed that she had stopped drinking for the previous 4 months and was now fit to have extended access. Her current access to the children was on Saturdays between 1-7pm, but because of her work commitments she could only avail of access until 4pm. Counsel for the respondent husband believed the medical report was too one-sided and did not address the needs of the family, the wife's ability to re-integrate into the family and the impact of increased access on the children. While the applicant claimed that drink was the only issue that was disputed, the respondent requested that a Section 47 report should be carried out before access could be extended. Both parties were seeking sole custody orders. The Court ordered a Section 47 report before access could be extended or a decision on custody made.
- In Case A28, the applicant wife sought a barring order because her husband entered the family home, where she and their daughter lived, and behaved aggressively. The father wished to remain in contact with his 12-year-old daughter. He objected to his wife's new partner living with them. The wife was granted a barring order and the Judge told the father that he would have to make a formal application for access to his daughter.
- In Case A12, the wife claimed that the father had a gambling addiction and was unfit to access children. The father, however, was seeking more access. The wife claimed that he had not met the access agreements made after the divorce. In response, he claimed that he was 'too depressed' to do so, but he felt better now and wanted more access time overnight and unsupervised access. The Judge explained to the father that if access did not take place as agreed, the children become upset and so it was important to maintain existing access agreements. The Judge ordered that the agreed arrangements of access (for 3 hours every Saturday) be acted upon and that access would be reviewed in 3 months' time.
- In Case A8, the separated father was denied access to his two children, aged 9 and 13. His former wife refused him unsupervised access, even though the psychologist's report said that access could take place. The Judge recommended the appointment of a guardian *ad litem* and sought sworn affidavits of what each parent wanted in access arrangements.

In all these cases, external evidence-based reports were commissioned and used to investigate any claims of 'unfitness to parent'. This gives legal protection to both child and parent.

Obstruction of access by other parent

Even where access is agreed, it is often obstructed by the residential parent, who can act as a gatekeeper to their children.

- In Case A29, the father raised difficulties in relation to access. While he was supposed to see his children from Saturday at 12 noon to Sunday at 6pm, he complained that he did not get his children the previous Saturday until 5pm as they had been at a party. Further, when he went to collect the children, he was threatened by his brother-in-law. The Judge ruled that there should be no organised activities on the weekends when the father had access and that the father's access must be upheld.
- Case A10 involved a separated couple, both present in Court, who had two children, aged 8 and 5. There had been great difficulties with access since they separated. A Section 20 report had been awaited for several months. There was a Circuit Court order for access in

place as a result of an appeal from a District Court case. The applicant mother stated that the Court order did not include telephone access and that access should take place around the activities of the children. The respondent father complained that he had been denied telephone access and further that the mother showed up late on access days with the children or sometimes did not turn up at all. In response, she claimed that the time of their daughter's dancing lesson clashed with the time of the father's access on Saturdays. The Judge was of the opinion that the person who has the child at the time of the activities should be the one who brought and collected the child to and from the activity.

The Judge asked the couple to deliberate outside the courtroom and they returned with an agreed schedule. It was agreed that access would take place every second weekend from Saturday at 2.30pm to Sunday at 6pm and when there was no dancing lesson, access time would be from 12 noon instead of 2.30pm. Telephone access was to be facilitated (by the mother) between 7-7.30pm on Tuesdays, Wednesdays and Thursdays during weeks when the father did not have the children. He was also allowed to take them on a week's holiday of 7 days. The father would collect and return the children to their mother's home. The Judge stressed that both parties must be on time when facilitating these arrangements and they must both work to facilitate and encourage access. Their case and their progress on these access arrangements would be reviewed a month later.

Both these cases illustrate the major role that the Family Law Courts play in developing and promoting parent-child access by dealing with attempts to obstruct access. Judges implicitly work on the principle that access should be promoted, granted and not obstructed by the residential parent. This creates a cultural context for respecting access as a legal right for all concerned.

Variation requested in existing access orders and new partners

When access is specified and especially in cases of restricted access orders, the applicant can return to the Court to vary the order. There were several examples of such cases in the present study.

- In Case A3, the 5-year-old son lived with his mother during the week and saw his father 3 weekends a month. The mother now sought to have her son 2 weekends a month. The father had a new partner and daughter. The Judge permitted that access arrangements be continued as they were for 18 months, drawing the mother's attention to the fact that the father continued to pay maintenance. He stressed that the father-son relationship must be maintained and told the mother that she could apply at a later stage for 2 weekends a month. It may be that the presence of a new partner had invoked retaliation from the mother.
- In Case A38, a separated mother also wanted to vary an access order. Their daughter was collected by her father on Wednesdays after school and stayed overnight with him in her grandparents' house; he then brought her to school on Thursday mornings. He also had access from Friday to Sunday every second weekend. This arrangement had operated without any problems for the previous 6 months. But then, the mother complained that her child was tired when she came home after overnight stays with her father. However, the father denied this since he lived only 10 minutes from the school. He had also got new accommodation, with a room provided for his daughter. He sought permission to have his daughter stay there overnight. It later transpired that the father had a new partner. His house also had another occupant.

The Judge refused permission for the daughter to stay when there was a stranger in the house. Otherwise, he recommended access remain as it was: the father could continue to have access 3 weekends out of 4 from Friday after school until Sunday at 11pm. Accusations of abusive texts were claimed by both parties. The Judge ignored these and said that they had a framework for access and must work together on it.

Research elsewhere has shown that disputes can arise or be reactivated when the equilibrium established between couples is disrupted by one of them entering a new partnership (Smart and Neale, 1999).

