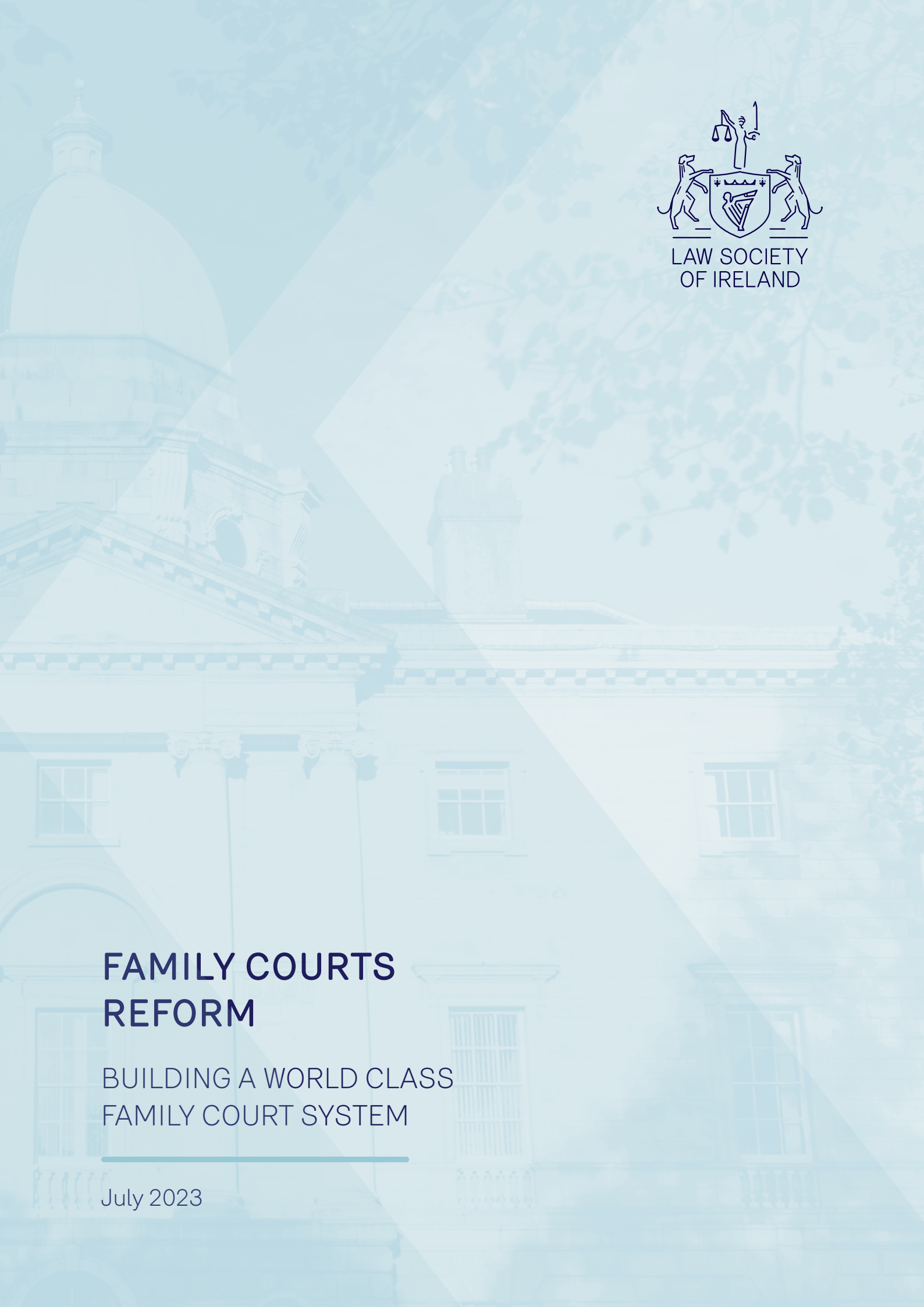
FAMILY COURTS REFORM

BUILDING A WORLD CLASS FAMILY COURT SYSTEM

July 2023

LAW SOCIETY OF IRELAND



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CONTENTS

1. INTRODUCTION

This paper on the Family Courts Bill has been drafted with the intention to build on and consolidate the issues already raised by the Law Society in their February 2021 submissions; to the Department of Justice from the Family Justice Oversight Group and to the Joint Oireachtas Committee on Justice on the General Scheme of the Family Court Bill. This third research paper highlights the main issues arising and outstanding with the Family Courts Bill as the Law Society sees it. Throughout this paper, reference is made to Sections as opposed to Heads as previously done, as we are now working off the document of the Family Courts Bill 2022 ("the Bill").

2. GUIDING PRINCIPLES

Part 2 of the Bill sets out the guiding principles for the establishment of a Family Court and which will apply to all family law proceedings. This envisages a set of core principles which the court, lawyers, and the parties to proceedings are to have regard to. In general, the Law Society welcomes these principles, however, there are a number of matters which they wish to raise, by way of fine-tuning.

The overarching concern is that there is nothing in the Bill to indicate how the statutory obligation to have regard to certain principles can have any meaningful impact on family law proceedings. There is no statutory obligation on practitioners to inform clients of their obligations under the Bill, and there is no penalty in circumstances where practitioners, judges, or parties to a dispute default on these obligations. There is also no system set out to assess whether the parties to a dispute are complying with their obligations. For the foregoing reasons, it is difficult to avoid the conclusion that Section 8 is purely aspirational from a legal perspective, particularly where it places obligations on parties to a family law dispute without providing for any enforcement mechanisms.

2.1 THE VOICE OF THE CHILD

The 2019 Joint Committee on Justice and Equality 'Report on Reform of the Family Law System' ("**the 2019 Report**") made a number of recommendations relevant to hearing the voice of the child and expressed the necessity of establishing a panel of suitably qualified child experts. These recommendations included:

> *29. Greater clarity is necessary in relation to the specific criteria for appointing an expert, including the area of specialisation, where the person would fit in terms of accountability, the professional body and the qualifications he or she would have to have, and how this expert would be resourced.*
>
> *30. Although there is a Constitutional requirement to ascertain the views of the child, in reality this is undermined by the fact that the funding of the*

necessary expert reports to give effect to this can fall on the shoulders of parents, who will often not have such resources. If the constitutional aspiration that the voice of the child be heard is to be made reality, there is a need to establish a State panel of experts who would be available to the courts to produce a report within a reasonable timeframe. An alternative solution would be to establish a national body such as the Guardian ad litem service in Northern Ireland, with a view to the service being utilised in both public and private family law proceedings.

