

# TRANSPARENCY IN FAMILY AND CHILD LAW PROCEEDINGS: DISENTANGLING THE STATUTORY TECHNIQUES AND TERMINOLOGY

## *Abstract*

*Article 34.1 of the Constitution of Ireland, 1937 provides that justice shall be administered in public, save ‘in special and limited cases as may be prescribed by law’. Family law and child law proceedings are part of this ‘special’ category of cases. The Oireachtas has engaged both different techniques and different statutory phrases, such as, inter alia, ‘in camera’ and ‘otherwise than in public’ to regulate these hearings. This article examines both the techniques and statutory phrases as they apply in family and child law proceedings and considers whether the court has exercised its discretion consistently.*

*Author: Clare Craven-Barry, BL, LL.M, PhD candidate with Dublin City University. The doctoral research which considers the protection and vindication of the rights of children civilly detained in special care through the court process is funded by the Irish Research Council.*

## Introduction

The overarching principle under Article 34.1 of the Constitution of Ireland, 1937 is that court proceedings must be heard in public.<sup>1</sup> Its importance was considered by Hamilton CJ in *Irish Times Ltd v Ireland*:<sup>2</sup>

Justice is best served in an open court where the judicial process can be scrutinised. In a democratic society, justice must not only be done, but be seen to be done. Only in this way, can we respect the rule of law and public confidence in the administration of justice, so essential to the workings of a democratic state, be maintained.<sup>3</sup>

Article 34.1 also provides for departure from this constitutional imperative.<sup>4</sup> When this occurs, proceedings can be heard privately, that is, to the exclusion of the public. One of the categories of exceptions is family and child law proceedings which by their nature reveal issues of a highly personal and sensitive nature. Private hearings, particularly in child care matters, have in the past been criticised. In their *Report of the Independent Child Death Review Group 2000-2010*, Shannon and Gibbons observed that the ‘maintenance of a shroud of secrecy around child care cases does not necessarily mean that the interests of minors are always protected as well as they can be as practices which may need overhauling are shielded from scrutiny’.<sup>5</sup> Family law cases were also in the past described as having been ‘shut off from the world at large’.<sup>6</sup>

<sup>1</sup> *In Re R Limited* [1989] IR 126 (SC), 136. Walsh J in the Supreme Court opined that this ‘fundamental principle in the administration of justice was made part of the fundamental law of the State by Article 34 of the Constitution in 1937’.

<sup>2</sup> *Irish Times Limited v Ireland* [1998] 1 IR 359 (SC).

<sup>3</sup> *ibid* 382.

<sup>4</sup> Not only is departure provided for under statute but also and under the ‘common law power of the Court to regulate its own proceedings’ per *Gilchrist & Rogers v Sunday Newspapers Limited & ors* [2017] 2 IR 284 [46]; See also *Hampshire County Council v CE & Ors* [2018] IECA 154 [18]-[19] & *JD v SD* [2013] IEHC 648 (SC) [16]; Gerard Hogan, Gerry Whyte, David Kenny and Rachel Walsh, *Kelly: The Irish Constitution*, (5th edn, Bloomsbury Professional 2018) 6.1.307-6.1.316.

<sup>5</sup> Geoffrey Shannon and Norah Gibbons, *Report of the Independent Child Death Review Group 2000-2010*; (DCYA, 2012) <[https://www.dcy.gov.ie/documents/publications/Report\\_ICDRG.pdf](https://www.dcy.gov.ie/documents/publications/Report_ICDRG.pdf)> last accessed 17 September 2018, 394.

<sup>6</sup> See *K v K* [2004] IESC 21, 5, 12. McGuinness J This case was decided prior to the relaxation of the privacy aspect of family and child law cases.

Striking the balance between respect for privacy and ensuring that practices are open to scrutiny is essential. Legislation is now in place which permits researchers and the media attend and report on family and child law matters, but all reporting must be anonymised.<sup>7</sup> The rationale underpinning reporting is to ‘increase public confidence in the judicial system by partially removing the veil which often hangs over such cases’.<sup>8</sup> Reporting provides insights into the operation of the court system (and State agencies in child care proceedings), promoting transparency while simultaneously protecting the rights of litigating parties to privacy, confidentiality and anonymity. This is in line with the constitutional imperative of the public administration of justice while respecting one’s constitutional right to privacy.<sup>9</sup>

This article is concerned only with the various statutory provisions providing for privacy and how they are interpreted in family and child law proceedings. In interpreting statutes, recourse must be had to the European Convention on Human Rights. The reason this is so is because section 2 of the European Convention on Human Rights Act 2003 provides that when the court is either ‘interpreting and applying any statutory provision or rule of law’, it shall ‘in so far as is possible, subject to the rules of law relating to such interpretation and application’ do so in a Convention compliant manner.

Certain principles can be derived from the case law of the European Court of Human Rights to assist in the interpretation of statutory phrases. Family law and matters relating to children being taken into care are covered by Article 6(1) of the European Convention of Human Rights, the right to a fair trial.<sup>10</sup> Although the European Court of Human Rights has opined that a public hearing is an essential tenet of this Article unless there is ‘a pressing social need’ to do otherwise,<sup>11</sup> it also provides for various specific departures from a public hearing regarding private life and children from a human rights perspective. Although measures taken must be proportionate, there is no requirement that the exceptions must be ‘prescribed by law’.<sup>12</sup> Jurisprudence from the European Court of Human Rights also establishes that where matters are held *in camera*, there is still a need for judicial control in that the ‘reasons for excluding a case from public scrutiny must be subject to careful examination’.<sup>13</sup> The Supreme Court in *Gilchrist & Rogers v Sunday Newspapers Limited & ors*<sup>14</sup> noted that the Convention does not compel the parties in a case to establish that justice cannot be done in *inter alia*, family or child related cases unless the public are excluded (even though there may exist an admissible or justifiable determination anyway to exclude the public).<sup>15</sup>

Although the court remains in charge of its own process and has inherent powers exercisable where necessary to protect constitutional rights, the Oireachtas engages different techniques and

---

<sup>7</sup> Civil Liability and Courts Act 2004 s 40 (as amended by Civil Law (Miscellaneous Provisions) Act 2008 s 31; Civil Liability and Courts Act 2004 s 40(2)(b) refers to the Courts (Supplemental Provisions) Act 1961 s 45 (is so far as it relates to matrimonial causes or matters, or minor matters). The Civil Liability and Courts Act 2004 (Section 40(3)) Regulations 2005, SI 2005/337 identifies certain persons as relevant persons for the purposes of the 2004 Act, one of whom are researchers nominated by certain Universities and approved by the Minister. (See also the Child Care Act 1991 s 29 as amended the Child Care (Amendment) Act 2007, s 3; Child Care (Amendment) Act 2007 (Commencement) Order 2007, SI 2007/509 and the Regulations (Child Care Act, 1991, (section 29(7)) Regulations, SI 2012/467) as they refer to researchers). See also, Courts and Civil Law (Miscellaneous Provisions) Act 2013 which permits members of the press attend at family law and child law proceedings.

