



# The Family Courts in Ireland

Judicial Separation and Divorce in the  
Circuit Court In Ireland  
*An empirical study*



# Snapshot of Irish Family Law

- Indigenous Irish Law (Brehon Law) characterised by gender equality in family law and availability of divorce, the use of arbitration and restorative justice.
- Anglo Norman invasion in 1169, gradual extension of English common law throughout Ireland: Characterised by patriarchal model of family law.
- Independence in 1922: Strong influence of Catholic Church and Catholic social teaching on the new State.



# Irish Consitution

- Irish Constitution paints a very traditional view of family life, very strong protection from State interference in the family based on marriage.
- No divorce.
- No abortion unless there is a 'real and substantial risk to the life of the mother'. Recent legislation introduces very strict criteria to allow for abortion in this circumstance.



# Changing Nature of Irish Law

- 1989: First liberalisation of the law on legal separation.
- 1996: Introduction of divorce after popular referendum.
- 2010: Civil partnership established and co-habitant rights increased.
- 2013: New article to protect children's rights placed in the Constitution.
- 2014: New family law to address legal needs of 'non-traditional' families.
- 2015: Gay marriage referendum to take place.



# Snapshot of the Irish Family

- Recent census figures show that in 2011, half a million women were looking after their families on a full time basis, as compared with 9,600 men.
- Only half of Irish women are in the workforce, compared with 7/10 men.
- See <http://www.cso.ie/en/media/csoie/releasespublications/documents/otherreleases/2011/Women%20and%20Men%20in%20Ireland%202011.pdf>



# Irish Households

- Ireland has the highest fertility in Europe. (15.6 births per 1,000)
- It has a very low rate of marriage breakdown, at 9.7%.
- However, 23% of households consist of a lone mother with her child or children, so there is also a high rate of birth to single mothers.
- Women do the majority of household chores, even if they also work full time.
- Child care costs are among the highest in Europe, with little or no State subsidy.



# Research Findings

Judicial Separation and Divorce in the  
Circuit Court In Ireland  
(2008-2012)



# Families at War

- “When you start a court case, you are starting a war”
- *Justice Harvey Brownstone, Ontario Court of Justice*
- *Tug of War, Toronto ECW Press 2009*



# The path to research

- My own experience of that war, cost me emotionally and financially, and € 55,000 in legal fees poorer, I went back to college to study law, to do my own divorce.
- Gaining an understanding of the mechanics of legal war, inspired me to train as a mediator- and to use that legal knowledge to bring peace
- I was provoked into doing a PhD in Family law
- *Canada's Chief Justice Beverly Mc Lachlan*



# Family Law Research

(Background Research in Other Jurisdictions)



## International research

- **Family law courts Toronto (2009)**
- 10 family law judges
- Mediation at the Unified Family Court Oshawa
  
- **Family law courts New Zealand (2012)**
- Shadowed Senior Family law judge
- Whanu; development of family mediation



# International Research...contd.

- **Canadian-Irish family law conference (2010)**

25 Irish Judges;

10 Canadian Judges

2 American Judges

International family law experts

1 New Zealand Judge, by live link

Darlene Murphy Mediation Co-ordinator



# International family justice

## Workshop – 2012 funded by Irish State

- To explore the concept of a global family justice model, prioritising the best interests of the child
- ***WE NEED TO PROVIDE A SYSTEM THAT IS FRONT LOADED WITH ASSISTANCE TO CREATE A “COOLING OFF PERIOD” THAT KEEPS PEOPLE AWAY FROM THE COURTS –***
- Legal information
- Counselling for all members of a family
- Mediation – to include parenting planning, formal legal agreements
- Child representation



# Participants in Family justice workshop

- Judge Deborah Mc Nabb Circuit Court Referee, Michigan, Family Court **USA**
- Ms Jane Long SC Family Policy and Programs branch Ministry of the AG Toronto **Canada**
- Dr. Tamar Morag, Associate Professor Haim Striks Law School Colman **Israel**
- Mr Oliver Connolly, Barrister, ADR lecturer at Trinity College, and founder of Friarylaw Dublin **Ireland**
- Dr. Sinead Conneely Law Lecturer W.I.T. **Ireland**
- Ms Marianne Gabrielsson Project Leader Barnfrid, Lund University, Stockholm **Sweden**
- Josepha Madigan, Partner in Madigans Solicitors, Chairperson Family Lawyer Mediation Committee DSBA **Ireland**
- Judge James O' Donohoe Circuit Court **Ireland**
- Ms. Mary O' Malley County Registrar Meath **Ireland**
- Ms. Susan Ryan County Registrar Dublin **Ireland**
- Shane Dempsey Research Lead- Information Systems; Senior Researcher at TSSG and Family Mediator
- \*Mr. David Hodson, International Family law specialist, Solicitor, Mediator, Arbitrator, Deputy District Judge at the Principal Registry of the Family Division HC London. **England**
- Owen Connolly Consultant Psychologist, and marriage and family therapist **Ireland**
- Ann Thomas is a solicitor, civil and family mediator, a trained collaborative lawyer and the Managing Partner at The International Family Law Group LLP, London **England**
- Inge Clissman SC **Ireland**
- Ms Morag Driscoll, Director Scottish Child Law Centre **Scotland**
- Dr. Louise Crowley, Law Lecturer, UCC **Ireland**
- Róisín O' Shea, Principal Investigator.