32. The Committee recommends that consideration be given to providing regulations in respect of section 47 reports, similar to the recent Child's View Expert Regulations. Such regulations would ensure that those who prepare the reports are properly qualified and given specific terms of reference for engagement.

The Law Society re-states its support for these recommendations. The Bill remains silent on these issues save insofar as it anticipates that the "parties" shall participate in the proceedings in a manner which has regard to the welfare of the child (see Section 8(2) and 8(4)(b)(i) of the Bill providing that parties are to participate in the proceedings in a manner which ensures that the best interests of the child are a primary consideration. It flows from this that the child is to be informed, as appropriate in light of their age and capacity, of the nature of the proceedings, developments, and progress in the proceedings, and the outcome of the proceedings).

The 2019 Report states:

"[T]here is a Constitutional requirement to ascertain the views of the child, in reality this is undermined by the fact that the funding of the necessary expert reports to give effect to this can fall on the shoulders of parents, who will often not have such resources. If this Constitutional aspiration, that the voice of the child be heard, is to be made a reality, there is a need to establish a State panel of experts who would be available to the courts to produce a report within a reasonable timeframe. An alternative solution would be to establish a national body such as the Guardian ad litem service in Northern Ireland, with a view to the service being utilised in both public and private family law proceedings".

Urgent attention is required to ensure that the newly developed Irish Family Court system meets both international standards and our national standards in terms of protecting children's rights.

We need to go further to ensure that the voice of the child is heard in cases concerning their interests and welfare. Courts in Ireland have a duty to hear children and to give due weight and consideration to their wishes, under Article 12 of the United Nations Convention on the Rights of the Child (CRC) and under domestic law. Section 24 of the Child Care Act 1991 (as amended by the Child Care (Amendment) Act 2022) requires a court to give due consideration to the wishes of the child having regard to the age and understanding of the child. The enactment of the Children and Family Relationships Act 2015 incorporated the right of children to be heard in private law proceedings, though it is not yet clear how, or if, this is being fully implemented. Further, since 2015, the insertion of Article 42A into the Constitution has provided for a more heavily entrenched right of children to be listened to in private family law cases. However, there is a distinct lack of provision in Ireland for accommodating the voice of the child, which results in inconsistencies in if and how effectively the voice of the child is ascertained.[1]

Guardians ad litem ('GAL'), are often the most effective mechanism through which children can present their views to the courts, yet they may or may not be appointed in each case. As such, it is submitted that the best way of achieving the incorporation of the child's voice may be through a holistic court support service that incorporates professionals such as GALs or other similarly qualified professionals.

Further, the Bill lacks necessary regulations in respect of Section 47 reports (see recent B v B June 2023 decision of the Court of Appeal), similar to the recent Child's View Expert Regulations. Such regulations would ensure that those who prepare

1 See, for example, Aoife Daly, "The Judicial Interview in Cases on Children's Best Interests: Lessons for Ireland" 20 *Irish Journal of Family Law* 3 (2017); Aoife Daly, "*Limited Guidance: The Provision of Guardian ad litem Services in Irish Family Law*" (2010) 13(1) *Irish Journal of Family Law* 8.

the reports are properly qualified and given specific terms of reference for engagement. Perhaps this work could form part of the focus of the Oversight Committee. In any event, it is preferable that there is a positive articulation of this requirement in the legislation.

The Use of GALs

The Guardianship of Infants Act, 1964 (Child's Views Expert) Regulations 2018 which came into force on 1 January 2019 stipulates qualifications and fees for experts which have proven to be problematic. In practice, Child's Views Experts quote fees that render their services outside the reach of many parents. The Society believes it may therefore be prudent to introduce a panel of suitably qualified experts. Under this system, experts would apply to be placed on the panel, in a manner similar to the Private Practitioner Panel of Solicitors or Counsel as under the Legal Aid Board.

The State no longer provides a comprehensive welfare report-type service, which means that the most vulnerable children in our society often do not have access to a child expert, in the context of a private family court case concerning their welfare. It is submitted that we could examine both the Children and Family Court Advisory and Support Service ('Cafcass service') (as will be examined in more detail on page 4) in the United Kingdom and their GAL service to see whether we could design an appropriate court panel of child experts and/or GALs in private family law matters.

The benefit of a holistic system such as this is that the expert/GAL would be in a position to identify the other supports required by the individual family such as counselling services, addiction services, housing, medical needs, and educational needs. Additionally, a GAL could keep the child informed about the litigation progress and next steps, in a child-friendly manner, and could equip them with some of the necessary coping skills for dealing with their parents' separation. A GAL/child expert would also be in a position to conduct a targeted consultation with the children themselves (perhaps at commencement or at an early phase of the family court process). There is a concern that the present system results in a focus on the exchange of financial documentation rather than prioritising the needs and interests, and indeed, the voice of the child.

At present, the GAL system in Ireland will be largely unregulated until the commencement of section 7 of the Child Care (Amendment) Act 2022. The Law Society envisages that when regulated, all children should have a GAL appointed so as to properly put the principle, that all children should be heard in cases which impact them, into practice. Currently, in private law proceedings, the burden of financing a report falls on individual parents. If they cannot pay, as previously stated, the child's voice is not heard. This is arguably in breach of international treaties, domestic legislation, and the Irish Constitution. All children who are the subject of proceedings should be given the choice to be heard. In public law cases, GALs should be appointed in all cases where children are the subject of care proceedings. Those proceedings will decide one of the most important and sensitive issues a child can have to face in front of the courts i.e., whether they live with, or are removed from, their family.

Judicial Interview

Another issue in Ireland is that of the judicial interview, whereby the judge will interview the child involved in the proceedings. CRC Article 12 stipulates that children may be heard by the decision-maker directly, and the UN Committee on the Rights of the Child emphasises that children should have a choice in this matter.[2] Though judges may meet occasionally with children in Ireland, data is not collected on the extent to which that happens. Furthermore, there are no guidelines for meetings between judges and children, apart from some points set out in 2008 in O'D v O'D.[3] Herein, Abbott J. opined that judges should not seek to act as a child expert; the terms of reference should be agreed upon with the parties beforehand; the judge should explain the nature and purpose of the interview to the child, including the fact that children will not have a determinative say; the judge should assess

2 UN Committee on the Rights of the Child, General Comment No. 12, CRC/C/GC/12 (20 July 2009)(2009)

3 [2008] IEHC 469

"whether the age and maturity of the child are such as to necessitate considering his or her views"; and only speak to children in confidence if the parents agree. [4]

Though these points are useful, they are not comprehensive. They also fail to acknowledge that CRC Article 12 requires that the process begins with an assumption in favour of hearing children (instead of focusing on adult-centric concerns about securing the agreement of parents rather than on ensuring children's comfort and consent). [5]

Again, the Law Society submits that perhaps we could be guided by the UK in this regard, details of which are set out below. The Law Society notes the vision of the Bill to have specialist family law judges and submits that part of this training should include training in interviewing children directly in some cases.