Access time and travel time

A separated couple often live miles apart in Ireland and this creates difficulties in organising and continuing access arrangements.

- This issue was raised in Case A7 in which a separated applicant father wanted increased access to his son. In particular, he wanted longer hours of access at the weekends. There had been a 12-18 month absence in the father–son relationship and the father was anxious to build on their current relationship since he had only resumed access 6 months earlier. Access was going well. However, since it entailed a 12-hour-long round trip, the father wanted weekend access to begin on Fridays at 6pm (instead of on Saturday mornings) and to finish on Sundays at 6pm for one of the weekends and from Saturday at 10am until Sunday at 6pm for the ‘shorter weekend’. He also wanted to have the son on every Bank Holiday. The Judge did not permit the latter: the father could only have the son on those Bank Holidays that followed his weekend access. The father was also ordered to purchase a separate bed for his son’s overnight stays. He was not allowed to take his son on a summer holiday outside Ireland because it was ‘too much, too soon’, but he could take him on holidays in Ireland in two separate, but not concurrent weeks.

This case shows the detailed arrangements that the Court can make or be asked to adjudicate on. Such initial access arrangements, if they work well, can be extended later, but they are designed to assuage any fears that the residential parent might have about the child’s welfare while permitting the father to progress a relationship with the child. It also suggests that the relationships between couples who take such cases are very poor or conflictual, given the fact that they thought they had to go to Court to agree these conditions. However, the Judges seem to have adopted a ‘gradual progressive practical approach’ to ensuring and promoting parent–child contact.

Increased access time

- If daytime contact goes well, a parent can apply for overnight access, as was the request by the mother in Case A15. She requested to have her daughter stay over one night during the week, which was agreed by consent in Court.
- Case A34 was a mother’s appeal to change an access order. The father had access every Tuesday and Thursday, which the mother claimed was disrupting the children’s schooling patterns. In addition, he had access for one weekend day and an overnight each weekend and 50% of holiday time. The couple agreed to change access times to after school until 7pm on Wednesdays only and every second weekend (from Friday at 6pm to Sunday at 6pm). The father wanted to take the children to Italy, but while the Judge permitted this, he recommended that, as the mother had agreed, a maximum holiday period of 14 days.
- Case A33 involved a father who wanted overnight and increased access. Divorced, he was supposed to have access every Saturday for 3 hours. The Judge ordered that the latter access be continued and the case could be heard again in 3 months’ time. By then, with ongoing access, his request for an extension could be considered. This case illustrates the way in which a non-residential parent (in this instance, a father) builds up an ‘access rating’ over time. If the access agreed goes well, he can then seek additional access time.

Negotiating access in cases where fathers work abroad

For couples who get Court-agreed access hours, it is important that they both comply with the arrangements; otherwise, it generates conflict and can lead to a return to the Court. Accordingly, as each parent assumes life as a single separated parent, the residential parent must plan their lives around the availability of ‘access childcare’ at scheduled times. For those parents whose working times are unpredictable, this can generate access-related problems. The following case illustrates an annual access schedule agreed by a couple in Court and the way the couple planned to address the father’s travel:

- In Case A40, a legally separated couple had difficulties resolving access issues for their 8-year-old daughter. The father spent much time working abroad, which complicated matters. In Court, they agreed new access orders. The father had weekly access from Wednesday after school until Thursday morning and every second weekend from Friday

afternoon to Monday morning. In the future, when the father had to go away, it was agreed that he must give the mother one week's notice and seek alternative access time. The child will spend 2 weeks each summer, one week each at Easter and one mid-term a year with each parent. The first Christmas, one parent will have the child from 3pm on Christmas Eve until 1pm on Christmas Day and the arrangements can be swapped the following year. There were further conditions attached to birthdays: the child must not be removed from the country for her birthday and the other parent must have access to her for 2 hours on that day. Only immediate cousins and grandparents were permitted to attend birthdays. The parents planned to jointly attend parent-teacher meetings and to have lunch together on the child's Communion day. Telephone access was to be permitted at 7pm each evening. Neither parent was allowed to have a third party around when their daughter was staying with them or on an access visit.

The conditions set by the Court in this case were extremely prescriptive. However, both parents were emotionally upset by the separation and both were in receipt of counselling.

Holiday access

Holiday access is an issue that can arise in all access agreements. If it means taking holidays abroad and leaving the country with the children, the parent has to have the other's permission to do so, and the second parent (usually the residential parent) can oppose it. The need for holiday access has increasingly become an issue in Irish Courts due to the number of families going abroad each year.

- In Case A49, the children, aged 7 and 8, resided with their mother and the father had unsupervised access to them on Saturday afternoons. However, he wanted to bring his children on a holiday with his mother to Scotland for 10 days in August. His wife objected. The Judge granted permission: he ordered that the mother provide the children with a mobile phone and that they be granted permission by their father to ring their mother. The address of the grandmother's home in Scotland and her mobile number were also to be made available to the mother.

Supervised access

In some cases as a result of a Section 47 report (*see p. 68*), the Court ruled that unsupervised access (and/or overnight) was not in the best interests of the child, so supervised access only was permitted. This can cause great conflict between parents.

