Legal Ease

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Note from your Editors

Since the beginning of this year we have commemorated and celebrated the anniversaries of significant events in our history. However one anniversary would appear to have gone unnoticed. Friday 1st July was the 50th anniversary of the commencement of the Succession Act 1965. This legislation replaced a common law system and numerous statutes, some dating back to 1216! The major change was that for the first time a testator's freedom was curtailed and protection was put in place for a disinherited spouse or the spouse of a deceased with no will. A child too was enabled to make application for provision from a deceased parent's estate. It is clear from the Dáil debates that there was much controversy and disagreement about whether the fettering of a testator's freedom should be left to judicial discretion or by fixing a fixed right share. The legislation went for the latter in respect of a spouse and the former in respect of a child. How far we have come in 50 years! We now see the protection available to spouses extended to civil partners under the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. Qualified cohabitants under the 2010 act are not given a fixed share but can make application for provision out of a deceased partner's estate (any amount awarded can not exceed the share they would have been entitled to as a spouse and other entitled parties' interests are taken into account).

I might also point out that this is the first anniversary of *Legal Ease* and it is fitting to thank all who have contributed, commented and read our publication. We hope that you "stick with us" and we look forward to hearing from you.

Phil O'Laoide, Regional Manager
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Many thanks to everyone who took the time to contribute to this edition of *Legal Ease,* in particular our external correspondent Keith Walsh who never needs reminding of deadlines! We hope you've all had the chance to enjoy the lovely summer weather and take a well earned break. As the days grow shorter and the nights cooler we can take comfort in the fact that there will be another issue of *Legal Ease* to look forward to in the autumn!

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'The Rights of the Child in Practice' - A Multidisciplinary Conference

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The conference on 'child-friendly justice' was held on 2nd and 3rd of June 2016, at the Spanish Judicial School in Barcelona. The long title was 'The rights of the child in practice, exploring a multi-disciplinary approach to child-friendly justice in European law'. The event was organised by ERA, Academy of European Law, which is based in Trier, Germany, and had already taken place in several other venues within the EU, such as Bucharest, Paris and Krakow. The ERA offers practitioners such as judges, barristers and solicitors an opportunity to advance their legal training in European law. The conference was financially supported by the European Commission, as part of a specific programme 'Fundamental Rights and Citizenship'. In attendance were Judges from Munich, Berlin, Gdansk, Madrid and Poznan, and lawyers from Romania, Luxembourg, Sweden and Ireland. Speakers included a law lecturer from UCC Cork, Dr. Aisling Parkes. Different nationalities, but a common cause: to share knowledge, experience and skills.

Children have a weak legal status. A child does not enjoy full legal autonomy. Only in exceptional circumstances may a child initiate court proceedings. When involved in a court process, the child is the most vulnerable party. Under Article 1 of the Convention on the Rights of the Child, 1989 (CRC), a child is defined as a human being below the age of 18 years.

The CRC is the overriding piece of legislation to date on children's rights. A child, though unable to vote, has rights. A right to survive. A right to develop. A right to identity. A right to access to services, such as health, social welfare, education and recreation.

Article 12 (1) CRC deals specifically with the right of the child to be heard. Article 12 (2) states that the child shall, in particular, be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with procedural rules of national law. In Ireland, a referendum brought about the 31st amendment to the Constitution, so that the views of any capable child are be ascertained and given due weight, according to age and maturity.

Baroness Hale in the House of Lords Appeal, *In re D (a child)*, 2006 UKHL 51, said 'those who do listen to children understand that they often have a point of view which is quite distinct from that

of the person looking after them…. That is no more reason for failing to hear what the child has to say, than it is refusing to hear the parents' views.'

A General Comment on Article 12 CRC issued in 2009, from the Committee on the Rights of the Child, gave some guidance as to how and when children should participate in family law proceedings. For example, to exercise the right to be heard is a choice of the child, not an obligation. Speaking to children should take place in a child friendly space, with child friendly information. The General Comment stated that a child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate to the child's age. There should be an individual assessment of the child's capacity and maturity, notwithstanding his or her age.

Specific training is required in order to effectively take and evaluate statements from boys and girls, or adolescents. In criminal proceedings, badly worded questions can undermine the value of a testimony. In general, children should be asked easy questions, which are short, open ended and not suggestive. The questioner should avoid producing feelings of guilt in a child, or imposing the questioner's point of view.

The Child Friendly Justice guidelines of 2010 set out fundamental principles in relation to children involved in court proceedings. The child is first and foremost a child, regardless of whether in court as a suspect, victim or witness. Regard should be had to his or her age, maturity, special needs, level of understanding, with language used appropriate to the individual child. Trained professionals should try to ensure as few interviews as possible. For example, a child alleging sexual abuse should not have to repeat his or her account numerous times to different professionals. Respect and sensitivity should be maintained throughout.

Even though the child has a right to be heard, it must be decided what weight should be attributed to his or her account… and what the child says should not be determinative.

The Courts of the European Union have a role in interpreting and enforcing children's rights. The Court of Justice of the European Union (CJEU) has so far mainly reviewed preliminary references, where a national court refers a matter to the CJEU for an interpretation of primary or secondary EU law, that is of relevance to a case pending in the national court. Most of the judgments concerning children's rights are in the context of free movement and EU citizenship. Children born in countries of the EU are citizens of the EU in their own right.

The European Court of Human Rights (ECtHR) has a wide jurisprudence on children's rights, often in cases brought by parents under Article 8 of the ECHR. Children have basic human rights which deserve to be protected, not just in the context of family law proceedings, but also protection against child trafficking, exploitation, forced labour, pornography and grooming.

Even though the child has a right to be heard, it must be decided what weight should be attributed to his or her

account, in all the circumstances, and what the child says should not be determinative.