Section 32/47 Reports

Section 32 of the Guardianship of Infants Act 1964 provides that the court can direct that an expert report ('Section 32 Report') be obtained on any question affecting the welfare of the child. It also allows for the appointment of an expert to determine and convey the views of the child.

Section 47 Reports can be ordered by the Circuit Court, or following an application by one of the parties to the case, subject to the courts agreement, and provides the court with information about issues that may be affecting the welfare of the child. They are usually prepared by a child psychologist, but can also be carried out by other professionals as authorised by the Circuit Court.

The Law Society submits that a panel of appropriately qualified professionals should be available to the court so that a report can be procured in every case, similar to Cafcass in the UK, and equivalent legislation needs to be introduced in Ireland to cater for this. There seems to be little uniformity in relation to the approach taken by assessors. This merits the creation of a list of accredited child assessors who would be obliged to carry out annual training so that they fully understand how to question and engage with children in these contexts. If an expert is appointed to prepare such a report, they should be able to provide feedback to the child, in a child-friendly way,

on what is happening in the process, ensuring they are informed and aware of developments. The child should be given an opportunity to express a view/wish. A number of meetings between the child and assessor may need to be accommodated throughout the court process.

Some children, even with this support, might like to meet and engage with the judge and this could be facilitated, but this exercise would be more so as the child could witness the decision-making process rather than the court gathering information or evidence from the child. Such professional services will satisfy the obligation to hear the views/wishes of the child. The child's active participation in the court process, subject to their age and maturity, is a further obligation that will require the professional to advocate effectively in the decision-making process. On much fewer occasions, children can join the proceedings and be allowed to participate with a legal representative, although this generally only happens when the child is over the age of 16. The design and funding of these professional roles will require careful planning and review. A reasonable fee structure also needs to be facilitated to allow for quality assessors to be appointed.

The UK System

In the UK, Cafcass is a dedicated service that has an independent role in advising the Family Courts, about what is safe for children and in their best interests. Cafcass was set up in the UK on a statutory basis in 2000, independent of the court, social services, and health authorities. Its duty is to safeguard and promote the welfare of children in the family courts.

Cafcass encompasses both private and public law cases and interestingly, it is the largest employer of qualified social workers in the UK. It replaced the UK GAL service and, unlike in this jurisdiction, it

4 See further Aoife Daly, "The Judicial Interview in Cases on Children's Best Interests: Lessons for Ireland" 20 *Irish Journal of Family Law* 3 (2017).

5 Ibid.

encompasses private family law cases. In contrast, our Child Care (Amendment) Act 2022 seeks to amend and extend the law as it relates to GAL in this jurisdiction. However, it is confined to children who are subject to care proceedings, young people in special care, and children detained under Section 25 of the Mental Health Act 2001. At present, the plan envisaged in this 2022 Act is to establish a National GAL service within an executive office which sits in the Department of Children. Therefore, children in Ireland interacting with the Family Courts diverge along two pathways, depending on whether they are before the courts in either public or private family law proceedings. This results in a substantially more fragmented model. Regrettably, we are lacking adequate infrastructure within which to standardise how Family Courts vindicate the rights of children under Article 42A of the Constitution.

Recently, Cafcass introduced new "welcome and goodbye" letters for use in public and private family law cases, with different versions for older/younger children. These are the types of tools which would greatly enhance keeping children informed of decision-making which may impact on their lives. In the UK these were devised following a consultation exercise with children. The Department should consider a similar exercise.[6] It is noted here that Barrett J. has been known to write letters in plain English to parents and children involved in family law proceedings, wider use of this approach should be incorporated.

With regard to Judicial Interviews, in England and Wales, the 2010 Family Justice Council Guidelines for Judges Meeting Children who are subject to Family Proceedings provides guidance for judges when meeting children. The guidance encourages judges to assure children that their wishes have been understood, to explain the nature of the judge's task, and to receive advice from the children's GAL or lawyer about when a meeting is appropriate. Judges are advised that the age of the child is relevant but that it should not be the sole determining factor in whether a meeting is offered. Where a meeting is refused, the judge is required to provide a brief written explanation for the child. The guidelines emphasise that the meeting is for the benefit of the child, rather than for another purpose such as gathering evidence. These progressive guidelines assist in ensuring that the meeting genuinely is for the benefit of the child involved and should be considered for adaptation to an Irish context.

Conclusion

Change is needed, not least because the Children and Family Relationships Act 2015 implements the right of children to be heard in proceedings that affect them. Yet, whether children can be represented by giving instructions, as opposed to a representation of their best interest, is unclear. Furthermore, the lack of clear guidance for judges meeting children in family law proceedings, outlined above, is a matter of concern. It has also been argued that children do not have sufficient visibility in proceedings in which their best interests are being determined and that greater priority should be accorded to their autonomy, considering the extent to which autonomy is valued in other areas of the law such as medical law and the rights of those with disabilities.

Currently, the voice of the child and the best interests of the child (as discussed below) are mainly dealt with by way of independent Section 32 or Section 47 reports prepared for the court. In some areas of the country, there are limited professionals available to prepare these reports and there are delays in obtaining them. Delays are exacerbated by the cost, which can be prohibitive, and Legal Aid Board clients (and others) struggle to make these payments, as they are not covered in total by their legal aid certificate. A panel of specialist family therapists/child psychologists should be available directly for this court work. In other jurisdictions, there are family court psychologists/therapists who are based in the court building or linked to the court specifically so it is not a separate task to source and fund these reports. These practitioners are specially trained and also retained for this purpose by the courts. This alongside specially trained Judges would assist in alleviating delay and also ensuring that these core principles are able to be implemented in a practical sense.

