DOMESTIC VIOLENCE AND CIVIL HARASSMENT: SOME ISSUES WHICH ARISE WHEN THE CASE COMES TO COURT

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I. INTRODUCTION

In this short paper I would like to concentrate on three aspects of the domestic violence debate. Firstly what is domestic violence and although the law is gender neutral, is it a gender issue? Secondly how the new remedy of 'interim barring orders' is operating in practice, and finally whether access to children by a barred spouse should be resolved in isolation to the domestic violence issue - and how and whether children themselves should be involved in the Court decision affecting their interests in the light of recent cases where the European Court of Human Rights held that Germany had violated the Convention.

II. WHAT IS DOMESTIC VIOLENCE?

The term 'domestic violence' has a very wide currency. It covers a broad spectrum of behaviour from pushing and shoving to 'controlling battering'. It also covers cases where there is no physical assault or battery but where the term 'violence' has been given a wider meaning and covers a variety of insidious behaviour such as psychological intimidation, molestation or harassment, mental cruelty, and sexual abuse. 'Domestic Violence' is not defined by the Domestic Violence Act, 1996. The Report of the Task Force on Violence against Women published in April 1997 endorses the interpretation used in The Garda Síochána Policy Statement on domestic violence. The Garda Síochána Policy Statement defines domestic violence as 'the physical, sexual, emotional or mental abuse of one partner by another partner in a relationship which may or may not be one based on marriage or cohabitation and includes abuse by any family member against whom a safety order or a

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barring order may be obtained by another family member'.

It has long been argued that domestic violence represents an exercise of 'power and control'. The peculiar dynamic of domestic violence, it has been argued, can be understood only when one considers the traditional roles of men and women and in particular the structural disparity in terms of 'power' and 'control' at a material and symbolic level that characterises gender roles within our society. At the end of the Seventies, men in the US who wished to break free of the cycle first developed programmes for male abusers. Different approaches and modalities of interventions were developed, however, the one which had most influence in Europe was the Duluth (Minneapolis) model.[1]

III. THE CYCLE OF POWER AND CONTROL

Domestic violence is a problem that crosses all socio-economic lines and is a phenomenon in many cultures and societies. The psychological dynamics are rooted within the need of the perpetrator to exercise power and control over the victim. The tactics may include both physical and emotional or verbal abuse. Domestic violence almost always escalates in both frequency and severity over time, unless the victim and the abuser receive specialist help. The perpetrator frequently minimises his or her behaviour and seeks to discredit or blame the abused partner. Frequently a cycle of violent and abusive behaviour is punctuated by efforts on the part of the victim to leave and escape the problem, only to be encouraged by the abusive partner, children and society to return to the relationship. Writers suggest a three-stage cycle of violence leading to "symbiotic bonding" of victim and perpetrator.[2] The first phase is the tension

[1] The Duluth, Minnesota Domestic Abuse Intervention Project. It is described in detail in Pence, E., and Paymer, M., *Education Groups For Men Who Batter: The Duluth Model*. The "Power and Control Wheel". In Europe see (a) "The Daphne Initiative (1997-1999)" which represented an extraordinary commitment by the European Commission to prevent and protect women and children against violence and was created to address growing concerns about violence against children, young people and women throughout Europe. There have been four evaluation reports on the 2000 project. The Daphne Programme is now linked to the to the European Charter of Fundamental Rights, the Framework Strategy on Gender Equality, the UN Convention on the Rights of the Child and the UN trafficking protocol. See http://europa.eu.int/comm/justice_home/funding/daphne/documents/report/ex_post_2000_report_en.pdf
DAPHNE - External Evaluators' Report on the Daphne - Programme (year 2000) and (b) Council of Europe publications including Reid S "Preventing violence against women- a European perspective" Council of Europe Publishing, November 2003.

[2] Carden, A.D., "Wife abuse and the wife abuser: Review and recommendations" (1994) 22 *Counselling Psychologist*, 539; Walker, L.E., "The Battered Woman" (Harper and Row, New York, 1979).

building phase and in this phase the victim rationalises and internalises the abusive behaviour and at the same time excuses it on external causes. The victim feels able to control the behaviour and therefore believe that they are to blame if they cannot continue to do this. In the second phase the behaviour goes well beyond control and the victim may be seriously injured. The third phase is characterised by contrite and loving behaviour by the perpetrator to the victim. In this phase the perpetrator is remorseful kind and considerate and the victim is hooked into remaining in the relationship and the cycle will inevitably begin again. The cycle of abuse can include alcohol or drug abuse, stress or depression. The latter problems can mask the underlying problem of domestic violence. Understanding the cycle helps family lawyers to understand why victims of domestic violence go back to the abusive partner, time and time again.

The programme of intervention for violent men developed in Duluth (Minneapolis)[3] requires a co-ordinated framework of responses taken by different agencies. These would include shelters, police, courts, social workers, etc., with the aim of combining the dual role of protecting women and re-educating men by convincing them that they are responsible for their violent behaviour and for its elimination.

IV. GENDER WARS

The Domestic Violence Act, 1996, is gender-neutral. Domestic violence has historically been seen as a gender issue, and many people see it in terms of 'wife beating'. Feminist analysis asserts that the prevalence of domestic violence is largely attributable to 'patriarchy'.[4] Violent behaviour is normal in a patriarchal society to

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Cwik, M. S., "Peace in the home? The response of rabbis to wife abuse within American Jewish congregations Part I" (1996, Special Issue) 20 *Journal of Psychology and Judaism*, 273 and Cwik, M.S., "Peace in the home? The response of rabbis to wife abuse within American Jewish Congregations Part II" (1996) 21 *Journal of Psychology and Judaism*, 1.