In *B.B. and F.B v Germany* (ECtHR) Nos. 18734/09 and 9424/11, 14 March 2013, a 12 year old girl and her 8 year old brother were placed in a children's home, after the 12 year old's assertion that she and her brother were repeatedly beaten by their father. The District Court made a full order transferring parental authority, based on direct evidence from the children. About a year later, the daughter admitted she had lied, and the children were eventually returned to their parents. The claim to the ECtHR, was that the authorities failed to adequately examine the facts, and indeed relied only on the statements of the children, which appeared contrary to medical statements, with no other evidence of mistreatment of the children by their parents. It was found that the German courts failed to give sufficient reasons for their decisions to withdraw the applicant's parental authority, and were found to be in breach of Article 8 of the European Convention of Human Rights, on the right to respect of private and family life.

In Northern Ireland, Scotland, England and Wales, in any matter concerning the welfare of the child, family courts have a dedicated service, where social reports and reports ascertaining the voice of the child can be ordered, and a Judge can hear the child directly. In England and Wales, a Children and Family Court Advisory and Support Service (CAFCASS) officer can meet with the child to obtain the child's views, and report back to the court. In Germany, children are generally only informed of court proceedings, to an extent suitable to their age and maturity. A representative from the Child and Family Section of Social Services must meet with the parents and child before a court will reach a decision, and the child can also have a representative appointed. In Italy, in the context of divorce or separation proceedings, if a child is over the age of 12, and deemed mature enough, a Judge can hear the child.

Article 3 (1) CRC states that 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 the primary consideration. In Ireland, the Children and Family Relationships Act, 2015 refers specifically to 'best interests' of the child. Section 31 (2) of the 2015 Act sets out 11 factors to be taken into account by a court when determining what is in the child's best interests.

Multidisciplinary and international co-operation has many benefits, including reduction of complexity of proceedings and polarisation of points of view, as well as co-ordinated training and protocols on judicial proceedings. This is ultimately to aid vulnerable children, where their fundamental rights are at risk of being breached.

Aoife Byrne began her legal career with the Refugee Legal Service in 2001, as a caseworker, and went on to work in the role of Legal Clerk in the Legal Aid Board for 7 years, until 2009. Aoife qualified as a solicitor in 2011, and is currently practising at Law Centre (South Mall), Cork. Aoife is registered as an Irish speaking solicitor, and is commencing an LLM in University College, Cork in September 2016. Aoife is on the Editorial Board of the Law Society Gazette .

Solicitors' Costs

Keith Walsh,
Keith Walsh Solicitors

Court of Appeal clarifies when time starts to run for time limit within which solicitors costs must be taxed (12 months from delivery of bill of costs) arising from issue over taxation of bill of costs in family law case.

The importance of what precisely constitutes a bill of costs is that the 12 month time limit within which a client must apply to tax the costs of a solicitor only runs from the date a bill of costs is delivered. The incorrect practice followed until Irvine J.'s decision was that a bill of costs was only viewed as a bill of costs if it complied with Order 99 r. 29(5) of the Rules of the Superior Courts which refers to a 7 column bill of costs and which is the type of bill drawn up almost exclusively by legal costs accountants.

Irvine J. held that a valid bill of costs for the purposes of the 1849 Act, and to start the 12 month clock running within which the bill can be sent to taxation, is a bill of costs which complies with the definition of bill of costs in sections 2 and (the obligations set out in) section 68(6) of the Solicitors (Amendment) Act 1994 and does not have to be a legal cost accountant's type bill as set out in Order 99 of the Rules of the Superior Courts.

The Background to the Case

The solicitor was retained by the client in two sets of family law proceedings in the Circuit Court in 2002. The solicitor furnished her client with section 68

letters on 18th July 2005 and 29th May 2007 in which she estimated her solicitor's fees would be approximately €45,000 plus VAT and outlay and excluding conveyancing, witnesses' expenses and barristers' fees. The family law cases were settled in May 2007 and no order for costs was made.

The settlement agreement provided for the transfer of substantial assets to the client - the family home was to be transferred into her sole name, and she was to be paid the sum of €1 million within five years and to receive substantial monthly maintenance payments until payment of the capital sum. A further payment of €125,000 was to be made to the client within three months.

On 12th November 2007, the solicitor furnished the client with a total bill of €120,855 comprising her own fee of €55,000 plus VAT of €11,550 which was described as "all work done in this connection to include client appointments, phone calls, all correspondence, consultations with counsel and attendances at court". A list

of 15 items of outlay and an itemised list of fees paid to senior counsel, junior counsel, auctioneers, forensic accountants etc. was included in the bill. The solicitor explained in her cover letter that she had deducted the fees from the sum of €125,000 received from the other solicitor on foot of the settlement and held in her client account. A cheque in the sum of €4,145.60 was enclosed "to conclude".

The client retained another solicitor to act on her behalf in relation to another matter and this other solicitor took up her documents and files in 2009. The client raised no query or objection to the bill of costs and she did not object to the fact that the solicitor had paid herself her fees from the funds otherwise payable to her by her husband under the settlement agreement. Following correspondence in 2012 where the client called upon the solicitor to submit her bill of costs for taxation and where the solicitor refused stating that the time within which the client could tax the costs had expired, the client then issued High Court proceedings claiming that the invoice initially furnished was not a valid bill of costs. The relief claimed by her was an order "requiring the defendant to submit to taxation a solicitor and client bill of costs within the meaning of sections 2 or 6 of the Solicitor (Ireland) Act 1849".

The High Court Judge on the 7th July, 2014 refused the solicitor's application to have the proceedings dismissed and required the solicitor to submit her bill of costs to taxation and the matter was then appealed by the solicitor to the Court of Appeal.

In response, the solicitor by notice of motion returnable before the court on 26th May 2014, sought an order dismissing the client's claim on the grounds that it was frivolous and vexatious or alternatively on the basis that it was bound to fail. The solicitor set out the facts on affidavit.

The High Court Judge on the 7th July 2014 refused the solicitor's application to have the proceedings dismissed and required the solicitor to submit her bill of costs to taxation and the matter was then appealed by the solicitor to the Court of Appeal.