- In Case A22, access was contested by the father. He sought to vary the access. Currently, he had an order for unsupervised access to his 10-year-old son on Saturdays from 2-4pm, but he complained that his access had never actually been unsupervised. His wife sought a Section 47 report, which the father insisted was not required. However, because of their past difficulties and the length of time since proper access had taken place, the Judge ordered a report and instructed both parents to each pay 50% of its cost since it was in the best interests of the child. The motion was adjourned for 10 weeks.
- In Case A9, both parties were present and represented. The husband sought to vary the access order to allow for overnight and unsupervised access. The respondent wife agreed to unsupervised access, but not overnight, in relation to their two youngest children. (There was no evidence of abuse found in a previous police inquiry.) The access time was expanded, with the husband's sister to supervise. There seemed to be underlying animosity between this couple, but the Court ignored that and simply advanced the access needs of the father and child.
- In Case A41, the applicant mother claimed that the father had breached his access conditions by bringing his daughter to his house rather than seeing her in his mother's home as agreed. The mother had called the Gardaí to remove the child, who was asleep, from the house. The father had been cooperative, but intoxicated. The Judge was tempted to remove access from the father because of the child's safety. But the respondent father gave an undertaking that he would not consume alcohol when he had access to his daughter. The Judge allowed access to continue – in the grandmother's house only.

From unsupervised to supervised access – and back again

Access orders can be changed from unsupervised to supervised, as seen in the following case:

- In Case A24, the parties had a 4-year-old daughter, who resided with her mother. The father had personal problems as a result of the marriage breakdown and initially had supervised access only. On the basis of medical reports, he was later given unsupervised access. However, on the last occasion there were allegations of sexual impropriety, which were being investigated by the HSE and An Garda Síochána. The Judge ordered a return to supervised access until the outcome of the case was known.

Access and relationships with second 'blended' families

After separation and divorce, ongoing contact arrangements can be disrupted by changes in lifestyles. Either partner can form a new relationship, re-activating animosity and hostility, and making access arrangements a renewed area of conflict. The Court puts the interests of the child first, overruling elements of spousal vindication, envy or blame, and by doing so facilitates and promotes access to the non-residential parent.

- The parents in Case A2 were separated for 10 years and had joint custody of two boys, aged 10 and 12. At the time of the Court case, the father had two other children with his second partner. Contact with his sons in the first family was quite frequent until the mother moved to the countryside. The issue before the Court was the refusal by the applicant wife to allow the sons to go on holiday abroad with their father and his new (second) family. The mother argued that one of the children was unfit medically and the boys claimed that they did not like their step-mother and paternal grandparents, who would also be on holidays with them. Medical evidence procured for the Court showed that the children were fit to travel and the Judge allowed the boys to go on the planned holiday. The Judge did not seek the views of the children.
- In Case A14, the divorced applicant husband sought to increase access to his 6-year-old son, access to whom consisted of 3 weekends a month (from Friday to Sunday), including a round trip of 240 miles each weekend. But the father also had a new partner and a 3-year-old daughter with her. Since the two children got on well together, he wanted access to his son at Christmas and at other holiday times. His ex-wife, however, argued that she was spending less quality time with her son and would like to have him 2 weekends a month. She applied for legal aid and the motion was put back another week until she could get legal representation.

Digital access

As noted in several of the cases already, telephone access and contact featured extensively in conflict over access. The widespread use of mobile phones has created an environment that has increased digital contact between parents and children. This increased use has led non-residential parents to seek mobile phone access to their children.

- In Case A13, the father complained that his 15-year-old son's mobile phone was turned off during the week and that he (the father) was the person ringing him all the time. The mother explained that their son was doing his Junior Certificate and was studying. There was a counter claim from the father, who complained about the son's school report. The Judge, however, responded that this could be the position of any 15-year-old boy. The mother, in response, claimed that while the father claimed that he wanted more contact with his son, he refused to meet him in his home, which he shared with his three other children from a new relationship. In response, the father claimed that his new family got upset about this as they wanted to see more of his son, hence his wish to see his son in a neutral space. The Judge found it difficult to understand this state of affairs. He informed the father that he could build up a relationship with his son through his own means or the Judge could put a Court order in place. Telephone access should continue, with the mother making sure the son's mobile was switched on and in credit. In the meantime, a date would be set for a full hearing.

- In Case A30, the father wanted better access to his children on a telephone land line since he lived in South America and mobile coverage was too expensive. He wanted to contact his children via Skype. The Judge stated that because of the ages of the children (17 and 16), contact was a 3-way process. The parties' solicitors proposed that contact take place twice a week. No formal orders were made as an adjournment date was set for other outstanding matters related to their divorce.

Limited access because of accommodation

The non-resident parent can be faced with another obstacle to access: a lack of suitable accommodation.

- In Case A23, a 12-year-old child resided with her mother. The father was living in a one bed-roomed flat and could not have his daughter over to stay. He paid maintenance of €100 per week and the Judge encouraged him to visit his daughter. The mother was the primary residential parent and the father had 'visitor' status. His housing need was an obstacle to co-parenting and shared residential care, which in this case was unrelated to the relationship between the parents.

Relocation, contact and access arrangements

As noted already, access for some couples is especially difficult to maintain because of the geographical distances between their respective residences. Relocation issues are very controversial in family law. Article 8 of the European Convention on Human Rights (ECHR) provides for the 'right to respect for private and family life'. Cases can be brought to the EctHR concerning the application of the ECHR in Ireland and Article 8 has been the most litigated provision (Kilkelly, 2008, p. 40). The right of one parent to go abroad taking their child with them, either to marry someone else or get employment, can be interpreted as exercising a parent's rights. However, leaving the country can reduce access between the child and the other parent, and so denies the other parent and the child their rights of contact with each other. Courts are asked to adjudicate on these competing needs and in doing so take into account the welfare of the child. There were a number of such cases audited in the present study.

