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SUBMISSION ON THE FAMILY COURTS BILL 2022

11 MARCH 2024

PURPOSE OF THE BILL

The Family Courts Bill 2022 provides for the establishment of a Family High Court, Family Circuit Court, and Family District Court as divisions within the existing court structures.

The stated aim of the Bill is that it will form an intrinsic part of the reform of the family justice system, providing many of the building blocks essential to the development of a more efficient and user-friendly family court system; a system that puts families at the centre of its activities, facilitates access to specialist supports and encourages the use of appropriate dispute resolution in family law proceedings.

The Bar of Ireland welcomes the reform of the family justice system and supports the vast majority of provisions contained in the Bill.

JURISDICTION CONCERN

This submission is primarily concerned with **one** aspect of the Bill where we have genuinely held concerns that the proposed reorganisation of jurisdiction for the hearing of family law proceedings, so that most of the divorce and judicial separation cases will be heard and disposed of in the Family District Court, is *not* in the best interest of families who find themselves interacting with the family justice system and will create a two-tier family justice system.

Although the proposal to have most of the divorce and judicial separation cases disposed of in the District Court is undoubtedly well intentioned, we fear that far from serving the interests of families, the allocation of these often complex and challenging cases to the District Court, a court of summary jurisdiction is likely to have the unintended effect of *disadvantaging* the very persons whose interests most acutely require to be defended.

The District Court is already extremely busy with matters ranging from Civil, Criminal and existing categories of Family Law (see Table 1). As a court of summary jurisdiction, the onus and management of the Court's workload fall solely on the judge, without the procedural safeguards and levers already available at the Circuit Court jurisdiction in respect of judicial separation and divorce. The District Court jurisdiction is designed to process high volume, minor offence matters.

TABLE 1**Incoming Case Category Breakdown**

2022, District Court, Civil

	2017	2018	2019	2020	2021	2022
Appeals To District Court	111	163	103	103	58	70
Foreign Proceedings (Other)	116	70	96	96	116	83
Judgment Mortgage Certs Issued	1,029	866	709	340	256	198
Judgments Marked In The Office	6,882	9,040	9,841	5,839	6,233	7,084
Licensing	46,448	41,701	42,587	12,949	10,603	44,052
Liquidated Debt	15,332	18,713	23,759	13,890	12,405	15,188
Litigious Enforcement	2,692	2,236	1,954	1,954	1,243	1,094
Maintenance (Foreign)	122	115	97	97	153	127
Other	5,679	5,360	4,365	2,538	2,845	4,038
Personal Injury	1,011	967	1,116	1,045	1,070	1,542
Property (Other)	109	80	87	71	53	484
Satisfaction Piece	159	51	85	37	111	74
Small Claims	3,274	3,476	4,627	3,557	2,134	2,159
	82,964	82,838	89,426	42,516	37,280	76,193

Incoming Offence Category Breakdown

2022, District Court, Criminal

	2017	2018	2019	2020	2021	2022
Drugs	23,216	26,563	33,242	38,635	35,220	30,045
Larceny/Fraud/Robbery	32,018	35,261	37,686	35,354	30,390	30,692
Other	61,417	69,872	59,167	42,176	51,704	47,990
Public Order/Assault	38,710	41,667	46,144	48,823	42,587	44,917
Road Traffic	233,018	215,033	226,692	214,056	189,317	181,969
Sexual	2,828	2,900	3,549	3,411	4,277	3,212
	391,207	391,296	406,480	382,455	353,495	338,825

Incoming Case Category Breakdown

2022, District Court, Family

	2017	2018	2019	2020	2021	2022
Child Care	11,931	13,168	10,224	13,091	14,038	14,914
Domestic Violence	15,962	16,599	20,501	22,970	22,596	23,536
Family Law (Other)	1,290	3,342	3,369	2,225	2,196	1,616
Guardianship Custody And Access	12,442	12,611	12,582	8,747	10,016	10,822
Maintenance	9,234	8,935	8,383	5,055	5,451	5,862
	50,859	54,655	55,059	52,088	54,297	56,750

Total District Court (all categories)	2017	2018	2019	2020	2021	2022
Incoming	525,030	528,789	550,965	477,059	445,072	471,768

As demonstrated in Table 2, in 2022, the District Court received **56,750** family law related cases out of a total of 471,768 cases across all categories – 12% of the total volume of cases dealt with at District Court level.