Relevant Factors in Determining What is a Valid Bill of Costs as Highlighted by Irvine J.

As no provision for costs were made by the Court or by way of settlement in the family law case which gave rise to the bill of costs, the costs were solicitor and client costs only.

The bill of costs in question was for work done which was "contentious business", as defined in section 2 of the 1994 Act:-

"Business done by a solicitor in or for the purposes of or in contemplation of proceedings before a court or tribunal or before an arbitrator appointed under the Arbitration Acts, 1954 and 1980."

Bill of costs is defined in section 2 of the 1994 Act as including :-

"any statement of account sent, or demand made, by a solicitor to a client for fees, charges, outlays, disbursements or expenses;"

Due to the fact that the subject matter of the proceedings in this case were contentious, the following additional obligations were placed on the legal practitioner pursuant to section 68(6) of the 1994 Act:

"68(6) Notwithstanding any other legal provision to that effect a solicitor shall show on a bill of costs to be furnished to the client, as soon as practicable after the conclusion of any contentious business carried out by him on behalf of that client:–

(a) a summary of the legal services provided to the client in connection with such contentious business,

(b) the total amount of damages or moneys recovered by the client arising out of such contentious business, and

(c) details of all or any part of the charges which have been recovered by that solicitor on behalf of the client from any other party or parties (or any insurers of such party or parties),

and that bill of costs shall show separately the amounts in respect of fees, outlays, disbursements and expenses incurred or arising in connection with the provision of such legal services".

This is the bill of costs which solicitors furnish to their clients following a contentious matter and it is now clear that the 12 month time period runs from delivery of the normal solicitor's bill of costs, provided it complies with section 2 and section 68(6) of the 1994 Act, rather than the bill prepared by the legal cost accountant which may never be prepared or may only be prepared in the event of a dispute.

it is now clear that the 12 month time period runs from delivery of the normal solicitor's bill of costs, provided it complies with section 2 and section 68(6) of the 1994 Act.

What do Section 2 and 6 of the Solicitor (Ireland) Act 1849 Say and Can a Client Tax a Bill of Costs After 12 Months from the Delivery of a Valid Bill of Costs ?

In her judgement Irvine J. refers to the summary of McCarthy J. in *State (Gallagher Shatter & Co.) v DeValera* [1986] ILRM 3 where he states: –

"The combined effect of Sections 2 and 6 in respect of a bill of costs for solicitor and client charges duly delivered, would appear to be that: -

(1) the solicitor cannot lawfully sue for one month after delivery,

(2) the client has a period of 12 months within which to demand and obtain taxation,

(3) after the expiry of 12 months or after payment of the amount of the bill, then the court may, if the special circumstances of the case appear to require the same, refer the bill to taxation, provided the application to the court is made within 12 calendar months after payment,

(4) after the expiry of the latter period, there is no statutory power to refer for taxation".

Irvine J. gives examples of what she considers could amount to "special circumstances" for the purposes of section 6:

- payment of a bill of costs without the consent of the client (see *RE McLaughlin* [1908] 42 ILTR 153), in circumstances where the bill was paid by reason of undue pressure on the client or where the client on payment, expressly reserves the right to have the bill taxed at a later date (see *RE Walker v Carey and Ors* 65 LT 68).

The High Court also possesses an inherent jurisdiction to refer a bill for taxation at any time, and Irvine J. referred again to the judgment of McCarthy J. in *Gallagher* where he stated: –

"It is well established law that the court has always retained its inherent jurisdiction to order taxation; it derives from the court's inherent jurisdiction to supervise its officers, including solicitors, all of whom are offices of the court. A fortiori, such a jurisdiction requires that it be invoked; it has not, as yet, been invoked here. Such a jurisdiction runs in parallel to the statutory jurisdiction that I have sought to detail as derived from the Act of 1849; running in parallel does not mean that the court should lightly disregard the restrictions or limitations imposed by the statutory code; it is sufficient, however, in my judgement, to hold, as I do, that the jurisdiction relied upon by the respondent in the taxation of the prosecutors bill of costs is not to be found on the statute rules relied upon and consequently, that in undertaking this taxation he acted without jurisdiction, that the cause shown should be disallowed and the conditional order made absolute."

Irvine J. points out that any judge considering invoking the Court's inherent jurisdiction would *'firstly have to have regard to the extent of any delay and the reasons therefore having regard to the fact that the court's inherent jurisdiction runs in parallel to the statutory jurisdiction. For my part the following matters would sound against the exercise by the court of its inherent jurisdiction on the facts of the present case namely:-*

(i) The fee note was not disputed when it was delivered.

(ii) Ms. Spillane made no complaint about the fact that Ms. Dorgan deducted her fees from the sum of €125,000 which would otherwise have been payable to her on foot of a settlement.

(iii) It was not until 2nd July 2012, almost five years after the delivery of the bill that Ms. Spillane first complained about the size of that bill.

(iv) Ms. Spillane was under no disability during any of the aforementioned period of delay.

"It is well established law that the court has always retained its inherent jurisdiction to order taxation; it derives from the court's inherent jurisdiction to supervise its officers, including solicitors, all of whom are offices of the court.

(v) Ms. Spillane's entire file had been transferred by Ms. Dorgan to a new solicitor in 2009 thus affording her every opportunity to raise a query regarding the size of the bill, but none such was made.

(vi) There is a bald assertion in August 2012 that had the fee note been referred to taxation the same would entitle her to

a rebate of €30,000. The same is unsupported by any evidence from a solicitor or a costs accountant, a somewhat surprising omission in light of the fact that she was in possession of her full file since 2009.

(vii) The solicitor and client bill when considered separate from fees, outlays, disbursements and expenses is not blatantly or obviously excessive having regard to the section 68 letters notified to Ms. Spillane at the commencement of the solicitor client relationship".