- In Case A4, a judicial separation involved two dependent children, aged 12 and 10. The couple had been married abroad and the mother planned to return abroad with the girls. The father agreed to pay maintenance and a detailed parenting schedule was agreed between them. However, while the husband agreed with this proposal, the actual distance involved would inevitably result in reduced contact between him and his daughters. But since this had been agreed by the parents, the Court did not object or interfere with this private arrangement, even though it would not facilitate contact.
- The following case (Case A5) suggests that joint parental agreement does seem to be essential. Here, the husband opposed his wife's application for permission from the Irish Court to relocate overseas with their daughter. The applicant was from overseas, came to Ireland and married here. Their daughter was only 4 years old at the time of the hearing. According to the Judge, the main issue before the Court was the well-being and welfare of the child. But the issues as presented by the applicant wife were that she was very unhappy, homesick and felt compelled to return overseas. She claimed a natural bond with her daughter and that her daughter should go where she went. She would also have good support and good employment opportunities overseas. The respondent husband argued that the parties met in Ireland, their daughter was born in Ireland and had lived here all her life, save for a couple of trips abroad. The respondent husband was in good full-time pensionable employment. His family had been very supportive of the applicant wife, both before and after the birth. The parties shared access and the primary care of their daughter. The respondent husband had his parents for support and they looked after his daughter on a regular basis, effectively incorporating their granddaughter into their family.

The Judge in this case stated that *'in the circumstances where both parties are co-parenting and where the child is so happy and supported, the Court would need serious proof that the welfare of the child would benefit from a move overseas'*. He was not convinced that such proof had been argued. He also stated that the move overseas would mean that access to

the respondent husband would be severely restricted. The suggestion of a 4-week summer visit and e-mail/video contact was, according to the Judge, 'an unrealistic proposal'. It might happen for a year or two, but the applicant wife was bound to move on to another relationship or have other commitments, and would not always have the time to travel to Ireland. The distance would create a huge obstacle and expense, and would be very intimidating. The Judge concluded by stating that it would be a very high risk for the welfare of the child to relocate overseas since it would deprive the child and father of a relationship with each other. It would not only endanger their relationship, but also the relationship with her extended family. In this case, the mother's own well-being and welfare, while presented as important, did not gain the support of the Judge, who ordered that the welfare of the child was best upheld by contact with her father and he refused the mother leave to relocate.

- Coincidentally, Case A31 was another case where a mother had relocated. The couple had agreed that the separated mother could go abroad with the child. She had agreed to come back for a contact visit a year later. The father took his case to Court, claiming that he had no contact with his child because the mother claimed that she could not afford to return to Ireland. Her legal representative claimed that the father had not sent any letters or gifts to his daughter, aged 5. The father said that his daughter had not responded very well to his telephone calls, claiming that his wife was tutoring his daughter to say negative things to him on the phone. When asked by the Judge if he was willing to travel abroad to see her, he said that his wife had accused him of rape and he feared that she would repeat those accusations if he went to visit her. The Judge ordered in favour of the applicant, saying that there was a flagrant breach of the agreement between father and child, and that an order of production be made within 3 months.

Section 20 of the Child Care Act, 1991 applies to any proceedings under the Guardianship of Infants Act, 1964, the Judicial Separation and Family Law Reform Act, 1989 or any other proceedings for the delivery or return of a child.

Relocation within the country

The following case, although referring to relocation *within* Ireland, is not dissimilar to those above and suggests that the Irish Family Law Courts are adopting a greater respect for father-child contact and access when asked to adjudicate on relocation issues.

- In Case A26, a separated wife wanted to move to another county in Ireland to be near and supported by her parents. This was a contested issue in their judicial separation case. The couple owned a house valued at €380,000, with an outstanding mortgage of €250,000. They had a 10-year-old child. The mother worked part time as her son grew up. She then went to college and got a degree, which would enhance her employability prospects. She had already found temporary work. The child's father had left the family home 4 years earlier and lived with his new partner in rented accommodation. The mother wished to move nearer her family of origin, where her sister would be able to help her look after the child when she worked.

The Judge questioned the applicant mother's need to go to her home town, 140 miles away. She replied that she had been trying to get a permanent job where they lived, but was finding it difficult. She hoped it would be easier to find employment near her parents' home. She also admitted that she had a difficult relationship with her husband. She only texted him as necessary, only to communicate with him about their son. He paid her €800-€900 a month in maintenance. She claimed that for 2 years he paid her no maintenance. Her part-time work and her parents helped her financially. She hoped to purchase a family home near her parents from the equity released from the sale of their present family home. The father had access to their son on Fridays from 7pm to Saturdays at 4pm. The father and son got on well and had fun together every weekend. However, the father had not paid any maintenance for the previous 3 months.

The Judge questioned the mother about her plans to get a job that far away from the father of her child. He argued that the father was 'an active father' and that the mother had not thought through the impact of her proposed move on her son, the impossibly long drive and its effect on paternal access and contact. The father had only recently heard of her plans to move. He also claimed that he had been unable to take his son on holidays, unlike his wife who took her son to her parents' home for summer holidays and at Christmas time. He agreed that his initial career was vicarious and that his wife had supported them financially by doing part-time work. He had now changed career and had a secure job.

The Judge said that it was a difficult case, but he had to think of the best interests of the child. He was not in favour of the child being moved to a new school and a new area, with the access problems it would present for him. Both parents had worked hard to adjust to their separated state. She had taken a degree and he had moved into secure employment. However, the Judge said that the child should remain in the county in which they now lived. The family home should be transferred to the wife and the father should pay the mortgage until such time as the mother got employment. He envisaged that this could take at least 6 months. A sum of €5,000 should be paid immediately to the mother. This was a modest amount and the father must realise that there were financial costs incurred if his son was to remain nearby. In addition, he had to pay €700 per month maintenance for their son via a standing order, payable through the District Court. The Judge ordered immediate payment of the maintenance arrears and awarded them joint custody. He suggested that they both attend a parenting course to help them address their son's needs.