[3] Commonly called a community intervention program or community based program model and it requires domestic violence be treated as a crime requiring a criminal justice response and sanctions alternative to prison. See generally Dobash, R.E., et al, *Changing Violent Men* (Sage, London, 2000); Mullender, A., *Rethinking Domestic Violence The Social Work and Probation Response* (Routledge, London, 1996); Hague, G. and Malos, E., *Domestic Violence Action for Change* (New Clarion Press, Cheltenham, 1993); Dobash, R.E. and Dobash, R.P., *Women Violence and Social Change* (Routledge London and New York, 1992); and Edleson, J.L. and Tolman, R.M., *Intervention for men who batter: An Ecological Approach* (Sage, California, 1992).

[4] Steinem, G., *Outrageous Acts and Everyday Rebellions* (Rinehart and Winston, New York, Holt, 1983).

achieve the desired goal of control required by that society, *i.e.* female subordination. The expression 'rule of thumb' is said to have derived from the practice of a man only using a stick of the thickness of his thumb to chastise a wife or children. The husband was responsible for the acts of his wife, children and servants and so had a right of reasonable chastisement.[5] The legal system in many third world countries, for example, supports the patriarchal ideology and deprives women of their independent rights and their human rights. Wife beating or burning is not an uncommon occurrence in the Indian subcontinent. However, is this argument still valid in modern democratic societies?

Many men's organisations fervently argue that women are just as violent as men are and that the feminist movement has hijacked the moral high ground. They believe that the legal system is colluding with women in denying them their human rights.[6] The Annual Report of An Garda Siochana for 2001 which records the number of incidents of domestic violence recorded by the police show that 11% of the offenders were women, which was the same percentage as in 2000. Complainants were predominantly female. Male complainants accounted for 13% of the total and this was a decrease over the previous year where they accounted for 16% of the total. The figures in the 2002 Annual Report record that 9% of the offenders were female. Complainants were again predominantly female with only 8% of the total being male in 2002.[7] It must be acknowledged that women are not the only victims of domestic violence and men may equally be victims of domestic violence.[8] The OSS Cork (Domestic Violence Information Resource Centre) has

[5] Dobash, R. and Dobash R., *Violence against Wives* (Shepton Mallett, Open Books, 1980) and Freeman, M., "Legal Ideologies, Patriarchal Precedents and Domestic Violence" in Freeman, M. (ed.), *The State, the Law and the Family: Critical Perspectives* (Sweet & Maxwell, London, 1984).

[6] See Amen website and see Steinmetz, S.K., "The Battered Husband Syndrome" (1978) 2(3-4) *Victimology: An International Journal*, 499; Straus, M.A, Gelles, R.J and Steinmetz S.K., *Behind Closed Doors: Violence in the American Family* (Sage Publications, Beverly Hills, 1981).

[7] An Garda Siochana Annual Reports for 2001 p. 133, and 2002 at p.137 available on WWW.GARDA.IE.

[8] Fiebert, M.S., Department of Psychology, California State University, Long Beach has produced an annotated bibliography of sources which examine assaults by women on their spouses and male partners at http://www.csulb.edu/%7Emfiebert/assault.htm.

noted that 15% of its clients are men who suffer domestic violence.[9] The UK Government's discussion document "Safety and Justice" published in June 2003 suggests that one in four women and one in six men will be a victim of domestic violence in their lifetime and domestic violence has the highest rate of repeat victimisation of any crime .[10]

The Daphne Initiative 1998/1999 European Research Project on "Violent Men: What to do to them"[11] and re-titled "Responses to men who use violence against women: A European comparative analysis" final report in March 2000 was on the whole firmly of the view that the root of domestic violence against women lay in an inherent power control imbalance rather than a personal pathology of the men in question. Unfortunately however, the results show a great disparity in the availability and type of national interventions. The Report sets out 'good practice guidelines' for programmes directed to men who use violence against their partners. A booklet and CD-ROM entitled "Europe against violence: messages and materials from Daphne" was published and is available from the European Commission website. Daphne II-EU programme to combat violence against children, young people and women is to run from 2004 until 2008 and has a budget of 50 million euro. This initiative represents the starting point of NGO's and voluntary organisations cooperating at EU level in the fight against domestic violence. The increased budget takes on board the 10 new countries which joined the EU on enlargement. The programme encourages the exchange of good practices about domestic violence and the setting up or affiliating of national initiatives to existing NGO's or voluntary organisations at EU level. Innovating projects can thus be funded, evaluated and disseminated throughout the EU. I am not aware of any specific programmes of intervention for violent women currently available.

The United Nations Declaration on the Elimination of Violence

[9] Report on preliminary data available from July 2000 to June 2003, "Three years On: Report on Monitoring of Users and Inter-Agency Referrals and Contacts July 2000- June 2003" available on http://www.osscork.ie.

[10] "Safety and Justice :The government's Proposals on Domestic Violence", (June 2003), p. 9, Crown Copyright, quoting Claire Flood-Page and Joanna Taylors (eds.), *Crime in England and Wales 2001/2002* Supplementary Volume (Home Office, London, 2003), p. 55 and Chris Kershaw et al, *Home Office Statistical Bulletin* 18/oo (Home Office, London, 2000), p. 38.

[11] Project No. 98/211/W @ http://europa.eu.int/comm

against Women adopted by UN General Assembly in 1993 defined the root of the problem of domestic violence as the historical power/economic imbalance between men and women. The 1993 report by the World Conference on Human Rights in Vienna and the platform for action of the 1995 UN Conference on Women also focused on violence against women.