6 https://www.cafcass.gov.uk

In recent years, the state of Israel has successfully introduced a holistic system whereby therapeutic endeavours are used and there is a presumption that children will be involved in proceedings. This inclusive approach is of great interest in the Irish context. The Scottish children's hearings system is another unique model to consider for use in this jurisdiction. It uses a lay panel to establish the welfare needs of children in cases concerning childcare and criminal behaviour and brings children and families together in relatively informal hearings.

Regarding the principle set out in Sections 8(2) and 8(4)(b)(i) of the Bill, these provisions will only hold sufficient weight if resources are allocated to the provision of funding for services to enable the views of the child to be ascertained. Frequently, in private family law cases where the parties do not qualify for legal aid, parties simply do not have the funds to engage assessors under Section 32 of the 1964 Act. The cost of these reports is a significant burden on the parties who may not be able to afford these costs (typically, Section 47 reports can cost thousands of Euros).

While in theory, of course, a sitting judge can hear from the child directly, generally the judiciary has been reluctant to do so except in rare situations. Therefore, for this provision to be effective, significant funding needs to be allocated toward resources to provide for the effective implementation of this principle to ensure child's views experts are accessible to all.

The Law Society is of the view that consideration should be given to a service, such as Cafcass in the UK, being made available which can be accessed in every case where it is needed. This would require state funding, but if that is not put in place, the most vulnerable children will not have their voices heard. Questions are therefore raised as to whether Article 42A of the Constitution is being met, as ultimately, the requirement to hear the voice of the child in family law proceeding is not always vindicated as a result of resource constraints.

RECOMMENDATIONS

- The Law Society believes that consideration should be given to establishing a service to provide for more consistent use of GALs to ascertain the views of the child and prepare reports in an independent and child-focused manner. The Law Society recognises that further legislation may be needed to properly give effect to this endeavour.
- Section 8(4)(b)(i) of the Bill provides for ensuring that the "best interests of the child are a primary consideration". This section should be re-drafted so that the best interests of the child are the paramount consideration, in accordance with Article 42A of the Constitution.
- Hearing the voice of the child should be an automatic requirement in all proceedings, especially where there is no consensus between the parties on access/custody arrangements for that child.
- The ability of parties to family law proceedings to pay for Section 32/47 reports should not be a determinative factor as to whether same is commissioned.

2.2. BEST INTERESTS OF THE CHILD

As stated above, the Law Society welcomes the intention set in Section 8(4)(b)(i) of the Bill, that the best interests of the child are to be a primary consideration. However, concerns remain in relation to the extent to which this principle will actually be reflected in practice. The effectiveness of this principle is limited by how the system operates in reality and the lack of resources allocated. The current system is not equipped to allow for full implementation of this principle.

A checklist of factors in assessing the best interest of the child, similar to the 11 set down in the Guardianship of Infants Act 1964 (**'the 1964 Act'**), should be introduced into the Bill. Their inclusion would provide greater clarity in the application of this principle. Section 63 of the Children and Family Relationships Act 2015 deals with determination, by a court, of what is in the best interests of a child and inserts a new Part V into the 1964 Act.

The 11 factors at Section 31(2) of the 1964 Act, to which the court shall have regard in assessing the best interests of a child are:

(a) the benefit to the child of having meaningful relationships with each of his or her parents and with other relatives and persons who are involved in the child's upbringing;
(b) the views of the child;
(c) the physical, physiological, and emotional needs of the child;
(d) the history of the child's upbringing and care;
(e) the child's religious, spiritual, cultural, and linguistic upbringing and needs;
(f) the child's social, intellectual, and educational upbringing and needs;
(g) the child's age and any special characteristics;
(h) 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;
(i) proposals made for the child's custody, care, development, and upbringing and for access and contact, having regard to the desirability for parents or guardians to agree proposals and co-operate with each other in relation to them;
(j) the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives;
(k) the capacity of each person in respect of whom an application is made under the Act to care for and meet the child's needs, to communicate and co-operate on issues relating to the child and to exercise the relevant powers, responsibilities, and entitlements to which the application relates.

RECOMMENDATION

- A checklist of factors in assessing the best interest of the child, similar those set down in the Guardianship of Infants Act 1964, should be introduced into the Bill to provide greater clarity in the application of this principle.

2.3. ALTERNATIVE DISPUTE RESOLUTION (ADR)

Please note that this section will also include a discussion of other areas of the Bill where ADR is mentioned alongside the principles set out in the Guiding Principles section.

Section 8(2)(b) of the Bill sets the principle that alternative forms of dispute resolution ("ADR") should be encouraged over the traditional court system unless it would not be appropriate due to the nature of the proceedings. Further, Section 8(4)(a) provides that parties are to endeavour to resolve their dispute outside court, including through ADR processes. Sections 10, 24, and 39 of the Bill cover the place of ADR in High, Circuit and District Court proceedings.

In general, the Society supports the principles set out in Sections 8(2)(b) and 8(4) on the basis that it enshrines the aim of reducing the conflict and adversarial nature of family law proceedings. The Society is of the view that it is imperative, where possible, that family law matters are settled by consent or by ADR resolution. Mediation, for example, is an area where there is potential for greater flexibility in family law, particularly since the enactment of the Mediation Act in 2017. It has been recommended as an area for greater attention having regard to international practice and what would be possible in Ireland. [7]

The use of mediation and other ADR processes, where successful, appears to result in more amicable and enduring arrangements, and the attention of parents is more likely to be on children's needs.[8] It may facilitate families to explore options and solutions more openly themselves. Where parties enter into a mediation agreement, generally, such agreements can provide for parenting plans and wider detail than as set out in a Court Order. Parties who agree issues in mediation have a much higher possibility of retaining a working co-parenting relationship with the other parent in circumstances where children are involved.

Additionally, the Society recognises that where mediation is not fully successful, it could be used as a useful mechanism for narrowing the issues outstanding, thereby enabling parties to file a "statement of outstanding issues". If this route is taken, mediation and counselling services should be the first option that family court users encounter, either on entering the family court portal online or on entering a family court office. The mediation and counselling services offered should be extensive and should go beyond simply offering attendance at an information meeting but offer access to actual mediation and counselling services on the ground.

Significant questions arise around encouraging mediation if conceptualised as an alternative to legal aid.[9] It should be noted, however, that in England and Wales, separating couples frequently do not want to engage in mediation, opting instead to self-represent in court.[10] Generally, whether mediation is attempted or not is dependent on the views of the solicitor instructed and if the mediation certificates are signed without cause or thought. Therefore, having to set out in a Civil Bill, whether or not mediation has been attempted, should assist in focusing the minds of practitioners to meaningfully advise their clients of the benefits of mediation.