Irvine J. on behalf of the Court of Appeal found in favour of the solicitor appellant and held:

- the solicitor and client bill of costs furnished by Ms. Dorgan to Ms. Spillane on 12th November 2007, was a bill of costs in accordance with section 68(6) of the Solicitors (Amendment) Act 1994 and was thus a valid bill of costs for the purposes of triggering the time limits attaching to section 2 of the 1849 Act.
- the trial judge erred in concluding that Ms. Spillane's claim to relief under section 2 of the 1849 Act was not time barred.
- the facts of the present case did not support the exercise by the court of its inherent jurisdiction to refer that bill of costs to taxation.

Interaction Between the 6 Year Limitation Period in Contract and the 12 Month Period within which to Tax a Bill of Costs

Counsel for the solicitor appellant submitted that regardless of the twelve month time limit provided for in section 2 of the 1849 Act, Ms. Spillane's claim must be statute barred by virtue of the fact that her action was a claim for breach of contract arising out of the solicitor and client relationship to which a six year statutory period applies. Irvine J. did not accept this submission as she held that the Act of 1849 contained its own time limit within which a client may challenge the validity of a bill of costs. Irvine J. concluded that it must be inferred from the statutory provision that the client's entitlement to engage section 2 of the 1849 Act is lost once the time provided (12 months) expires.

Thanks to George Gill for alerting me to this case and to the solicitor Ms. Dorgan for ensuring the law was corrected by bringing this case all the way to the Court of Appeal.

Irvine J. concluded that it must be inferred from the statutory provision that the client's entitlement to engage section 2 of the 1849 Act is lost once the time provided (12 months) expires.

Keith Walsh is Principal of Keith Walsh Solicitors in Crumlin. He worked for the Legal Aid Board from June 1998 to February 1999 as a temporary Law Clerk in Newbridge Law Centre, and he qualified as a solicitor in 2001. Keith is former President and current Council member of the Dublin Solicitors Bar Association, and is currently Vice Chairman of the Law Society Family and Child Law Committee.

Be Vigilant in Combating Modern Human Slavery

Phil O'Laoide,
Regional Manager

We know human trafficking is a crime but would we recognise its victims? These victims are found not only in large urban areas but throughout the length and breadth of Ireland. They are Irish citizens, EU Nationals and people for other countries. They may apply for services in law centres or mediation offices and never disclose a background of having been trafficked. We therefore need to be alert to the indicators and to know the legislative framework so that we can support, advise and protect.

Legislative Framework

The legislative protections are found as follows:

Internationally

- The UN Convention on the Rights of the Child
- The Palermo Protocol: A UN protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children
- The Council of Europe Convention on Action Against Trafficking in Human Beings 2005
- EU Directive 2011/36/EU

Nationally

- The Criminal Law Human Trafficking Act 2008
- The Criminal Law Human Trafficking Amendment Act 2013
- The Civil Registration (Amendment) Act 2014

The 2008 Act specifically prohibits trafficking for sexual and labour exploitation, including sex trafficking and forced labour, and is applicable to both men and women. The 2008 Act also criminalises trafficking for the purpose of exploitation consisting of the removal of human organs. The exact text of the Act can be accessed at the following link

http://www.irishstatutebook.ie/2008/en/act/pub/0008/index.html

The 2013 Amendment Act broadens the scope of the definition of 'exploitation' in the 2008 Act to include exploitation consisting of forcing a person to engage in criminal activities (inside or outside the State). It also:

- expands the definition of the term 'labour exploitation' to include forced begging;
- for clarity, defines the term 'forced labour' in line with the definition based on that set out in International Labour Organisation (ILO) Convention

No. 29 of 1930 on Forced or Compulsory Labour;

- provides that where a trafficking offence (for sexual or labour exploitation) is committed by a public official during the performance of his/her duties, that fact shall be treated as an aggravating factor for the purpose of determining sentence; and
- amends child evidence rules by increasing, from 14 to 18 years, the upper age threshold for out-of-court video recording of a complainant's evidence and makes provision for video recording the evidence of a child witness (other than an accused) who is under the age of 18 years.

The exact text of the 2013 Amendment Act can be accessed at:

http://www.irishstatutebook.ie/2013/en/act/pub/0024/index.html

The Civil Registration (Amendment) Act 2014 was enacted on 4 December 2014. The Act contains a provision at section 18 to make it more difficult to broker a marriage of convenience thereby protecting vulnerable persons, usually women, from trafficking for the purpose of sham marriages. This provision is designed to counter the abuse of Irish marriage laws to gain an automatic right of residency in Europe. Civil Registrars are empowered to ask questions and to inform immigration authorities or An Garda Síochána if they have reason to believe a marriage is a sham.

It is noted that a large number of victims end up in the sex trade. The Criminal Law (Sexual Offences) Bill 2015 was moved at Second Stage in Dail Éireann on 29 January 2016. It aimed to strengthen the existing law to combat child pornography, the sexual grooming of children, incest, exposure and other offensive conduct of a sexual nature. Part 2 of this Bill addressed the sexual exploitation of children. Part 3 of the Bill contained two sections providing for the criminalisation of the purchase of sexual services.

Under the Bill it was an offence for a person to pay, offer or promise to pay, a person for the purpose of engaging in sexual activity with a prostitute. The person providing the sexual service – the prostitute – will not be subject to an offence. The purpose of introducing these provisions was primarily to target the trafficking and sexual exploitation of persons through prostitution. The Bill fell with the dissolution of the 31st Dáil in February 2016.

The International Protection Act 2015 was enacted on 30 December 2015 but has not yet commenced. The principal purpose of the Act is to reform the system for examining and determining applications for international protection in Ireland through the introduction of a single application procedure. Under the single procedure, an applicant will make only one application, and will have all grounds for seeking international protection and to be permitted to remain in the State examined and determined in one process. It may help with early identification and referrals for victims of trafficking.

So What is Trafficking?

