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THE ‘DEJUDICIALISATION’ OF FAMILY LAW IN EUROPE: WHERE DOES IRELAND STAND?

By Dr Kathryn O’Sullivan (LLB, PhD), School of Law, University of Limerick

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Introduction

Ireland occupies an almost unique position in an EU context. Following the Brexit Referendum, it now stands alone with Cyprus as one of only two common law jurisdictions among the European Union’s 27 Member States. While it adopts a broadly similar approach to the administration of family law justice to its neighbours in England and Wales, it is often quite distinctive at an EU level. Despite these differences with its continental civil law counterparts, however, it can be interesting to see whether (or to what extent) trends emerging across Europe in family law and family justice are also evident in Ireland.

In many European jurisdictions there has been a noticeable shift in the administration of justice from courts to other non-judicial authorities including notaries, civil status officials, child protection agencies, judicial officials, lawyers, and, in some cases, the individual parties themselves. This development is particularly apparent in the context of family and succession law. Issues as varied as the granting of divorce, the establishment or termination of parenthood, the granting of parental responsibility and the administration and division of estates are now liable, in several jurisdictions, to be effected by non-judicial administrators and institutions.¹ Given that EU private international law instruments are typically founded on the supposition that justice in such matters will be administered by courts, this transformation in how justice is ordered is liable to create significant difficulties vis-à-vis judicial co-operation across the European Union.²

¹ For example, French law was recently reformed to allow a couple to divorce without any judicial involvement. See Margaret Ryznar & Angélique Devaux, ‘Voilà! Taking the Judge Out of Divorce’ (2018) 42(1) *Seattle University Law Review* 161-183.

² In light of these developments, a large scale EU-wide study on the matter was launched entitled the ‘Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters’. The project is currently financed by an action grant under the Justice Programme of the European Union and conducted in cooperation between the European Law Institute (ELI), the University of Pisa and the Ludwig-Maximilians-University Munich. The aim of the project is: ‘to develop an outline for a harmonised European concept of courts, including i.a. notaries and other actors traditionally not qualified as courts, building on the approach of the [Court of Justice of the European Union] in its recent case law, to ensure a harmonised application of EU instruments in the Member States by detecting and developing best practices and minimum standards to be fulfilled.’ See <https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/concept-and-role-of-courts/> (accessed 15 January 2024).

This article questions to what extent, if at all, the same or similar trends may be evident in Ireland. Part I considers how justice is administered in relation to Irish family law specifically, and highlights how dependent it remains on the exercise of judicial authority. Notwithstanding this, however, Part II reflects on some recent developments which might signal more of a shift towards the out of court resolution of common family law disputes before Part III focuses specifically on associated recent proposals for the reform of the child maintenance system in the jurisdiction.

Part I: Current administration of justice in Irish family law

Although the range of quasi-judicial bodies and regulators in Ireland has increased in recent times, particularly in the context of areas such as media and company law,³ Irish family law has seen few developments towards the devolution of the administration of justice to non-judicial authorities or to the parties themselves. True, Ireland takes a less bureaucratic and less judicially intensive approach to several non-adversarial family law issues than many European civil law countries. Unlike other jurisdictions, individuals can change their name or secure a gender recognition certificate quite easily and usually without the intervention of the Irish courts.⁴ Similarly, the administration of estates is greatly assisted by the Probate Office (an office attached to the High Court)⁵ while the Adoption Authority of Ireland plays a significant non-judicial role in facilitating adoptions in the jurisdiction.⁶ However, notwithstanding these notable exceptions, Irish family law by and large continues to be characterised by the importance it places on the role of the courts to administer justice.

Moreover, to date, Irish family law has done little to help parties resolve typical family law disputes, wholly or in part, in an out of court setting. To the contrary, Irish family law effectively pushes parties into initiating litigation to determine, for example, on a case by case basis, the rights and entitlements arising from marriage. While most civil law countries apply matrimonial property regimes which specify precisely what

³ See, for example, the expanded role of *Coimisiún na Meán* vis-à-vis online safety.

⁴ Although many jurisdictions adopt complex legal rules for how an individual may change his or her name, Irish law does not regulate how a person changes their name. A Deed Poll may simply be signed through which a person may legally declare their new name and this may be relied upon for official purposes. Note, where a name is changed upon marriage, a Deed Poll is typically not required.