Discussion

The contested case discussed above (Case A26) is a good example of where the 'needs of the child' to have access to both parents was central to the decision-making of the Judge. This was an important judgment. The Judge in question regularly questioned couples about their relationship with their children. He actively recommended (in effect, ordered) some couples to attend parenting classes to help them focus on the development of their children, especially when their children were young. This particular Judge also commended couples who put their children's interests before their own. Simultaneously, he condemned parents who defaulted on the payment of maintenance for children or who did not avail of access arrangements.

These judgments signify the way in which the Family Law Courts uphold the rights and obligations of parents post-separation and divorce. The cases described above set a precedent that restricts the right of either parent to move or emigrate with their child. In each of these cases, one parent objected to the other's plans. However, not all relocation plans are disputed, but can be agreed by the couple themselves privately. These relocation issues are extremely contentious. Some argue that they greatly restrict the movement of parents, especially women who are being asked to restrict their life plans to facilitate their child's contact with the father. Yet it seems that, increasingly, this may become a normative expectation in post-divorce situations. More research is required on this topic since it may be the case that private uncontested arrangements, agreed between the parents, can enable one parent and child to relocate, while an almost identical case – if contested – will be refused leave to relocate.

The other cases show the competing needs of the two parents for the sole care of their children by arguing that the child preferred the company of one parent to the other. These cases are especially problematic because one parent is being denigrated in an attempt to refuse access to the other. The Court is reluctant to deem parents 'unfit for access' in any way. Rather, it is assumed that an adequate relationship has not been built up between the non-residential parent and the child. This can only be done over time and access is seen as a process that is ongoing and progressive, with a view to improving relationships over time. The onus is on the parents to work to promote access, even if their views of it are negative or even if the child is finding it hard to adjust to access. The Court is also aware of the hidden agenda relating to unresolved issues between the couples.

The first cases of defaulting on access arrangements were presented in terms of the wishes and welfare of the child. They reveal the vulnerabilities of some children. The parents, as we have seen, can request an independent report to support their claims against each other. But children cannot do this and, in fact, in only one of the cases were children actually consulted about their views on access and contact (*see p. 68*).

Children's views have been deemed more important of late, even though in the past in UK law, there has been a reluctance to bring children into the Court situation since it might directly involve them in conflict with their parents, which was deemed undesirable. There are competing discourses at work here, consistent with the accusations of 'malicious women' and 'dangerous dads' (Trinder, 2007). The gatekeeping role of residential parents was also clearly visible in these cases.

6 CONCLUSIONS

The aims and objectives of this study were to identify the kind of separation and divorce arrangements that parents make in Ireland in the Family Law Circuit Courts. This is the first sociological study of decision-making in Ireland's Family Law Courts. It was based on passive observation and the auditing of cases. This report includes the following aspects:

- a review of the literature on the effects of separation and divorce on children, within the broader socio-legal context as prescribed in Article 41.3.2 of the Constitution of Ireland;
- a review of the legal implications of the UN Convention on the Rights of the Child;
- a description of legal settlements in relation to the family home;
- an analysis of sole custody awards;
- a description of the residential and access arrangements made for children;
- the identification of the issues that arise in relation to ongoing access and maintenance payments;
- the role of the Court in supporting parental contact and access to both parents.

Summary of main findings

Legal separation and divorce

The separation and divorce process in Ireland is embedded in a prescriptive Constitutional legislation towards proper financial provision for the spouse and children of separating couples. Divorce was legalised on the basis of the irretrievable breakdown of a marriage. One of the expected effects of the latter was to minimise the negative effects of adversarial divorce on children. The review of international literature in Chapter 2 identified three areas of policy concern for children and divorce: family poverty, exposure to conflict, and parental lack of contact. This review also identified the legal focus on child–parent contact post-divorce and State obligations brought about by the UN Convention on the Rights of the Child and the enactment of the European Convention on Human Rights Act 2003.

The process of analysing the Court data, as described in Chapter 3, focused on the key variables that feature in all separation and divorce cases heard in the Circuit Court, namely: (1) the disposal of the family home and attendant financial settlement; (2) spousal and child maintenance; (3) custody and parental residential care of children; and (4) access and contact between non-residential parent and children. The process usually begins with the first two (family home and maintenance), which in turn have implications for the way in which parents manage the third and fourth aspects (custody and access/contact).

Divorce legislation was introduced in Ireland in 1997 amid concerns about whether divorce would pose risk of poverty and material problems affecting the welfare of spouses and children in first families. As outlined in Chapter 1, the prescriptions in Article 41.3.2 of the Constitution are a testament to the State's obligation to respond to these concerns.

Family home

Data on the family home and maintenance settlements were analysed in Chapter 4. The types of settlement varied. Among the 63 home-owners, mothers (33) were more likely than fathers (7) to remain in the family home. Approximately half of these mothers, mostly with children, were given the family home in a compensatory package (in lieu of maintenance) or because of paternal desertion of the family. In the case of the other mothers (14), they made a financial settlement with the father that recognised his equity in the home. There were also 6 cases where the father retained the family home, but in a similar fashion paid their wives for their equity share. In the sole case in which the father got the family home, his wife had deserted him. Three mothers were permitted to reside in the family home for as long as their children were dependent.