Blueblindfold which is the garda website dealing with trafficking (www.Blueblindfold.gov.ie) tells us that

there are three main components to this crime:

- The ACT of recruitment, transportation, transfer, harbouring or receipt of persons must be done by
- A MEANS such as the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability or the giving or receiving of payments and it must be for the purpose of
- EXPLOITATION i.e. sexual exploitation, labour exploitation or organ removal

Some Points to Note

An Irish citizen can be trafficked. There is no requirement that a person must have crossed a border for trafficking to have taken place – it can and does take place within national borders. A child cannot consent to being trafficked.

Our Role

The Legal Aid Board has a special unit dealing with cases which are referred by the gardaí or cases which come to the unit's attention in the asylum process. However trafficked people may well present to law centres throughout the country for other civil issues. In a recent childcare case in the west of Ireland what commenced as a straight forward defence of a childcare application became an investigation of a human trafficking case when the full circumstances of the one parent was explored in court.

Red Flags

So what are the indicators which should alert us to ask the question is our client a modern day slave? The list below taken from the blueblindfold web site is of assistance but not exhaustive:

- An applicant/client who has no tax or PRSI contributions and no access to social supports
- An Applicant/client who has no contract of employment
- An Applicant/client who is working without the employment documents required for workers from their country
- An Applicant/client who has been unable to move around the country freely, who has limited contact with others and who is always accompanied to interviews
- An Applicant/client who is unfamiliar with the area
- An Applicant/client who is working to pay back fees for transport to this country

The number of identified cases of trafficking is on the rise. The latest figures available to us are from 2015 and the gardaí report that in 2015 91 cases were investigated and 78 identified as victims. In 2014 the figure was 26. It would seem that increasing awareness in this area is paying off in that more referrals are being made each year. Interestingly the majority of victims identified in 2015 were from three countries: Romania, Nigeria and Ireland.

We can echo the words of Theresa May the newly appointed British Prime Minister. She, as Home Secretary, was instrumental in enacting in the United kingdom the modern day Slavery Act 2015. She said "the presence of modern

slavery is an affront to the dignity and humanity of us all".

With an increase in awareness and vigilance both professional and frontline staff can play a vital and active role in combatting this heinous crime.

I Swear by the Holy Bible……

Solicitors should be aware of their obligations when witnessing affidavits and may even need to inquire as to a deponent's religious beliefs. This was highlighted from the comments of Judge Peter Kelly *In RE Michael Hennessy In Re Carina Davidson* 4th April 2016. The case was listed on the direction of the presiding judge and arose from a bail application which had been made in mid March in Cloverhill courthouse. In the course of this bail application Judge Kelly had questioned the Applicant as to the circumstances in the swearing of his affidavit. The Applicant's oral evidence had been in some respects different from the contents of his affidavit. When asked if he had sworn his affidavit the bail applicant stated that he did not know what this meant. The judge then required if he had taken an oath and if a bible had been produced. The Applicant said it had not. Arsing from this Judge Kelly directed that the solicitor for the Applicant and the solicitor who witnessed the "swearing" of the affidavit appear before him to explain why no valid oath had been administered.

Both solicitors, represented by senior counsel, accepted that a bible had not been produced. It was a law student and not Mr Hennessey who had been present when the affidavit had been "sworn" but Mr Hennessy accepted full responsibility. Ms Davidson, who had been the witness, herself furnished an affidavit to the court and averred that she used a bible when administering oaths but had not one with her in Cloverhill and that no bible was available to her in Cloverhill remand centre. She suggested that she should have had the deponent affirm rather than swear. Judge Kelly did not agree. He said that affirmation was only appropriate where the deponent had no religious belief or one which does not permit him to make an oath in religious terms. Judge Kelly emphasised the importance of trust in the solicitor profession. He said a document had been put before him which purported to be an affidavit but was not.

The Law Society has now warned solicitors that they should carry copies of the Bible and Koran if they are required to administer oaths. The only exception is where someone objects to the use of such a text and seeks to affirm rather than swear. The Oaths Act 1888 is the relevant legislation. Every solicitor who holds a practising certificate is a person who is authorised to verify sworn statements made in writing i.e. affidavits. A solicitor who is witnessing an affidavit must make sure the deponent has read the document and understands it contents. For swearing purposes it should be noted that Christians swear on the New Testament, Jews on the Old Testament and Muslims on the Koran.

Our thanks to Angela Sweeney, Athlone Law Centre and Mary Bunn, Smithfield who brought this case to our attention.

Book Review: Children and Family Relationships Law in Ireland

Keith Walsh,
Keith Walsh Solicitors

Children and Family Relationships Law in Ireland: Practice and Procedure, Dr. Geoffrey Shannon, Clarus Press, 2016, 483 pages.

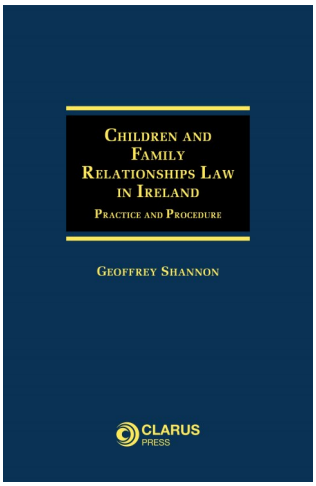
The 2015 Children and Family Relationships Act heralds a new era of rights for the family outside marriage. As Geoffrey Shannon says it represents 'the most significant change in family law in a generation and attempts to reflect the social reality of contemporary family life in Ireland' and must be viewed in the context of the recent child centred constitutional amendment in relation to best interests of the child being of paramount consideration and hearing the voice of the child and the more recent constitutional amendment recognising same sex marriage. The 2015 Act also recognises children as having rights and grants new rights to a more extended and modern family.

Geoffrey Shannon has produced the definitive work on the 2015 Act. His book is an authoritative analysis and critical examination of the Act. He clearly sets out how the 2015 Act will work in practice by reference to the newly amended District and Circuit Court Rules as well as the Rules of the Superior Courts. Practice and procedure, in the District Court in particular, is flagged as part of the examination of the Child and Family Relationships Act 2015. His cross referencing of the new Act with the new District Court Rules will be of considerable assistance to practitioners.

