



Doing Feminist Legal Work Best Practice Guide 4

DFLW Best Practice Guide 4

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Empirical Approaches to Family Law Research

Edited by Maebh Harding and Aoife O'Donoghue

This best practice guide brings together lived experiences from legal academics and PhD students to highlight the value of empirical approaches to family law research and to open discussion about overcoming some of the difficulties that come with doing this kind of research on the island of Ireland. It is hoped that this research tool will inspire and empower researchers to collaborate and develop new approaches to this important work.

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What is feminist legal work?

Any form of action that ensures that issues of gender are central in legal policy making, legal education and public discussions.

What do we mean by Empirical Approaches to Family Law Research?

Empirical approaches to family law research include any approach that looks outside traditional doctrinal method in gathering data to understand, critique and reform family law and legal understandings of family life.



Why do Empirical Family Law Research?

Maebh Harding

Empirical family law research gives us important context for legal reform. Targeted studies yield findings about a particular legal issue but properly analysed, also provide insights that can influence the nature of the research questions that should be asked on this island and better data collection. The framing of empirical research questions and the application of findings to legal and policy issues are vitally important in developing a modern and inclusive family law. However, legal limitations on the type of data that can be collected and practical barriers to accessing data can unduly shape these concerns, putting the cart before the horse.

Empirical family law research is important and rewarding work, but difficult to do. Researchers must engage with research design, access issues, ethics, political sensationalism of particular issues and the emotional toil of dealing with challenging source material. Our contributors have experience of gathering data through both quantitative and qualitative methods and also of the specific data access problems that result from operation of the *in camera* rule in Ireland. The purpose of this best practice guide is to give practical insights into doing this kind of research and to spark conversation and collaboration about better ways to research the interaction between law and family on this island.

The challenges and rewards of undertaking large-scale surveys in family law

Emma Hitchings

There are two key sources of quantitative data in socio-legal research: survey data and administrative data (e.g. in England and Wales; HMCTS or Cafcass data, or court files). Administrative data is restricted to (a) the court population and (b) the limited objective variables it collects. Therefore, for research involving a wider population or research that requires a depth of information, then surveys are the only option. Collecting survey data is challenging. However, that is not to say that this method of research is not without its rewards.

The first challenge is identifying and approaching individuals to survey and ensuring that any survey is representative of the population of interest, which means that ad hoc recruitment (e.g. asking practitioners to promote it, social media calls, snowballing etc) is rarely suitable. Furthermore, if the aim of the research is to obtain data about the wider (non-court) population, then it often means approaching large numbers of potential participants to find the small percentage who are eligible for the survey (e.g. parents who have separated in the past five years). Arguably the most cost effective method is to do this via an existing survey panel, where the survey organisation maintains a panel of potential participants. However, this route is expensive and will usually require funding

to be in place. Panel members register to take multiple surveys and are contacted directly by the organisation to see if they fit the researcher's population of interest. If they do, panel members are invited to take part and there are different ways the survey organisation can help to ensure the survey respondents are representative of the researcher's population.

The second challenge involves survey design, particularly ensuring that the survey is a reasonable length and that participants understand the questions. This will require piloting of the survey, ideally alongside cognitive interviews of some pilot participants to assess the participant's understanding and whether any questions are problematic either in terms of recall of information or sensitivity. The latter being a particular issue in the area of family law.

One of the most significant aspects of working with survey data is being able to test hypotheses through the use of numerical data and if the data is weighted appropriately, to draw conclusions about a population. However, in order to do so, there needs to be a suitable expert on the research team and the sample itself needs to be an appropriate size in order to use statistical analysis on the dataset. This is a further challenge. Without a large enough starting sample size, it will be difficult to maintain smaller sub-group sizes when undertaking more focused analysis on the sample (e.g. participants over or under a certain age who have been divorced, or mothers with dependent children).