<sup>8</sup> Dáil Deb 09 July 2013, vol 810, no 1, 64-79. Debate related to second stage reading of the Courts and Civil Law (Miscellaneous Provisions) Bill 2013.

<sup>9</sup> Article 34.1 of the Constitution of Ireland 1937 which provides that justice shall be administered in public, save ‘in special and limited cases as may be prescribed by law’.

<sup>10</sup> Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White, Ovey, The European Convention on Human Rights* (7th edn, Oxford University Press 2017) 279, 281.

<sup>11</sup> *Werner v Austria* App No 21835/93 (ECtHR, 24 November 1997).

<sup>12</sup> Michael Forde and David Leonard, *Constitutional Law in Ireland* (3rd edn., Bloomsbury Professional 2013), para 18.17.

<sup>13</sup> *Moser v Austria* App No 12643/02 (ECtHR, 21 September 2006) para 97.

<sup>14</sup> *Gilchrist* (n 4).

<sup>15</sup> *ibid* [24].

statutory phrases for hearing family and child law proceedings in private. Consequently, certain issues arise for consideration: what are these techniques and prescribed terms and how have they been interpreted and applied by the court in this jurisdiction in family law and child law proceedings.

## Statutory Techniques and Phrases

One of the techniques engaged by the Oireachtas is to mandate that in certain circumstances the public must ('shall') be excluded from the proceedings but in other cases the public 'may' be excluded. While the Oireachtas in some statutes mandates the exclusion of the public, in other statutes it provides a statutory mechanism for the court to decide, on a case by case basis, whether the public ought to be excluded. What is important to bear in mind is that the court is being afforded such discretion.

Having established initially whether the court has discretion or not, the Oireachtas also utilises numerous diverse statutory phrases within that technique which permits departure from public hearings.<sup>16</sup> These phrases, described by Fahey as a 'gradation' of exceptions, permit this departure from the constitutional imperative.<sup>17</sup> Such phrases are, *inter alia*, proceedings heard *in camera*, proceedings heard 'otherwise than in public', proceedings 'in chambers' and those proceedings subject to reporting restrictions.<sup>18</sup> Fahey draws attention to some key difficulties with the various phrases. The first issue is that the statutory phrases are undefined. The second issue is that the relationship between the terms is also undefined.<sup>19</sup> Under those circumstances, it is left to the court to determine what is meant by each statutory phrase.<sup>20</sup>

These techniques and statutory phrases merit consideration before considering their application in family or matrimonial proceedings or proceedings concerning children.

### 'May' or 'shall' be otherwise than in public/in camera/in chambers

The first issue relates to what exactly has been mandated by the statute in terms of a public or private hearing, regardless of the specific statutory term engaged thereafter. Must the proceedings be heard to the exclusion of the public or does the court have discretion to decide whether the public ought to be excluded? Up until the Censorship of Publications Act 1929, family law cases were held in public.<sup>21</sup> The Act of 1929 restricted reporting. Certain information was open to publication, such as the names of the parties to the proceedings, brief statement of the charges, points of law and the result of the proceedings.<sup>22</sup> Following from the Act of 1929 is the Courts (Supplemental Provisions) Act 1961. Section 45 identifies and lists certain

<sup>16</sup> For example, Courts (Supplemental Provisions) Act 1961 s 45(1) provides that 'Justice may be administered otherwise than in public in any of the following cases' which affords the Court initial discretion; Judicial Separation and Family Law Reform Act, 1989 s 34 provides that 'Proceedings under this Act shall be heard otherwise than in public'; Children's Act, 2001 s 277 (2) provides 'The powers of a court under this section shall be in addition and without prejudice to any other power of the court to hear proceedings *in camera* or...'; Family Home Protection Act 1976, s 10(7) as amended provides that 'proceedings shall be heard in chambers'.

<sup>17</sup> Elaine Lucille Fahey, 'Open Justice? The Practical Operation of Article 34.1 of the Constitution-Part 1' (2003) 21 *Irish Law Times* 303.

<sup>18</sup> Fahey (n 17), 305.

<sup>19</sup> *ibid.*

<sup>20</sup> Fahey (n 17), 305-308; See also *In Re R Limited* (n 1) at 9 where the Court held '[t]hese statutory provisions also display a varied and unexplained choice of words to describe hearings other than in public, such words as "in camera", "in private" and "in chambers"'.

<sup>21</sup> Charles Lysaght, 'Publicity of court proceedings' (2003) 38(1) *Irish Jurist* 34, 42; Censorship of Publications Act 1929 s 14 provides for the restriction on publication of reports of judicial proceedings; Section 14(2) specifically provides for such restrictions as they relate to divorce, nullity, judicial separation, restitution of conjugal rights and was repealed by the Family Law (Divorce) Act 1996, s 33.

<sup>22</sup> *ibid.*

proceedings that may be administered ‘otherwise than in public’, such as matrimonial issues and ‘lunacy and minor’ matters. The court retains discretion under the Act as to whether the proceedings are to be held ‘otherwise than in public’ in the first instance. Dáil Éireann and Seanad debates provide some insight into the rationale behind the provisions of section 45 of the Act of 1961.

The provisions of what is now section 45 of the Courts (Supplemental Provisions) Act 1961 were debated in Dáil Éireann during 1961. Mr. Charles Haughey (Parliamentary Secretary to the Minister for Justice) proposed that these provisions provide a balance ‘between the desirability of having justice appear to be done and the impossibility or undesirability in the general interest of having hearings in open court’.<sup>23</sup> It was further stated that the relevant provisions ‘give the constitutional authority to enable a case like that to be held in camera’.<sup>24</sup>

What is evident from the debates is that their understanding of the operation of Article 34.1 was that any departure had to be prescribed by the Oireachtas. It appears to have been the view that it was incumbent upon them, for the purposes of compliance with Article 34.1, to provide a statutory basis for the court should it form the view that the case before it ought to be heard to the exclusion of the general public. Therefore, discretion remains with the court as to whether the matter ought to be heard in private or not in the first instance. There is no reference to the court retaining or not retaining discretion as to whom may be permitted access to court should the Judge determine that the matter will be heard privately. Given that the court is being afforded discretion as to whether the hearing ought to be held ‘otherwise than in public’ in the first place, it can be inferred by the same analogy that the court retains discretion as to how the proceedings will proceed thereafter and that it retains such discretion through use of the term ‘otherwise than in public’.

Of note also is that there is little discussion on issues relating to ‘lunacy and minor matters’. Their inclusion in section 45 of the 1961 Act provides the court, for the first time, with the statutory authority to hear such cases privately if deemed appropriate. The court did, however, have the authority to hear some of those cases privately previously but, under inherited common law principles. *Scott v Scott*,<sup>25</sup> which was decided almost 50 years prior, is authority for the proposition that cases involving ‘lunatics and wards’ fell within the exception to the open justice policy in the jurisdiction of England & Wales.