There may be merit in fast tracking mediated cases, as this which would make it more desirable for parties to engage in mediation, so that it becomes part of the culture of family law.

As a preliminary point, there appears to be inconsistency throughout the Bill where ADR is mentioned, in some sections only referring to mediation (see e.g. Chapter 2 Section 24(1)(b) which sets out that it should be included in the Family Law Civil Bill whether or not mediation has been attempted).

7 Law Society of Ireland, *Submission to the Department of Justice, Equality and Defence: Family Law – The Future* (Dublin: Law Society of Ireland, 2014).

8 Joan Kelly, "Children's Living Arrangements Following Separation and Divorce: Insights from Empirical and Clinical Research" 46 *Family Processes* 35 (2007), at 40.

9 Rachel Treloar, "The Neoliberal Context of Family Law Reform in British Columbia, Canada: Implications for Access to (Family) Justice" in Mavis Maclean, John Eekelaar and Benoit Bastard, eds., *Delivering Family Justice in the 21st Century* (Hart Publishing, 2015).

10 Rosemary Hunter, "Inducing Demand for Family Mediation: Before and After LASPO" 39 *Journal of Social Welfare and Family Law* 189 (2017).

Consent

ADR processes such as mediation are characterised by the parties' consent to the dispute resolution mechanism, neither Section 8(2)(b) nor Section 8(4)(a) of the Bill seem to clarify or overcome this requirement. Party consent is often a primary factor in advocating for ADR processes over the traditional courts system. Advice from legal practitioners and directions from judges can only go so far when it comes to ADR; it must always be up to the parties to freely consent to engage in ADR processes. Thus, such judicial or legal advice or direction must be conscious of not overtly undermining this consent. It is not clear what, if anything, can be gained from legal practitioners and judges having regard to the principle of encouraging ADR. If the parties to a dispute cannot consent to ADR, then having regard to this principle will make no difference.

Sections 10, 24, and 39 of the Bill refer to ADR within court proceedings under each jurisdiction. These provisions are silent on the issue of party consent. Allowing for the suspension of proceedings, at the motion of the judge or the request of parties, where the judge is of the opinion that mediation or another ADR process could assist in resolving some or all of the issues in dispute.

As far as ADR is presumed to be voluntary, and that parties have a constitutional right of access to the courts, if they choose not to avail of ADR it is unclear whether these sections enable judges to mandate that parties engage in mediation. Without clarification around whether or not party consent is a necessary pre-requisite, the breadth of this power and the impact of these provisions is unclear. Is ADR to be enshrined in the Bill in such a way as to enable judges to make it mandatory to engage in ADR processes? What would happen if the parties or one party refused to engage?

Additionally, the reference contained in Section 10 of the Bill to an obligation to cite attempts at mediation in the summons in certain proceedings, seems a somewhat onerous additional requirement given that solicitors in family law already have an obligation to swear a declaration which covers mediation, prior to issuing Judicial Separation and/or Divorce proceedings.

Informed consent

Mediation is not always possible and does not suit every case. There is, perhaps, an over emphasis on the benefits of mediation within the Bill. Where one of the parties cannot advocate effectively for whatever reason, mediation simply does not work. Furthermore, mediation is not suitable for a domestic violence application because of the risk of a power imbalance. In light of this, the Society welcome the inclusion in the relevant sections that ADR should only be encouraged where appropriate.

The Law Society submits that more needs to be done in terms of ensuring the parties are fully informed about ADR processes and the potential benefits of same. Information sessions could be held in situ in the District Court, Circuit Court, and High Court nationwide. ADR specialists such as accredited mediators, conciliators, and lawyers could provide such information sessions and adhere to a code of conduct. While they would not furnish legal advice in any specific case, they could provide information on ADR generally.

Often times lay litigants bring or defend cases which may have actually been suitable for mediation, especially in the District Court. If mediation is to be raised as a real alternative for families in conflict, it needs to be promoted at an early stage and even before the proceedings are issued. Moreover, the Mediation Service needs to be available and visible for people who are accessing the courts. While the Society recognises that this may be the case in some locations where there are on site mediation services, such as Dolphin House, it simply is not in other areas. This results in mediation not being considered in a meaningful way initially as a viable alternative to resolving conflict. Even if it is not a pre-requisite to issuing proceedings, some information or understanding of mediation should be available as part of the system but it must be a realistic, viable, and available option.

Accessibility of mediation is therefore very

important if the principle in Part 2 of the Bill is to have a meaningful impact. Logistics are an important consideration in deciding on areas for investment. For example, the closest Family Mediation Offices and Services to Cavan/Monaghan are in either Dundalk or Blanchardstown. Poor public transport makes accessing services very difficult and costly. If the mediation principle is to become embedded in family law reform, it has to be readily available. Currently, mediation is under-resourced. The Society is concerned by the lengthy waiting times for mediation in some areas: Laois (six months), Donegal (six months), Carlow (7 months) and Sligo (9 months).

Often while parties are engaging in mediation (usually in cases where there are assets, property, or pensions) legal advice will be required and this should be readily available in order to assist progress. Mediation has its benefits and could be used more extensively, in particular in routine private law access and maintenance matters. Where there are no child protection issues and where it is merely a parenting/access plan that is required or assistance given to parents to work out a co-parenting schedule, these cases could all be managed through mediation.

Where there is a mediation service based within the court service/in the court building, this could make this more accessible and a more realistic option. The District Court pilot scheme which was initiated a number of years ago to promote mediation has been very successful. The fact that the mediation services are housed in the same building is of great assistance. If all court buildings had a mediation service available on hand, Judges adjourning cases before them to allow mediation to take place could be facilitated more smoothly. The Law Society welcomes the model used in Dolphin House and in Limerick which is already being extended to other districts. It is a great example of staff, judiciary, and practitioners all working collaboratively to improve outcomes and, in turn, to ease the pressure on the parties, and ultimately, the lists.

Interdisciplinary training in mediation for family justice practitioners

The Society submits that the new Family Court structure must recognise and actively promote an interdisciplinary system to ensure effective communication between all the disciplines involved in family law e.g., medical, legal, education, guardians ad litem, and social services.
If the use of ADR is to be enshrined as a Guiding Principle to the new Family Courts system, there must be the promotion of a system of mediation training for family justice practitioners. This will assist in achieving the objective of meeting the particular needs of the users of the family court structure.

