Issue 5

# Winter 2016: Family Law Newsletter

## Welcome!

Welcome to the latest edition of our new family law newsletter. It has been a while since our last newsletter so hopefully you will find it of interest.

There has not been much in the way of new legislation in 2016 but there have been some interesting cases. There has been a bit of time between this newsletter and the last and that is because I believe that one is better waiting until you have something substantive to report rather than issue newsletters to a timetable. I do not want to become a menace of your inbox but an informative, if brief, source of recent developments in family law!

I hope you find it informative.

Kind regards,

Justin Spain

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## Right to amend a Post Nup upheld

In the recently published case of ***GR V NR*** [2015] IEHC 856 Ms Justice O'Hanlon was dealing with a divorce application and what provision should be made for the dependent wife and children.

The parties had entered into a post nuptial agreement and the question arose of whether the Court had the power to vary such an agreement. The Court held that it did have the power to do so, thus upholding the practice of Courts in Ireland to take account of, but not be bound by, pre or post nuptial agreements.

## Important case on race to jurisdiction

Our firm was recently involved in a very important case on when jurisdiction is seized – ***MH v MH*** [2015] IEHC 771

We acted for the husband who lived in England but had Irish domicile. The husband issued proceedings in Ireland on a Monday lunchtime and served them on the wife the following day. The wife posted her proceedings to the court in England on the previous Friday where they arrived on the Monday morning but were not issued until 3 days after the husband's were issued.

The practice in both countries has been that first to issue seizes jurisdiction. However, the Brussels IIA Regulation uses the word "lodged" not "issued". The Irish High Court, Court of Appeal and then ECJ all found that the wife had seized jurisdiction because her proceedings had arrived in the post room of the court in England before the husband attended at the Central Office to issue in Ireland a few hours later.

This case has important ramifications not only for family law but for other cases where there is a race to jurisdiction.

*The voice of the child is becoming ever louder in Irish Courts*

## Case law update

In the case of ***KC v TC*** Ryan P considered the mandatory requirement on courts to have regard to the factors set out in section 16 of the 1995 Act when deciding on what is proper provision for the parties. In this case the Court of Appeal found that the High Court had not gone through the factors set out in section 16 seriatim and so remitted the case back to the High Court for re-hearing. The Court of Appeal also found that the trial judge did not pay enough heed to the husband's failure to give proper financial disclosure.

The issue of whether conduct should be taken into account was considered by Irvine J in the case of ***QR v ST***, again in the Court of Appeal. The Court affirmed the position taken by the judiciary heretofore which is that conduct should not be taken into account unless it is "gross and obvious".

Since the landmark Supreme Court decision of ***G v G*** the courts have been very reluctant to vary settlements at divorce that were reached in previous judicial separation proceedings, particularly if the settlement was on a "full and final" basis. In ***CQ v NQ*** [2016] IEHC 486 the High Court did vary a previous settlement, but only because the value of the family home had fallen so much as to make the terms unworkable – it fell from a value of €3m in 2006 to €1m now. The court said that the particular facts of this case meant that there should be a flexible adjustment but affirmed that in the normal course full and final settlements reached at judicial separation should not be varied at divorce, other than in relation to maintenance and access.

In ***HN v BN*** [2016] IEHC 330 the High Court considered what should happen a farm of 200 acres worth about €4m which was inherited by the wife from her father (and had been in the family for generations). She had transferred into the joint names of herself and her husband during the marriage. The court decided against the wife's proposal of giving the husband 50 acres of the farm and directed that the farmhouse should go to the wife but that the rest of the lands should be sold and that the husband should get 32% of the sale proceeds, the lesser percentage to reflect the fact that the lands were brought into the marriage by the wife and were inherited. This case shows that whilst inherited assets should, according to the Supreme Court in ***G v G***, be excluded from assets divided between the parties, where the assets consist almost exclusively of inherited assets they may in fact be divided, albeit not equally.

Two recent cases have emphasised that the Family Relationships Act 2015 is having an increasing influence on court rulings regarding access. In the cases of ***MR v DR*** [2016] IEHC 459 and ***CN v QG*** [2016] IEHC 608 the High Court emphasised that the 11 factors as set out in section 31(2) of the 2015 Act (which amended Part V of the Guardianship of Infants Act 1964) must be applied before access order are made, in much the same way as section 16 of the Family Law Act 1995 must be applied before making proper provision.

Finally, a questionable decision by the High Court. In the case of ***NK v SK*** [2016] IEHC 571 a husband was ordered to leave the family home, not as a result of a Barring Order but pursuant to an Order made under section 11 of the Guardianship of Infants Act 1964 which, in short, allows a court to make directions regarding the welfare of children. We think that this sets a dangerous precedent and that a parent should not be excluded from the family home other than pursuant to a Barring Order.