Where a person is aged over 18 years old, they may apply for a gender recognition certificate by completing a form available from the Department of Social Protection (Form GRC1). Again, unlike other jurisdictions, a court application is not usually required. See the Gender Recognition Act 2015. Other developments seeking to reduce the role of the courts in certain family law issues include the commencement of the Assisted Decision-Making (Capacity) Act (2015) (as amended) which introduced a new legal framework for supported-decision making in Ireland.

⁵ It may arguably be considered 'non-judicial' despite its High Court links given that it is staffed by court officials rather than the judiciary.

⁶ The Adoption Authority of Ireland [AAI] is an independent body established under the Adoption Act 2010. It was preceded by *An Bord Uchtála*. Following an assessment of prospective adoptive parents by the Child and Family Agency (TUSLA) or an accredited adoption agency, the AAI is empowered to issue a declaration of eligibility and suitability for the purposes of adoption. It may also make adoption orders, transferring parental rights to the adoptive parents. However note judicial review proceedings may be taken in the High Court to challenge any decisions of the AAI. Judicial intervention may also be required if, for example, the AAI wish to dispense with the consent of birth parents to an adoption under section 31(3) or section 54(2) of the Adoption Act 2010.

happens to family property (howsoever defined) on divorce – thereby reducing the role of the court in making such determinations and empowering the parties to reach settlements in the clear shadow of the law – Irish law continues to demand, at least in theory, judicial intervention to ensure that bespoke ‘proper provision’ is made for a dependent spouse and children in all cases. Thus, unlike the rules-based approaches of our European counterparts, all aspects of provision on divorce (including both the assets to be shared and the proportions they are to be shared in) remain subject to the overriding discretion of the court, with provision varying depending on the circumstances of each individual family.

Even within common law jurisdictions, the extent to which Irish family law demands the intervention of the courts in resolving common family law issues is noteworthy. Ireland now appears to stand alone in remitting all issues to do with the quantification of child maintenance to the better judgment of the court. Although other common law jurisdictions apply a range of guidelines or formulae to determine the amount of child maintenance to be paid – with such issues also often determined with the help of a non-judicial child maintenance agency – there have been no equivalent developments in Ireland.⁷

Unfortunately, in the absence of legislatively or judicially developed scaffolds to help parties resolve such common disputes in an out of court setting, encouragement for alternative dispute resolution such as mediation has arguably had little meaningful effect.⁸ Although, as Shatter noted, mediation in many family law cases ‘offers a better route and outcome for the parties than the adversarial environment of the courts’,⁹ the ability to confidently enter into such mediation or otherwise seek to reach an agreement in the shadow of the law – without a guiding framework, certainty or foreseeability as to a likely outcome – is limited.

Unsurprisingly in this context the generalist Irish courts system through which such family law disputes are addressed has come under significant strain and appears to be now characterised by ever increasing delays and costs. In 2021, the Irish Human Rights and Equality Commission described the Irish family justice system as ‘marked by chronic delays in court proceedings, repeat adjournments, crowded lists, excessive caseloads, delays in conducting assessments of children and adults’.¹⁰

⁷ Change may, however, be coming. See below for more.

⁸ Although 90% of divorce cases are estimated to be settled at least in part, this is often at the last minute when the judge to hear the case is named and thus a settlement may be reached in line with said judge’s known preferences. See Lucy Ann Buckley ‘Irish matrimonial property division in practice: a case study’ (2007) 21 *International Journal of Law, Policy and the Family* 48. See also Kathryn O’Sullivan, ‘Bespoke Justice and Equitable Redistribution in Ireland: An Optical Illusion’ in M. Briggs and A. Hayward (eds) *Research Handbook on Family Property and the Law* (Edward Elgar, 2024)(forthcoming). Such last-minutes settlements, often arising after a part hearing of the case, do little to reduce the burden on the courts.