# Irish Family Law Research

(Data Collection)

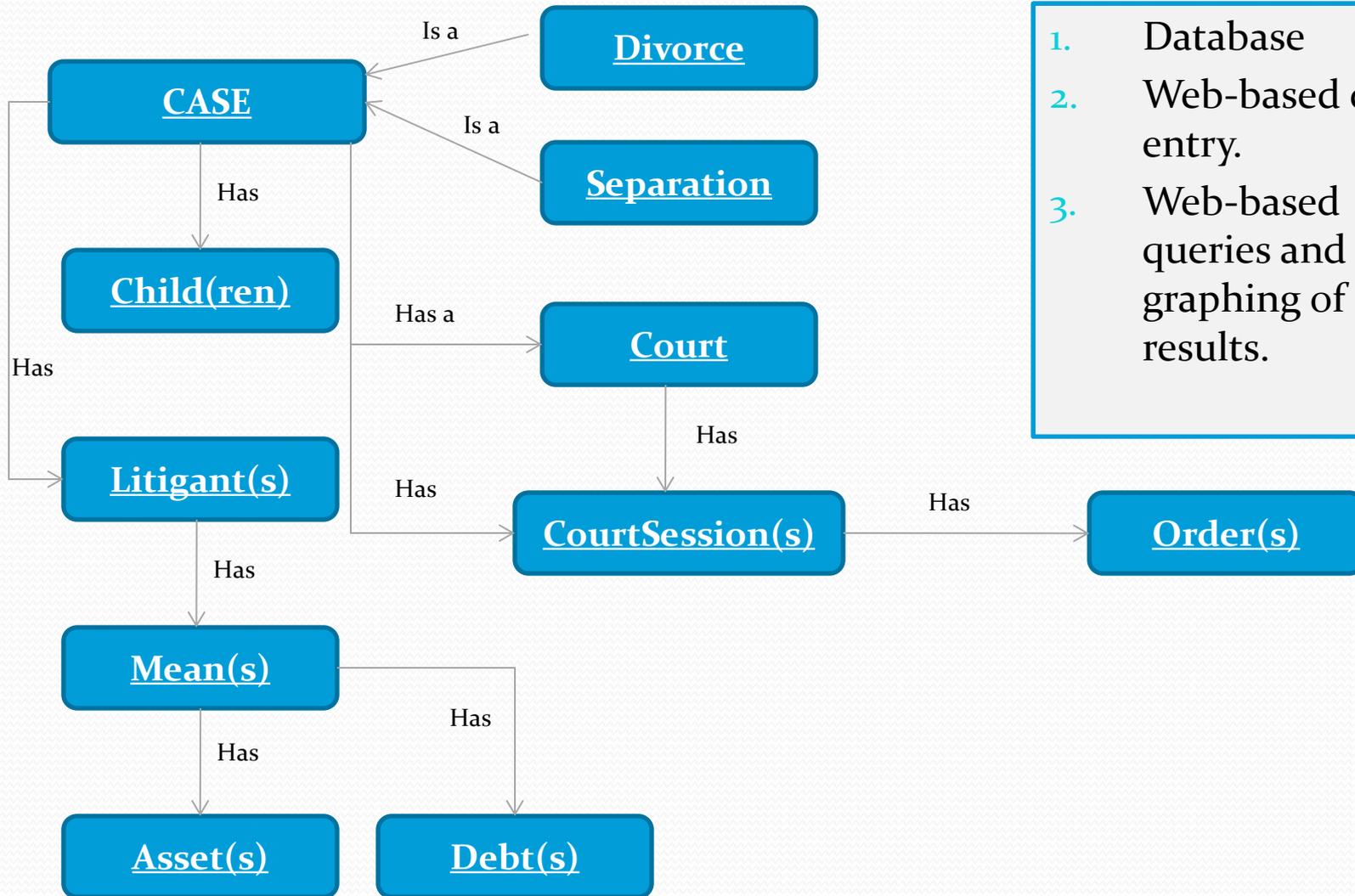


# Empirical research

1. Capture as much information as possible about family law cases in the Irish circuit court to pierce the veil of the in camera rule – verbatim notes
2. Used a flexible and intuitive database structure – 184 inter-linked fields
3. Anonymize the information to protect privacy
4. Produce statistics from database queries
5. Give quantifiable and qualitative research conclusions



# Data structure



1. Database
2. Web-based data entry.
3. Web-based queries and graphing of results.



# Research Statistics

(Irish Family Law Study)



# Empirical Research

- Approx 1,200 relevant cases 2008-2012
- Irish Family Courts (Circuit Court hears 98% of cases)
- 8 circuits [across the entire country]
  
- Holistically examined the Family law system in relation to Judicial Separation and Divorce
- Comparative research in Canada and New Zealand



# Research outcomes

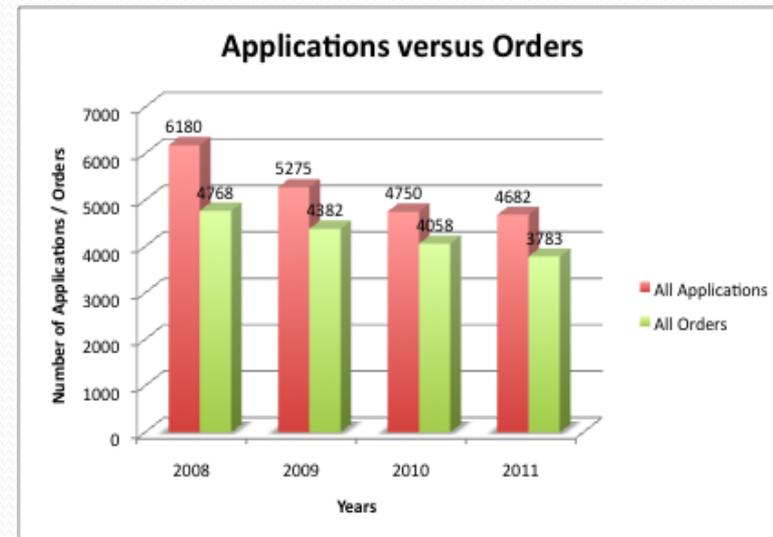
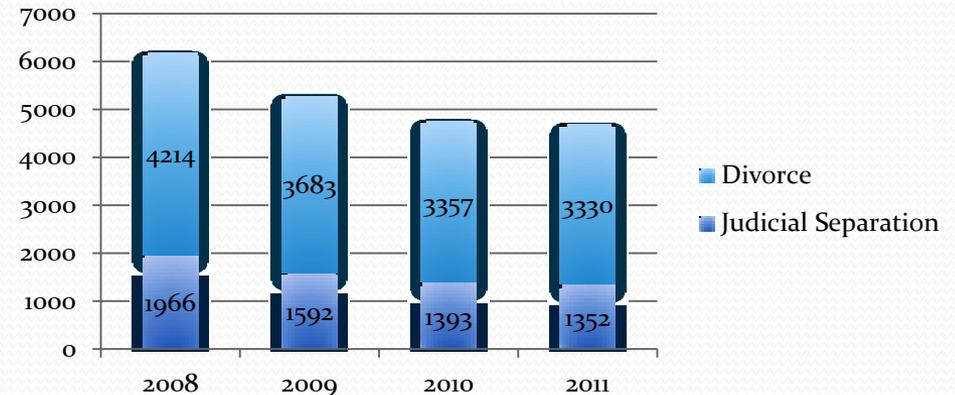
- The poorest outcomes were for men who were lay litigants, followed by non-national lay litigants
- 22% of all litigants were lay litigants
- In no case did a judge ask to meet with a child in a matter that affected them, despite such rights being enunciated in the UN Convention on the Rights of the Child 1989
- “Joint custody” appeared to be merely an acknowledgement that both parents had obligations to care for their children, it did not mean shared parenting relating to the day to day care of children.
- Maintenance orders were made against fathers in receipt of State benefits, bringing those fathers below the acknowledged subsistence level as stated in the 2013 national insolvency guidelines.
- The “Tender Years Principle” was uniformly applied
- Default access arrangements for non-resident fathers, every second weekend and one evening during the week