In 2022, the Circuit Court had **6,305** family law related cases (see Table 3). The proposal to transfer this workload to an already over-burdened District Court - a Court designed to process high volume and address minor matters - will increase their case workload by **11%**.

**TABLE 2: Courts Service Data – District Court, Family
Incoming Case Category Breakdown**

2022, District Court, Family

	2017	2018	2019	2020	2021	2022
Child Care	11,931	13,168	10,224	13,091	14,038	14,914
Domestic Violence	15,962	16,599	20,501	22,970	22,596	23,536
Family Law (Other)	1,290	3,342	3,369	2,225	2,196	1,616
Guardianship Custody And Access	12,442	12,611	12,582	8,747	10,016	10,822
Maintenance	9,234	8,935	8,383	5,055	5,451	5,862
	50,859	54,655	55,059	52,088	54,297	56,750

**TABLE 3: Courts Service Data – Circuit Court, Family
Incoming Case Category Breakdown**

2022, Circuit Court, Family

	2017	2018	2019	2020	2021	2022
Dissolution Of Partnership	56	99	66	60	75	79
Divorce	3,964	3,864	4,050	5,220	5,808	5,498
Domestic Violence	51	59	38	38	40	48
Judicial Separation	1,271	3,864	1,206	617	530	468
Nullity	23	99	27	10	11	5
Other	207	59	173	242	235	207
	5,572	8,044	5,560	6,187	6,699	6,305

COMPLEXITY | THE NATURE OF DIVORCE & JUDICIAL SEPERATION

Divorce and judicial separations often give rise to challenging and complex legal and factual scenarios. As well as addressing the breakdown in relations, where the parties have not been able to resolve their differences, the courts have to disentangle economic and welfare interests and adjudicate on what is in the best interests of dependent children. The decisions made will have a lifelong effect on the parties and their children.

Where there is a dispute and competing claims, the court process must ensure that all relevant evidence is before it and properly tested. Parties emerging from marital breakdown deserve to be heard carefully, to have their issues analysed forensically and this is a process that takes court time. This is not appropriate for a summary procedure – which is the approach used in the District Court - and it should not be rushed.

Currently, family matters before the District Court have a *clearance rate*¹ of approximately 120%, which is testament to the summary nature of the type of family matters before the court. The *clearance rate* of judicial separation and divorce proceedings at the Circuit Court is approximately 72% (average over past 6 years). This is due to the fact that the complex nature of judicial separation and divorce proceedings give rise to more intensive court involvement and management and is clear evidence of the need for time to be allocated to these cases, and their unsuitability to be heard at District Court.

Divorce and judicial separation cases also require a particular type of expertise from a judicial perspective given the sensitive and complex nature of the issues involved.

MOTIVATION FOR THE JURISDICTION CHANGE | UNCLEAR RATIONALE

The rationale for assigning complex multi-issue cases to the District Court, typically described as a Court of summary jurisdiction, is not clear. Prior to the publication of the Bill, many issues had been identified as needing to be addressed in the conduct of family law proceedings. Allocation of jurisdiction was not one of them. The distribution of family law cases between the different courts has been clear and has not given rise to any calls for change. In their report on Reform of the Family Law System, the Oireachtas Joint Committee on Justice and Equality in 2019 endorsed the continuing relevance of the recommendations for structural and legal reform made by the Law Reform Commission in their 1996 report.² This concluded that that a unified family courts system drawing on the resources of both the District Court and Circuit Court would work well but noted that:

*‘On balance, we believe that our provisional recommendation in favour of a Circuit level Family Court is correct. **We do not believe that remedies such as divorce, annulment or judicial separation should be made available at the level of a court of summary jurisdiction. Therefore, if there is to be a unified family law jurisdiction, as we strongly believe there should be, it must at this time be established at Circuit level.***³

The District Court is already overworked and overstretched, resulting in litigants experiencing substantial delay in getting heard in a Court the hallmark of which should be a speedy hearing of a single-issue family law matter. If the Bill progresses as planned, the increased volume will no doubt result in less time being available for other cases at District Court level impacting on access to justice in a wider sense – despite any additional resources being made available at a judicial level.

THE MISNOMER OF SAVING COSTS

Legal costs were cited by the Minister for Justice in introducing the Bill as a core justification for the change. The proposal that the moving of most of divorce and judicial separation cases into the District Court will save on costs for individuals is unlikely for the following reasons.

¹ Clearance Rate, or disposition rate, is an internationally recognised measure of efficiency and measures whether the court is keeping up with its incoming caseload. If cases are not disposed in a timely manner, a backlog of cases awaiting disposition will grow. See <https://rm.coe.int/what-can-be-said-on-clearance-rate-and-disposition-time-and-some-more-/1680786fc9>

² Houses of the Oireachtas, Joint Committee on Justice and Equality, Report of the Family Law System (October 2019) 8

³ Law Reform Commission, Report on the Family Courts (LRC 52 – 1996), p iii

Presently every District Court in the country is overwhelmed by the volume of family law work on hand, with District Judges often being faced with tens of cases in their lists each day. Such are the number of stand-alone applications under the Domestic Violence Act, and for custody and access and maintenance, that there are already enormous delays in the system with return dates for summonses often many weeks and months after their issue. To get through the lists, the District Judges often have to take a very summary approach to cases which often disclose extremely challenging situations for families and dependent children. The proposal to add divorces and judicial separations to the workload of these busy District Judges will not only lead to greater delays in getting hearing dates, but will also lead to applications for interim relief, which in turn will fill up the lists and push plenary hearing dates back even further. The requirement for more interim hearings, which will inevitably follow when cases can't be reached in already impossibly full lists, and the necessity for lawyers to be in attendance at those hearings will only add to the eventual legal costs.

As clients are generally charged on the basis of time spent, which in turn is directly related to the complexity of the issues involved, the stated aim of achieving a reduction in legal costs is unlikely to be realised and could actually result in having the opposite effect – in addition to causing the emotional stress of the parties involved.

Furthermore, and accepting that the Bill provides for the transfer of cases to and from the District Court, if a case commenced in the District Court is to be transferred to the Circuit Court by reason of complexity or otherwise, this will just lead to delay (and thereby increased costs), when it would have been preferable to have such case commenced in the Circuit Court to begin with.

CREATION OF A TWO-TIER FAMILY JUSTICE SYSTEM

In addition to our concerns above, the proposal has the further unintended consequence of creating a two-tier family justice system.

Under the proposed Bill, the Family District Court will have jurisdiction in judicial separation and divorce proceedings where the value of the land at issue (which includes the family home) is less than €1M. For land, including family homes with a value of more than €1M, the proceedings will be heard in the Circuit Court, a court that has the infrastructure already in place to allocate time to the parties to be fully heard, thereby ensuring in-depth consideration of family law cases. For example, at Circuit Court level, there is a case progression process in place underpinning the effective case management of contested cases, dealt with by the County Registrar. There is no equivalent infrastructure in the District Court.

The consequence of the arbitrary €1M jurisdiction means that those families who are in a particular socio-economic class will benefit from a more in-depth consideration of their cases, i.e. those who are better off, and/or a greater proportion of those who live in Dublin.