Legislative encouragement for mediation may be found in sections 5 and 6 of the Judicial Separation and Family Law Reform Act 1989 and sections 6 and 7 of the Family Law (Divorce) Act 1996, which oblige lawyers acting for separating parties to advise the latter of the availability and possible benefits of mediation (and negotiation). Note also judicial encouragement for parties reaching an out of court settlement: the Supreme Court in *MD v ND* [2011] IESC 18 at [30] noted: ‘it would be to the advantage of the parties and their children if this matter could proceed by way of agreements rather than further litigation.’

⁹ Courts Service, *Courts Service News* (2011) 13(3) 9.

¹⁰ IHREC, *Submission on the General Scheme of the Family Court Bill 2020* (IHREC 2021) 3-4. The Joint Committee on Justice and Equality, *Report on Reform of the Family Law System* p21 also noted the ‘[d]elays, excessive caseloads, inadequate facilities and lack of specialist training for judges’ in relation to family law disputes and reflected on ‘a general consensus amongst stakeholders that the current family law system in Ireland is beset by a number of difficulties’.

Conscious of these pressures and the ever growing family law caseload in the jurisdiction, the Government recently published the Family Courts Bill 2022 with a view to introducing, for the first time, a specialist family court system in Ireland.¹¹ The Bill, which provides for the establishment of a specialist Family High Court, Family Circuit Court and Family District Court, aims to modernise the family-justice system and improve access to justice for families.¹² Among the various measures proposed, it seeks to enable a greater share of non-contentious family law matters to be dealt with at District Court level which, it is hoped, will reduce the costs associated for litigants with accessing justice. While aspects of the Bill have been subject to some criticism, notably from the Law Society of Ireland,¹³ the introduction of a specialist court system, dealing exclusively with family law matters, has been warmly welcomed.

Indeed, the introduction of the 2022 Bill could, if viewed in isolation, be regarded as proof positive that Ireland has baulked the European trends towards the non-judicial administration of justice in family law. Rather than shifting away from the courts, Ireland appears to be (belatedly) developing its judicial infrastructure to address family law issues. The reality in Ireland, however, is much more nuanced with other, perhaps more subtle, policy shifts also emerging.

Part II: Signs of a change in direction?

Notwithstanding that in almost every aspect of family law (and in many areas of succession law) the courts retain a significant, if not exclusive, role in the administration of justice, there appear to be signs of a change in direction – at least at a policy level. Ireland’s first *Family Justice Strategy 2022-2025* was published by the Department of Justice in late 2022.¹⁴ It now seeks to provide for ‘a modern, streamlined and user-friendly family justice system that supports simple, early, fair and – where possible – non-adversarial outcomes’.¹⁵ Goal 4 of the Strategy specifically highlights that ‘[p]romoting the most appropriate ways to help families resolve their problems is a central aim of this strategy, including the increased use of non-court options’,¹⁶ and emphasizes the benefits of alternative dispute resolution [ADR] in ‘alleviating the

¹¹ Note, Senator Mary Robinson advocated for ‘proper family tribunals’ as far back as the 1970s, see Seanad Éireann Debate, Family Law (Maintenance of Spouses and Children) Bill, 1975: Second Stage, 10 March 1976, Vol. 83 No. 12. Such calls were repeated by the *Report of the Joint Oireachtas Committee on Marriage Breakdown* (Stationary Office 1985) Chapter 9, the Law Reform Commission *Report on Family Courts* (LRC52-1996) and the Law Society of Ireland, *Divorce in Ireland: The case for reform* (2019) p 6.

¹² See ‘Family Court Bill aims to make system more efficient’ (2022) *Law Society Gazette* available at <https://www.lawsociety.ie/gazette/top-stories/2022/november/ministers-back-bill-to-set-up-family-court>.

¹³ ‘Child voice muffled in family-law bill – Law Society’ (2023) *Law Society Gazette* available at <https://www.lawsociety.ie/gazette/top-stories/2023/july/voice-of-child-muffled-in-family-court-bill-law-society>.

¹⁴ See <https://www.gov.ie/en/collection/4790f-family-justice-strategy/>.

¹⁵ *ibid* (emphasis added).