Hogan *et al* note that:

notwithstanding any potential inherent jurisdiction to waive the in camera rule, concerns surrounding the usual application of the in camera rule in family law proceedings, including on the basis that the practice of hearing of all family law cases in private even where a mere discretion to do so has been conferred by statute would not seem to conform the requirements of Article 34.1 as interpreted by such cases as *Re R* and *Irish Press*. These cases suggest that the court must make its own independent judgment as to whether the facts of the case before it require that the hearing (or part of the hearing) be in camera.<sup>26</sup>

---

<sup>23</sup> Dáil Deb 27 July 1961, vol 191, no 11 (Courts (Supplemental Provisions) Bill, 1959-Committee Stage (Resumed)); Dáil Deb 2 August 1961, vol 191, no 14 (Courts (Supplemental Provisions) Bill, 1959 – Report Stage (Resumed) and Final Stage); The Children’s Act 1908 was the main governing legislation in the State prior to the commencement of the provisions of the Child Care Act 1991; Children’s Act 1908 s 114 provides that the Court retains the power to clear the court, if appropriate, when a child is giving evidence. However, nothing in that section can operate as to exclude *bona fide* representatives of the press.

<sup>24</sup> Dáil debate for the Courts (Supplemental Provisions) Bill 1959 (n 23).

<sup>25</sup> *Scott & anor v Scott* [1911-1913] All ER Rep 1; [1913] AC 417 82, LJP 74; 109 LT 1; 29 TLR 520; 57 Sol Jo 498.

<sup>26</sup> Hogan, Whyte, Kenny and Walsh, *Kelby*, *The Irish Constitution* (n 4), para 6.1.347.

They note however that legislative reform has somewhat ameliorated this position.<sup>27</sup> If the Oireachtas has determined that the case ‘may’ be held either otherwise than in public or *in camera* then the court has discretion to do so. But before exercising that discretion in favour of the exclusion of the public, it must decide based on the merits of each case, as to whether a hearing in the absence of the public is warranted. This would appear to be more in line with the constitutional imperative. Section 45 of the Courts (Supplemental Provisions) Act 1961 predates the raft of more modern family and child law legislation, which for the most part provides that such matters must be heard ‘otherwise than in public’ and as such does not provide that element of initial discretion to the court.<sup>28</sup> There are however various examples of cases under section 45 of the Courts (Supplemental Provisions) Act 1961 that detail how the court exercises its discretion as to whether the matter may be held ‘otherwise than in public’. Such cases are relevant to the issues of marital privacy and family autonomy where the specific family law statutes are not invoked or on matters affecting children but do not necessarily fall neatly into the category of child law.

Two cases of a similar nature, namely, *JOC v GD & ors*; *JOC v KW*<sup>29</sup> and *JON v S McD & ors*<sup>30</sup> concerned proceedings and motions respectively before the court which arose out of family law proceedings.<sup>31</sup> In *JOC*, consideration was given as to whether the provisions of section 45(1)(b) and (c) of the Courts (Supplemental Provisions) Act, 1961 (which concern matrimonial and minor matters) ought to be invoked. Initially, Keane J declined to concede that the matter ought to proceed ‘otherwise than in public’ given that the matters in issue appeared to be removed from ‘marital and infant privacy interests’ but were more concerned with issues surrounding the family home. The case proceeded on that basis. Subsequently, Keane J considered that it should have in fact been heard ‘otherwise than in public’, as matrimonial and minor issues to a certain extent were referenced and they were such matters that required protection. As it transpired, the matter was heard ‘in an empty courtroom’ and the resulting judgment was anonymised.<sup>32</sup> In so deciding the matter in this way, it was adopting the approach of Birmingham J in *JON*. In this case the court considered that the ‘extensive reference’ to the family law proceedings, which would form part of the within proceedings, justified hearing the matter ‘in camera’ subject to the disclosure of the names of those against whom there may be adverse findings.<sup>33</sup> In deciding on the merits as to whether the matters ought to be heard ‘otherwise than in public’, the court was mindful of the potential exposure of the content of the family law proceedings which were mandatorily heard ‘otherwise than in public’ (although referred to as ‘in camera’) and it was that that precipitated the court in the exercise of its discretion to hear these cases to the exclusion of the public. Although the court did not engage in a balancing act, it is clear the redacted judgments which subsequently issued addressed the nature of the issues, while simultaneously preserving the anonymity of all parties concerned. In addition, in *JON*, the court was prepared to permit the disclosure of the names of those against whom it may make adverse findings (ultimately it made no such findings), thus ensuring the proper administration of justice in compliance with Article 34.1 of the Constitution.

---

<sup>27</sup> *ibid*, para 6.1.348.

<sup>28</sup> For example, Judicial Separation and Family Law Reform Act 1989 s 34, Family Law Act 1995 s 38(6), Family Law (Divorce) Act 1996 s 38(5), Child Care Act 1991 s 29(1) & 23 NH.

<sup>29</sup> *JOC v GD & ors*; *JOC v KW* [2017] IEHC 781.

<sup>30</sup> *JON v S McD & ors* [2013] IEHC 135.

<sup>31</sup> *JOC* (n 29) [23]; *JON* (n 30) [1], [4]-[5].

<sup>32</sup> *JOC* (n 29) [23]-[27].

<sup>33</sup> *JON* (n 30) [5].

Marital privacy and family autonomy were considerations in *XY v Clinical Director of St. Patrick's University Hospital*,<sup>34</sup> which concerned the involuntary detention of an adult. This case is particularly illustrative and informative of the balancing act which a court engages in when considering the exercise of its statutory discretion to hear a case 'otherwise than in public'. In considering the application made under section 45(1) of the Courts (Supplemental Provisions) Act 1961 for the matter to be heard 'in camera',<sup>35</sup> Hogan J deliberated on Article 34.1, previous case law, and the significance of having the complaints of those detained aired in public together with the derogations from the constitutional imperative being proportionate and 'capable of objective justification'.<sup>36</sup> In acknowledging the rights of the individual in this case to be considered, namely, the right to marital privacy, the autonomy of the family unit, confidentiality in medical matters and dignity, the court considered that the appropriate way to proceed was in open court and by imposing reporting restrictions under section 27 of the Civil Law (Miscellaneous Provisions) Act 2008, and by doing so, the competing values were proportionately balanced.<sup>37</sup> This case is illustrative of the court exercising its discretion based on the merits of the case before it, identifying the issues and the rights at stake while balancing that against the constitutional imperative of the public administration of justice, and opting for the least restrictive and proportionate measure that protects the subject of the proceedings while doing justice in public.

