

DOMESTIC SEXUAL AND GENDER BASED VIOLENCE IN IRELAND

LEGISLATION AND LEGAL REMEDIES

Prior to 1976 the Injunction was the only civil law remedy available to a wife who required speedy and permanent protection from ill treatment by her husband and who wished to have him excluded from the family home.

Section 22 of the Family Law (Maintenance of Spouses and Children) Act 1976 for the first time conferred jurisdiction on the Courts to provide by way of a specific family law remedy protection against spousal misconduct by enabling the Courts to grant barring orders.

This provision was subsequently repealed and replaced by the Family Law (Protection of Spouses and Children) Act 1981 which contained more elaborate measures to provide protection against spousal misconduct.

This Act is now repealed and was replaced by the Domestic Violence Act 1996 which came into force on the 27th March 1996. It was an Act designed to make provision

- For the protection of a spouse and any children or other dependent persons

- Or persons in other domestic relationships – whose safety and welfare required it because of the conduct of another person in a domestic relationship
- Also to provide for arrest without warrant in certain circumstances
- To provide for the hearing at the same time as certain applications to the Court under more than one enactment for Orders relating to domestic relationships and
- To provide for other connected matters

In the last 21 years there have been some amendments to the 1996 Act namely

1. By the Family Law (Miscellaneous Provisions Act) 1997
2. The Domestic Violence (Amendment) Act 2002
3. The Civil Law (Miscellaneous Provisions) Act 2011

The 1996 Act prescribed two principal forms of protection – the Barring Order and the Safety Order. In addition it facilitates the making of interim Orders where immediate protection is required pending a Court fully determining proceedings initiated under it. An application can be made under the Act by persons in need of protection themselves and/or for a dependent person.

I will now deal with the Act under three separate headings.

- A. Where can proceedings be initiated
 - B. Who can initiate proceedings and
 - C. What type of relief is available
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- A. Family Law serves two main functions.
 - a. firstly protection against violence and
 - b. secondly marital separation.

It takes place mainly at two court levels, the Circuit Court and the District Court. The District Court deals with a menu of reliefs which often include domestic violence relief as well as custody access and maintenance leading in many cases to a de facto

separation. Access to the District Court enables non-marital as well as marital applicants to obtain both emergency and long term reliefs. Now on application they will also be referred to the Mediation Service to see if an alternative method of dispute resolution can be more effective. The Circuit Court grants either a decree of judicial separation or a divorce and domestic violence orders are only one of the reliefs granted

B. The jurisdiction of the Court in respect of Civil Proceedings under the 1996 Acts may be exercised

- a) As regards the Circuit Court by a Judge of the Circuit and
- b) As regards the District Court by the Judge of the District Court for the time being assigned to the District Court district where the applicant resides.

As regards applications made before the District Court these shall be as informal as is practicable and consistent with the administration of justice. The vast majority of applications under the 1996 Act are taken in the District Court and are usually coupled together with other applications such as custody, access and maintenance to the intent that a de facto separation occurs between the parties.

In the Circuit Court the parties to the proceedings will be applying for a Judicial Separation and under the provisions of the 1989 and 1995 Acts the Court is empowered to make an Exclusion Order so an application for relief under the 1996 Act is often deemed unnecessary or not proceeded with. Students are referred to a recent decision of the Court of Appeal and the judgment of Mr Justice Gerard Hogan delivered on the 17th January 2017 in a case entitled NK Applicant and FK Respondent where an interesting review of the jurisdiction of the Court to exclude a spouse from the family home, the inherent jurisdiction of the Court, the 1995 Act and the 1964 Act are set out in the context of the exercise of the Court's jurisdiction.

C. The parties who may make an application for relief under the Act

- a) In relation to a Safety Order and
- b) In relation to a Barring Order

The application for a Safety Order may be

- (i) A spouse
- (ii) Not a spouse but a person who has lived for a period of six out of the previous 12 months with the Respondent
- (iii) A parent of the Respondent
- (iv) Lives with the Respondent in a relationship the basis of which is not primarily contractual
- (v) Is a parent of a child whose other parent is the respondent

Applicants for a Barring Order can be

- (i) The spouse
- (ii) Not the spouse of the Respondent but has lived with the Respondent as husband and wife for a period of at least six months of the previous nine months prior to the application
- (iii) Is a parent of the Respondent

The Health Board also has the right to make an application if they feel that the safety of a person or a dependent child warrants it.