This interdisciplinary approach involves an acceptance that simply making a court order is not sufficient and that further work needs to be undertaken by specialists with a range of non-legal skills to ensure that the needs of clients are met. It would require a problem-solving court where, for example, judges would be in a position to order a mental health assessment. Without this type of addition, any new system remains as flawed as the current one.

However, many of our court buildings are not appropriate for family law and involve a lot of waiting around in a busy environment where the other party and many others are also waiting. To have other services also present (mediation, family therapists, maybe legal aid centres) would mean that the physical infrastructure would have to change also and the Society is concerned that that is unlikely. In light of this potential reality, at the least having some good signposting and information available when the Family Court is sitting would help court users to understand their options and the supports available.

Since the coming into force of the Mediation Act 2017, awareness has been raised among the profession generally, and family law practitioners in particular, of the need to discuss mediation with clients. Unfortunately, the delays in the family mediation service act as a deterrent and private

mediation may be too expensive for many clients. The optimum solution would be to invest resources in mediation and reduce the waiting lists. A system of filtering appropriate cases through mediation, supported by child experts, with access to the court would be very helpful. The possibility of judicial guidance could arise if certain issues became problematic. However, mediation should not be the only mechanism used to try to resolve disputes. Disputes are often resolved very effectively by the lawyers acting for both parties. The difficulty is that the vast majority of cases are settled very close to the hearing date. There is very little regulation of mediators, particularly in regards to their minimum standards of qualifications, which is an area that should be addressed. We note, in this regard, that the Mediation Act 2017 makes provision for a Code of Practice. In many cases, mediation can be assisted by the use of therapists and a panel of qualified trained therapists should be available to assist in issues relating to the children.

Conclusion

Ultimately, successful ADR processes can save time, cost, and protect relationships, but it is not a panacea in all cases. A balance needs to be struck between providing a more informal/less intimidating process for litigants and ensuring that respect for the court and the right of access to same is maintained. In this regard, the litigation umbrella under which our family law system currently operates is unsuitable and enhances the potential for conflict. A move away from that model is vital and that appears to be reflected in this principle.

It has often been emphasised that the common law adversarial system is highly unsuited for family law cases, as parents are focused on 'winning' and their disputes can be psychologically damaging for themselves and their children.[11] The binary nature of family law processes is also problematic for complex family situations. Children state that it is very important to them to have flexibility built-in to arrangements so that children themselves can seek to change them if they wish.[12] Yet, children are frequently unable to secure changes to private law arrangements[13], or to timelines imposed by the courts.

It is still unclear which system is better for family law and for proceedings concerning children in particular. This might only be clear on a case-by-case basis. Those in favour of a more inquisitorial system (for example, the Lord Chief Justice of England and Wales appeared to advocate such a change in 2014) point to decreased bitterness and the potential for economic savings as compelling factors[14]. However, those against it say it will not save money, as more judges will be necessary and that judgments will be delivered less considerately[15].

11 Joan Kelly, "Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice" 10, *Virginia Journal of Social Policy and the Law*, 129 (2002), at 131.

12 John Eekelaar, "The Interests of the Child and the Child's Wishes: The Role of Dynamic Self- Determinism" in Philip Alston, ed., *The Best Interests of the Child: Reconciling Culture and Human Rights* (Clarendon Press, 1994), at 42.

13 Judith Timms, Sue Bailey and June Thoburn, "Children's Views of Decisions Made by the Court: Policy and Practice Issues Arising from the Your Shout Too! Survey" (2008) 14 *Child Care in Practice* 257, at 268.

14 Owen Bowcott, "Inquisitorial System may be Better for Family and Civil Cases, Says Top Judge" *The Guardian Online* (4 March 2014).

15 Lorna Borthwick, "Why an Inquisitorial System for Family Courts Won't Work" *Halsburys Law Exchange* (12 March 2014). See also Adrienne Barnett, "Family Law without Lawyers: A Systems Theory Perspective" 39 *Journal of Social Welfare and Family Law* 223 (2017).

RECOMMENDATIONS

- ADR should be clearly defined in the Family Court Bill to include other forms in addition to mediation i.e., collaborative law, lawyer-assisted settlements, and arbitration. References to 'mediation' throughout the Bill should be changed to 'ADR' in order to harmonise the intention set therein.

- Additional clarity should be provided as to the place of party consent in general, and more specifically where a judge is of the view that the parties should engage in ADR processes. Regard ought to be had to the Constitutional right of access to the courts.

- A system of regulation for mediators should be introduced to ensure a uniform standard in the provision of mediation services.

- There are issues relating to power dynamics in relationships and children are often excluded from ADR. Therefore, the focus should be on ADR as a useful alternative mechanism for resolving family law disputes, not as a cost-saving measure.

- The Society believes that ADR should be actively promoted and facilitated, wherever possible, having regard to the facts and circumstances of every case and the needs of particular clients.

- Having a mediation service present and available at Family Court houses would greatly assist the implementation of this guiding principle. However, where this is not possible due to resource or structural constrains in the buildings, information should at least be readily available.

- Information sessions could be held in situ in the District Court, Circuit Court, and High Court nationwide. ADR specialists such as accredited mediators, conciliators and lawyers could provide such information sessions and adhere to a code of conduct, similar to that as has been done in Dolphin House.

2.4. ACTIVE CASE MANAGEMENT

The concept of "active case management" as a guiding principle is worthy if it assists in streamlining the court process and, in particular, if it focuses on the needs of children to have matters progressed in a timely manner. Correcting failure to adhere to time limits and word counts are two marked areas where this principle could be of assistance.

Timetabling and case management decisions must be child-focused and made with explicit reference to the child's needs and timescales. This recommendation should be underpinned by primary legislation as delay and drift have a profound impact on the welfare of children and families. A special case management court may be worthy of consideration.

Case management hearings should take place at the beginning of proceedings in order to set out dates for the filing of papers/documents leading to a final hearing date being assigned at the outset. The Society acknowledges that this may not always be possible, but the procedure could include an option to bring an application to extend time in cases where it is reasonable and necessary to do so.

A further option worthy of consideration is that cases could be given specific time slots to avoid large numbers of litigants waiting in crowded courthouses for prolonged periods. As part of the Courts Service modernisation programme, e-filing and e-court documents should be actively explored in family law matters to simplify the application/motion process and to minimise costs and time for both the Courts Service and practitioners.

This would result in discontinuing the use of call overs which would be replaced with case management hearings. There may also be merit in introducing pre-action protocols to ensure that mediation has been attempted where appropriate. Such an innovation would make the application process more user-friendly and accessible to lay litigants.