Maintenance

Spousal maintenance payments were very rare and noted in only 2 of the 87 separation and divorce cases analysed. The outcome of these agreements was that many post-separation parents in full-time caring positions were on low incomes, unless they had employment or had rental or business incomes. Parents who were employed, who had shared the mortgage payments and were in egalitarian relationships, were not as likely to be exposed to poverty post-separation or divorce. In these cases, too, their children were less likely to be at risk of poverty. In accordance with evidence presented in Court, only 21 of the 87 wives were in employment, 5 were in receipt of social welfare (such as One-Parent Family Allowance or Deserted Wives Allowance) and one was on Disability Benefit. It is quite possible that others may have been involved in part-time work, but these data were not presented in Court. When mothers cannot work because of childcare demands, the lack of spousal maintenance will undermine the ability of the residential parent to care for their children.

The lack of spousal maintenance paid to mothers with whom children reside suggests that they are expected to earn their own financial keep by taking up employment. It shows their financial vulnerability and exposure to a risk of poverty unless they can re-enter the workforce. With the exception of the disposal of the family home (which can be a significant financial asset), there is little compensatory or rehabilitative support for ex-wives. Their financial freedom to divorce may be based on their capacity to gain employment. Further research is required to explore the reasons for the absence of spousal maintenance, which may be at odds with 'proper provision' as specified in the legislation.

Child maintenance payments were recorded in 54 of the 87 cases analysed. The amount of payment varied considerably, ranging from €140 to €3,000 per month. This study, together with Coulter's (2009b) research, reveals an average of €60-€100 per week per child. Many fathers pay medical and educational expenses for children in addition to maintenance or as an alternative to it. The average maintenance awards assist towards the costs of providing basic food and clothing for dependent children. These payments do not cover the costs of the time involved in childcare incurred by a resident parent.

In a few cases, child maintenance payments were in arrears and wives had to take their husbands to Court to ensure payment. The non-payment of maintenance, even when ordered by the District Court, exposed low-income mothers and their children to high risks of poverty. The One-Parent Family Allowance was essential for these mothers. It may well be that 'proper provision', as Constitutionally required, is not made in all cases. Also, there is no standard recommended rate of payment for child maintenance. The focus on the family home as a major asset can displace a focus on child maintenance until after the separation or divorce is agreed.

Custody and parental residential care

Chapter 5 examined the custody arrangements made by parents in the 87 cases analysed. Joint custody was awarded in 70 of these cases, while sole custody was made in a further 11 cases. In the remaining 6 cases, the couples' children were teenagers or grown-up so the Courts are reluctant to make custody orders, specifying their place of residence.

Sole custody orders were made for two reasons. The first was because of one parent's unfitness to parent due to the risk (usually of violence) they posed to the spouse or children. The second reason was paternal desertion of the family and the father's failure to maintain any contact with his children; 6 of the fathers had gone to live abroad, while 2 had returned to Ireland and had second families.

While joint custody was the norm, this in effect was primarily joint *legal* custody. However, arrangements for the physical care of the dependent children varied between couples who had joint custody. In 63 of the cases, the primary residence of dependent children was with their mother, while fathers were the residential parents in 6 cases.

However, 8 couples decided to share the care of their children on an almost 50:50 division of time during the week. A further 4 couples shared care by one parent having the children at the weekends. In addition, 2 couples divided their children between them, with the girls living with their mothers and the sons with their fathers. Older children chose which parent they wanted to live with or how to divide their time between their parents. In general, the majority of couples were able to agree on their childcare arrangements; for a minority, it generated ongoing conflict. The dominance of the mother as primary carer stemmed from her being the primary carer in the past and the spouse most likely to remain on in the family home. Both of these factors gave continuity to the lives of their children. Residential fathers were also more likely to have remained in the family home.

Access and contact

The most common description of access in separation and divorce cases was 'liberal' or 'flexible' access arrangements, with no further details provided in Court (*see Chapter 5*). If access was disputed or controversial, access details were specified in Court. Some of the disputes revolved around 'unfitness to have access', while others were presented as being in the children's best interests. Cases concerning supervised access (in which one parent can be a risk to the child's welfare) are very difficult. These cases raise serious questions about ongoing access as being always in the best interests of the child. The welfare of children was invoked in some of these cases and the Court or parents sought professional reports to adjudicate claims. In a small number of cases, parental conflict persisted. Fathers were more likely to be the plaintiffs seeking access. In such cases, the dominant judgment of the Court was to promote access and limited contact time on an initial basis. If these arrangements were satisfactory, the time component would be increased. The expectation was that once access was initiated and ongoing, it would lead to greater acceptance of it over time, to the mutual benefit of both parents and children.

The second set of issues related to the practicalities of access – the time and logistics for non-residential parents in actually getting to their children. These inconveniences are problematic if there is little give-and-take between parents, but again the Court response was to recommend practical steps that would promote ongoing access. Holiday access time was again a practical matter and one that should be specified as part of a separation agreement. Continuous digital contact with children was also an issue and Judges promoted the use of mobile phones or computers to maintain contact with a non-resident parent. The Court was also asked to adjudicate in relocation cases, where one parent planned to move far away from the children to facilitate employment or to avail of family supports. Overseas relocation cases were also brought to the Court with unpredictable outcomes. There is an extensive legal case literature on such cases that merits further analysis.

The final set of issues related to conflicts around new 'blended' family formations (where people re-marry and have a second family), coupled with the fragmentation of the first families. Again, the Court promoted and ordered access in the context of parental objections. Parents were expected to overcome the negative and depressing effects of the breakdown of their relationships in order to promote and continue ongoing parent-child contact. Mothers as residential parents in particular were expected to take responsibility for their children's ongoing contact with their fathers. In the initial post-separation period, this could be very difficult and so the Judges encouraged them to put the welfare of their children first and focus on their joint parenting obligations.