## Number of Cases

- Approx 18,700 applications during the period of the study
- ~14,500 orders during same period.
- Revealed ruling trends
- Follow up interviews with 6 judges discussed basis for rulings / bias.
- *Statistically significant findings; confidence level 95% and margin of error of +/- 1% to +/- 3%*

## Divorce & Judicial Separation Applications by year

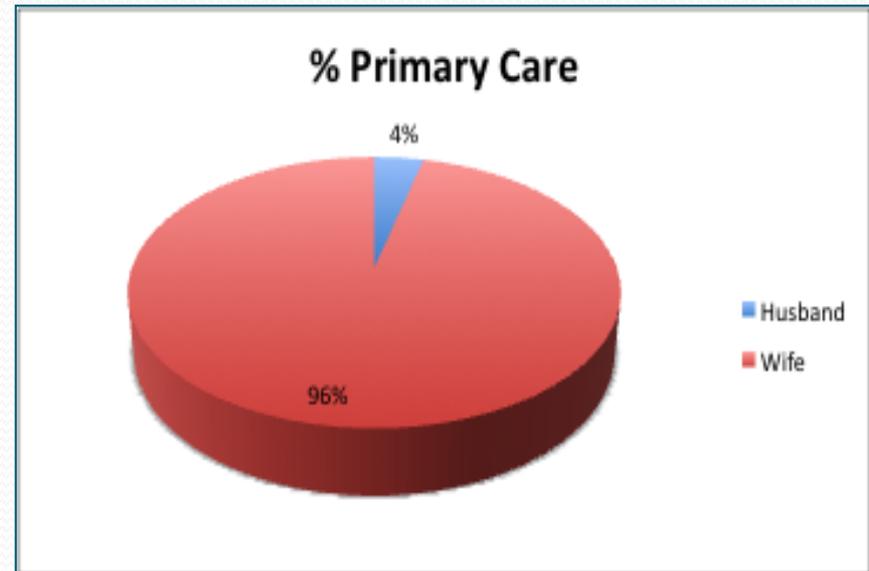




# Primary Care of Children

- **96% of children were in the Primary Care of Mothers**

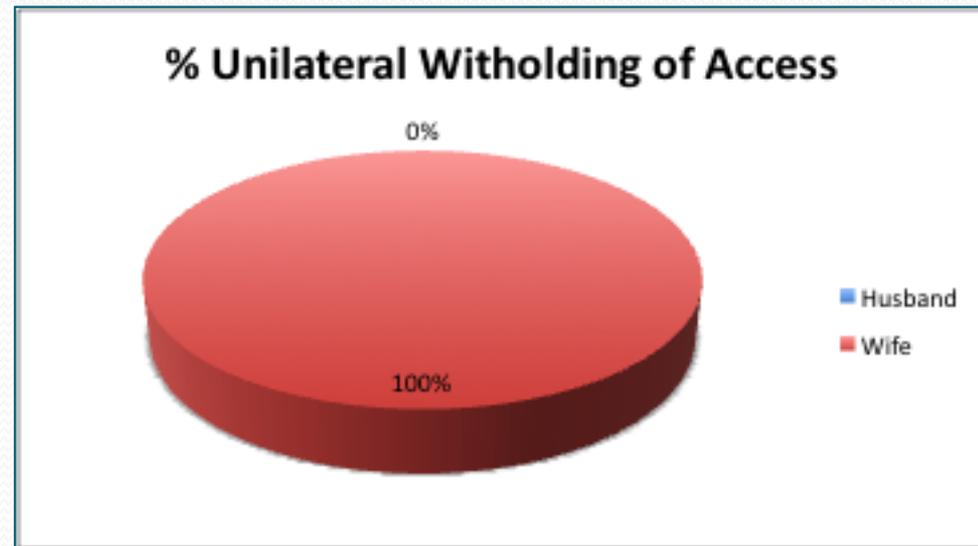
*Where access was persistently unilaterally with-held by the primary carer, no sanction was imposed by the court*