Although not directly related to child law, a three-month old baby was the subject of an application in *Children's University Hospital Temple Street v D & anor*.<sup>38</sup> Hogan J heard and granted an application to transfuse this seriously ill baby. Due to the extreme urgency of the case, the application was heard in his home in the early hours of the morning during the Christmas vacation period. Under those circumstances, it was 'necessary and unavoidable' that the matter was in fact heard 'otherwise than in public', which is mandated in any event by the provisions of section 45(1)(a) and (c) of the Courts (Supplemental Provisions) Act 1961.<sup>39</sup> However, given the 'importance of the matter' and with due regard to the 'primary command' contained in Article 34.1, Hogan J delivered the judgment subsequently in open court so that the public would be aware of the proceedings while simultaneously preserving anonymity.<sup>40</sup> An order was also made under section 27(1) of the Civil Law (Miscellaneous Provisions) Act 2008 which prohibits the identification of a relevant person suffering from such a medical condition if such identification would cause that person stress.<sup>41</sup> The manner in which this case was ultimately heard was simply unavoidable due to the prevailing circumstances, but the importance of and the public interest in the nature of the case was such that the court formed the view that an anonymised public pronouncement of the proceedings and outcome complied with the constitutional imperative while preserving anonymity, thus giving due consideration to the merits of the case before it.

These cases illustrate how the court variously exercises its discretion. It is clear there is no 'one rule fits all', as to have such a proposition would detract from each case being considered on its merits as to whether the matter may be heard otherwise than in public or in camera.

---

<sup>34</sup> *XY v Clinical Director of St. Patrick's University Hospital* [2012] IEHC 224.

<sup>35</sup> *ibid* [14].

<sup>36</sup> *XY* (n 34) [15].

<sup>37</sup> *ibid* [17]-[19].

<sup>38</sup> *Children's University Hospital Temple Street v D & anor* [2011] IEHC 1.

<sup>39</sup> *Children's University Hospital Temple Street* (n 38) [15].

<sup>40</sup> *ibid*.

<sup>41</sup> *Children's University Hospital Temple Street* (n 38) [20]-[25]. In that regard Hogan J adopted a 'teleological approach' when interpreting section 27 of the 2008 Act given the anomaly identified, which was that the baby was too young to be adversely affected by publicity as he lacked the 'consciousness or capacity' and the parents did not have a medical condition. Hogan J was of the view that if this interpretation and the position he adopted was incorrect, that section 45 of the 1961 Act provided for the proceedings to be held 'in camera' with the preservation of that anonymity being retained in the public judgment.

## ‘Otherwise than in public’ versus ‘in camera’

Having considered the issue as to whether the court has discretion in the first instance, it is now worth considering the interpretation of the various statutory phrases themselves. The more widely used statutory provision contained in the more modern family law and child law legislation is the phrase ‘otherwise than in public’.<sup>42</sup>

### ‘Otherwise than in public’

Much of the existing case law considers applications to lift the ‘*in camera* rule’ in circumstances where the relevant statutory expression is actually ‘otherwise than in public’.

### Private Family Law Proceedings

There is a narrow line of authority in interpreting ‘shall be heard otherwise than in public’ as provided for under section 34 of the Judicial Separation and Family Law Reform Act 1989. In *MP v AP*,<sup>43</sup> an issue arose about a complaint made to the Psychological Society of Ireland in respect of the Applicant who was a potential witness in a family law case. The court held that the complaint to the Society resulted in divulging confidential matters arising from the family law proceedings, that consequently section 34 had been contravened and therefore, the ‘*in camera*’ rule had been breached. In *RM v DM*,<sup>44</sup> the Applicant unsuccessfully sought to provide documents to a Barrister’s Tribunal, which documents emanated from the family law proceedings as it was deemed impermissible. Both cases adopted a strict interpretation. In *DX v Judge Buttmer*,<sup>45</sup> Hogan J explained section 34 of the 1989 Act in the following terms:

6...the exception prescribed by s.34 of the Act of 1989 must be taken as reflecting a desire by the Oireachtas to protect other constitutional values in the context of family law proceedings such as the right to privacy (Article 40.3.1), the authority of the family (Article 41) and the protection of the constitutional rights of children (Article 42.5). It is in that context that s. 34 of the act 1989 falls to be interpreted.<sup>46</sup>

In *AB v CD*,<sup>47</sup> the Times Newspaper Ltd wished to report certain family law proceedings. Such proceedings were being heard under section 34 of the 1989 Act (and the Family Law Act 1995). They were refused admission on the basis that the court did not have discretion under the Act to permit them attend. The Judge considered, *inter alia*, that the Oireachtas had engaged in the appropriate balancing act of constitutional rights and therefore the court could not subsequently impose its own view.<sup>48</sup> The court held that the instant case was more in line with that of *MP v AP* and *RM v DM* than the more relaxed jurisprudence in child law cases considered below. However, now part 2 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013 provides for the attendance at court of *bona fide* representatives of the press.

### Proceedings involving children

In *Health Service Executive v McAnaspie*,<sup>49</sup> the High Court determined that the District Court had jurisdiction to lift or modify the ‘*in camera*’ rule regarding court documents. The decision of the court appears to be based on an interpretation of section 29(1) of the Child Care Act 1991 as opposed to reliance on section 40(8) of the Civil Liability and Courts Act 2004, which permits

<sup>42</sup> For example, Judicial Separation and Family Law Reform Act 1989 s 34.

<sup>43</sup> *MP v AP* [1996] IR 144 (HC); Judicial Separation and Family Law Reform Act 1989 s 34 provides that proceedings are otherwise than in public.

<sup>44</sup> *RM v DM* [2000] 3 IR 373 (HC); Judicial Separation and Family Law Reform Act 1989 s 34.

<sup>45</sup> *DX v Judge Buttmer* [2012] IEHC 175.

<sup>46</sup> *ibid* [6].

<sup>47</sup> *AB v CD* [2013] IEHC 578.

<sup>48</sup> *ibid* [25]-[31].