¹⁶ Department of Justice, *Family Justice Strategy 2022-2025* (2022) p 33 (emphasis added). One example of how non-court processes are being encouraged may be seen in the recent changes to encourage unmarried parents towards a non-judicial route to conferring the status of guardian on the father under section 6A of the Guardianship of Infants Act 1964. Seeking to address a common misconception, the parents of a child will now be informed when registering or re-registering the birth that if they are unmarried, merely naming the father on the birth certificate will not automatically make him a guardian. The couple will be provided with a copy of the statutory declaration conferring guardianship which they can sign, at no charge, in front of the registrar immediately or within a fortnight, reducing the potential risk of an unmarried father having to initiate legal proceedings at a later date. See section 27A of the Civil Registration Act 2004 (as inserted by section 97 of the

adversarial nature of family law proceedings'.¹⁷ Conscious of the important role which will continue to be played by the courts in family law disputes, it stresses:

'Even when a case is in court, it is proposed that ADR may be used as a way to agree other matters that *may not need a court decision* e.g. family visits and access agreements, and judges or other court officers should be able to refer cases to ADR, at any stage throughout a court process.'¹⁸

The increased awareness of the need to provide greater certainty and foreseeability to parties involved in family law disputes is particularly evident in relation to issues concerning family property and finances. Aiming to better facilitate the out of court resolution of issues arising on marital breakdown, the Law Reform Commission of Ireland's *Fifth Programme of Law Reform* intends to consider how more guidance may be given to parties on divorce vis-à-vis the meaning of 'proper provision'.¹⁹ It intends to

'consider to what extent any further guidance may be provided in order to ensure a consistency in the approach taken to the exercise of this judicial discretion, *in particular to assist spouses to reach settlements* and resolve disputes more efficiently and at lower financial ... cost'.²⁰

While the need for any settlement agreed to be subject to judicial approval before a decree of divorce or judicial separation is ordered by the courts will continue notwithstanding the introduction of any guidelines or clarification, such efforts to provide greater foreseeability and certainty facilitating parties in this regard is to be welcomed and could play a significant role in reducing the demands on the court system.

Part III: Developments Towards Child Maintenance Reform

Although the vision presented in the *Family Justice Strategy*, and the intention of the Law Reform Commission to consider how to assist parties in reaching settlements on divorce, certainly speaks to an increased interest in facilitating non-judicial pathways (where possible), nowhere is such a policy shift more obvious than in recent proposals for the reform of the child maintenance scheme adopted in Ireland.

Children and Family Relationships Act 2015). See also Brian Tobin, 'Guardianship and Unmarried Fathers in Ireland: One Step Forward, Two Steps Back?' (2020) 23(4) *Irish Journal of Family Law* 87-92.

¹⁷ Department of Justice, *Family Justice Strategy 2022-2025* (2022) p 34.

¹⁸ Department of Justice, *Family Justice Strategy 2022-2025* (2022) p. 34 (emphasis added).

¹⁹ It a pre-condition to a decree of divorce under Article 41 that 'proper provision' must be made for a spouse and any dependent children. What constitutes 'proper provision', however, remains undefined.

²⁰ Law Reform Commission's *Fifth Programme of Law Reform* (2019) 16 (emphasis added).

Conscious of the weaknesses identified in the antiquated, discretionary and highly problematic Irish child maintenance system,²¹ a number of reviews have recently been undertaken.²² While the introduction of a non-judicial ‘State Child Maintenance Agency’ was unfortunately vetoed in late 2022,²³ there nevertheless appears to be a continuing political will to see the introduction of a more settlement-friendly approach to child maintenance issues reducing the need for parties to invariably seek judicial intervention, in particular, in determining the amount of child maintenance due.

In January 2024, building on the earlier findings of the Child Maintenance Review Group,²⁴ the Department of Justice published the results of its *Review of the Enforcement of Child Maintenance Orders*.²⁵ Notwithstanding the somewhat narrow sounding title, the review adopted a relatively broad approach in considering how best to encourage and/or enforce compliance with child maintenance obligations. Its recommendations spanned three named approaches to ensure public compliance: ‘the deterrence based approach (punishment), the compliance based approach (monitoring or automatic withholding) and the consensus based approach (culture of paying)’.²⁶ Crucially, in relation to the latter, it recommended the introduction of child maintenance guidelines²⁷ reiterating the many benefits associated with guidelines