The Council of Europe has also looked at the issue and made recommendations on the need for the elimination of violence in the family in 1985 and 1990. In response to the 1997 European Parliament resolution[12] the need to establish a European Union wide campaign for zero tolerance of violence against women, the European Commission conducted a campaign to raise awareness on violence against women in 1999/2000.[13] The campaign was intended to promote increased awareness among European citizens of violence against women, with particular emphasis on domestic violence. To this end, a European wide survey on domestic violence against women was conducted. The survey produced results, which showed that one in two people thought that this type of violence as 'fairly common', one in four thought that it was 'very common', and 18% felt that it was 'not very common' and 1% thought it was 'not at all common'. As for the cause of domestic violence against women:

- 96% of the people surveyed said that it was due to alcohol,
- 94% cited drug addiction,
- 79% cited unemployment,
- 75% cited poverty/social exclusion,
- 73% cited "having oneself been a victim of domestic violence"
- 64% cited "the way women are viewed by men",
- 64% cited "a genetic predisposition to violent behaviour",
- 59% cited "the way power is shared between the sexes",
- 57% cited "a low level of education",
- 49% cited "the media",
- 47% cited "religious beliefs", and
- 46% cited "the provocative behaviour of women".

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[12] A4-0250/1997.

[13] European Commission, Directorate-General X, "Information, Communication, culture and Audiovisual Media".
http://europa.eu.int/comm/employment_social/equ_opp/eubaro51_en.pdf.

A total of 95% of people surveyed thought that punishing the perpetrator served a useful purpose.

The results of the Irish survey showed that of those surveyed in Europe, the Irish think that domestic violence against women is most widespread. The Irish public regard domestic violence against women as a very serious social problem in Ireland. Overall those surveyed in Ireland felt that its cause lay more in personal pathology, unemployment or disadvantage, personal experience of domestic violence, and lack of education more than the way power is shared between men and women, or the last three categories listed above.

It is well established that for some people in close relationships, the use of power and influence during conflict can escalate into the use of physical violence and that such violence in and of itself, can be thought of as a form of influence/power. So unsurprisingly, how conflict is resolved within the relationship can predict to some extent the potential for violence. Where power and resources are shared it is more likely that decisions will be consensual. Where there is a perceived or actual imbalance and poor conflict solving styles, there is more likely to be violence. Research suggests that male and female dominated couples experience the highest levels of violence, where couples who report shared power in decision making reported the lowest levels of violence.[14]

Competing with feminist and culture of violence theories is the intergenerational transmission theory, also called the cycle of violence theory. This suggests that individuals who observe or experience violence in the home as children are more likely to use violence in their own homes.[15] This latter theory is acquiring much support in modern reanalysis on the causes of domestic violence and in particular male to female violence.

Children of the relationship inevitably end up as victims. Children may themselves be victims of physical or mental abuse. Indirectly,

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[14] Straus, M.A. and Gelles, R.J., "Societal Change and Change in Family Violence from 1975 to 1985 as Revealed by two National Surveys" (1986) 48(3) *Journal of Marriage and the Family*, 465 and Straus, M.A., Hamby, S.L., Boney-McCoy, S. and Sugarman, D.B., "The Revised Conflict Tactic Scales (CTS2)" (1996) 17 *Journal of Family Issues*, 283. See also, Baker, J., Lynch, K., Cantillon, C. and Walsh J in "Equality: From Theory to Action" (Palgrave Macmillan, London, 2004), chapter 2.

[15] Cwik, M.S., "A Review of Current Research on Domestic Violence". http://members.aol.com/Agunah/articles.htm

children living in such a relationship observe or may become embroiled in the dynamics of the violent relationship. They may thus be socialised into either accepting or committing violence as a result of witnessing it and later they themselves may develop problems in their relationships as adults. In examining the question of youth violence prevention, Manuel Eisner of the Cambridge University Institute of Criminology maintains that "Longitudinal research.. generally finds that family factors are important in predicting various types of problem behaviour".[16] Children rarely present as 'clients' directly. Their position is articulated through the presenting adult client who may not necessarily see them as victims of domestic violence.

There is a high incidence of victims who return to the abusive partner even after obtaining interim relief from the court. This feature causes confusion for legal practitioners and for victims themselves. This pattern of behaviour may repeat itself on many occasions before the client finally follows through with the legal remedy and also leaves the dysfunctional relationship. Research suggests that where violence has been a significant feature of the relationship during the cohabitation period, it tends to intensify at the time of separation. Unless a victim feels adequately protected it is likely that they will be persuaded to negotiate their way back to the relationship to secure some safety and financial security for themselves. This is typically the case in control-instigated violence by men towards women.

It is therefore essential that the victim of domestic violence be given the names and addresses of a counselling service conversant with the particular dynamics of domestic violence. Legal advisors are primarily lawyers. However, as well as a thorough knowledge of the law, an understanding of the dynamics of domestic violence is essential to the lawyer practising in this area of law. The style of interview, which the legal advisor employs, can have a significant

[16] Eisner, M., "Towards More Effective Youth Violence Prevention-an Overview" in Violence in schools- a challenge for the local community" Council of Europe Publishing, November 2003, p. 30. See studies referred to by Farrington, D., "Developmental Criminology and Risk-Focussed Prevention in *The Oxford Handbook of Criminology*, edited by Maguire, M., Morgan, R., and Reiner, R., (Clarendon Press, Oxford), p. 657 and Hawkins, D.J et. al. "A review of Predictors of Youth Violence" pp. 106-146 in "*Serious and Violent Offenders; Risk Factors and Successful Interventions*" edited by Loeber, R., and Farrington, D.P., (Sage, Thousand Oaks, Sage 1998), pp. 106-146.

impact on the client. While it is clearly important that the legal advisor should elicit the facts, analyse them and impart legal advice, it is equally important to set the client at ease and elicit the objectives and concerns of the client. The victim of domestic violence can come from any walk of life. All victims of domestic violence find themselves in a very difficult situation. Some find their plight intensely embarrassing. A client may be quite fearful of making him/herself vulnerable to scrutiny by a Health Board in a child-care context, should they disclose the level of abuse and seek legal protection from domestic violence. A client may be fearful of losing custody of their children. It is most important therefore that as well as outlining the legal remedies in clear terms, the victim should be referred for assistance and support. It is important to be aware of the various services available for both the victims and perpetrators of domestic violence. When referring a client for professional counselling it is important that the counsellor is aware of the history of domestic violence.