# Unilateral Withholding of Access

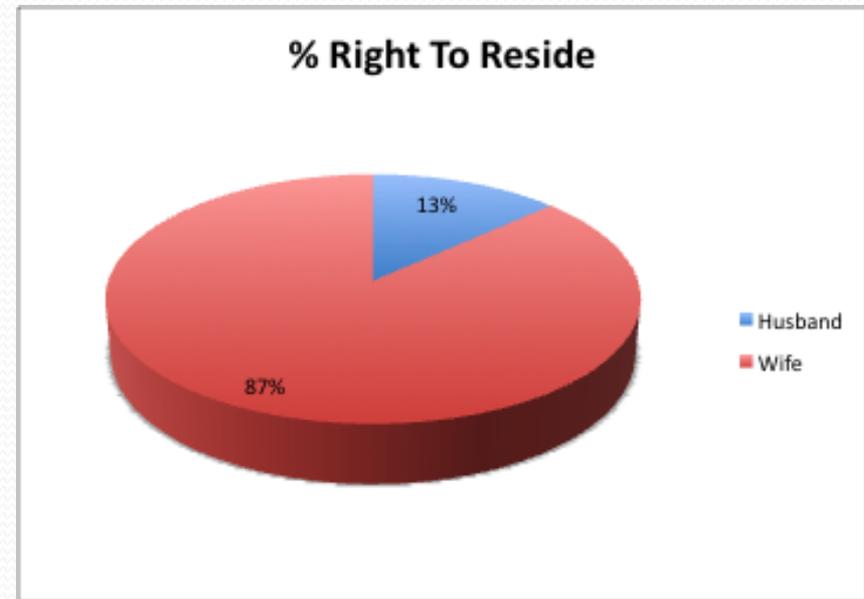
- In all cases, it was Mothers who unilaterally Withheld Access
- The most common reason given; *“He wasn’t paying maintenance so I told him he wouldn’t see the child until he did”*





# Right To Reside

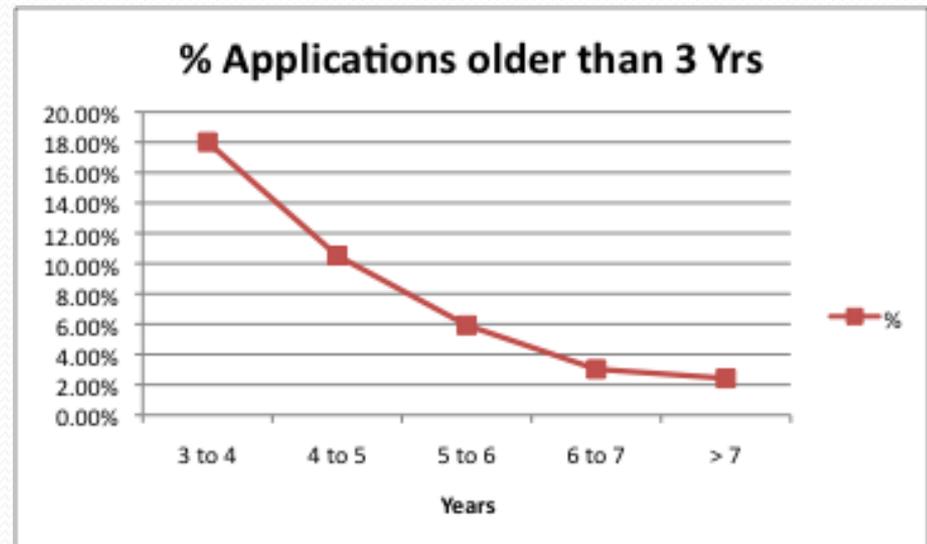
- Men rarely acquired the right to reside in the Family Home.
- Also applied in cases where the man had sole responsibility for discharging the mortgage on the family home





# Justice delayed

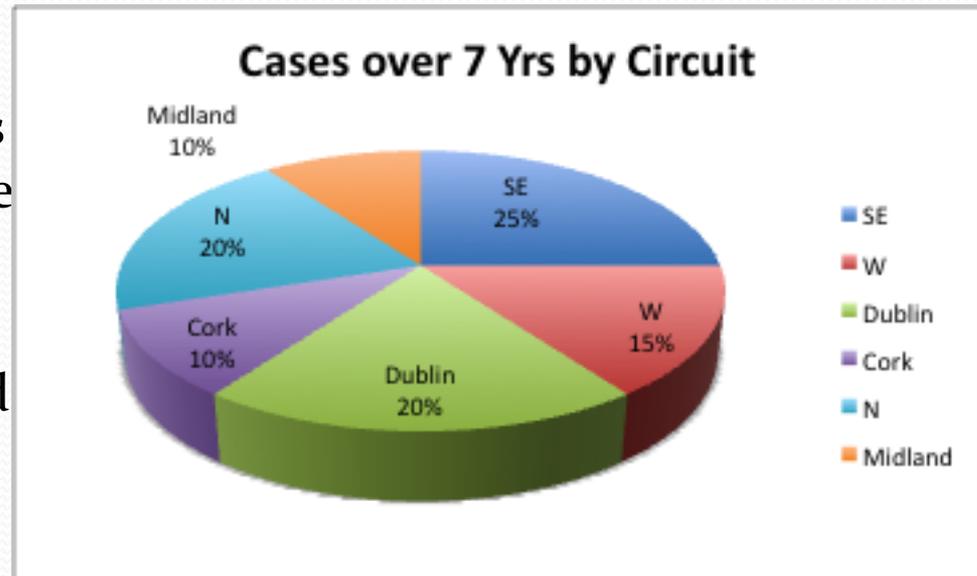
- 18% of contested cases were filed between 3 and 4 years before the case came to court,
- over 10% were filed between 4 and 5 years before coming to court,
- 6% were filed between 5 and 6 years before coming to court,
- 3% were filed 6 to 7 years before coming to court and
- 2% had been filed over 7 years before coming to court