Residential mothers in post-separation and divorce parent-child contact

This research concludes that while there is no explicit legal specification to a child's right to have contact with both parents in current separation and divorce legislation, this right is upheld and promoted by the Family Law Courts. The Constitutional principle of joint custody has formed a basis for this approach. The late introduction of divorce legislation in Ireland and the necessity for parents to separate and live apart prior to divorce has generated a divorce climate that does

not have the fault-based legacy of other jurisdictions. This, together with the increasing labour force participation of women, has helped to initiate a more egalitarian approach to separation and divorce. While the Courts promote contact, some couples have moved beyond contact to embracing shared parenting. This is, in effect, joint *physical* custody. Traditionally, shared residential parenting was not favoured by the Courts, especially for young children. Yet psychologists promote very frequent regular contact between parents and their children – including between fathers and their infant and younger children – so the emergence of shared parenting is a welcome development in that context.

Shared parenting is a policy that is being actively promoted in other countries. Couples who have adopted such practices tend to have higher incomes and sufficient assets to finance two homes. Other couples are not so fortunate and for them one primary residential parent with liberal access to the second is the dominant outcome. However, these matters are left to the parents to arrange and unless they are disputed, these arrangements remain to be negotiated in the privacy of the family.

Paternal desertion was identified in a number of cases and this was associated with a subsequent lack of contact. It is quite possible that a legal regulation of post-separation lives in the initial stages of their marital breakdown might have helped to promote ongoing contact with these fathers. For this reason, the parental obligations to promote joint parenting and in particular ongoing parental contact needs to be more clearly articulated in all separation and divorce settlements.

The Court's role in reducing conflict between couples

The overall context of a no-fault divorce system and the long period of separation required before getting it reduces the acrimony in Court. In the cases audited in this study, Judges actively discouraged any discussion of past conjugal roles and misdemeanours. Spousal behaviour had little impact on agreements or on child custody or access (apart from the few 'unfitness' cases mentioned). This can still seem unfair to some parents and form the basis of antagonism related to access.

Children's voices

The care and future of children is articulated in the context of children as dependents of their parents. There were almost no children's voices in the Family Law Courts during the course of this study. The parents came to a variety of decisions about the family home and financial support within the context of the breakdown of their conjugal relationship. These decisions, in turn, provide the context within which ongoing contact and care of children is organised. The European Convention on the Exercise of Children's Rights aims to initiate procedural mechanisms in all Member States by which the voice of the child can be heard and which would enable them to participate in family law proceedings that concern them.

Parent-child contact

More recently, the focus on father-child access has been raised nationally and internationally by the Fathers' Rights movement. This has helped to generate a social climate in which social contact is supported and encouraged by the Courts. In addition, the UN Convention on the Rights of the Child and the European Convention on Contact concerning Children (which came into force in 2005, but is not yet ratified by Ireland) are creating an awareness of children's rights to parental contact with both parents. In practice, this study found that the Irish Family Law Courts played a major role in implementing the contact rights of children. These Conventions are leading to the promotion of shared parenting in several countries and this study found a number of cases where shared parenting was agreed in Irish Courts. The Courts are also upholding the rights of fathers to have contact with their children and in general promote such contact in cases where fathers have lost contact.

Further research

This study on post-separation and divorce parenting is an exploratory study, based on cases audited and analysed from the Family Law Courts. It has identified the key variables that form part of Court agreements. The kind of data presented in this report in terms of Court outcomes could, with appropriate resources, be collected and compiled by the Courts Service. In particular, statistics on custody, access and residential arrangements for children (which form part of the Courts Service's statistics output) need to be expanded. Such data would enable sociologists to identify social trends in separation and divorce.

Qualitative research is also needed that follows up parents and their families after divorce in order to investigate ongoing parenting practices and parent-child contact arrangements over time. The long-term influence of Court decisions would be gleaned from such research.

The present study has also identified new 'blended' forms of family formations, with divorced parents re-marrying and having additional children (second families). This phenomenon may increase over time. Thus it is important that future research on families takes account of the fact that families are no longer situated within one household, as is currently done. Accordingly, a module on family lives should be included in the next Census, which would research families' lives as relational. Such a module would also take account of family transitions and the ongoing contact between parents and children outside one household.

The ongoing National Longitudinal Study of Children in Ireland, entitled *Growing up in Ireland*, also offers an opportunity to investigate the effects of separation and divorce on children's lives (see www.growingup.ie). In particular, it could assess the impact of ongoing parent-child contact on children's emotional and educational development.

The exposure of separated or divorced families to poverty also needs further research. While there has been much research on the poverty levels of lone parents, it is timely to focus in particular on post-separated and divorced lone-parents given the Constitutional provision of 'proper provision'. The scarcity of compensatory maintenance payments to ex-wives and the low level or absence of child maintenance merits further analysis since both have implications for the poverty risks of children in these situations.

The several research projects proposed above would more fully explore the ongoing effects of our current separation and divorce policies, and their long-term effects on children. Such research would also assist in the formation of policies that would be consistent with the responsibilities of the Office of the Minister for Children and Youth Affairs (OMCYA).

Policy issues for consideration

Role of Family Law Courts

Since two-thirds of couples who separate or divorce take their cases to Court, the Family Law Courts can play a major role in promoting parent-child contact. This would reduce the number of no-contact cases that have occurred in the past. A legal separation is preferable to the 'paternal desertion' of earlier years, which often resulted in no paternal-child contact, as noted in some cases in this study.