However, despite these challenges, data collection through surveys provides a valuable opportunity to answer a range of research questions including those which focus on legal issues beyond the courts and in areas where there is no other formal source of data.¹ In family law this is particularly important, given that only a minority of private family law disputes ever reach a contested court hearing. Without an understanding of what happens in this informal space, a range of policy-relevant research questions will remain unanswered.

¹ See the use of survey data in E. Hitchings, C Bryson, G Douglas, S Purdon and J Birchall, Fair Shares? Sorting out money and property on divorce, (Bristol, 2023). Available at: Fair Shares report -final.pdf (bristol.ac.uk)

Insider Positionality

Alice Diver

My recent research has tended to focus upon adoption law and policy e.g. recent case law on post-adoption contact, the history of child adoption, identity rights, and redress processes. As a 1960s closed-records Quebec adoptee, I have often been accused of being an ‘insider researcher,’ and thus prone to deep biases (with a fearsome agenda apparently aimed at abolishing adoption). These are incorrect assumptions – I do also teach child protection law and am aware of the need for substitute parenting – but such indictments are enough to temper my wilder impulses, especially during analyses of judgments involving maternal relinquishments or contact bans, or when drafting critiques of redress schemes. It is difficult to keep ‘the personal’ out of such activities. It is one thing, for example, to read of a punitive, intergenerational veto on the release of a birth father’s name and quite another to live with the dark consequences of it for over half a century.

The sense of being ‘less than’ those who can easily access their own kinships and origin stories does tend to seep into one’s research. This can enhance the tendency to see adoption’s inequalities and injustices everywhere – and deepen the temptation to rail loudly against them – neither of which is the hallmark of the elegantly dispassionate legal researcher. (I am forever indebted to those cool-headed algorithms that select and flag recent cases as ‘most relevant’ rather than labelling them as ‘profoundly aggravating’ or ‘soul-destroying’ as would be my own inclination). There is a psychological toll: it can be near-impossible, for example, to lose the image of a ‘relinquishing’ mother – barred from bringing any further appeals against a decision to ban contact – clinging to the hope that the child will not think she simply abandoned them without any struggle. It is difficult too, to avoid hearing within such statements the sharp echoes of much earlier maternal testimonies, harvested from the long era of ‘forced adoption.’

In this sense, insider positionality does have some unexpected benefits, in addition to granting useful insights into the lived experiences of those affected by adoption. It also serves as a reminder of the need to pace yourself and make time to actively manage wellbeing, for example by looking beyond law and policy to other relevant disciplines (literature, folklore, memoir, graphic novels) which, though still often riddled with adoptee, foundling, or orphan rescue tales, can still generally offer a comforting distraction.

The Challenges of Empirical Family Research in Ireland

Conor O' Mahony

Empirical research in child and family law in Ireland is still at a very early stage. While there have been a number of reasonably large-scale projects looking at aspects of child protection law, there are very few in the area of private family law. As such, there is a huge need for such research to be undertaken so as to allow for evidence-based critical analysis and reform. Empirical data also facilitates a more rounded approach to teaching child and family law that moves beyond the text of statutes and written judgments that are really only available from the High Court and above (notwithstanding the fact that the vast majority of child and family law cases are heard in the District and Circuit Courts).

There are a number of challenges in undertaking such research. The *in camera* rule in its current form is a huge barrier in respect of efforts to engage with the parties to the cases. It is possible that this may be reformed to facilitate such research in future; but until that happens, researchers need to err on the side of caution in seeking to survey or interview adults or children about their experiences in the child or family courts. In the meantime, engagement with professionals about systemic issues is less risky, and still has potential to generate highly valuable data.

There is a statutory framework for courtroom observation where approval is sought from the Minister for Justice pursuant to Regulation 2(b) of the Civil Liability and Courts Act 2004 (Section 40(3)) Regulations 2005. This work can be very valuable but is labour-intensive and necessitates a travel budget if a representative sample is to be obtained. It also involves an unavoidable element of “dead time” sitting in courts waiting for relevant and significant cases to come up.