LAND incl. FAMILY HOME VALUE	JURISDICTION
Less than €1,000,000	District Court: A Court of summary jurisdiction
More than €1,000,000	Circuit Court: A Court with well-established infrastructure to have cases managed and fully heard to ensure high quality justice

The Oireachtas must take care not to create a two-tier justice system – a summary system for the less well-off operated by overworked and under resourced District Courts and a plenary system - where a more considered and less hasty outcome to the exact same or even more straightforward case is more likely, for the better off.

PLANS TO RESOURCE THE FAMILY DISTRICT COURT

While the memorandum accompanying the Bill acknowledges the need for increased resources in order to fulfil the stated aims of the Bill - such as judicial appointments and support staff, renovation and modernisation of court buildings, capital ICT costs, as well as the construction of the purpose-built family law court complex at Hammond Lane in Dublin - these resources are currently not in place to effectively deliver on the aims of the Bill and, in many cases, will take many years to be implemented.

Our experience to date is that the proper allocation of resources for family law matters has been poor. A recent example of this is the amendment to the constitution and legislation regarding the rights of children to have their voices heard in private family law litigation - in practice this is usually by way of report. Despite its good intentions, the current system has been slowed down significantly by the lack of suitably qualified experts to compile such reports and with little to no financial resources available to discharge the additional costs, has served only to delay litigation and speedy resolutions for all parties.

In the absence of the resources actually being in situ, the proposed reorganisation of jurisdiction to the Family District Court is placing the *'cart before the horse'*, is ill-advised and will worsen the situation for families if the jurisdictional proposal is implemented. Even if or when the resources for the Family District Court are in situ, the concerns regarding the summary disposal of cases and the creation of a two-tier system will remain.

OTHER CONCERNS

i. The requirement for a Special Reason to commence proceedings in the High Court | Loss of High Court Precedence

Section 68 in the Bill as drafted restricts an applicant from commencing family law proceedings in the High Court unless there is a special reason to do so. The impetus for the restriction is unclear. The data from the Courts Service does not reveal any overuse of the High Court in family law matters and there are existing procedures for transferring cases commenced in the wrong jurisdiction to the more appropriate Court (e.g., from the High Court to the Circuit Court).

Furthermore, the High Court's constitutional status as a court with full original jurisdiction is central to the development of caselaw. If it is no longer a court of first instance in certain proceedings, such as judicial separation and divorce, there will be fewer written judgments, which in turn will hinder the ongoing

development of child and family law, in circumstances where Ireland is a common law jurisdiction and precedent is crucial to the development of the law.

Any proposal to reduce the ability of the High Court to contribute to the development of domestic and international legal principles and remove judicial assistance to the lower courts is not in the public interest. It is vital that a body of caselaw continues to be generated to serve this area of law.

ii. Rights of the Child | Dilution of the Paramountcy Principle enshrined in the Constitution

Article 42A of the Constitution specifically requires the Court in proceedings involving children such as divorce or separation proceedings to ensure the best interests of the children are the paramount consideration of the Court in determining such cases.

Section 8 of the Bill as drafted makes reference to 'guiding principles' which the Court should consider and refers to children being the 'primary consideration'. It is vital that the language used in Article 42A is reflected in any such guiding principles and the use of the word 'primary' should be replaced with 'paramount'. The current language dilutes the language in Article 42A which would not be compliant with the Constitution.

CONCLUSION: FAMILY COURT BILL 2022 NEEDS TO BE AMENDED

The Bar of Ireland sincerely believe that the allocation of contested divorces and judicial separations to the District Court, despite being well-intentioned, is misguided and decidedly not in the public interest for a multiplicity of reasons.

For the reasons set out in this submission, and in order to safeguard the rights and interests of all families who interact with the family justice system, there is a need to amend the Bill so as to remove altogether the proposal for contested family law proceedings to be dealt with by the District Court.



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