V. THE DOMESTIC VIOLENCE ACT, 1996 AND THE TASK FORCE REPORT, 1997

The whole concept behind the legislative interventions from 1976-1981 was to produce a short sharp shock for the perpetrator of domestic violence and an opportunity for the victim to take stock and have a respite from the violence. The Domestic Violence Act, 1996, came into operation on 27 March 1996 apart from section 6 which was delayed until January 1997 in order to facilitate Health Boards in preparing for their new role under the legislation. The 1996 Act followed some of the recommendations of the Report to Government of the Second Commission on the Status of Women which had sought a type of 'Personal Conduct Order' along the lines of a Protection Order which stopped short of residence exclusion. The decision was made to extend the range of the protection available to include 'safety orders' in addition to 'barring orders' and to provide a rapid response in the form of *ex-parte* remedy going beyond the 'Protection Order'. In the case of the 'interim barring order' provision was made for this relief to be available, if necessary

on an *ex-parte* basis but on different threshold criteria showing the exceptional nature of the remedy. A very conscious decision was taken to extend the categories of victim of domestic violence who could avail of remedies provided by the legislation. The nexus chosen for non-spousal victims of domestic violence was 'residence' subject to the overriding Constitutional right to private property contained in Article 43 of the Constitution of Ireland. The 1996 Act repealed in total the Family Law (Protection of Spouses and Children) Act, 1981. The Domestic Violence Act, 1996 was introduced in order:

1. To protect spouses and children and other dependent persons and persons in other domestic relationships where the threat to their safety or welfare is at risk because of the conduct of another person in the domestic relationship,
2. To increase the powers of An Garda Síochána to arrest without warrant in certain circumstances and,
3. To provide for the hearing at the same time of applications to Court for other orders regarding custody and access, maintenance, conduct leading to the loss of the family home, restriction on the disposal of household chattels, and child care orders.

The Domestic Violence Act, 1996, may be used to obtain a 'stand alone' remedy in the District Family Court, or Circuit Family Court. Proceedings under the Act may of course also be brought in conjunction with Separation or Divorce proceedings in the Circuit Family Court or in the High Court. It can no longer be viewed as a 'short' sharp shock. A three-year order is certainly not short. It can however now be very 'sharp' where the court grants the barring order on an *ex-parte* basis.

VI. ORDERS WHICH MAY BE MADE ON AN *EX PARTE* BASIS INTERIM BARRING ORDER

The 1996 Act empowers the District Court to make an interim barring order either at the date of or in between, the institution of the proceedings and their hearing. This means that the District Court may grant interlocutory relief in the nature of an interim barring

order pending the determination of the barring proceedings. In exceptional cases such relief is available *ex parte*.

The criteria for the making of an interim barring order under the Domestic Violence Act, 1996 are not the same as for making a barring order in the ordinary way: To grant an interim order the Act provides that the Court must be satisfied that:

- there is an immediate risk of significant harm to the applicant or any dependent person if the order is not made immediately, and
- the granting of a protection order would not be sufficient to protect the applicant or any dependant person

Unfortunately the appropriate infrastructure was not put in place to ensure fairness in the operation of the new regime. The District Court Rules did not require an affidavit grounding the application for *ex parte* relief and the form of 'information' in many instances contained very little detail of the grounds upon which the relief was sought and did not contain the normal requirement of a Circuit Court affidavit for such relief that the party seeking the relief give an undertaking as to damages in the event of a frivolous or vexatious application. Another significant deficit lay in the fact that the original rules of court did not contain a space for an automatic early return date and even when the rules were changed to allow for a return date the time limit for the return date was not sufficiently proximate to warrant the requirements of 'due process'. Another concern was that there was an automatic power of arrest consequent on a complaint of 'breach of interim barring order'. The Report of the Law Reform Committee of the Law Society of Ireland published in May 1999, entitled "Domestic Violence the Case for Reform" highlighted these concerns and called for other reforms of the Domestic Violence Act, 1996 and amendment of the legislation.[17]

VII. ENGLISH JURISPRUDENCE ON EX-PARTE ORDERS

The English cases of *Ansah v. Ansah*[18] and *Bates v. Lord Hailsham*[19] reinforced the basic principle that an order should not be made ex parte unless there is a real and immediate danger of serious

[17] Copies of Domestic Violence: The Case for Reform available from Law Society of Ireland - Alma Clissman, Law Reform Executive.

[18] (1977) Fam. 138 (C.A.).

[19] [1972] 1 W.L.R. 1371 (Ch.D.).

injury or irreparable damage.[20] The English Law Commission quoted with approval the judgment of Ormrod L.J. in *Ansah v. Ansah*:

> The power of the court to intervene immediately and without notice in proper cases is essential to the administration of justice. But this power must be used with great caution and only in circumstances in which it is really necessary to act immediately. Such circumstances do undoubtedly tend to occur more frequently in family disputes than in other types of litigation because the parties are often still in close contact with one another and particularly when a marriage is breaking up, in a state of high emotional tension; but even in such cases the court should only act *ex parte* in an emergency where the interests of justice or the protection of the applicant or a child clearly demands immediate intervention by the court. Such cases should be extremely rare, since any urgent application could be heard *inter parte* on two day's notice to the other side ... If an order is to be made *ex parte*, it must be strictly limited in time if the risk of causing serious injustice was to be avoided.[21]

An interim barring order made *ex parte* under the Domestic Violence Act, 1996, was essentially an injunctive type remedy in the District Court. The District Court rules provided for 'information' to be sworn by the applicant on oath and in writing prior to the granting of *ex parte* relief.[22] In practice however, other difficulties presented for the respondent or his or her solicitor seeking to find out what had been said by the Applicant at the *ex-parte* application. As in the case of a Protection Order granted *ex-parte*, one must apply to the court 'for a copy of the information to ascertain the nature of the evidence, which lead to the making of the order by the court'. The information may not however contain all of the evidence tendered in court. The Circuit Court rules regarding *ex parte* matters is that the application should be on affidavit and if not then the