For either type of research, there are two key things to be aware of. The first is the multiple layers of ethical approval that must be sought, which can be a very slow process (e.g. university approval, Minister for Justice approval for courtroom observation, Courts Service approval for interviewing or surveying judges). The second is that there is a huge amount of regional variation in child and family law court proceedings in Ireland; many of the judges operate in silos, and the approach can vary enormously from district to district. As such, a robust approach to sampling is important so as to avoid attributing what happens in one or two districts to the country as a whole.

Where are the cases? Making sense of family law case law

Deirdre McGowan

Family case law is difficult to deal with; the cases have initials instead of names, identifying information is removed from judgments and they rarely appear nicely packaged in law reports. In addition, there is no agreed naming convention and so cases can have different names in different contexts. For example, the Supreme Court case at [2002] 1 IR 334 is variously described as *T v T*, *T(D) v T(C)* *DT v CT*.

Choosing the initials with which to describe a case appears to be a matter for the presiding judge. It was the case that the initials of the parties were used, which at least meant that most cases had different names. In recent years, the courts have moved to allocating random letters. The Court of Appeal began using *QR v ST* and *NO v PQ* for consecutive cases dealing with financial matters on divorce but then abandoned this approach, naming the next case *AX v BX*. Hague Convention cases use the parties' initials, or perhaps just random letters (*EG v TP*; *DE v EB*). The High Court has recently begun using single letters, such as *Q v Q* or *R v R*. Reusing the same letters is also common, and unhelpful when the cases are similar and in the same year: *X v Y* [2020] IEHC 502; *X v Y* [2020] IEHC 525; *X v Y* [2020] IEHC 579.

It is difficult to work with family law cases without using referencing software and I have had a lot of trial and error in figuring out the best way catalogue cases on software. I use *Zotero*, putting the full name, citation and case type in the 'Case Name' section. I then use tags and the 'notes' tab to 'personalise' the cases. Uploading the PDF of the case to the software helps with quick access. Despite this system, when working on a review of High Court cases recently I still found it quite difficult to avoid duplicating and/or omitting cases on *Zotero* and again whilst tabulating them on excel for analysis.

For some consistency, when naming cases I have defaulted to using double initials where possible so *DT v CT* in preference to *T v T*. I have yet to work out an effective shorthand way to distinguish the cases with the same name when citing them.

A further tripwire is finding cases. The difficulty with variation in the format of names means name searches rarely work and using just two initials, for example "*T v T*" will result in a lot of incorrect results. When looking for a specific case, it is therefore essential to have a full and accurate citation to find it. Searching *Westlaw* or *JustisVlex* for key words doesn't always work when the cases are not published in law reports, and mostly they are not. The keyword search on *courts.ie* is also not great. Surprisingly, cases sometimes appear on the databases but not on *courts.ie* and the 'unreported judgments' section of *Westlaw* has cases not available anywhere else. To identify all cases dealing with ancillary relief over a 20-year period, I manually searched the judgments section of *courts.ie* in addition to using keyword searches on the databases. One small positive is that family law cases are usually easy to identify on *courts.ie*, although probate and other *in camera* cases also have redacted names.

Securing Ethical Approval

Kenneth Burns

Best practice necessitates that researchers give due care and attention to ethical considerations associated with their research and that the research design is independently examined by research ethics committees (RECs). Research design, inevitably, involves an economic and practical analysis of what is possible for the researcher to deliver with the available resources.

While research ethics oversight is essential for researchers and can play a crucial role as a critical friend, it is also a significant time commitment to be factored into your research planning and [Gantt chart](#). For example, in a joint University College Cork and Trinity College Dublin study for the Department of Justice study on the [operation of the in camera rule in family law in Ireland](#), we had to apply for and secure permission from three research ethics committees. Research ethics approvals were secured from the following institutions: the [Social Research Ethics Committee](#) at University College Cork, [Tusla, Child and Family Agency](#), and the Legal Research and Library Services Subcommittee on Judicial Participation in Research Projects ([Courts Service](#)). At one point, we thought we might also have had to apply to a fourth body for REC approval! The total number of pages for all three RECs for this study came to well over 100 pages with many supporting documents. These were important tasks to complete to ensure that the study design was ethical, but they also involved a considerable time commitment. The introduction of a REC passport model between RECs could reduce repetition in research administration to encourage more research.