# Cases 7 years or older by circuit

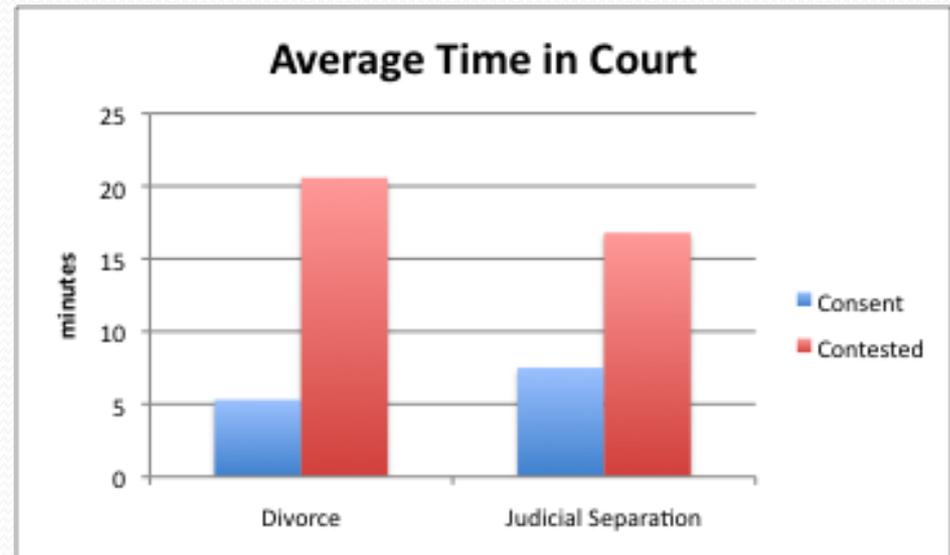
- The longest delays were in the Northern circuit; it was observed that that there was more than one active divorce case older than 11 years
- Letterkenny and Waterford had the most over-burdened lists, 79 cases listed for 3 days with an additional 52 cases “for mention”, and 76 cases listed for a 4 day period, respectively





# Average Time in Court

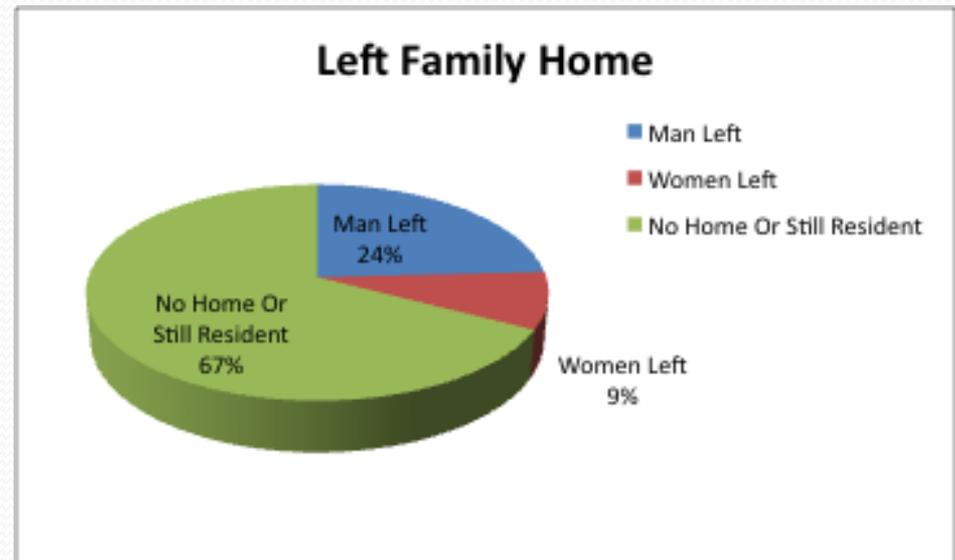
- Shortest divorce was 30 seconds with no evidence heard & neither litigant sworn in.
- Longest was 5 hours.
- *Average is 5 minutes for consent divorce and 7.5 minutes for consent separation*
- *Contested divorce; average 20.57 minutes*





# Leaving the family home

- Men are nearly 3 times more likely to leave the family home
- *When women leave the family home, they take the children with them in 99% of cases.*

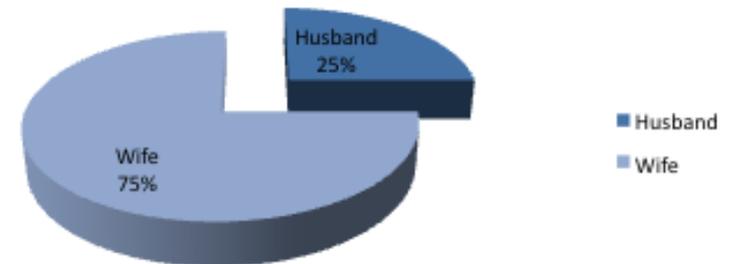




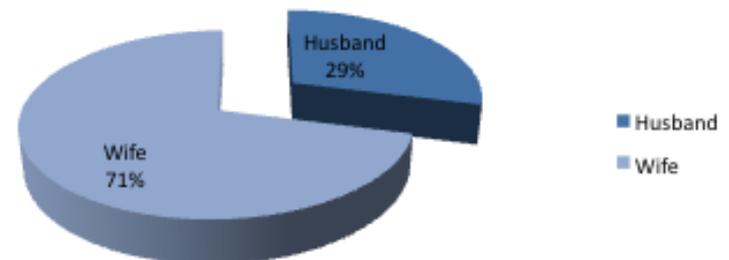
# Applicants for Divorce

- **Broadly similar for application and divorce.**
- Greater than 7-to-3 ratio in favour of the wife.

Applicants for Separation (when children)



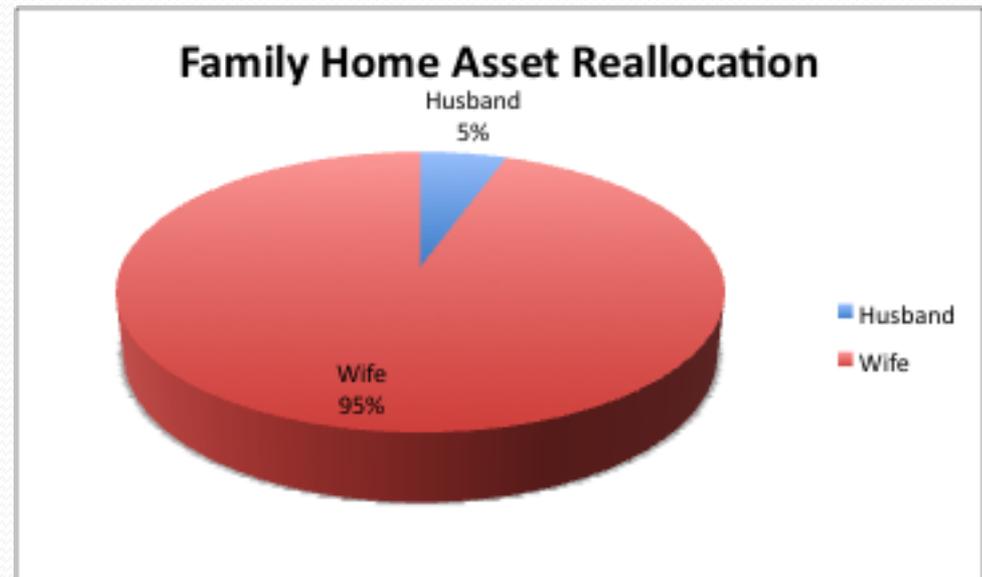
Applicants for Divorce (when children)