²¹ The core approach employed in the determination of maintenance cases in Ireland remains almost unchanged from that introduced in the Maintenance of Spouses and Children Act 1976. Based on her empirical research, O’ Shea reported that child and spousal maintenance in the Circuit Court is based on ‘a highly discretionary, individualised assessment of evidence and submissions made by counsel informed, in part, by the Affidavits of Means’, noting that ‘un-reliable Affidavits and inconsistent child and spousal maintenance orders were the hallmark of maintenance applications in the Circuit Court. During this project there was no evidence of any formulaic approach by the court, rather a rule of thumb pattern for each judge emerged’. Roisin O’Shea, *Judicial Separation and Divorce in the Circuit Court* (PhD Thesis, Waterford Institute of Technology 2014) 130-132. Rather than the affidavit representing a factual list of expenses, she described it as a ‘wish list’ in many cases. Note also the concerns voiced by the United Nations Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Sixth and Seventh Periodic Reports of Ireland* (2017) para 57 vis-à-vis the Irish approach to maintenance issues.

²² See *Report of the Child Maintenance Review Group* (November 2022). Available at <https://www.gov.ie/en/publication/f01cd-report-of-the-child-maintenance-review-group/>. See also Joint Committee on Justice and Equality, *Report on Reform of the Family Law System* (2019) and the Oireachtas Joint Committee on Social Protection, *Report on the Position of Lone Parents in Ireland* (JCSP01/2017).

²³ For a critique of this decision, see Kathryn O’Sullivan, ‘Child Maintenance Review Group Report: A Critique & Call for Reform’ (2023) 26(2) *Irish Journal of Family Law* 37-44. Interestingly, conscious of the strain on the Irish judicial system, calls for the introduction of a state child maintenance agency go back 50 years. See, for example, Senator Mary Robinson’s early efforts to advocate for same in the 1970s, Seanad Éireann debate, Family Law (Maintenance of Spouses and Children) Bill, 1975: Committee Stage, 23 Mar 1976, Vol. 83 No. 14.

²⁴ *Report of the Child Maintenance Review Group* (November 2022). Available at

<https://www.gov.ie/en/publication/f01cd-report-of-the-child-maintenance-review-group/>.

²⁵ Available at <https://www.gov.ie/en/publication/de4f9-review-of-the-enforcement-of-child-maintenance-orders/>.

²⁶ Ibid p 42. The review sought to ‘generate maximum compliance with child maintenance orders to ensure security and stability for children and to aid poverty prevention’. It explained the recommendations ‘seek to address both categories of those who don’t pay child maintenance – those who can’t pay, and those who won’t pay’ and were ‘chosen to complement each other and to work together to provide a fair, effective and efficient child maintenance system.’

²⁷ Describing the current regime, the review *ibid* explained at p 44: ‘The Irish courts currently operate without any guidelines in the determination of child maintenance... stakeholders noted that the current system is, or can be perceived as, inconsistent, and that it is very difficult for solicitors to advise a client on how much they will receive or pay. The way maintenance is calculated was called arbitrary and subjective. Stakeholders noted that currently the amount of maintenance ordered can come down to the individual judge, whether or not each party is represented, the proofs submitted, and the interpretation of those proofs.’

such as the increased ‘consistency, predictability and certainty’, the scope to ‘*greatly reduce the need for child maintenance to be litigated*’ as well as ‘the potential to significantly reduce parents need to access professionals or engage in protracted maintenance negotiations’.²⁸ To support the introduction of such reform and best ensure user accessibility, the review also proposed the introduction of a child maintenance calculator for guidance to ‘allow the public or a paying parent to quickly understand what the appropriate child maintenance amount will be’.²⁹ Underscoring the policy objective of encouraging out of court processes, the Department theorised that: ‘Child maintenance guidelines may lead to a *greater number of parents making voluntary maintenance agreements* and would increase transparency, consistency and predictability for those seeking and paying child maintenance.’³⁰ In a final nod to the policy focus of reducing applications to the courts for determinations in relation to child maintenance, the review proposed that prior to a court application for maintenance, ‘parents should have a mandatory mediation information session provided by the Legal Aid Board to encourage voluntary maintenance agreements’.³¹ It recommended that parents could be directed to the mediation service through Courts Service staff and proposed that there should be ‘investment in advertising the new process through media channels’.³²