<sup>49</sup> *Health Service Executive v McAnaspie* [2012] 1 IR 548 (HC).

the disclosure of documents in certain circumstances.<sup>50</sup> Section 29(1) of the Child Care Act 1991 as amended provides that proceedings under the relevant section must be heard ‘otherwise than in public’. Section 29(5) provides that certain categories of persons such as researchers are permitted to remain in court and have access to certain documents or reports subject to certain requirements as set out in the legislation. Family members are not identified as one of those categories. An application was made to court by McAnaspie’s sister for access to certain reports following his murder while in State care and such access was granted by the court. In relation to section 29(1) of the Child Care Act 1991, the court held

On its face, the requirement that proceedings should be heard otherwise than in public might be thought to afford a considerable measure of discretion as to how the proceedings should be conducted. The holding of proceedings in public is prohibited. However, other than that express prohibition, there is no precise stipulations as to what regime should apply. The manner in which the *in camera* rule operates and I use that phrase as covering the various differing statutory formulations to which I have referred, has been considered both in England and Wales.<sup>51</sup>

In that regard, the court considered a number of English wardship cases which are held *in camera* and further noted that notwithstanding the privacy element, in an appropriate case, the court has discretion ‘to lift or modify’ the *in camera* rule.<sup>52</sup> If it is the case that section 29(1) affords the court discretion to permit a person other than one identified in section 29(5) access to certain court records, then it must be the case that the discretion flows from section 29(1) and the phrase ‘otherwise than in public’. If this is so, then this must mean that the same phrase gives the court the authority to exclude the public but bestows upon the court an element of discretion as to who it may permit remain in court. This sits in harmony with the constitutional imperative of exercising the least restrictive measure while administering justice. It also sits in harmony with the jurisprudence of the European Court of Human Rights as it provides for judicial oversight of the issues.<sup>53</sup>

More recently, in the *Child and Family Agency v KB & RB*,<sup>54</sup> Humphreys J had cause to consider the phrase ‘shall be heard otherwise than in public’ under Part IVA, section 23NH of the Child Care Act 1991, as amended.<sup>55</sup> Part IVA provides for special care proceedings. What is significant about Part IVA is that it does not provide any statutory mechanism upon which, *inter alia*, researchers or *bona fide* members of the press can apply to attend court and report on such proceedings, similar to the provisions contained under section 29 of the Act. The court identified that the ‘threshold issue’ in this case for the purposes of extending a special care order was whether the ‘application has to be heard *in camera* or can be dealt with by way of reporting restrictions’.<sup>56</sup> The court considered that the question is ‘whether “*otherwise than in public*” means entirely otherwise than in public, in the sense of *in camera*, or could encompass situations of something less than that’.<sup>57</sup> Humphreys J. considered legal submissions at that point,

<sup>50</sup> Section 40(8) of the Civil Liability and Courts Act 2004 provides: ‘A court hearing proceedings under a relevant enactment, shall, on its own motion or on the application of one of the parties to the proceedings, have discretion to order disclosure of documents, information, or evidence connected with or arising in the course of the proceedings to third parties if such disclosure is required to protect the legitimate interests of a party of other person affected by the proceedings’.

<sup>51</sup> *McAnaspie* (n 49) [20].

<sup>52</sup> *ibid* [21]-[24].

<sup>53</sup> Constitution of Ireland, 1937, Article 34.1; *Moser v Austria* (n 13).

<sup>54</sup> *The Child and Family Agency v KB & RB* [2018] IEHC 513.

<sup>55</sup> Part IVA s 23HN (which provides the statutory basis for secure care cases) was inserted into the Child Care Act 1991 by the Child Care (Amendment) Act 2011 s 10 which commenced on the 31<sup>st</sup> December 2017 by Child Care (Amendment) Act, 2011 (Commencement) Order 2017, SI 2017/637; Prior to its commencement these cases were heard under the inherent jurisdiction of the High Court.

<sup>56</sup> *KB & RB* (n 54) [1].

<sup>57</sup> *ibid*.



acknowledged that another judge had reserved judgment on this issue in another special care case and accepted that the court's response may have to be considered as 'somewhat provisional'.<sup>58</sup> That said, Humphreys J interpreted the phrase 'otherwise than in public' as follows:

I do read it as allowing a court to have discretion to impose reporting restrictions rather than requiring an *in camera* hearing. Such an approach involves reading 'otherwise than in public' as meaning 'otherwise than fully in public', so as to allow the possibility of the protection of the confidentiality of the proceedings to be secured in a particular case by means (such as reporting restrictions) short of closing the doors of the court (even if the latter is the general approach in practice in any particular category of cases).<sup>59</sup>

Following on from the decision of Humphreys J is the decision of Reynolds J in *The Child and Family Agency v TN & anor*.<sup>60</sup> This special care case had one main issue for adjudication. That issue was whether section 23 NH of the Child Care Act 1991, as amended, provided the court with a residual discretion to permit non-parties (in this case, a doctoral researcher and the Child Care Law Reporting Project) attend at special care proceedings given the absence of any statutory mechanism permitting such access. It determined that the power of the court was not ousted in permitting such access and followed the decision in *McAnaspie* and the *Eastern Health Board v Fitness to Practice Committee*.<sup>61</sup> The court determined that section 23NH did 'not impose a mandatory obligation that such proceedings be held in-camera' and for completeness, the court also considered that it was in the child's best interests to lift the 'in-camera' rule to permit anonymised reporting of such cases.<sup>62</sup>

The foregoing illustrates how the same statutory phrase has been interpreted differently depending on the nature of the case leading to some element of confusion and conflation of the concepts. Notwithstanding the court's awareness and preference for the public administration of justice, the adjudication of cases 'otherwise than in public' appears to lean towards a tendency to guard private and financial matters closely within the family law context. Child law matters, however, are arguably underpinned by paternalistic tendencies and greater transparency is required, thus leading to a more flexible approach. That said, it may simply be the case that the confusion persists over the meaning of the phrase as it has not been consistently applied and this may be to avoid setting a precedent with universal applicability over all family and child law proceedings. For present purposes, this exemplifies the difficulty when a statutory phrase is left undefined.

### In Camera

Alternate statutory terms also exist within family law and child law proceedings such as proceedings may/shall be heard 'in camera'.<sup>63</sup> It is clear that there is a distinction between the term 'in camera' and 'otherwise than in public' as Humphreys J in *Child and Family Agency v KB & RB*<sup>64</sup> stated that he read 'otherwise than in public' as permitting an element of discretion regarding reporting restriction 'rather than requiring an *in camera* hearing'.<sup>65</sup> The difficulty is ascertaining what that distinction is. *K v K*,<sup>66</sup> which was a case decided prior to the (statutory)

<sup>58</sup> *KB & RB* (n 54) [1]-[2].

<sup>59</sup> *KB & RB* (n 54) [5].

<sup>60</sup> *The Child and Family Agency v TN & anor* [2018] IEHC 568.

<sup>61</sup> *McAnaspie* (n 49); *Eastern Health Board v Fitness to Practice Committee of the Medical Council* (1998) 3 IR 399.

<sup>62</sup> *The Child and Family Agency v TN* (n 60) [55] & [57].

<sup>63</sup> For example, the Children's Act 2001, s 257 as amended.

<sup>64</sup> *KB & RB* (n 54).

<sup>65</sup> *ibid* [5].