# Asset Division

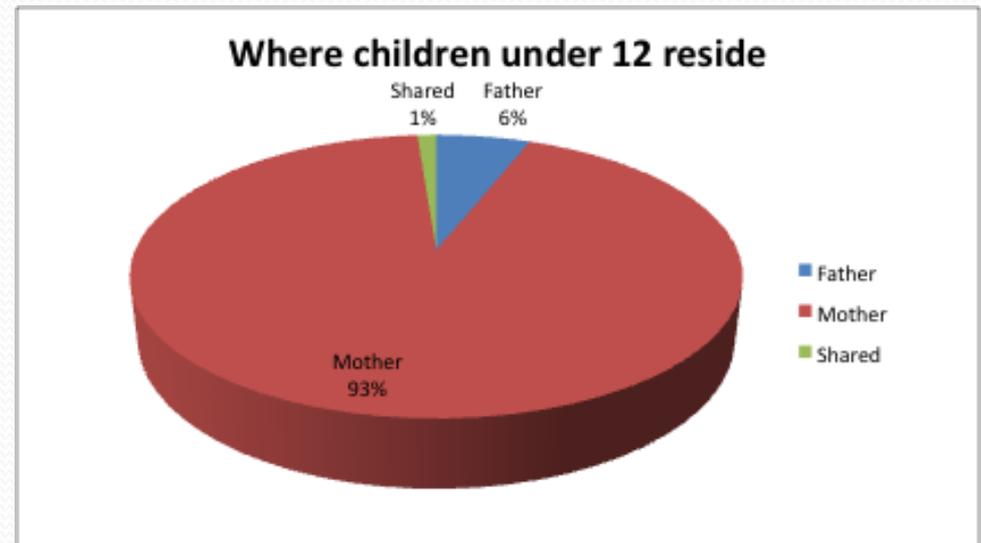
- Where a court ruled to allocate a greater % of the family home to one spouse,
- in 95% of cases the ruling was in favour of the wife.





# Where Children Reside

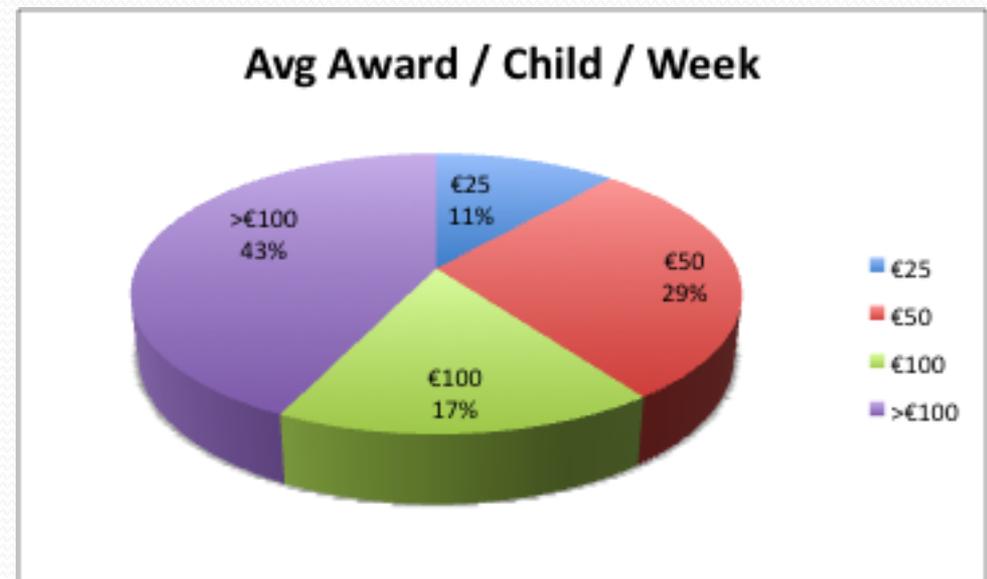
- In 93% of cases, children under the age of 12 resided with the mother.
- Only 1% resided under 50/50 parenting arrangements.





# Average maintenance award/week

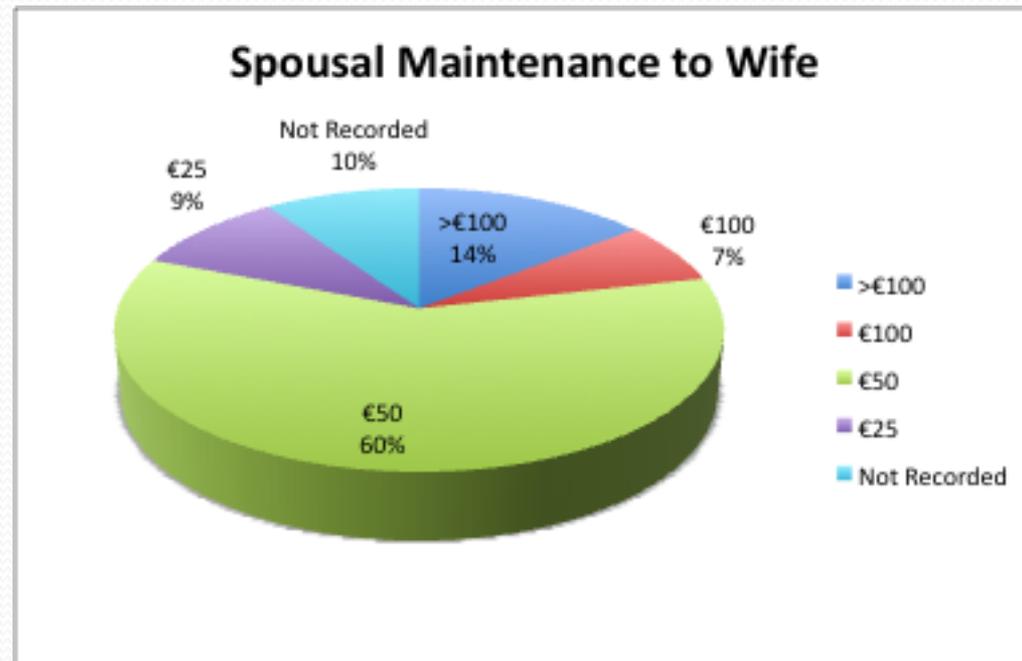
- Where child maintenance was agreed or ordered, a sum greater than or equal to € 100 per child per week was set in 60% of the cases.
- In almost one third of cases, maintenance per child was set at € 50 per week.