C (i) The Reliefs Available - Interim Protections

- Protection Order protects the Applicant and
- Interim Barring Order removes the Respondent if there is an immediate risk of significant harm to the Applicant and any dependent person
- Where granting a Protection Order would not be sufficient to protect the Applicant or the dependent person

- These reliefs are generally granted on an ex parte basis

- The rights of Respondent restrict the length of protection

- They are granted on an application for a Safety or Barring Order

- They are valid until the full hearing of the Action

- They grant short term protection to the injured party

(ii)Final Reliefs – Safety Order

This can be granted by the Court if the Court is of the opinion that there are reasonable grounds for believing that the safety or welfare of the Applicant or any dependent person so requires it and shall direct the Respondent to the application

- a) Not to use or threaten to use violence against, molest or put in fear the Applicant or the dependent person and
- b) If he or she is residing at a place other than the place where the Applicant or that dependent person resides shall not watch or beset the place where the Applicant or the dependent child resides and the Court may make such Order subject to such exceptions and conditions as it shall specify

A Safety Order expires five years after the date of making of such Order or of such shorter period as the Court may provide for in the Order

Barring Order

Where the Court on application to which is

1. Of the opinion that there are reasonable grounds for believing that the safety or welfare of the Applicant or dependent person so requires it may, subject to Section 7(i), direct the Respondent if residing at a place where the Applicant or the dependent person resides to leave such place and
2. If the Respondent is or is not residing at a place where the Applicant or the dependent person resides, prohibit that Respondent from entering such place until further Order of the Court

In deciding whether or not to grant a Barring Order the Court shall have regard to the safety or welfare of any dependent person in respect of whom the Respondent is the parent or in loco parentis. There is an additional section to the Barring Order and it is important to ensure, if appropriate that any Order made also provides:-

- a) A prohibition against using or threatening use violence against the Applicant
- b) Molesting or putting in fear the Applicant or

- c) Attending at or in the vicinity or watching or besetting a place where the Applicant or any such dependent person resides

The Barring Order can be made for a period of three years or such shorter period as the Court shall provide.

It is always necessary to balance competing rights and one of the sections of the 1996 Act which has caused most difficulty to date has been the section which states that a Barring Order may not be granted in respect of a person who has a legal or beneficial interest in the place where the Applicant resides but

- i) The Applicant has no such interest or
- ii) The Applicant's interest is in the opinion of the Court, less than that of the Respondent. Where in proceedings to which this section, Section 4(A) applies, the Applicant states the belief in respect of that place to which the application relates that he or she has a legal or beneficial interest in that place which is not less than that of the Respondent, then such belief shall be admissible in evidence but may be counteracted by evidence from the Respondent.

The legal and beneficial interest of any party in the proceedings shall not be affected by any Barring Order that is made by the Court.

Breach of Orders

A Respondent who contravenes the Safety Order, Barring Order, Interim Barring Order or Protection Order shall be guilty of an offence and shall be liable on summary conviction to a fine or to imprisonment. This means that any breach of an Order under the 1996 Act will be heard in the Criminal Courts and in open Court. Such a Respondent can be arrested without warrant by a member of the Garda Siochana who has reasonable cause for believing that a person is committing or has committed an assault occasioning actual bodily harm or an offence under Section 20 of the Offences against the Person Act 1861.

Over the past 21 years there have been many calls for changes to the Domestic Violence Legislation to protect new families, children, parties who have a child together as well as expanding the nature of the reliefs that can be sought under the

Act. In the past few weeks the Minister has caused **the Domestic Violence Bill 2017** to be published and subject to such amendments as may be agreed as the Bill passes through the Houses of the Oireachtas, the following are

- a) The aims of the Bill and
- b) The major changes that are set out therein

Aims

- An Act to consolidate law on Domestic Violence
- To provide for emergency Barring Orders in certain circumstances
- To provide for evidence to be given through television link
- To provide for the right of an applicant to be accompanied in certain proceedings
- To provide for obtaining the views of a child in certain proceedings
- To provide for the giving of information on support services to victims of domestic violence
- To provide for the making of recommendations for engagement with certain services by respondents
- To provide for restrictions on those present in Court during certain proceedings
- To prohibit the publication or broadcast of certain matters
- To provide for an offence of forced marriage
- To repeal provisions for the exemption in certain cases for minimum age requirements for marriage
- Overall to repeal the 1996 Act and the 2002 Act and provide for all the consequential amendments that may be needed

Changes

- The time limits for a non married applicant for a Safety Order and Barring Order have now been deleted in favour of “Living with the respondent in an intimate and committed relationship prior to the application”