[20] See also *G v. G (Ouster: Ex parte Application)* [1990] 1 F.L.R. 395 (C.A.).
[21] (1977) Fam. 138 at 142-143 (C.A.).
[22] See S.I. No. 93 of 1997, Ord. 59, r. 6.

respondent should be provided with a note of the evidence given at the hearing. The report of the Law Society of Ireland on domestic violence pointed out the frailty of the existing practice in this regard from the perspective of 'fair procedure' and called for two major reforms in this area. Firstly, an automatic early return date for the hearing of substantive case so that the person barred *ex parte* can present his or her side of the case. The rules were amended to provide a space for such a return date within the body of the order. However, in practice the return date often offered was many weeks later. And secondly, a mechanism whereby the person barred *ex-parte* would automatically be provided with a note of the information or evidence tendered at the *ex-parte* stage. For some considerable time doubt was expressed about the constitutionality of the existing position and the practice on the ground in relation to the ex parte barring orders granted.

A research study commissioned by Women's Aid and entitled *Safety and Sanctions* by Patricia Kelleher and Monica O'Connor noted that approximately 30% of applicants were granted an interim barring order while awaiting the determination for the barring order application decision. Only about one-fifth of interim barring orders translated into barring orders. One of the main reasons for this was that many applicants withdrew their barring order application before or on the hearing date.

Service of the barring summons is by ordinary prepaid post in accordance with the District Court Rules. If a party is barred *ex parte* however, personal service is more appropriate. In practice, the Court in such an event usually ordered personal service. The return date for the hearing of the substantive barring case could however, in some District Court areas, be several weeks or indeed months later. To circumvent such difficulty, in appropriate cases, an application could be made under section 13 of the Act to discharge the Interim Barring Order. Such summons may be abridged down to two days notice where the District Court Clerk is prepared to certify that the case is an urgent one pursuant to S.I. No. 93 of 1997, Ord. 59, r. 12. It may be recalled that similar problems arose regarding *ex parte* applications under the Children Act, 1908 and the Summary Jurisdiction Rules, where a substantial time lag could elapse between

the Health Boards taking *ex parte* proceedings under that legislation to take a child to a place of safety, and a hearing enabling the parents to challenge the order under section 20 of the 1908 Act. In the case of *State (D.C.) v. Midland Health Board*[23] Keane J. noted that the time lag could constitute an impermissible violation of parental rights. In that case, however, such a result did not result from a frailty in the Act or Rules but from the absence of a summons server for the particular area. The time lag in that case might have been circumvented and therefore the legislation was not held to be constitutionally unsound.

VIII. THE SUPREME COURT ON *EX PARTE* ORDERS

A challenge to the Domestic Violence Act, 1996, on the basis that the return date given in a case where the Court granted a barring order *ex parte* finally and inevitably came before the Supreme Court in 2002. Strangely, the Supreme Court report of the case is reported using the full names of the parties, notwithstanding the strictures of the *in camera rule* in family law proceedings. The facts of the case were that a wife applied for and was granted an *ex parte* barring order against her husband in the District Family court on the 6 November 1998. The return date for the substantive hearing for a barring order was fixed for the 3 February 1999. On the 9 November 1998 the husband applied for an Order discharging the *ex parte* barring order as provided for under the rules and that application was listed for hearing on the 23 November 1998. The husband, on legal advice, decided to adjourn that application to the same date as the substantive hearing date allocated to the hearing of the barring order. He stated that she asked him to return home to care for the children on the 11 November 1998. He said that he returned to the family home "on congenial terms" on the 15 November 1998 at which stage his wife and the children were out. He said that when his wife returned, she “verbally and physically abused me” at about 1.30 a.m. and, on leaving the family home, he was then arrested by a Garda and charged with an offence of being in breach of the interim barring order. The husband sought a Judicial

[23] [1990] 7 Fam. L.J. 10 (H.C.).

Review in the High Court claiming that the provisions allowing for *ex parte* relief in manner allowed in the 1996 Act were unconstitutional, and was given leave to apply for judicial review by way of certiorari in respect of the interim barring order.

The case came before Mr. Justice Peter Kelly in the High Court in June of 2000.[24] He held that because the husband did not proceed with his application to discharge the *ex parte* barring order three days after the order was made the application of the husband for judicial review was without merit. This decision was appealed to the Supreme Court and was determined on 9 October 2002. The Supreme Court, in a unanimous judgement delivered by the Chief Justice, declared that Interim Barring Orders made '*ex-parte*' under the 1996 Act were unconstitutional because of the absence of time limits in the duration of such orders before a substantive hearing is set - in other words they represented a breach of the ordinary rules of 'fair procedure'. The person against whom such an order was made was thus deprived of the right to be heard in his or her own defence. *Ex parte* orders deprive the respondents to such applications of the protection of the principle of *audi alteram partem* in a manner and to an extent which is disproportionate, unreasonable and unnecessary. Clearly therefore it is not the intrinsic nature of an *ex-parte* order itself that is unconstitutional but the manner in which such a remedy is made available.

Family lawyers were not surprised by this decision and it was felt that such orders were not only always constitutionally 'suspect', but would not survive the incorporation of the European Convention on Human Rights into Irish domestic law, even in the manner adopted in Ireland.[25]

Safety and Sanctions point out that support and safety measures for applicants should be put in place to ensure that they do not experience vulnerability during the inter regnum period between the granting of the *ex parte* remedy and the hearing of the application for the substantive remedy.