From undertaking research in family law in Ireland, the following advice may be helpful when designing your study and applying to RECs:

- 1 **Rules and guidance** from research ethics committees are constantly changing, therefore you need to keep up-to-date. Applying to an REC on the wrong form and using out of date guidance can impact upon your credibility as a researcher.
- 2 The **researcher's credibility and bone fides** are especially important when undertaking research on sensitive topics in family law. Address this in your REC application(s) and in your permission requests for access to gatekeepers.
- 3 **How many research ethics committees** do you need to apply to? Undertaking research in family law cuts across a number of agencies and services. Undertake your due diligence in advance to ensure that you do not proceed without all of the requisite approvals. It can sometimes be unclear which REC to apply to first. Usually, the application to your University REC should come first as external RECs will need to see that before they proceed. What is achievable with the resources and time available to complete your study?
- 4 Research ethics applications ought to address the **sensitive nature of topics** to be examined in your study; however, this should not limit your study design. RECs will require applicants to be **reflective and to anticipate** the ethical issues that will arise. As a researcher with over a decade's experience sitting on an REC, they will often reject an application, not because of the sensitivity of the topic, but due to the researcher(s) not addressing, and planning for, the foreseeable ethical issues arising from their study design.

Obtaining Permission to Observe In Camera Cases in Ireland

Méabh Browne

The *in camera* rule hinders the collection of information on family law cases at Circuit Court level, where there are typically no law reports and no written judgments published. Section 40(3) of the Civil Liability and Courts Act 2004 (as amended) and S.I. No. 337/2005 create a statutory exception to the *in camera* rule for certain classes of people, including researchers. There is no clear process for obtaining permission to attend *in camera* cases. There is legal research information on the Courts Service website, but it relates to judicial participation in research, and not to observing *in camera* cases. This may be due to the limited uptake on the researcher exception.

The Family Justice Strategy 2022-2025 acknowledges the historically low uptake on the researcher exception and outlines the aim of analysing the issues with the statutory exceptions. However, it is likely that this low uptake is due to lack of funding rather than the absence of a clear procedure. There has been a recent move towards reform of the family courts. This could result in increased researcher attendance given the lack of information on family cases in the Circuit Courts. Greater transparency and guidance on how researchers may apply to observe *in camera* cases could support this and assist in addressing the lacuna of data in this area.

Under S.I. No. 337/2005 2(b)(i) a researcher must be nominated by a body specified in the Schedule to the Regulations. There is no guidance on what format the nomination should take, what information it should contain or to whom it should be submitted. S.I. No. 337/2005 2(b)(ii) states that the researcher must be approved by the Minister for Justice, but provides no information on who to contact to arrange this, what is required to obtain approval, or who the approval must be presented to. There is no information on how to arrange to attend *in camera* cases, or how attendance will be facilitated. A further practical problem is that *in camera* proceedings in the Dublin Circuit are held in small, private rooms. There is no public viewing area and no place for a researcher to sit. A security card is required to access the court by anyone other than litigants and their representatives.

Existing court reporting projects do not describe their methodology in obtaining the *in camera* researcher exception. I interviewed Dr. Coulter and Dr. Craven-Barry, but Dr. Coulter did not require an exception to carry out her research and the unique characteristics of Dr. Craven-Barry's project brought it under different legislation. I am grateful that both researchers advised me to send a copy of the letter of Ministerial approval along with a letter explaining my research to the sitting Judges in advance of my attendance at court.