<sup>66</sup> *K v K* (n 6).

relaxation of the privacy aspect of family and child law proceedings, is somewhat illustrative of what is possibly meant by ‘in camera’ even though this was a case heard ‘otherwise than in public’. McGuinness J referred to the Applicant’s submissions and opined thereafter as follows:

In oral argument on behalf of the applicant it was strongly contended that orders in family law cases generally were made only *in personam*; that they were, as it were, shut off from the world at large by the operation of the in camera rule as expressed both in the family law statutes and in the relevant Court rules. This argument, if it is to have any reality, has to be seen in the context of the current extremely strict interpretation of the in camera rule- an interpretation which has yet to be considered by this Court...<sup>67</sup>

Murdoch’s *Dictionary of Irish Law* identifies a subtle distinction between the terms ‘otherwise than in public’ and ‘in camera’ as follows:

Where a case is heard *in camera*, the public must be excluded; the only persons permitted to be present are the parties directly concerned, their legal representatives and officers of the court. Where the law requires that proceedings be held *otherwise than in public*, the public will be excluded but certain specified persons may be entitled to be present, e.g. *bona fide* representatives of the press in rape and incest proceedings; or a parent, relative or friend of the complainant or of a minor accused in rape proceedings; Criminal Law (Rape) Amendment Act, 1990 s. 11; Criminal Law (Incest Proceedings) Act, 1995.<sup>68</sup>

This suggests that a strict interpretation of the *in camera* rule provides for the exclusion of everyone from the court save the parties, their legal representatives and court officers.<sup>69</sup> For cases heard ‘otherwise than in public’, it suggests that the public is excluded but that the court retains an element of discretion as to who can remain in court. The criminal statutes referred to in the extract above are useful examples for illustrative purposes as they specifically and helpfully provide for certain categories of persons to remain in court. Additionally, the statute provides for the exercise of judicial discretion to permit others remain if appropriate, all to the exclusion of the public. The corollary can be inferred which is that any ousting of judicial discretion must be specifically provided for.

### Possible explanation for the different statutory terms?

One of the first pieces of family law legislation to come into force after the Act of 1961 was the Family Law (Maintenance of Spouses and Children) Act 1976. Section 25 provides that such proceedings must be heard ‘otherwise than in public’ in the District Court but must be heard in chambers in the Circuit and High Court. This legislation was enacted following the recommendations of the *Nineteenth Interim Report of the Committee on Court Practice and Procedure, Desertion and Maintenance* in 1974. It is clear from the recommendations to, and the subsequent recommendations by, the Committee and the consequential Dáil debates that the privacy aspect of this legislation was mandated for two primary purposes. The first reason was to quell the ‘fear of exposure in their local paper’<sup>70</sup> given the sensitivities of the subject matter. The second reason was to keep in-laws out of court!<sup>71</sup> The Minister assured the Special Committee on Family Law that:

---

<sup>67</sup> *ibid* 12.

<sup>68</sup> Brian Hunt, *Murdoch’s Dictionary of Irish Law* (6th edn, Bloomsbury 2016) 834.

<sup>69</sup> In this regard see *The People (Director of Public Prosecutions) v WM* [1995] 1 IR 226 (HC).

<sup>70</sup> Dáil Deb 22 July 1975, vol 284, no 1 (Family Law (Maintenance of Spouses and Children) Bill 1975 2nd Stage).

<sup>71</sup> *ibid*; Committee on Court Practice and Procedure, *Nineteenth Interim Report of The Committee on Court Practice and Procedure, Desertion and Maintenance* (Prl 3666, 1974) in particular paragraphs 39, 40, 47 & 48.

the district court rules provide that in any proceedings a witness may be ordered by the Justice either to leave the court during the inquiry until after the evidence has been given. That is a normal district court power. In addition, section 24 makes it very clear. It states: Proceedings under this Act shall be conducted in a summary manner and shall be heard otherwise than in public. Relatives would be members of the public. The only people who would not be members of the public would be parties who were witnesses and they could be excluded under section 24.<sup>72</sup>

Satisfaction with this explanation, that relatives could be excluded, concluded this issue.<sup>73</sup> This statement clarifies that witnesses are not members of the public, but can be excluded at the discretion of the court until the court is ready to hear their evidence. The corollary must be that witnesses are permitted to remain in court for the duration of the proceedings. There was no elaboration on potentially who else may or may not be considered members of the public, because the focus of this piece of legislation was keeping in-laws out of court as they appear to have developed an unfortunate reputation for being obstructive. However, the Rules of the Court at that time were considered adequate in providing the required level of privacy.<sup>74</sup>

Deputy Mattie McGrath noted during the Dáil Éireann Debates in 2013 on the Courts and Civil Law (Miscellaneous Provisions) Bill 2013 that there ‘is a slight technical difference between cases heard *in camera* and those heard otherwise than in public’, but did not elaborate on that point as it was deemed unnecessary for the purposes of the legislation being considered.<sup>75</sup> The debates under the 1961 Act do not shed light either on the distinction between these different statutory terms.<sup>76</sup> Given that this occurred in 1961, and predated the raft of modern family law legislation, it is not surprising that more in depth discussion did not take place around either the use of the specific terminology or its possible ramifications. What is clear is that the use of either term, ‘*in camera*’ or ‘otherwise than in public’, mandates that such proceedings are to be heard to the exclusion of the general public. That is without issue. The point is, the terms have now been conflated together as being one and the same and are used interchangeably. *In Re R*,<sup>77</sup> the court held that the ‘meaning of the expression “the hearing of the proceedings or any part thereof shall be *in camera*” is such that such hearing shall be otherwise than in public’.<sup>78</sup>

In attempting to disentangle the statutory phrases further, in search of a more tangible interpretation, the English case of *Allen v Clibbery*<sup>79</sup> is somewhat appealing. This is a family law as opposed to a child law case. Dame Butler-Sloss P analysed the difference between public and private hearings. In considering that the overriding consideration is that of the ‘principle of open justice’, it was affirmed that this applies to both civil and family courts and retreat from that principle must be objectively justified.<sup>80</sup> Notwithstanding this position, the court accepted that ‘many family cases...require confidentiality’.<sup>81</sup> The court then clarified the categories of cases as follows: there were three categories of case, those heard in open court, those heard in private and those heard in secret where the information disclosed to the court and the proceedings remain confidential.<sup>82</sup>

---

<sup>72</sup> Special Committee Family Law (Maintenance of Spouses and Children) Bill, 1975 Deb 2 December 1975.

<sup>73</sup> *ibid.*

<sup>74</sup> *ibid.*

<sup>75</sup> Dáil Deb 09 July 2013 (n 8).

<sup>76</sup> Courts (Supplemental Provisions) Bill, 1959 (n 23).

<sup>77</sup> *In Re R Limited* (n 1).

<sup>78</sup> *ibid* 131.

<sup>79</sup> *Allen v Clibbery* [2002] EWCA Civ 45.

<sup>80</sup> *Allen* (n 79) [16].

<sup>81</sup> *ibid.*

<sup>82</sup> *Allen* (n 79) [20], [75].