As the title of the book indicates, Shannon is concerned not only with the 2015 Act but with all family and child relationships law and as you would expect he provides an in depth analysis of the Adoption Act, 2010 as well as the 2016 Adoption (Amendment) Bill. Although not included in the 2015 Act, the issue of relocation is addressed in detail and he flags the difficulties the Irish courts face in determining whether the relocation of a child is in the child's best interests or not. As this is an area with few Irish cases Shannon highlights relevant English case law as well as the recent Irish case of *UV v VU*.

The book is divided into three parts. The first part focuses on the international legal framework and the most significant international instruments as they affect the 2015 Act. In the first part Shannon also deals with children's rights, parentage, guardianship, custody and access, dispute resolution and enforcement orders, adoption,

maintenance and civil partnership. The international element permeates each chapter in the first part and Shannon includes references to the various international conventions, covenants and charters. He refers to the practical experience of other jurisdictions where appropriate e.g. when discussing custody and access he points out that the Court when granting joint custody should precisely set out the terms of the order to ensure the parties do not mistakenly believe that they should have equal custody in terms of time spent with the child and he references the Australian experience following the introduction of a rebuttable presumption that equal parental responsibility was in the best interests of the child post separation. Australian courts then had to decide whether it would be in the best interests of the child and reasonably practicable to order equal time with both parents. Shannon indicates that significant problems followed this development in Australia and this law was viewed to be parent centred rather than child centred.



The second part of the book is a fully annotated version of the 2015 Act containing helpful explanatory notes on almost every section of the Act.

The third part contains the new District, Circuit and Superior Court Rules and forms which were introduced following the commencement of the 2015 Act. Shannon has annotated the rules and as they are cross referenced with his earlier chapters on the 2015 Act in Part 1, it makes both the rules and the Act much more accessible and understandable to practitioners.

It is not possible to properly read and apply the 2015 Act to even a straightforward matter without reference to at least one or two other family law statutes and the new District Court Rules but thanks to Geoffrey Shannon's masterpiece of clarity, scholarship and precision the 2015 Act and the whole area of children and family relationships law has become much more understandable and accessible for practitioners and those affected by the law. Equally important is the timing of this publication, coming just less than 6 months after the introduction of the Act. It is entirely appropriate that the President of the District Court, who has done so much to promote the child centred approach to family law and who, along with her fellow District Court judges, will be responsible for implementing the new approach to child and family relationships, provided the foreword for this book.

Children and Family Relationships Law should immediately become an essential part of any family lawyer's library and practitioners owe Geoffrey Shannon a debt of gratitude for the huge time, effort and most importantly expertise which he has clearly left on the pages of this book for practitioners to pick up and use for our clients' benefit and to further our understanding of this new and complex law.

Copies of the book are available from the LAB Library on request.

Interview with Fiona McAuslan, Regional Manager, Family Mediation Service

Phil O'Laoide,
Regional Manager

Fiona McAuslan

POL: *Fiona congratulations on your appointment as a Regional Manager in the mediation service. What prompted you to apply for this role?*

Thank you very much. The decision to apply for this job seemed like quite a change of direction for me, as I have spent the last ten years working right across the board in mediation and conflict resolution practice. Many of my colleagues would know of my education work, publications and workplace mediation business and would wonder at this sojourn into full time public service management. The truth is, I really believe in public service and it seemed natural for me to step up to the challenge that I see lying at the heart of the Family Mediation Service and Legal Aid Board integration.

Mediation is, in essence, still a pioneering profession. So, each of us has to keep to the forefront of our practice the task of how we influence and develop mediation for future clients. In taking on the role at this time in the service, I see considerable possibilities for that development.

POL: *What skills do you think you bring?*

The skills I have as a mediator definitely will be a big help, working to bring people with me and looking to create ways through the impasses will be useful. I also have a very determined streak to my nature, which is not necessarily a skill, but it does mean that I do not give up on anything I set my mind to. It does not matter how long it takes, I will keep working away to achieve the goal.

I also am a great one for my ideas, which tend to bubble up, one after another. A number of my colleagues will testify to this habit at meetings. You would need to ask them if they saw this as a help or a hindrance! I really enjoy projects and the ideas that flow when a group of people are working to a common end, and I think that my skill set is principally built around that sort of work.

I have clocked up a lot of mediation case work. For the last decade, I have done an average of 500 hours of face to face case work per year of all sorts of cases and I understand the job. I know what it's like to close the door and sit in a room with two highly conflicted people with a myriad of issues and build a successful collaborative negotiation, while empowering the said people to resolve their conflict. It is not for the

faint hearted and requires huge compassion and resilience in the mediator themselves. I hope that I never lose that understanding.

POL: *What experience from your past life do you think will be useful?*

As many people know, I was a professional, symphonic violinist, latterly in the National Symphony Orchestra. That training has done more to influence my understanding of what it is to succeed than anything else. You are trained to be artistic and creative, but within a strong technical structure. The training is very demanding and very disciplined. The experience of playing in a symphony orchestra is like no other. You are part of this big, noisy organism that produces an amazing sound, and you learn to sublimate your own needs to be part of this spectacular whole. You are anonymous, as part of this great machine, but yet in front of an audience. I think that taught me not to take myself too seriously and that it is worth putting the job first, when you really care about what you do.

Growing up in Scotland has been a big factor in how I see the world. I have a strong Christian Faith and it is rooted in the Scottish tradition of egalitarianism and social service. There is a sort of no nonsense attitude from my part of the world that I value. You get up in the morning, get on with your day and sleep with your own conscience at night. It is a rather good way of keeping yourself from getting too caught up in unnecessary complexity.

POL: *What do you think would help the Legal aid Board provide a more integrated service for the person who seeks our help?*

Top of the list is acknowledging that we are better at our jobs for knowing each other. I am a better mediator for working with solicitors and I know there are solicitors that have benefited from working with me. I do believe that our professional dialogue has got stuck. I could rhyme off the list of criticisms solicitors rap out about mediators, and mediators rap out about solicitors. To be honest, I think we are well past the stage that this is an acceptable professional discourse and it does not behove any of us well to accept its continuance.