Yet, while the review’s core proposals could, if framed correctly, certainly assist significantly in guiding parties with regard to the calculation of child maintenance, they did not seek to eliminate the role of the court. Rather, the review emphasised the importance of retaining judicial discretion, noting that the courts should not ‘become trapped by the guidelines’, but merely have regard to them in all cases.³³ Thus, even if introduced, the fate of any guidelines as accurate predictors of child maintenance would seem to rest in the hands of the judiciary and whether it ultimately endorses and supports their application. Notwithstanding this caveat, however, the publication of, and support for, such reform by a government department vis-à-vis child maintenance does mark a significant milestone in Irish family law, representing

²⁸ Ibid p 44 (emphasis added). It also noted that guidelines would likely ‘lead to more transparency’, ‘increase perceived fairness’ and ‘promote a culture of maintenance’.

²⁹ Ibid p 46. At p 47 it further recommended that maintenance figures granted by Court Orders should be included as data to be collected and reported for the purposes of Goal 6, Action 1.3 of the Family Justice Strategy which is currently scoping requirements ‘for either a new or improved data collection methods across the sector’. The inclusion of such data would, the review concluded, ‘increase transparency in the amount of maintenance awarded by the courts.’

³⁰ Ibid p 44 (emphasis added).

³¹ Ibid p 48.

³² Ibid p 48. Finally at p 49, it recommended a ‘national media campaign promoting the payment of maintenance and framing it as the right of the child and the responsibility of the parent to provide for their child should be rolled out.’

³³ Ibid p 44. The review also included various supporting recommendations. To avoid the difficulties arising if they are not reviewed often enough, it also proposed that ‘the guidelines be reviewed initially after one year and subsequently reviewed periodically’. In terms of who would devise (and update) the guidelines, the review proposed at p 45: ‘Guidelines could be produced and reviewed by an Inter-Departmental Group established by the Department of Justice and including representation from the Department of Social Protection and the Department of Children, Equality, Disability, Integration and Youth. Input could be sought from the Child Poverty and Wellbeing Office in the Department of An Taoiseach and other stakeholders as required. Bodies with experience of developing similar initiatives, such as the Vincentian Minimum Essential Standard of Living (MESL) Research Centre, which inputs to the Reasonable Living Expenses used by the Insolvency Service of Ireland (ISI), could also be engaged with on this work.’ For an academic perspective on how such guidelines should be formulated and the considerations involved, see Kathryn O’Sullivan, ‘Child Maintenance Reform in Ireland: Lessons from Abroad’ (2022) 34(1) *Child and Family Law Quarterly* 41-60.

a seemingly important step towards the facilitation of non-judicial pathways for the resolution of at least one vital family law issue.

Conclusion

Unlike some of our European neighbours, the administration of justice in family law matters continues to be ensured primarily through the mainstream courts system in Ireland. With few exceptions, non-judicial authorities play a very limited role and the legislative stance to rely on judicial discretion and ‘avoid the imposition of a rule-based process’ clearly continues.³⁴ In short, while at an EU level many jurisdictions may have moved towards the extra-judicial administration of justice – facilitating parties in resolving their disputes in an out of court setting or securing determinations from non-judicial authorities – Irish family law has yet to follow suit.

However, although it is hard to see any scenario arising where the role of the courts would be meaningfully reduced for a long time to come, there seems to be some doubts over the sustainability of retaining the status quo in Ireland and its focus on the provision of individualised justice. Increasing signs appear to be emerging of a policy shift towards empowering parties to resolve common family law issues themselves, particularly in relation to family property and finances, thereby reducing the burden on the courts.

What impact, if any, these policy shifts will have at a legislative or judicial level remains speculative. Nevertheless, it is to be hoped that the most concrete proposals advanced with a view to putting the policy into practice, namely the recommendations put forward by the Department of Justice in its review on child maintenance, will be implemented, paving the way for a more transparent approach to the calculation of child maintenance and facilitating parties in resolving such issues without necessarily having to have recourse to the courts.

³⁴ Louise Crowley, *Family Law* (Round Hall, 2013) 591.