The Domestic Violence Act, 1996, was amended by the Domestic

[24] *D.K. v. L.K. and others*, High Court, unreported, Kelly J., 2 June 2000.
[25] Ring, M.E., "After D.K- A Licence for Violence", paper delivered at the Family Lawyers Association Annual Conference 16 November 2002.

Violence (Amendment) Act, 2002, to allow for the exceptional cases where '*ex-parte*' relief is necessary but having due regard to the rights of all parties. The act provides that an interim barring order may be made *ex parte* where, having regard to the circumstances of the particular case, the court considers it necessary or expedient to do so in the interests of justice. The application for such an order must be grounded on an affidavit or information sworn by the applicant. If an interim barring order is made *ex parte* a note of evidence given by the applicant must be prepared forthwith either:

(a) by the judge,
(b) by the applicant or the applicant's solicitor and approved by the judge, or
(c) as otherwise directed by the judge.

A copy of the order, affidavit or information and note must be served on the respondent as soon as practicable. The *ex-parte* barring order is limited in duration to a maximum of eight working days. The question remains as to whether this amending legislation is sufficiently protective of the rights of the respondent to satisfy the standards outlined by the Supreme Court in the DK case and indeed to satisfy the fair procedure requirements of the European Convention on Human Rights as incorporated into domestic law by the European Convention on Human Rights Act, 2003.

IX. PROTECTION ORDER

This is an order that stops short of putting the respondent out of the family home but orders the respondent

- not to use violence or threaten to use violence against, molest or put in fear the applicant or any dependant person; and
- if the parties do not reside together, the respondent should not watch or beset the place where the applicant or dependant person resides.

The protection order does not have a life of its own but only lasts until the determination of the barring or safety order proceedings. Protection orders are available to entitled persons who have commenced proceedings for either remedy. Clearly they do not carry the same draconian consequences as an Interim Barring Order made

ex parte in the sense that the respondent is not directed to vacate the family home pending the determination of the proceedings. However there are serious consequences for breach of the Protection Order which automatically attach to the Order when granted.

X. DOMESTIC VIOLENCE AND CHILDREN

Even where children are not direct victims of domestic violence in the sense that they have not been beaten or mistreated by the abusing parent, they may still be indirect victims of domestic violence. Children experience negative effects by witnessing, or overhearing violence. This can result in under achieving or poor performance at school, sleeping problems, missing school, bedwetting, over anxiety or aggression. While family life is a positive experience for many children, it is also true that some children suffer enduring psychological trauma as a result of rejection, neglect or abuse by parent figures, prolonged separation from attachment figures in early childhood, parental loss or witnessing inter-parental conflict and violence. Harry Ferguson and Pat Kenny in their book *On Behalf of the Child*[26] put the situation very plainly when they say that:

> The nature and quality of family experiences influence not only how a child copes with life growing up but also helps to determine the quality of that youngster's intimate relationships, parenting and mental health in adulthood.

It is important to bear in mind that children in the shadow of a violent or abusive relationship may themselves be exposed to and be victims of emotional abuse. There is a tendency to see the issue of domestic violence as distinct and unrelated to the issue of access by the abusive parent who is barred. Provided the children have not been subjected to physical violence, access is generally either agreed or fixed by the Court. In practice little effort is made to ensure that

[26] Ferguson, H. and Kenny, P., *On Behalf of the Child: Child Welfare, Child Protection and the Child Care Act 1991* (A. & A. Farmar, Dublin, 1995).

the child and the parents have the benefit of receiving the assistance and advice of a child care professional or child psychologist where access problems are foreseen at the hearing of a domestic violence case, or where they develop subsequent to such a case. To be fair, the District Family Court has very little in the way of power to secure such assistance as the provisions enabling the District Court to order a Social Report in civil family has not been brought into force.[27] There is the additional *cost* aspect of obtaining such reports in private law cases where the parties are of modest means and not legally aided and yet the Court wants the benefit of a Report. If neither litigant can afford to pay for a Report how is it to be financed?

Parents must exercise fairly negotiated responsibility for the arrangements relating to access to children. Firmly managed mediation may be of assistance in reaching agreement on parenting issues - provided that the victim of the domestic violence can be protected from further abuse and victimisation. Mediation can be utilised only where the victim feels secure within the process and the perpetrator understands that the mediation process will be terminated if violence, threat or intimidation is used again. It is not an easy task for a mediator to meet this precondition however.[28] It is essential for clients to be advised that they themselves should understand the dynamics involved in control-instigated domestic violence before they chose to put themselves into a potentially vulnerable or dangerous situation.

In general, access by a child to both parents is beneficial to the child. It is the right of the child to have a relationship with both parents. The paramountcy test requires the court to regard the welfare of the child as the first and paramount consideration. The safety of the child and family members on access is also relevant where the access is ordered or agreed as a result of a domestic violence case. There is a growing debate about the wisdom or correctness of allowing access to children by someone guilty of

[27] Section 26 of the Guardianship of Infants Act, 1964 (as inserted by section 11 of the Children Act, 1997) provides the infrastructure which will enable the District Court to order such reports when in force. This is one of the two sections of the Children Act, 1997 not yet in force.