I would suggest that solicitors and mediators need to look at the needs and interests of the clients with more of a common purpose. What do they need and how do we deliver that? To me it's a bit like a hospital. We all have our disciplines and each can be used for the benefit of our client.

What do Irish citizens want? That is where we all start, isn't it? They need their issues dealt with in the best and most timely way possible. Mediators and solicitors alike have a fabulous opportunity to look at this through the prism of public service and work to develop a broad spectrum of interventions to meet that need.

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disciplines and each can be used for the benefit of our client.

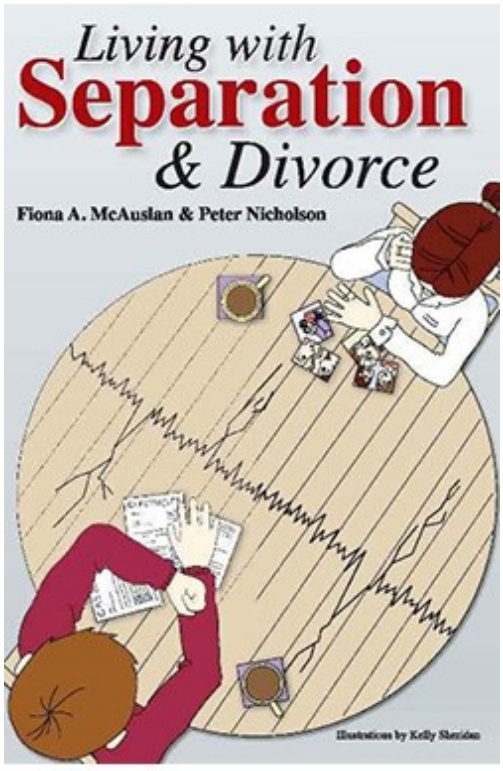
We need to develop proper research projects that actually measure what our services are delivering and develop training to further the skills of our staff in the areas we need to be skilled. Mediation has enormous potential beyond what we are doing now, and that is a good thing. However, it needs to be measured and developed with good fundamentals.

POL: …and finally?

I believe that mediation and what it has to offer is irresistible. It was to me. The fact that you can view a crisis or conflict as an opportunity for creative thinking and empowerment of the very people who are in the said crisis, was magical to me when I first studied the subject. That is not to say that it is easy, but what a thing it is to be able to focus on the strength of people to work together, when so much looks fractured. The skill set of the negotiator that chooses to use their skills to build the capacity of others is always impressive. We now have the backing of neuro-science research to show us that the types of interventions we use are much more effective to the whole person and the problems they face than would have been realised before.

To be part of a world wide movement that understands we need to put people at the heart of their own problem solving and work for peaceful, long lasting solutions, whether it is within families or within countries, is a huge privilege. It demands our strength, attention and fortitude and I believe it is the way forward. I hope I can impart some of that in the post I now take up.

"The skill set of the negotiator that chooses to use their skills to build the capacity of others is always impressive. We now have the backing of neuro-science research to show us that the types of interventions we use are much more effective to the whole person and the problems they face than would have been realised before".



Copies of Fiona's book *Living with Separation and Divorce* are available on request from the LAB library.

Case Summary: Child Abduction

Grainne Brophy, Smithfield Law Centre

DE v EB [2015] IECA 104

An applicant in child abduction proceedings sought the return of his young infant to the jurisdiction of the requesting state, a European Country, on the basis of a wrongful retention by the respondent's mother. The Respondent contended that the child's habitual residence had changed prior to the alleged date of wrongful retention and also that the child would be at grave risk if returned to the requesting state.

The High Court Judge found in favour of the applicant. The trial Judge held that the child's habitual residence had not changed.

The Court referred to the European Court of Justice case of *Mercredi* which judgment found inter alia that it is imperative that the removing parent has it in mind to establish there (the state) the permanent or habitual centre of his/her interests, with the intention that it should be of lasting character, but duration of the aforesaid stay can serve only as an indicator in the assessment of the permanence of the residence, and that habitual residence must be assessed in terms of circumstances fact specific to the individual case. That in determining Habitual Residence, it was important that in addition to the physical presence of the child in a member state, other factors must also make it clear that the presence of the removing parent and the child is not in any way temporary or intermittent. That it was for the national courts of member states to determine the issue of habitual residence, taking into account all the circumstances of facts specific to each individual case.

The Court made no finding of grave risk, and, also sought, and, obtained undertakings from the Respondent so that adequate plans would be in place upon the return of the child.

The Respondent appealed the High Court decision to the newly established Court of Appeal, arguing that the trial judge failed to apply the criterion outlined by the CJEU correctly to the facts of the case, that the trial judge failed to have sufficient regard to the onus being on the father to establish that the Habitual Residence remained in the requesting state, that the Court had erred in distinguishing the application on its facts from those in *Mercredi* and that undue weight had been put on periods spent in the requesting state, that the trial judge failed to have proper regard for the fact that the child was very young and entirely dependent on her mother, who had as a matter of probability changed her Habitual Residence, and that the proximate family and social connections were with the mother in

The Respondent appealed the High Court decision to the newly established Court of Appeal, arguing that the trial judge failed to apply the criterion outlined by the CJEU correctly to the facts of the case.

Ireland.

Regarding the assessment of the Habitual Residence of the child the Court in considering all the circumstances of fact specific to the case, concluded that on the evidence before the High Court the father discharged the onus on him to establish that the Habitual Residence of the child remained in the requesting state.

The Court found that as appears from the judgment in *Mercredi* ," all of the relevant factors must be taken into consideration, including of course the entire centre of interests of the child at the relevant time and where relevant, one weighed against the other. The reasons for the child's move and conditions under which she came to be in the Second Member State are also relevant factors.