- Each of the various reliefs under the Act are extended to “following or communicating with (including by electronic means)” the applicant or the dependent person
- The creation of an additional relief namely an **Emergency Barring Order** and for the purposes of this relief it is available to an applicant who has no legal or beneficial interest in the place or such interest is less than that of the respondent. This Emergency Barring Order, like the Interim Barring Order, will only last for 8 days, can be made ex parte and will be grounded on Affidavit or sworn information and such evidence shall be served on the respondent as soon as practicable. Unless there are exceptional circumstances, the applicant cannot obtain a further Emergency Barring Order within one month
- In relation to a Protection Order, a copy of the Protection Order, the Affidavit or the sworn information shall be served on the respondent as soon as possible
- Section 21 provides for the evidence through television link for Civil proceedings.
- Section 22 provides for the right to be accompanied to the Court in certain circumstances.
- Section 23 provides for the views of a child to be sought.
- Section 24 provides for information to be given to victims of domestic violence on support services.
- Section 25 provides for a recommendation for engagement by the respondent with certain circumstances, such as a programme for perpetrators, addition, counselling or financial planning service.
- Section 31 provides for the exclusion of the public from the Court where a breach of DV Order is being heard unless they are interested parties.
- Section 33 provides for the prohibition on publication or broadcast of certain matters.
- Section 35 provides for the creation of a new criminal offence of forced marriage.
- Section 39 provides for the necessary amendments to the 1995 Family Law Act to remove the exemption for underage marriage

I understand that the Minister has agreed to certain amendments and is still open to further submissions so the above explanations come with a government health warning.

NON FATAL OFFENCES AGAINST THE PERSON ACT 1997

For people who do not qualify for relief under the Domestic Violence Legislation the above Act may provide some comfort. There are always gaps in legislative protection for family members or connected persons and it is important to be able to advise on other remedies that may be available to injured parties albeit that these may only be available if a complaint is made to the Gardai and a criminal prosecution ensues. Such remedies are available for offences under the above Act involving assault, coercion, harassment and many more offences.

CHILDREN AND ACCESS

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 an abusive parent who is barred. Provided the children have not been subject to physical violence, access is generally either agreed or fixed by the court.

Difficulties always arise if these applications are not heard contemporaneously by the court as the court may not be aware as to the impact or effect of children living in abusive relationships. Indirectly, children living in such a relationship may observe or may become embroiled in the dynamics of a violent relationship and they may thus be socialised into either accepting or committing violence as a result of witnessing it. Their perspective is often overlooked and it is to be hoped that following the recent Referendum there will be more awareness of the affect that living in a dysfunctional relationship can have on children. Questions arise as to whether access to children by a barred spouse should be resolved in isolation to the domestic violence issue and

recent research has shown that abusive parents will continue their pattern of behaviour post separation to 'get at' the custodial parent.

Using the children is very much about power and control and such behaviour can be:

- i. questioning the child as to the mother's relationship with others or her activities,
- ii. failing to turn up at the appointed time,
- iii. failing to return the children at the appointed time, i.e. making agreements in relation to access and failing to honour them,
- iv. giving the children the wrong type of food so that they are returned to the custodial parent fractious and upset,
- v. buying the children with gifts, and
- vi. looking for sympathy from the children.

All these traits are designed to destabilise the custodial parent so that they never know where they stand. Broken promises on the part of the non- custodial parent are a common feature of this continuing abuse.

Section 63 of the Child and Family Relationships Act 2015 which amended the 1964 Act by the insertion of Part V gives direction to the Court on the issues to be taken into consideration. '**The best interests of the child**' will be a critical yardstick for Court. One of the factors to be taken into consideration at s.31(2)(h) will be 'any harm which the child has suffered or is at risk of suffering including harm as a result of family violence, and the protection of the child's safety and psychological well-being'. Section 31 (3) goes on to state that the court shall have regard to household violence that has occurred or is likely to occur in the household of the child and the likely impact of any such violence.'

CONFLICT RESOLUTION

It is clear that how conflict is resolved within a relationship can predict, to some extent, the potential for future violence. Where power and resources are shared it is more likely that decisions will be consensual. Where there is perceived or actual imbalance and poor conflict resolving styles, there is much more likely to be violence be it physical or psychological. Domestic violence on its own may not preclude the use of appropriate mediation or alternative dispute resolutions mechanisms but it must be noted that insistence by a perpetrator that the parties should go to mediation may be in itself another form of abuse

National Action plans.

The Minister for Justice signed the Action Plan under THE SECOND NATIONAL STRATEGY ON DOMESTIC SEXUAL AND GENDER-Based violence 2016-2021 IN November 2016 This action plan contains along with the carryover from the previous national strategies, all the additional actions required implement and eventually ratify the Council of Europe Istanbul Convention (The Convention on Preventing and Combating Violence against Women).

JOAN O MAHONY B.C.L. LLB (1971)

SOLICITOR

6 CLONKEEN ROAD

DEANSGRANGE

CO DUBLIN A94 W9V6

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