[28] See Family Law Benchbook appendix 6, Judicial Studies UK website at http://www.jsboard.co.uk/family_law/benchbook/.

domestic violence.[29] Sometimes access is only sought as an opportunity of 'getting at' the other parent or for obtaining information on the activities of the other parent from information gleaned from the child during access visits. As all access orders are interlocutory by nature however, therefore where access becomes abusive rather than child centred, further application can be made to court to change the order. Sometimes children refuse to go on an access visit. Difficulties can arise in the intervening period for the custodial parent. Failure to comply with an access order is an offence. It may well be implied that the custodial parent has 'poisoned' the child against the absent parent. Some access regimes put the child in a very difficult 'middle' position. Some children deal with this by choosing sides. The child can become totally alienated from the non-custodial parent and implacably opposed to any access. In extreme forms this has been termed 'Parental Alienation Syndrome'.[30]

The Domestic Violence Act, 1996 provides that questions relating to custody and access may be determined contemporaneously with an application under that Act, and without the need to institute separate proceedings. If there is any doubt on the question of access, however, an application under the Domestic Violence Act, 1996 to deal with access contemporaneously with the domestic violence proceedings should be resisted until appropriate psychological evidence or a psychological report is available to the court to enable it to consider the implications of the access in the light of the best interests of the children. Section 47 of the Family Law Act, 1995, makes provision for the court to obtain social reports. As stated earlier however, while this power was extended to the District Family Court in 1997 the appropriate sections have not yet been brought into force. That notwithstanding many District Courts operate as if the section was in force and the only restricting factor is the question of who pays the costs of it. The question of costs is determined by the court. Where one or both of the litigants is in receipt of Civil Legal Aid the Legal Aid Certificate may already cover the cost of obtaining such a report, or it may be possible to seek to

[29] Sturge, C. and Glaser D., "Contact and Domestic Violence-the Experts' Court Report" September [2000] Fam Law, 615, and Kaganas, F. and Day Sclater, S. "Contact and Domestic Violence- the Winds of Change? September" [2000] Fam Law, 630.

[30] See *Re L (Contact: Genuine Fear)* [2002] 1 F.L.R. 621 (F.D.) and *Re C (Prohibition of Further Applications)* EWCA Civ 29 [2002] 1 F.L.R. 1136 (C.A.). See also *In the marriage of J.G. and B.G.* (1994) 18 Fam L.R. 255 (F.C.A.).

amend a Legal Aid Certificate to cover the cost of such a report. The court is faced with a dilemma however where the litigants are unaided and cannot afford to fund such a Report from their own resources.

Articles 6 (the right to a fair hearing) and 8 (the right to private and family life) of the European Convention on Human Rights impose positive obligations on State parties to have accessible and coherent mechanisms available for ensuring the enforcement of Convention rights to individual family members. The European Court of Human Rights has not been slow to test the national measures against the standards required by the Convention. It also reviews decisions taken in the exercise of discretionary powers.[31] The right to participation in the proceedings to ensure adequate protection of individual interests is part and parcel of the right to a fair hearing and is well established in the context of parents.[32] It is clear that children also have rights which are not always discharged through the expediency of ensuring rights to their parents.

In *Elsholz v. Germany*[33] the ECHR (Grand Chamber) held that there had been a breach of Article 8 by the German national courts because the court had not commissioned an expert in psychology to help it assess the child's statements. In that case a father failed to secure access to his six-year-old son. The District Court Judge in that case interviewed the child three times and the child was consistently clear in his wish not to see his father. The Grand Chamber considered that the importance of the issues at stake for the father were such that the German national court should have had expert evidence in order to be in a position to evaluate the child's evidence and so there had also been a breach of Article 6 as this failure meant that the father had insufficient involvement in the decision making process.

The decision of the European Court of Human Rights in *Sahin v. Germany*[34] has caused considerable controversy in Germany. This case was one of three Chamber decisions given in October 2001

[31] See Hearing the Children edited by the Rt Hon Lord Justice Thorpe and Justine Cadbury (Jordan Publishing Limited, 2004), p. 179.
[32] *W. v. United Kingdom* (1987) 10 E.H.R.R. 183 and *Elsholz v. Germany* [2000] E.C.H.R. 25735/94.
[33] [2000] E.C.H.R. 25735/94.
[34] [2001] E.C.H.R. 30000943/96.

which have been heavily criticized in German academic and judicial circles. In that case a father's application for access was rejected when a Court expert found that contact between father and his five year old child were not in the child's best interest without prior reconciliation of the conflicts between the parents. The Court did not hear the child in that case. Expert evidence was commissioned however to ascertain whether a hearing of the child in Court dealing with the child's relationship with the father would represent a psychological strain on the child. The expert indicated that she had not directly asked the child about her father because she felt that this would entail risk, since the child could gain the impression that her statements would be decisive. Attempts to reach a settlement between the parties about the use of external therapeutic support failed. The ECHR however was of the view that the courts should have considered the best interests of the child after having had direct contact with the child. Furthermore the ECHR commented that the Regional Court should not have been satisfied with the expert's vague statements about the risks inherent in the questioning of the child without even contemplating the possibility to take special arrangements in view of the child's young age. Correct and complete information on the child's relationship with the applicant as the parent seeking access to the child is an indispensable prerequisite for establishing a child's true wishes and thereby striking a fair balance between the interests at stake.[35]

In *Sommerfeld v. Germany*[36] the ECHR (Chamber) criticized the German national court for not obtaining a psychological report, in order to assess the apparently entrenched views of a thirteen year old child not to see her father. The German District Court had heard both parents and the child who was clear that she did not want to have any contact with her father. The circumstances of the case were that the parents were unmarried and mother subsequently married and her husband was *in loco parentis* to the child. The ECHR (Chamber) expressed the view that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element

[35] See paper by Professor Ludwig Salgo given in Trier, September 2002 "Rulings by the European Court of Human Rights on the hearing of children and the need to obtain expertise in proceedings in family courts".
[36] [2001] E.C.H.R. 31871/96.

of family life, even if the relationship between the parents has broken down. Domestic measures which hinder such enjoyment amount to an interference with the right protected by Article 8 of the Convention and so must be justified as being in accordance with law, pursue a legitimate aim and be necessary in a democratic society. The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. National authorities enjoy a wide margin of appreciation, in particular when assessing the necessity of taking a child into care but a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between the parents and a young child would be effectively curtailed. A fair balance must be struck between the interests of the child and those of the parent. In doing so, particular importance must be attached to the best interests of the child. These interests, depending on their nature and seriousness, may override those of the parent. In particular, the parent cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child's health and development. The failure therefore to order a psychological report on the possibility of establishing contact between father and daughter was deemed to reveal an insufficient involvement of the father in the decision making process. They therefore concluded that the national authorities overstepped their margin of appreciation, thereby violating the applicant's rights under Article 8 of the Convention.