# Spousal Maintenance to Wife

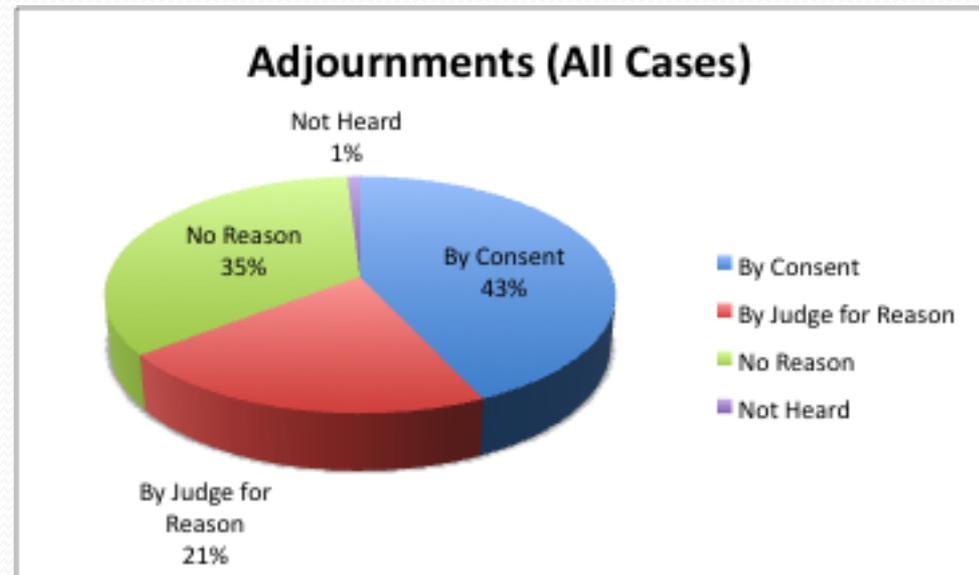
- Where spousal maintenance was agreed or ordered,
- € 50 per week was set in 60% of the cases before the court. In 10% of cases the value of the spousal maintenance was not stated in court.





# Adjournments (All Cases)

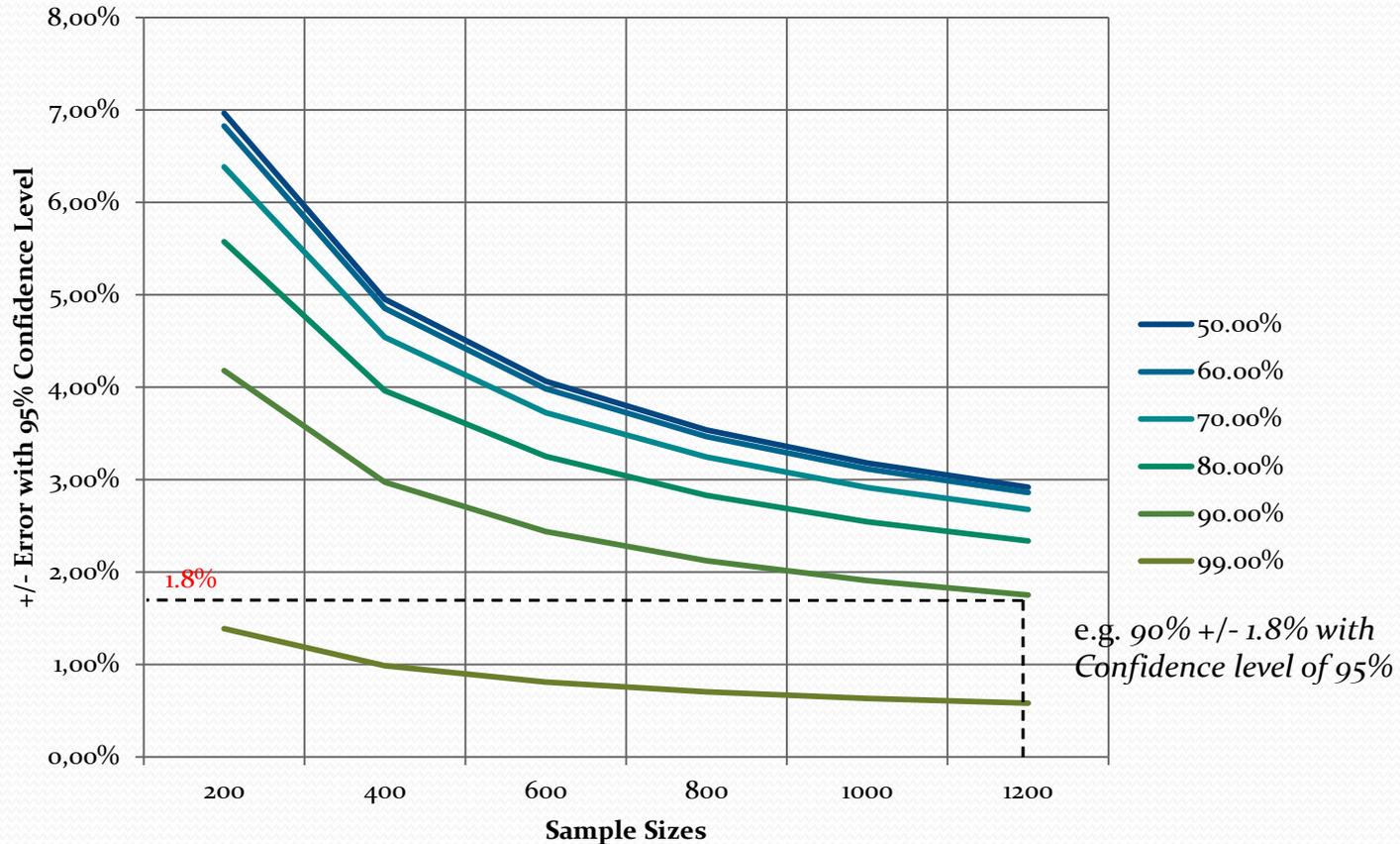
- **Over-burdened lists meant that the cases listed to be dealt with on any given day during the research period could not realistically be dealt with.**
- **24.8% of all cases listed were adjourned; of those 35% were adjourned with no reason either given, or requested by the court.**





