



Children and Contact in the Private Family Law Setting: Resolving disputes in practice

1. What is the study's background?

This study was the subject of a PhD thesis (2009) by Elaine O'Callaghan of the Department of Law, University College, Cork, with funding from the Office of the Minister for Children and Youth Affairs (now the Department of Children and Youth Affairs) under the National Children's Research Scholarship Programme.*

2. What is the study's purpose?

The purpose of the study was to examine the child's right to contact with his or her parents following divorce and separation, and to explore the most effective ways of ensuring contact for children with their parents following relationship breakdown. In focusing on the resolution of child contact disputes, the research examined the Courts and the role which they play in resolving such disputes, as well as the processes of mediation and collaborative law.

This briefing note summarises the method of research, key findings, conclusions and recommendations of the study. The full report is available from the Library, University College, Cork.

3. How was the study undertaken?

The study involved both black letter research and empirical research, as well as Court observation and reporting.

- » *Black letter research:* A literature review allowed Irish domestic law to be benchmarked against international law standards. International law examined included the UN Convention on the Rights of the Child, the European Convention on Human Rights, the Council of Europe Convention on Contact Concerning Children, and the Brussels II Regulation.

- » *Empirical research:* Semi-structured interviews were carried out with 27 professionals working directly in the area (including judges, solicitors and barristers, family mediators, guardians ad litem, child psychiatrists and social workers). In addition, 7 interviews were conducted with separated and divorced parents on their experiences of resolving disputed contact cases.
- » *Court observation and reporting* of 'in camera' family law proceedings were carried out in the District and Circuit Courts at Cork, Limerick and Dublin during 2008 and 2009.

4. What are the key findings?

The key findings concern procedural issues within the Court process and the under-utilisation of alternative dispute resolution methods, such as mediation and collaborative law.

4.1 Time and delay in the Courts: Long delays, brief hearings and increasing number of cases

One of the most problematic issues for families in relation to the Court process is the issue of time and delay. As practice currently stands, parties can expect to wait approximately 3½-4 months to get their case before the Court. It is clear that as far as contact issues are concerned, this is an incredibly long period of delay, particularly if one of the parties is not in a position to have contact with the child in the intervening period.

The issue of delay is also a major factor within the Courts themselves, particularly in relation to ascertaining the views of the child. A number of

interviewees observed, for example, that social reports examining the child's living arrangements can add a further 2-3 months' delay to the Court process. With this in mind, judges seem to be of the view that the benefits of ascertaining the child's views are outweighed by the detrimental aspects of delay. This is a crucial point and means that, in practice, judges are forced to make decisions that are supposed to be, according to Irish and international law, in the best interests of the child without hearing the voice of the child in order to avoid adding another delaying factor to the process.

Not only is the issue of time important as regards delay, but it is equally important in the context of Court disputes as regards the amount of time that the judge has to spend on the particular case. It is clear that the number of family law cases that the Court has to deal with means that time for individual cases is limited as a result. According to the legal practitioners interviewed, a Court may have to work its way through 30-40 cases in a single day. Needless to say, this allows very little time for each case and could clearly raise both procedural as well as substantive issues.

One judge commented, *'I would like, particularly in child contact cases, to have a lot more time with them, but time is at a premium given the way that the system is'*. A solicitor also remarked that *'the whole Courts system gives so little time to issues of access, it's like it is the lowest issue on the rung. It's interesting that the Circuit Court deals with important things like property, while the District Court has to deal with minor issues such as guardianship and access'*. It must therefore be asked – what is the effect of all this on the child? One judge commented that *'generally speaking, (delay) is regarded as a debilitating feature and it is not to the advantage of the child ... delay is damaging'*.

4.2 The voice of the child: No State services available, costs and delays

It is imperative in disputed contact cases that the child of 'sufficient age and maturity' is heard in some manner. Yet, this was one of the most contentious issues highlighted by the practitioners interviewed for this study. As one solicitor commented, *'Children are not involved at all ... In custody and access cases, the child is never heard. The child never makes an appearance'*. Another solicitor referred to the child as *'the silent partner'*.

Why is the child not heard in Court? One judge commented that he tries to *'avoid having children involved in the Court as much as possible'*. This seems to be the general approach in the Family Law Courts in Ireland. There are a number of reasons for this, in particular, the lack of resources and also the notion of the need to balance the right of the child to have his or her views heard against the need to avoid damaging or harming the child by involving him or her in the Court process.

In relation to the lack of resources, the problems seem to be twofold. First, the Court system itself is problematic: it is clear that *'... the whole family law system is not organised in such a way that the voice of the child can be brought forward'*. Indeed, the interviewees showed a great sense of frustration at this and one judge commented that *'the Court is denied a method of accessing the child's wishes ... I think that is a huge problem'*. In practice, there tends to be a large number of family law cases all held on the one day. As one judge commented, *'If you had a list ... of 35 cases and if everybody turned up for those 35 cases, just hypothetically, I'd have 70 people out there. The last thing I really want is a whole lot of children out there as well'*.

Secondly, the lack of a State service for a guardian ad litem in private family law cases has been well documented as being the central problem in this area. Several interviewees also specifically emphasized the need for a State agency with sufficient resources to respond adequately and quickly enough to the demands of the children.