# Family Relationships Act 2015

Key provisions of this Act came into force earlier in 2016. In summary they are:

- A non-marital father will automatically become the guardian of the child in certain circumstances.
- A person other than a parent can become the child's guardian in certain circumstances.
- It is possible to appoint a person as a child's guardian if that person has been responsible for the child's day-to-day care for over a year.
- It is possible for a parent to appoint a temporary guardian for his/her child if the parent is suffering from serious illness or injury.
- A parent's spouse, civil partner or cohabitant can apply for custody in certain circumstances.
- A grandparent or other relative can apply to court for custody of a child in certain circumstances.
- Relatives of a child, or those acting in loco parentis can apply to have access to children in certain circumstances.
- The child's best interests are the paramount consideration for the court in proceedings on guardianship, custody or access.
- The court can impose "enforcement orders" where a parent or guardian has been denied custody or access.
- A child co-parented by civil partners has the same protections as are enjoyed by a child of a family based on marriage.
- A cohabiting partner has a maintenance responsibility where the cohabiting partner is a guardian of the child.

I was recently at a Conference where I had the opportunity to speak to the President of the District Court on how the Act was working at the coalface. Her view was that it was working well and assisting Judges.

As regards the new enforcement provisions for breaches of access orders, she said that Judges tend to order that the parents attend parenting courses rather than making orders that one parent compensate the other for breaches by means of compensation or extra access and they felt this new power was of great assistance to them.

## Delays being tackled…

There have been a lot of complaints from family lawyers over the bottlenecks that have built up in the family law system in recent times leading to long delays in getting family law cases listed for hearing.

Following representations made us on the family law committee of the Law Society to the President of the Circuit Court, a committee was set up to include a Circuit Court Judge, the County Registrar and representatives from the Law Society, the Bar and the Family Lawyers Association.

The result of the work done by this committee is that changes are afoot which should speed up cases. The changes in summary are as follows:

- If both parties certify a case is ready for hearing then it will not have to go through the case progression system but can go straight for hearing, thus saving months.
- It will now be possible to get cases ruled quickly where they have settled, something that has not been possible recently.
- Where one party is in default the Motion seeking Judgment in Default will be listed within 4 weeks (as opposed to roughly 3 months at present).

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# The voice of the child takes centre stage

The Referendum on the voice of the child was overwhelmingly carried by the Irish people in 2012 and so it should have been. However, what was not teased out in full during the Referendum campaign was how their voice would be heard in practice and some problems have arisen.

The long and short of it is that the Government have failed to put in place the machinery to allow the voice of the child to be heard in an effective way and regardless of the means of the parents of the child. In England CAFCASS are on hand to ensure that the voice of the child is heard regardless of means but in this country the necessary resources to allow children to be heard effectively have not been put in place with the result that in some instances it is only parents with the necessary financial resources that are able to have the voice of their children heard with their ability to pay for section 47 reports or lawyers to represent children. This is clearly unsatisfactory.

Notwithstanding the above, the voices of children are being heard on a daily basis in family law cases from the District Court to the Court of Appeal. The problem is that there is no uniformity or policy as to how this happens. In the District Court all Judges have received specialist training on how to talk to a child and how to spot a child who has been coached, but similar training does not appear to have been given to Judges of the higher courts. Granted the District Court would deal with more child cases than the higher courts but this is no excuse for a lack of uniformity across the system.

The writer has, for example, had a case where a child expert (s.47 assessor) has given evidence to the Circuit Court that the children have been clearly coached and alienated by one parent against the other and as a consequence the views of the children are completely unreliable. Despite this a Circuit Court Judge listened to the children and made orders based on their discussions with the Judge in chambers.

In the District Court children as young as 7 are being brought to court so that their views can be heard by Judges. To the writer this is too young but as the principle is now enshrined in our Constitution Judges feel that they have little choice. In the recent High Court case of ***TS v ES*** Judge O'Hanlon based her decision on the views of a 14 year old child who did not wish to return to another jurisdiction with her mother. Listening to the views of a 14 year old is one thing but listening to the views of a 7 year old is quite another we would respectfully suggest.

In years gone by the wishes of children were ignored when it came to a court making a decision as to what was in the best interests of their welfare. This is clearly not in the best interests of the child. However, the Government having put the principle to the people has a duty now to put the necessary state machinery in place to allow the voice of the child to be heard in a uniform and effective manner and so avoid the trauma that is being foisted on children at present of being brought to court and asked in some cases to choose between the competing wishes of parents. Action and resources are required to remedy this situation and time is of the essence in this regard.

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