Failure to hear children (aged four and nine years) and obtain the necessary expertise was also a feature of the decision in *Kutzner v. Germany*.[37] However, in that case expert evidence was in fact requisitioned and obtained by the Court in assisting it to come to its' decision to take children into care and grant the parents one hour access per month. The Court did not however "hear" the children in question.

In the case of *Hoffman v. Germany*[38] the ECHR found no

[37] [2002] E.C.H.R. 46544/99.
[38] [2001] E.C.H.R. 34045/96.

violation by the national courts as the child had been heard and the appropriate expertise obtained. In *Hoppe v Germany*[39] The applicant alleged that the German court decisions concerning his right of access to his daughter and the awarding of parental authority breached his right to respect for his family life, that he was denied a fair hearing in the relevant proceedings and that he had been subjected to discrimination. He invoked Articles 6, 8 and 14 of the Convention. In the context of divorce proceedings he had sought joint custody and rights of access to his daughter. The District Court reaffirmed the principle that to maintain personal relations between a father and his child, subject to the best interests of the child, was a decisive factor when determining the right of access. Against this background, the District Court considered that the applicant's previous and extensive rights of access had, at least for the time being, to be reduced to visits once per fortnight. All the experts heard in the proceedings agreed that the four-year old child was exposed to a conflict of loyalty, which she experienced as a strong pressure, and that she could not cope with this situation. The situation would be greatly improved and would support greater access if both parents managed to create an atmosphere which took the pressure off the child but they had not been able to do so. The child could not cope with the frequency of visits requested by the applicant. Although the applicant was aware of his daughter's problems, he was incapable of accepting restrictions on access and did not show concern for the child's psychological health. The mother had not yet managed to give her daughter a feeling of security as to permit her to visit the applicant without feelings of fear. For these reasons access was fixed to accord with the child's best interests, objectively ascertained. In relation to the question of joint custody the District Court determined that the conditions necessary for the exercise of joint parental authority requested by the applicant, were not met. In particular, the parents' relations with each other regarding their daughter as well as their relations with her were not free of conflict. The applicant was not ready to accept that his daughter's living situation had changed following the separation. As a four-year-old child, she needed a stable life without being torn between different

[39] [2003] E.C.H.R 28422/95.

apartments and different styles of education. The Court noted that, notwithstanding the applicant's interest in his daughter's well-being, he failed to see that his wishes obstructed her psychological development. The ECHR noted that consideration of what lies in the best interest of the child is of crucial importance in every case of this kind. National authorities have the benefit of direct contact with all the persons concerned and therefore the task of the ECHR is not to substitute itself for the domestic authorities in the exercise of their responsibilities regarding custody and access issues, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their margin of appreciation. The Court also noted that a fair balance must be struck between the interests of the child and those of the parent and that, in striking such a balance, particular importance must be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents. In this case it was clear that the domestic courts had in fact carefully considered the questions of access and of awarding parental authority. Unfortunately as a conflict appeared to exist between the parents it would not be in the best interests of the child to increase the applicant's access rights or to award joint parental authority. In coming to this decision the national courts had regard not only to the fact that the child's mother was opposed to any access by the applicant, but also to the applicant's insistence on the recognition of his rights and to his disregard for the child's psychological health. The national court relied on expert reports and on the evidence given by the parents at hearings and was thus in a better position than the European judges to strike a fair balance between the competing interests involved.

The Judiciary in Germany were critical of the sundry decisions in relation to the findings of the ECHR on the issue of the adequacy of expert evidence and the necessity of hearing children in every case. Expert opinion was commissioned by the Court in most cases and the matter should have been within the 'margin of appreciation doctrine' as the national Court saw the demeanour of the experts and witnesses and was best placed to determine that matter. In July 2003 the ECHR (Grand Chamber) published its judgements in the cases of *Sahin v. Germany* and *Sommerfeld v. Germany* reversing the

Chamber's decisions and holding that there had been no breach of Article 8 in either case. In *Sahin* the Court determined that it was a step too far to say that domestic courts were always required to hear a child in Court in a contact dispute. In *Sommerfeld* they went even further in deciding that it was going too far to say that national courts were always required to involve psychological experts in cases of disputed parental contact. In both cases the Grand Chamber concluded that the decision on whether to hear a child in court, or whether to engage an expert to provide a professional opinion should depend upon the circumstances in each individual case. The age and maturity of the child involved would also be a factor to be taken into account.

The Children Act, 1997, amended the Guardianship of Infants Act, 1964 and provides for the appointment of a guardian *ad litem* for a child and separate legal representation where the court considers such to be necessary in the special circumstances of the case. This gives the child a voice and a way of being heard in such proceedings. However, this portion of the amended legislation is one of two sections (sections 26 & 28) which have not yet been brought into force. Therefore the District Court cannot requisition a social report, or appoint a guardian *ad litem* and separate legal representation for a child in private law proceedings. Where the court considers that there are serious child-care concerns and that consideration must be given to whether the Child Care Act, 1991 should be invoked, it can request the Heath Board to provide a report under section 20 of the 1991 Act. It must be asked however whether this could be considered to be "an accessible and coherent mechanism" as envisaged in the *Glaser v. United Kingdom*[40] case and a satisfactory discharge of the positive obligations on national authorities under Article 8?

It must be conceded that in most access applications in Ireland the court does not only 'not hear the child directly', neither does it hear the child 'indirectly' through experts in the majority of cases. It will be very interesting to see how the Irish system will fare when measured against Article 6 and 8 obligations under the European Convention on Human Rights.

[40] [2001] 1 F.L.R. 153.