Although the hearing of family cases in the jurisdiction of England and Wales is now regulated by the Family Procedural Rules to regulate the statutory framework,<sup>83</sup> the essence of three categories of cases identified are somewhat comparable to what is being proposed as the gradation of statutory phrases in this jurisdiction. Both identify the starting position as proceedings in open court.<sup>84</sup> The most extreme cases in terms of privacy are hearings similar to those held ‘in camera’ prior to the relaxation of the rule which now permits reporting and could therefore be said to be hearings ‘in secret’.<sup>85</sup> The middle category, which mandates privacy, but not complete secrecy, is suggestive of the interpretation that ought to be attributed to the phrase ‘otherwise than in public’; which is that the judge retains discretion as to whom may be permitted access to court even though the public is excluded. This interpretation is more compatible with the Constitution and the European Convention on Human Rights.

### Proceedings in Chambers

Another term existing within family and child law proceedings are those that may/shall be heard ‘in chambers’.<sup>86</sup> Murdoch’s *Dictionary of Irish Law* explains proceedings held ‘in chambers’ as follows:

The room of judges. A judge sitting in chambers can exercise the full jurisdiction of the court. Applications which in the opinion of the judge would be more conveniently and expeditiously disposed of in chambers than in open court, may be made and heard by the judge in chambers. Some statutes require proceedings to be in chambers for reasons of confidentiality...<sup>87</sup>

Jacobs J in *Forbes v Smith*<sup>88</sup> considers and elaborates on the meaning of ‘in chambers’:

A chambers hearing is in private, in the sense that members of the public are not given admission as of right to the courtroom. Courts sit in chambers or in open court generally merely as a matter of administrative convenience.....when judgments are given in chambers they are not to be regarded as secret documents. There is in principle all the difference between a judgment given in camera (ie a judgment which the judge has specifically orders, for cause, to be treated as secret) and a judgment given in chambers merely for administrative reasons.<sup>89</sup>

In referencing this passage in her judgment, the President in *Allan v Clibbery* considered that ‘the allocation of work to chambers in the family courts has a somewhat different basis’ but did not elaborate on what that might be.<sup>90</sup>

The foregoing suggests that proceedings can be heard in chambers for administrative ease, although they are still proceedings in public. In the alternative, it appears that where provided for in statute, proceedings in chambers might also be proceedings *in camera*. However, if the statute does not specifically provide for privacy or confidentiality or secrecy, but merely that proceedings are to be heard in chambers, then such hearings are public.

<sup>83</sup> *Allen* (n 79) [50].

<sup>84</sup> Constitution of Ireland, 1937 Article 34.1; The open justice policy in England & Wales stems from common law, see for example, *Scott v Scott* (n 25).

<sup>85</sup> See *K v K* (n 6) 5, 12, where McGuinness J referred to the ‘current extremely strict interpretation of the in camera rule’.

<sup>86</sup> For example, Family Home Protection Act 1976, s 10(7) as amended and Family Law (Maintenance of Spouses And Children) Act 1976, s 25(2) as amended.

<sup>87</sup> Brian Hunt, *Murdoch’s Dictionary of Irish Law* (n 68); See also RCC Ord 20.

<sup>88</sup> *Forbes v Smith* [1998] 1 FLR 835; This is not a family law case but centred around the dissemination of a judgment where proceedings were held ‘in chambers’.

<sup>89</sup> *ibid* 836.

<sup>90</sup> *Allen* (n 79) [21].

The Irish family law statutes which provide for proceedings to be heard in chambers are generally prefaced by providing that such proceedings shall be heard ‘otherwise than in public’.<sup>91</sup> The reality, therefore, is that any application brought under those specific provisions means that privacy is being mandated and proceedings in chambers in such circumstances are not public hearings, but are hearings ‘otherwise than in public’. It is not usual in family or child law proceedings for matters to proceed in the judge’s chambers.

## Rules of the Courts

The Rules of the Court merit consideration regarding the interpretation of the statutory phrases in family and child law cases, as they are concerned with the practice and procedure of the court. The Rules of the District Court and the High Court as they relate to proceedings under the Child Care Act 1991, as amended, provides that such ‘proceedings heard otherwise than in public’ means witnesses are permitted to stay in court for the proceedings and such other persons as the Judge deems fit in his or her discretion. It appears that the statutory phrase has been interpreted by the Rules Committee as the Oireachtas, conferring the presiding Judge with discretion to permit certain persons to be present in court.<sup>92</sup>

The Circuit Court and the High Court have concurrent jurisdiction to hear proceedings under the Judicial Separation and Family Law Reform Act 1989, Family Law Act 1995 and Family Law (Divorce) Act 1996, under which proceedings are heard ‘otherwise than in public’.<sup>93</sup> The Circuit Court Rules, however, identify that subject to certain statutory provisions permitting researchers and the media attend court, that such proceedings ‘shall be heard in camera’.<sup>94</sup> Paradoxically, the same Circuit Court Rules mandate that proceedings for a declaration of parentage under section 36(4) of the Status of Children Act 1987 must be heard ‘otherwise than in public’, which accords with the primary legislation.<sup>95</sup>

What is interesting to note, is the difference in the terminology used by the Rules Committee when considering private family law proceedings and public child care proceedings. If it is accepted that there is a distinction between the statutory terms, subtle or otherwise, then an issue may arise as it is not possible for the Rules of the Court to amend primary legislation.<sup>96</sup> In the alternative, if it is not accepted that there is a difference in the terminology, then why is the wording in the Rules slightly different? Or, is it the case that privacy in private family law proceedings is more necessary than privacy in public child care proceedings?

---

<sup>91</sup> For example, Family Law (Protection of Spouses and Children) Act 1981, s 14; Family Law (Maintenance of Spouses and Children) Act 1976, s 25; Family Home Protections Act 1976, s 10.

<sup>92</sup> RDC Ord 84 & RSC Ord 65A, r 2 (Special Care of Children) 2018; Courts and Civil Law (Miscellaneous Provisions) Act 2013, Part 2 provides for the attendance at Court of *bona fide* representatives of the press.

<sup>93</sup> Judicial Separation and Family Reform Act 1989, s 34 provides that proceedings shall be heard otherwise than in public; Family Law Act 1995, s 38(1) provides for concurrent jurisdiction and s 38(5) applies, *inter alia*, s 34 of the 1989 Act; Family Law (Divorce) Act 1996, s 38 provides for concurrent jurisdiction and s 38(5) applies, *inter alia*, s 34 of the 1989 Act.

<sup>94</sup> RCC Ord 59 (Family Law: Mediation) 2018 provide as follows: ‘13. (1) Subject to any provision of statute and to any order of the Court made under section 40(3A) of the 2004 Act and in accordance with Part X of this Order in the case of an application under a relevant enactment (within the meaning of section 39 of the 2004 Act), hearings of proceedings and applications under this Order shall be held in camera’.