While litigation is not actively promoted in family law cases, it is important to recognise that Family Law Court judgments make important contributions to the development of family law policies and to the welfare of children. Elements of family law also need to be reformed to enable it to deal with the new changes and challenges faced by couples and their children in their family lives post-separation and divorce. Accordingly, the recent report on *Legal Aspects of Family Relationships* by the Law Reform Commission (2010) is welcomed.

Increased public knowledge of family law

While Irish family law is quite prescriptive, there is still a lack of public knowledge about the outcomes of family law cases because of the *in camera* rule. The *Family Law Matters* series and Coulter's research has helped to generate knowledge about family law proceedings. The present report will increase that knowledge base. However, this research needs to be further disseminated. Such knowledge, by providing couples with a series of post-separation options, should help to reduce conflict between parents and facilitate agreements between them, both of which would greatly benefit the physical and mental well-being of their children.

Poverty implications of divorce and separation

Separation and divorce remain gendered to a great extent. More mothers become residential parents than fathers. Fewer mothers than fathers are in employment and so full-time mothers have relied on working fathers to support their families. While this is acceptable during a marriage, the continuity of this arrangement is contested after separation and this leads to conflict. Rehabilitative spousal support is required in such cases, especially if a mother (or father) is expected to be a full-time carer of children after separation. Currently, a parent who ceases to be employed because of childcare needs is at greater risk of poverty when separated or divorced.

The risk of spousal dependency and child poverty should be emphasized and addressed by policy-makers. For example, child maintenance payments might be related to the income of parents and rehabilitative spousal support should be considered in cases where there are young children and one of the parents has taken on a full-time parental caring role. Parental care time should be financially acknowledged if parental responsibilities are unequally shared.

At a more general level, it is important to introduce policies that help all parents to reconcile their work and their family lives.

Implications of a focus on children's rights

From the perspective of children's rights, there should be a renewed focus on the responsibilities of *both* parents towards their children, expressed in terms of financial and social contributions to their upbringing. While parents divorce each other, they cannot divorce their children. Recognition of the latter would re-orientate parents towards the future care of their children. While these plans will inevitably be intertwined with parents' own personal lives, it would help to disentangle conjugal spousal roles from parenting roles. In addition, consideration should be given to the introduction of a legal marriage contract since divorce is, in effect, the dissolution of an implicit contract.

Shared parenting

Joint custody is based on the equal rights accorded to married parents in the Constitution of Ireland. Judges generally award joint custody to almost all parents. This is interpreted by parents as joint *legal* custody and now forms an important basis on which to uphold and implement the rights of children to ongoing contact with their parents. It enables the Courts to recognise the rights of marital fathers to have contact with their children after separation and divorce. It also helps to facilitate shared parenting. Judges also act on a presumption of parent-child contact: they note its importance and advocate and promote contact with non-residential parents for the well-being of the children when access is raised in Court. This helps to create a basis for shared parenting, which is now being presented in many other countries as the ideal post-divorce family practice. The Courts can also ensure that parents remain financially responsible for their children.

Proposed changes in terminology

While current family law practices are encouraging in terms of new rights of contact for children, there are proposals to change the terms used in Irish family law, as has already been done in several other countries (Law Reform Commission, 2010). For example, the term 'custody' has been replaced by 'residence', 'access' by 'contact' in both Australia and the UK. In Canada, the concept of 'shared parental responsibilities' was invoked in response to the Fathers' Rights movement. Australia has introduced parenting orders that determine where the child shall live and with whom they will have contact. The Irish Law Reform Commission has recommended that the terms 'parental responsibility', 'day-to-day care' and 'contact' should be used instead of the terms 'guardianship', 'custody' and 'access' respectively.

Changes in terminology were introduced in other countries to reduce the notion of 'winners' and 'losers' in custody cases, especially when custodial rights were given to only one parent. The Scottish Law Act talks about 'parental responsibility', 'residence' and 'contact'. In particular, it counteracts any impression that a parent had rights but no responsibilities – rights were not absolute or unqualified, but were conferred in order to enable parents to meet their responsibilities (Scottish Law Commission, 1992). These terms seem appropriate for the emergent types of family formations and are consistent with the introduction of a no-fault divorce system. All three terms relate to the children of the family in a user-friendly language.

In terms of the present study, 'joint custody', 'residence' and 'contact' were the common terms used by Courts and by parents. There were few references to the term 'guardianship', which is applied primarily to non-marital fathers or fathers living abroad or other relatives who may take on the role of guardian. While 'custody' has never been given a statutory definition in Ireland, 'joint custody' was frequently used and understood as joint *legal* custody. If required, the Irish Courts often then went on to specify the agreed residential arrangements for the children, so 'residence' is already part of legal discourse here. Finally, parents themselves and the Irish Courts spoke about and agreed 'access' and parent-child 'contact'.

The international research on the development of children's rights tends towards the promotion of joint parental responsibility, shared residence and equal contact between parents and children after separation.

The proposal to introduce new legal terms, as proposed by the Law Reform Commission, affords us an opportunity to address changing families in child-friendly ways. A policy on parental responsibilities for the financial and social needs of their children could be developed, which would include maintenance payment obligations, the children's rights to a family life and the rights of each parent to contact with their children. This would make the rights and needs of children more explicit in separation and divorce policies.

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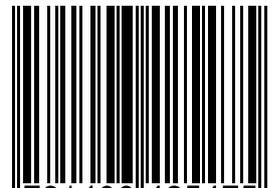
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