In a case such as the present - where both parents hold parental responsibility and each have a right to participate in a decision as to where a child should live - a consent given for a limited duration or, to put it another way, the absence of a consent to a change in the habitual residence is a factor to be taken into account and weighed against other relevant factors.

It does not appear to me that the judgments of the CJEU when considered collectively in the context of the relevant features of each case identify that any one or more competing factor should be given on overriding consideration. The weight attached to each will depend on the facts of the individual case. Differing considerations will apply depending on all the different factors identified by the CJEU"

Regarding the assessment of the Habitual Residence of the child the Court in considering all the circumstances of fact specific to the case, concluded that on the evidence before the High Court the father discharged the onus on him to establish that the Habitual Residence of the child remained in the requesting state.

The Court of Appeal upheld the High Court decision.

The full judgment is available on the Courts Service website.

Practice Note: Brussels I

Brussels I Regulation has been repealed by EU Regulation 1215/2012. The superior court rules have been amended to reflect this change. The regulation came into force on 10th January 2015. The EU maintenance regulation still applies and Brussels 11*bis* would seem to be unaffected. 1215/2012 applies to Civil and Commercial judgements. The main thrust of the new regulation is that judgments in one member state are automatically enforceable in another.

Practitioners should note: SI No. 9 of 2016 Rules of the Superior Courts (Jurisdiction, Recognition and Enforcement of Judgments) 2016 and SI No. 10 of 2016 Rules of the Superior Courts (Jurisdiction, Recognition and Enforcement of Judgments) (No. 2) 2016.

Case Summary: Judicial Review

John A Burke v Robert Lynch and Ors, Supreme Court, 12 July [2016] IESC 38

This was an appeal to the Supreme Court from a refusal by Judge Peart in the High Court to grant an application for leave to apply for judicial review. A motion was also before the Supreme Court seeking that additional evidence be adduced. Judge Denham gave judgment on 12th July.

The Appellant John A Burke had sought leave to institute judicial review seeking the reliefs of certiorari and injunction. He sought to quash a letter of reminder in respect of fine notices and an injunction preventing gardaí delivery documents to his house.

Mr Burke's grounding affidavit before the High court set out that on 29th April 2009 he returned home to his house to find that a letter had been left on his kitchen floor. This was a letter informing him that if he did not pay certain fines within a seven day period he would be arrested. Mr Burke stated that he had never given any garda permission to enter his house.

In the High court Judge Peart said it was not apparent whether there had been a forcible entry by the garda to the kitchen or whether the door had been left open. He also said that reminder letters were not capable of being the subject of an order for certiorari and that judicial review was not the appropriate mechanism to seek an injunction preventing the gardaí from entering this home.

In the papers before the Supreme Court was an affidavit of Garda Lynch (one of the Respondents) which related to other proceedings but which the court said "cast some light on the background". Garda Lynch set out in his affidavit that when he served summonses on Mr Burke he left them inside the sliding patio door at the rear of the house as the post box outside the house was often filled with water.

The appeal came before Judges Denham, Clarke and O'Donnell and oral submissions were heard. The court dismissed the appeal concluding that there was no error by the High court and that it was not arguable that the garda was not entitled to deliver documents in the manner he had chosen. He was entitled to deliver mail by putting it through an open door.

The full judgment is available on the Courts Service website.

Sources of Irish Case Law

Courts Service (http://www.courts.ie)

British & Irish Legal Information Institute (http://www.bailii.org)

Family Law Online (Library subscription)

JustCite (available via LAB Portal & E-Library)

Justis (available via LAB Portal & E-Library)

Lexis Nexis (Library subscription)

Stare Decisis Hibernia (available via LAB Portal & E-Library)

Westlaw IE (available via LAB Portal & E-Library)

Current Awareness: Legislation Update

Thirty-fifth Amendment of the Constitution (Divorce) Bill 2016

Introduced on 6th July 2016, this Private Member's Bill seeks to amend Article 41 of the Constitution to reduce the time period in which spouses are required to have lived apart from each another at the institution of proceedings, from four years in the previous five to two years in the previous three.

Thirty-fifth Amendment of the Constitution (Repeal of the Eighth Amendment) Bill 2016

This Private Members Bill was introduced on 30th June 2016. It proposes to amend Article 40 of the Constitution by deleting subsection 3(3) which reads "the State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right".

Circuit Court Rules (Actions for Possession, Sale and Well-Charging Relief) 2016 - SI 171/2016

These rules, which came into operation on 19th May 2016, amend the Circuit Court Rules by revising the forms of Civil Bill (Form 2R) and the verifying affidavit (Form 54). The Title to Order 5B has also been revised to "Procedure in Certain Actions for Possession or Sale of Land and Actions for Well-charging Relief".

Circuit Court Rules (Choice of Court (Hague Convention) Act 2015) 2016 - SI 172/2016

These rules amend the Circuit Court Rules to bring into force the Choice of Court (Hague Convention) Act 2015. The purpose of the Convention on Choice of Court Agreements is to provide for the recognition and enforcement of certain exclusive choice of court agreements, and provide greater legal certainty to parties relying on such agreements.

Equal Participation in Schools Bill 2016

This Bill was introduced on 20th July 2016 and aims to end religious discrimination in admission to primary and post-primary schools and to provide for full participation of pupils of all faiths and none in primary and post-primary educational establishments.

Equal Status (Admission to Schools) Bill 2016

Introduced on 21st June 2016, this Bill seeks an amendment to the Equal Status Act 2000 to make it easier for parents to send their children to their local school regardless of faith, and to uphold the constitutional right of any child to attend a school receiving public money without attending religious instruction at that school.

Rules of the Superior Courts (Service of Documents) 2016 - SI 148/2016

These rules amend rule 2(1) of Order 121 (Service of Documents) of the Rules of the Superior Courts to clarify that the methods for service or delivery of documents not required to be served personally are subject to any other methods of delivery or service specified in other provisions of the rules for particular types of proceedings.