<sup>95</sup> RCC Ord 59 (Family Law: Mediation) 2018 provide as follows: ‘13. (2) On the hearing of every proceeding for a declaration of parentage, the Court may direct in accordance with section 36(4) of the Status of Children Act that the whole or any part of the application shall be heard otherwise than in public, and an application for a direction in accordance with section 36(4) of the Status of Children Act shall be so heard unless the Court otherwise directs’.

<sup>96</sup> For example, in *Luby v McMahon & ors* [2003] 4 IR 133 (HC) 138 the Court held ‘Such Rules [of the Superior Court] would always be subject to a legislative provision in the normal constitutional hierarchy of laws’.

Despite the apparent conflation or confusion over the interpretation of statutory phrases in family and child law proceedings, this paper is proposing a ‘gradation’ as Fahey previously described in the following terms: that the starting position is that all proceedings must be heard in public; the next least restrictive is a public hearing with reporting restrictions; the next least restrictive in terms of gradation are those heard ‘otherwise than in public’ because even though the public is not permitted to attend, the phrase affords the court discretion to permit specified persons remain in court unless the statute specifically ousts the discretion or jurisdiction of the court and this is buttressed by the Rules of the Court; the most restrictive are proceedings heard *in camera*, as no-one is permitted to stay in court save the parties, their representatives and court officers. Proceedings heard ‘in chambers’ serves to potentially expedite certain administrative matters and are therefore not private but may be private.

## Impact of these statutory phrases

A question necessarily arises regarding the impact, if any, of the different statutory phrases on attendance at or reporting of cases given that for the most part the phrases ‘otherwise than in public’ and ‘in camera’ are generally understood to mean the same thing.

Even if it is accepted that there is a distinction regarding the statutory phrases, the significance and importance of this distinction has been diluted in three ways. The first is by the enactment of statutory provisions which permit researchers and *bona fide* members of the press attend court. This promotes compliance with Article 34.1 of the Constitution of Ireland, 1937 and Article 6(1) of the European Convention on Human Rights. This has also served to lift the mystery regarding family and child law court proceedings. The second is based on the provisions of sections 40(5) and 40(8) of the Civil Liability and Courts Act 2004. Hogan J opined that section 40(5) of the 2004 Act ‘acknowledges the general rights to have a friend present in court, subject to the approval of the court and the right of the court to impose decisions’.<sup>97</sup> Section 40(8) provides for the disclosure of certain documents under certain circumstances. The third is due to the court being able to exercise its inherent powers to protect rights or regulate its own proceedings and the incremental development in common law. Specific statutory authority would be required to oust this discretion of the court. Consequently, the court can impose or lift the ‘*in camera* rule’ (even though the term invoked is ‘otherwise than in public’) if warranted and exercise its discretion as it deems appropriate.

As has been identified through case law regarding attendance at court or access to documents arising out of family law or child law proceedings, a strict interpretation of the phrase ‘otherwise than in public’ is adopted in family law proceedings. A more flexible approach is adopted in public child law proceedings. This occurs notwithstanding the fact that both sets of proceedings must be heard ‘otherwise than in public’. Notwithstanding the diverse interpretation of the same statutory phrase, written judgments in family law and child law proceedings tend to be anonymised and there is currently a statutory mechanism for the attendance at and reporting of such cases, thus negating the impact of this diverse interpretation.<sup>98</sup>

That said, the impact of the statutory phrases on both attendance at and reporting of cases must be considered alongside the ability of the court to hear a case publicly, while being able to impose reporting restrictions generally or imposing reporting restrictions under section 27 of the Civil Law (Miscellaneous Provisions) Act 2008. For example, before the commencement of Part IVA of the Child Care Act 1991, as amended, proceedings to civilly detain adolescents with

---

<sup>97</sup> *DX v Judge Buttimer* (n 45) [12].

<sup>98</sup> See note 7.

certain disorders in special care units were heard in public under the High Court's inherent jurisdiction, but subject to such reporting restriction under section 27 of the 2008 Act. Such reporting restrictions at that time ensured anonymity, while administering justice in public; a mechanism most in line with Article 34.1 of the Constitution of Ireland 1937 and Article 6.1 of the European Convention on Human Rights. A comparison can be drawn between that and the current system of hearing special care cases under Part IVA of the Child Care Act 1991, as amended.<sup>99</sup> Leaving aside the common law power of the court to invoke or lift the 'in camera rule' for one moment, and focussing solely on the statutory provisions, the decision in the *Child and Family Agency v TN & anor*<sup>100</sup> is instructive. Given that there was no automatic statutory mechanism under Part IVA to apply for access to court or to report on such special care cases, it once again fell to the court to determine the matter. What could have prevented this situation was a clear understanding as to what the statutory phrase 'otherwise than in public' actually means.

Although the court actively promotes the public administration of justice, it can be argued that the engagement of various undefined statutory phrases regulating privacy in family and child law proceedings has over time impacted attendance at and reporting of cases; for the most part, this has improved. There is currently a statutory framework in place for certain persons to attend court and report on proceedings.<sup>101</sup> Further, the court has a common law power to lift the 'in camera' rule in private hearings when appropriate to do so.<sup>102</sup> However, clarity regarding the statutory definitions is still required as such clarity would have obviated the need for the court to decide such matters as most recently seen in the *Child and Family Agency v TN & anor*.<sup>103</sup>

## Conclusion

This article considers the various techniques and statutory phrases which regulate family law and child law court proceedings. It argues that there is a distinction between the statutory phrases, 'otherwise than in public' and 'in camera', with the former vesting a discretion in the court as to who may attend at and report on court proceedings whereas the latter does not vest that element of discretion automatically. If it is argued that both phrases mean the same thing, then why are both phrases continually engaged by the Oireachtas? Legal certainty advocates consistency. What is clear is that the use of either legislative phrase requires privacy. But if what is mandated by the statutory phrases is either different levels of privacy or different levels of discretion bestowed on the Judge, then that should be set out clearly in statute.

Where statutory provisions remain undefined and where certainty is missing in legislative provisions, then it is easy to see how the terms have ended up as being understood as one and the same, even though they have at times been interpreted slightly differently. Therefore, trying to disentangle them from each other is problematic particularly when the conflation is embedded in case law. Dame Butler-Sloss P in *Allen v Clibbery*<sup>104</sup> noted that the terms 'in camera' and 'in chambers' are frequently engaged to mean the same thing. In that case, the judge opined: 'I am driven to recall Humpty Dumpty: "When I use a word - it means what I choose it to mean - neither more nor less"'.<sup>105</sup> The same could be said of the interchangeable nature of the phrases 'otherwise than in public' and *in camera*!

---

<sup>99</sup> See note 55.

<sup>100</sup> *Child and Family Agency v TN* (n 60).

<sup>101</sup> See note 7.

<sup>102</sup> See note 4.

<sup>103</sup> *Child and Family Agency v TN* (n 60).

<sup>104</sup> *Allen* (n 79).

<sup>105</sup> *ibid* [19].