In relation to the notion of avoiding harming the child by involving him or her in the Court process, one interviewee referred to this as a most *'delicate balance'*. One solicitor commented that *'On the one hand, the Court must hear the voice of the child and, on the other hand, you don't want to damage the child by having them involved in their parents' dispute – that can do untold damage. So there is a balance there'*. One judge commented that he tries to keep children *'out of the conflict in Court because it can be very, very hard and very, very upsetting and, God knows, there may be enough upset at home without getting involved in this aspect of matters as well'*.

4.3 Enforcement of Contact Orders: Limited options and ineffective in facilitating contact

The risk of contact not being facilitated or enforced is an ever-increasing problem in practice and also an issue that can have a major impact on a child's development. The Court has very limited options in Ireland: it can impose a fine or commit a parent to prison, neither of which are used in practice. As one judge commented, *'I think it is appalling that the only sanction I can threaten people with is a fine or imprisonment. It seems to be an awful large baseball bat to have to wield, in what can often be very difficult circumstances ... If I had other options to consider, I would consider them'*.

The main point is: if one or both parties will not comply with the Contact Order, the child and the party involved are not able to avail of or exercise their right of contact. This can have detrimental consequences, both short and long term. Some interviewees, for example, referred to cases where contact was damaged indefinitely and also to difficulties involved in rebuilding a relationship.

4.4 Alternative dispute resolution: Rethink the process or potential of mandatory mediation

It is vital that the process of separation and divorce is handled as amicably as possible so as to avoid conflict and ensure that children are given the opportunity to adequately enjoy their right to family life. An inability to achieve communication and cooperation can result in a number of challenges to maintaining family life following the relationship breakdown of parents and clearly raises grave implications for the family life of many children. For example, continuing conflict between parents in relation to their parenting arrangements has been highlighted as being damaging to children both in the short and long term.

Conflict is accentuated in Court. As one judge commented, *'Everything I have here is based on confrontation in one form or another ... It's kind of a bad pitch to be starting out on'*. It is evident that the best way to resolve these contact disputes is to get some degree of communication and cooperation between the parties involved, particularly in a non-confrontational setting. The interviewees noted,

for example, that parties who resolve the issues for themselves are more likely to produce more successful agreements.

This study has highlighted that parties involved in disputed contact cases are not aware of alternative forms of dispute resolution in bringing about agreement on their contact issues, particularly at an early stage in the dispute. One parent, for example, commented that she *'had 79 family law court appearances in 4 years and was never once offered or asked about mediation or any other way of finding a solution'*.

5. What are the conclusions?

The study reached the following overall conclusions:

- 1. The voice of the child:** The importance of hearing the voice of the child in disputed contact cases cannot be underestimated since it can greatly help the judge to reach an informed decision in relation to the day-to-day life of the child, as well as help to realise the child's right to participation within the process.
- 2. Enforcement of Contact Orders:** It is imperative that a range of new measures are introduced to coincide with the current penalties of a fine or imprisonment. In particular, two useful alternatives that could be ordered by judges are (1) attendance at parenting courses, where the obligations involved with the care and custody of children is discussed; and (2) community service. Overall, an overhaul of the current law and policy surrounding enforcement is urgently required to ensure that this serious issue is managed and ultimately prevented.
- 3. Alternative dispute resolution:** The State has an important role to play in ensuring that parents recognise the impact of separation and divorce on their children and, in particular, that their choice of dispute resolution may exacerbate any negative aspects of the relationship breakdown. Indeed, the approach adopted in relation to the resolution of child contact disputes is important because the resolution of such disputes – regardless of whether they have been resolved privately between parties, negotiated or mediated by solicitors and mediators or imposed by a Court – requires some degree of communication and



For more information, please contact: **Dr. Elaine O'Callaghan**
E-mail: elaineocallaghan@hotmail.com

cooperation between all of the parties involved in order to ensure that any arrangements made are workable in practice. In this regard, it is essential to provide information and support to families on their options and needs following the breakdown of relationships.

- 4. Mandatory mediation:** The possibility of making mediation, or some stages of it, mandatory must be considered. In particular, such a development could ensure that parties are given a real opportunity to come to understand the process of mediation and how it works, which could ultimately lead to the development of agreement and effective arrangements that would be workable in practice. The importance of upholding the voluntariness principle (which ensures that parties will freely participate within the process) must, however, be of central focus when considering such an approach to ensure that it would be of use in practice. Further, as regards instituting mandatory mediation, the importance of promoting mediation is essential so as to ensure knowledge and understanding of its existence and operation.

6. What are the recommendations?

In order to ensure that children's rights are respected in the resolution of contact disputes in Ireland, it is submitted that the State must focus on two core measures that could be implemented in the short term and that could bring about immediate results for children's lives. The combination of the two recommendations below could greatly reduce the backlog of family law cases in the Courts, as well as in mediation, and ensure that contact disputes are resolved in a children's rights-compliant manner.

1. Strong information campaign

A strong information campaign is essential, detailing the value of cooperation and communication among parents following relationship breakdown, as well as the negative impact of conflict on children's lives in establishing parenting arrangements. It is clear that age-appropriate information on relationship breakdown, as well as available support, must also be fully accessible for children.

2. Mediation services

The State must place renewed emphasis on mediation, including on the Family Mediation Service, and ensure that more mediators are trained and available to work on the current caseload, as well as on future cases.

7. What are the benefits of the study?

This research provides an insight into the reality of contact between children and their parents following relationship breakdown and presents critical analysis of the extent to which the child's right to enjoy contact with his or her parents is realised in Ireland. In particular, the study identifies where reform is required in order to ensure greater compliance with the rights of the child and in this regard, it represents an important starting point for policy, services and research in this area in Ireland.