# Predictive Power of Study

## Confidence Interval for % Finding





# Judicial Quotes

- Judge 4, “The **lists are over-loaded**, the quantity of work is too great on any given day. The system has unreasonable expectations listing multiple cases for hearing and motions on the same day”
- Judge 7, “There are two categories of **lay litigants**, those who are forced to self-represent due to economic circumstances, and the jihadists who become obsessed with the court process...who have become embittered about what they perceive as injustices or wrongs wrought against them”
- Judge 3, “we are entering the world of Rumsfeld, the unknown and the great unknowns, that is where we are with **valuing the family home**”



# Judicial Quotes: Mediation

- Judge 2, “ *Mediated agreements must stand up , a poorly worded agreement that does not deal clearly with the legal issues arising creates significant problems later on...A great number of mediated agreements have come to my court that have been prepared by non-legally trained parties and this is an issue where there is financial provision for children and assets to be divided.*”
- Judge 7, “ *Mediated agreements that come before the court show lack of consistency, often are written in unenforceable language and showed disregard for legal outcomes. Only those with legal training should construct separation agreements in mediation that deal with financial provision and asset division.*”
- ***Mediation was tried by the parties in only .7% of the cases***



# Judicial Quotes; Children

- Judge 1, “ **I believe that children should be left with their mother** at least until they are 12 or 13, and I do not think it appropriate to order the sale of the family home where dependent children reside there with their mother”
- Judge 7, “ I am concerned that **allegations of sexual abuse** are at times being used as a very effective weapon, but a court is obliged to ensure that the HSE or the Gardaí investigate all such complaints
- Judge 1, “ **Parenting agreements** should be put together by experts, each case is different and a lot of time can be wasted trying to work out individual arrangements”
- Judge 2, “ **The lack of judicial training** in family law is an issue...some form of training is required to assist judges deal with children directly when required, and to understand the dynamics of parental conflict”



## Judicial Quotes

- *Judge 7, “ I can manage short bursts, but if I had to do a long stint I would go mad”*
- Most of the judges interviewed indicated an intense dislike for the emotional context of family law cases, and found disputes over the arrangements for children to be extremely difficult, and sometimes distasteful.



# Children in the battleground

- ***“Parental separation does not necessarily mean poor outcomes for children but research shows that prolonged exposure to frequent, intense and poorly resolved conflict is associated with a range of psychological risks for children”***
  - (Reviewing the Family Court, A public consultation paper, September 2011, Ministry of Justice New Zealand Government pg 28)
- ***“Early self resolution out of court, achieves better outcomes for children and families. We need to promote conciliation over litigation”***
  - (Reviewing the Family Court, A public consultation paper, September 2011, Ministry of Justice New Zealand Government)



## Poor outcomes for fathers

- **1% of children** resided with both parents under 50/50 parenting arrangements
- **In no case** were the views of any child heard directly by a judge, the views of the child were expressed through the primary carer or through court ordered expert reports where there were allegations of abuse. On several occasions counsel asked the court if a child could speak with a judge, in all instances this request was refused.
- **"Joint custody"** in the Circuit Court appeared to be merely an acknowledgement that both parents have obligations to provide for their children, it did not mean shared parenting relating to the day to day care of children. While the agreement or orders may commence with "joint custody", it was usually followed by "with primary residence to the mother/father".



## Poor outcomes for fathers...contd

- Of great concern was the common approach of the court to make child maintenance orders where the payor, in 100% of cases the father, was only in receipt of State benefits, the average State benefit observed being € 200 per week. The national insolvency guidelines for 2013 state that subsistence level, i.e. the basic amount a single person requires to live on, as € 237.65 per week. The court, in the main, prioritised the legal and moral obligation on the payor parent to financially provide for their child/children, making orders that effectively brought payor fathers below subsistence level, and took no account of their financial ability to exercise “access” in terms of any transport costs and providing for the child/children during those periods.
- It is a finding of this research that where court orders were made relating to access and parenting, that the outcome of those orders, was that the ‘tender years’ principle was almost uniformly applied.



## Poor outcomes for fathers

It is a finding of this research that where court orders were made relating to access and parenting, that the outcome of those orders, was that the **'tender years'** principle was almost uniformly applied.

*O'Dalaigh CJ in B v B [1975] IR 54*

*Rejected by Mc Guinness J in D.F.O.'S v C.A. 20 April 1999 High Court [unreported]*

*"I do not entirely accept the old "tender years" principle: modern views and practices of parenting show the virtues of shared parenting and the older principles too often meant the automatic granting of custody to the mother virtually to the exclusion of the father"*

- Fathers were not considered to be equal parents, the Mother was always the preferred primary carer



## *Judicial Separation & Divorce in the Circuit Court*

145,000 word thesis

187 case reports

Almost 1,200 unique cases

13 judges observed, in all 8 Circuits

Interviews carried out with 6 judges,

County Registrars, Court Clerks, and

back office administrators

Available through WIT library;

**[dlangford@wit.ie](mailto:dlangford@wit.ie)**



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ARC MEDIATION