Additionally, settlement hubs were used to good effect for the settlement of Circuit and High Court cases in the past year, and this model could be further promoted. In fact, this is what happens in many cases but is often left to the day of the hearing with a last-minute rush to secure valuations and vouching of documents to settle matters before a court adjudication. This could be scheduled as part of a Case Management/Case Progression system so that parties are given the opportunity to have settlement talks in a calmer, measured environment than that which almost always prevails on the day of a hearing.

A significant number of issues in contention can and should be narrowed between the parties in advance. Negotiation is, or should be, a mainstay of the family justice system. Case management has to be more than just the exchange of vouching followed by the issuing of a notice of trial.

RECOMMENDATIONS

- In addition to each of the above recommendations in respect of case management hearings, dedicated time slots, e-filing/documents and pre-action protocols, the Society recommends inclusion of the following text at section 8(2)(b) of the Bill:

  "Section 8(b)(i) –
  In cases involving non-compliance with Court Orders, or concerns where non-compliance might arise, ensure active and regular case management to monitor, and take active steps to ensure, compliance with Court Orders."

- The Law Society recommends introducing a provision for the imposition of a cost sanction for unreasonable non-compliance with Court Orders, particularly in relation to child access matters. This provision could include a principle to narrow the discovery process as it can cause hearing delays and increase costs.

- The Law Society suggest that the scheduling of settlement hubs be considered as part of the Case Management/Progression system.

2.5. CONDUCTING PROCEEDINGS IN A FAMILY-FRIENDLY MANNER TO REDUCE CONFLICT, WAITING TIMES, AND MINIMISE COSTS

Conducting proceedings in a family-friendly way to reduce conflict and minimise costs is dependent on the availability and input of agencies and professionals who can provide accompanying services and assessments. How these essential components can be included as part of a new system needs to be clearly identified and planned for.
One of the significant obstacles which the Society envisages with the proposed reforms is resource issues including the physical infrastructure requirements of a new Family Law system. For example, the space to consult with vulnerable clients, especially in domestic violence or child care cases, is very important and many existing court buildings do not lend themselves to a level of privacy or respect.

It is not appropriate to have family law clients, especially victims of domestic violence or child care clients, waiting in courthouses for their case alongside criminal and civil litigation clients. If the State is advocating for a more child-friendly and family-focused court experience, then listing family law matters in the same court where criminal law matters are being dealt with is entirely inappropriate and not consistent with that aim.

RECOMMENDATIONS

- Appropriate facilities are required to facilitate family law proceedings and a holistic approach to proceedings must be adopted. This may include the availability of domestic violence services and waiting rooms which avoid situations where victims of domestic abuse often have to wait, sometimes for hours, in proximity to their abusers.
- Advocacy services for childcare clients or clients with impaired capacity should also be available in the court setting.
- Other practical matters which are necessary to ensure that child and family law matters proceed smoothly include: having translators and sign language interpreters within easy reach to avoid lengthy delays or adjournments when there are language barriers as well as providing sufficient private space for parties to consult with their legal representatives.

3. THE FAMILY COURTS

Part 8 of the Bill entitled Jurisdiction is also discussed in this section.

The most significant changes effected by the Bill to the Irish Family Courts system come under these sections (Sections 9-50 inclusive). Three primary changes to Irish family law are seen in these sections. First, it establishes a tripartite Family Courts system in Ireland, with concurrent jurisdiction between the newly constituted Family District Court, Family Circuit Court, and Family High Court. The second key change effected by the Bill, and related to the foregoing, is the transfer of some family law adjudication from the Circuit and High Courts to the District Court. Thirdly, the Bill provides for the appointment of a Principal Judge together with other specialist Judges at each level, who by virtue of their training or experience and temperament is a suitable person to deal with family law proceedings. Judges are to be assigned for a period not less than four years in the Family High Court and 3 years in the Circuit and District Courts.

Under Part 8 (Section 69) of the Bill, the District Court is given unlimited monetary jurisdiction in family law proceedings where consent to settlement has been reached. Alongside this, the District Court is granted jurisdiction under the Family Home Protection Act 1976 for the first time; and monetary limitations placed upon the District Court's jurisdiction under the Guardianship of Infants Act 1964, the Family Law (Maintenance of Spouses and Children) Act 1976, the Family Law Act 1981, the Judicial Separation and Family Reform Act 1989, the Family Law Act 1995, the Family Law (Divorce) Act 1996, and the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 are expanded considerably. The foregoing Acts concern the rights of families and the rights of children, two groups with discrete constitutionally entrenched rights under Articles 41 and 42A of the Constitution. Given the high constitutional value placed upon the interests of families and children, it is vital that adjudication upon their interests is particularly diligent.

While the High Court appears to retain its originating jurisdiction, Part 7 (Section 68) of the Bill, which confers concurrent jurisdiction on the Family Court, sets out that "an applicant should not initiate proceedings in the High Court without special reason to do so". It further enables the High Court to transfer proceedings to the lower courts and make an order of costs, where it may be more appropriate. In light of the marked increase in the jurisdiction of the District Court and the above requirement of a "special reason", it is anticipated that the foregoing matters will be heard in the Family District or Circuit Court and not in the High Court at first instance. This is with the exception of special care cases, adoption cases, and child abduction matters. The Law Society is of the view that the success of the new Family Courts will depend on allocating the correct cases to the appropriate Court, with the required additional resources concentrated on the relevant courts. The Bill seeks to create an overall structure and leaves the allocation of actual cases between courts as a matter to be addressed in subsequent court rules and regulations.

Whilst the Bill will admittedly increase specialisation of the High, Circuit and District Courts through the establishment of discrete Family Courts within the courts systems and through the appointment of specially trained judges, the Bill does not remedy the resource and capacity constraints imposed on the courts. In fact, through increasing the caseload of the District Court by permitting additional private family disputes to be heard at that level, the Bill is likely to exacerbate existing capacity constraints seen in the District Court. This is a particularly pressing issue and ever increasing in light of the ongoing war in Ukraine. Ireland is experiencing one of the biggest immigration waves and one which involves mainly young families with small children. Practitioners working with these foreign nationals have seen a significant amount of these individuals making applications to Family District Courts, mainly in relation to Domestic Violence, maintenance and access to children. This also brings other related family law applications to District Court. These practitioners are providing

consultations to Ukrainian and Russian nationals on a daily basis and have said that for the last 10 years they have not had so many enquiries in relation to family law, most of which relate to District Court applications and are from recently arrived persons. Therefore, it is submitted that this immigration development has to be taken into account when considering new District court jurisdiction and new nature of District court applications.