I e-mailed a number of Principal Officers in the Department of Justice outlining my research project and requesting guidance. One confirmed that they were the point of contact in relation to obtaining Ministerial approval. They advised that the nomination should consist of a scanned and hard-copy letter from the university, signed off by a Head of School. They requested further information on the nature of my research and why access to *in camera* family law hearings was essential to it. I provided a more detailed outline with the nominating letter. I received the Ministerial letter of approval three weeks later. It was sent as a scanned copy with confirmation that I would receive a hard copy.

While awaiting Ministerial approval, I liaised with the Circuit Court Judges and the Courts Service. Locating professional contact details for individual judges is difficult, and there is no point of contact for researchers within the Courts Service. I made contact with one of the sitting judges who kindly invited me to attend Phoenix House to meet the other judges. This gave me the opportunity to introduce myself to the manager of the Circuit Court Office. I was provided with the forms to apply for a security clearance card, and when I enquired about access to seating they said they would do their best to locate a table and chair. I am grateful that a table and a chair were located for each court. The Courts Service and judges are open and accommodating, and there is a desire to facilitate family law research.

Contributors



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Dr Kenneth Burns is a senior lecturer in social work and a research associate with ISS21 at University College Cork, Ireland. He has undertaken research with colleagues on child care proceedings in the District Court, voluntary care, and the operation of the in camera rule in family law in Ireland. <http://research.ucc.ie/profiles/A012/kburns> k.burns@ucc.ie



Dr Alice Diver is a Senior Lecturer in Family Law at Queen's University, Belfast. Her research focuses mainly on the laws and literature of Critical Adoption Studies, looking in particular at the human rights of adoptees (e.g. identity, origin, family life). A former Solicitor, she is the author of two monographs: *Genetic Stigma in Law and Literature: Orphanhood, Adoption, and the Right to Reunion* (Palgrave, 2024) and *A Law of Blood-ties: The 'Right' to access Genetic Ancestry* (Springer, 2014). She is an associate editor for *Liverpool Law Review*, and a trustee of Kinship Care NI.



Dr Maebh Harding is a lecturer in Family and Child Law at University College Dublin. She obtained and led a competitive research grant from the Nuffield Foundation to investigate court promotion of shared parenting arrangements in the English courts. Her work has been widely cited and has significantly impacted policy and practice. She is an editor of *Family Law in Context* (Clarus 2023) and a founder of the Doing Feminist Legal Work Network.



Emma Hitchings is a Professor of Family Law at the University of Bristol Law School. She is an expert on financial remedies on divorce and family justice issues, and has been the lead or joint investigator on a range of empirical studies in family law and family justice. She has written widely on issues in family law. A key theme underpinning her research has been exploring how family law works in practice and its impact on individuals, professionals and the family justice system. She is the co-editor of the *Journal of Social Welfare and Family Law*, on the Advisory Group of the *Financial Remedies Journal* and a member of the Pension Advisory Group.



Dr Deirdre McGowan is a Senior Lecturer and Head of Law at Technological University Dublin. She is the editor with Dr Maebh Harding of *Family Law in Context* (Clarus 2023). Her research focuses on empirical and theoretical approaches to Family Law.



Aoife O'Donoghue is Professor of Law at Queens University Belfast. Her research examines how legal structures enable or prevent states, institutions and individuals to (not) act and the ramifications of such actions. She researches utopias and tyranny and the impact of Brexit. She was one of the Directors of the Northern/Ireland Feminist Judgments Project and now co-leads Feminist Constitutional Futures. She is a founder of the Doing Feminist Legal Work Network.



Professor Conor O'Mahony lectures in constitutional law and child law at the School of Law at University College Cork. He is the Director of the Child Law Clinic, which provides research support to litigation and advocacy in the area of child law. From 2019-2022, he served as Special Rapporteur on Child Protection to the Government of Ireland.



Further Resources

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Challenging research.org: <https://challengingresearch.org/>

Child Law Project: <https://www.childlawproject.ie/latest-volume/>

Special Rapporteur on Child Protection Reports <https://www.gov.ie/en/collection/51fc67-special-rapporteur-on-child-protection-reports/>