The Bill does not go so far as to require judges appointed to the Family Court to undergo specific training. The Society is of the view that it ought to be an explicit requirement that Family Court's judges undergo specific training or courses as was included in Head 6 (8) and 11 (8) of the General Scheme, as may be required by the Judicial Studies Committee. This would protect against the potential for inconsistencies in the depth of understanding held by each judge and thus inconsistencies in approach.

The creation of concurrent jurisdiction causes some concern. However, there is an exception to this, as the Bill also provides that the Circuit Court shall have concurrent jurisdiction with the District Court in cases under the Child Care Act 1991. This is a very welcome change, which will hopefully both free up time at the District Court to give the attention which is due to cases under the 1991 Act; and will ensure that in particularly sensitive public child care cases, the parties will receive due consideration at the Circuit Court.

On analysis of the totality of the Bill, it is suspected that the jurisdictional changes it proposes will likely do more to congest the adjudication of family law matters than it will to relieve the endemic capacity constraints within the Family Courts System. In particular, the Society is of the view that more clarity is needed between cases originating in the District and Circuit Court.

3.1. PART 3 - FAMILY HIGH COURT

Sections 9 – 18 of the Bill deal with the establishment, constitution, and jurisdiction of the Family High Court. Section 10 which deals with jurisdiction sees a change to how it was originally imagined under Head 17 of the General Scheme of the Family Courts Bill (September 2020), hereafter the General Scheme, which sought to limit the jurisdiction of the High Court.

It appears from Section 10(1) that the High Court retains its original and inherent jurisdiction. This will include exclusive jurisdiction in areas which were already provided for in the following acts:

(a) The Adoption Act 2019;
(b) The Child Abduction and Enforcement of Custody Orders Act 1991;
(c) The European Communities (Decisions in Matrimonial Matters and in Matters of Parental Responsibility and International Child Abduction) Regulations 2022 (S.I. No. 400 of 2022);
(d) Part IVA of the Child Care Act 1991.

The Society welcomes this change to the original draft, therefore, presumably this means that both Judicial Separation and Divorce cases can be brought in the High Court, at first instance, where it is appropriate to do so. However, it is submitted that the language in Section 10 is somewhat opaque and may give rise to confusion as to the circumstances in which family law matters can commence in the High Court.

However, Part 7 Section 68 is of concern to the Society. This section stipulates that proceedings should not be initiated in the High Court, "without special reason to do so" and, this section indicates an intention to introduce cost penalties where proceedings are initiated in the High Court where they could have been initiated in one of the lower courts. This provision appears to seek to limit the number of cases initiated at a High Court level and leans in favour of initiation at a District or Circuit court level. The courts will need to be cautious not to interpret this section in too narrow a manner and restrict parties' constitutional right of access to the court.

The Law Society is against the idea of cost penalties of this sort as it could work against fair settlement of proceedings and only serve to delay agreement. Additionally, the Society notes that this would run contrary to the intention set in Section 8 outlined at 2 above.

Over-reliance on the District or Circuit Court could serve to relegate family law to an inferior status when compared to every other area of the law. There are certain cases which, due to their complexity and value, require special consideration and the allocation of significant volumes of time which is simply not possible in the District and Circuit Court due to the volume of cases being heard. There does not appear to be a clear rationale for this decision, which may significantly hamper the operation of the District and Circuit Court due to the volume of court time needed to hear these cases. The Society believes that the High Court operates very efficiently in the area of family law, and the weekly housekeeping list allows matters to progress in an efficient manner. There is consistency, in that there is a sitting Judge with a support Judge, which provides a certain predictability as to outcomes, which, in turn, informs decisions and often assists in the early resolution of cases.

In addition, the benefit of jurisprudence from Family High Court decisions must not be overlooked. District Court or Circuit Court judges rarely have the time to issue written judgements. Practitioners regularly rely on High Court decisions to advise their clients appropriately. If the jurisdiction of the High Court is concentrated toward hearing points of law or appeals only, the loss of wider jurisprudence has the potential to prejudice the practice of family law. Moreover, altering the jurisdiction of the High Court may have constitutional implications. In this regard, Article 34.3.1 of the Constitution provides that the High Court enjoys "full original jurisdiction in and power to determine all matters of law or fact, civil or criminal".

Section 17 deals with the Family High Court on Circuit. The Society welcomes the inclusion of a system whereby the High Court would sit in prescribed appeal towns "not less than once in every year". However, with a view to ensuring greater access to the Family High Court on Circuit is facilitated in practice, the Society proposes that more concrete direction may be necessary beyond this vague timeframe.

RECOMMENDATIONS

- Clarity is needed on what would constitute a "special reason to do so", when assessing the appropriateness of originating proceedings at High Court level. This requirement must not be applied in too stringent a manner so as to restrict the Constitutional jurisdiction of the High Court under Article 34.3.1 and the parties right of access to the courts under Article 40.3.1.
- Clarity is needed in the wording of Section 10 and the circumstances in which family law matters can commence in the High Court.
- The current jurisdiction of the High Court in family law matters should be retained.
- More direction may be necessary with regard to the Family High Court on Circuit. Perhaps the Family High Court could sit in a different regional centre for one or more weeks per law term. Additionally, two-three weeks per law term should be allocated for hearing appeals from the Circuit Court in civil and family law matters.
- Costs penalties are inappropriate in the context of family law proceedings and the implication of same runs contrary to Section 8 of the Bill.

3.2. PART 4 - THE FAMILY CIRCUIT COURT

Sections 19 – 35 of the Bill deal with matters relevant to the establishment, jurisdiction, sittings, and proceedings in the Family Circuit Court. Many of the issues in these sections mirror those in Part 5 which covers the Family District Court. Therefore, to avoid repetition, the relevant sections of the District Court provisions will be noted alongside those of the Circuit Court, when the same issues arise.

Jurisdiction of Family Circuit Court and Exercise of same by Judges (Section 20 and 22) (Section 37 and 41 Family District Court)

A slight anomaly is created under this section in that jurisdiction can be extended to another Circuit, either on application of a party to the proceedings or by the judges own motion, where it is believed to be in the best interest of the child whose welfare is the subject of the proceedings. Outside of this, jurisdiction may also be exercised in another Circuit where the child or another party to the proceedings has a connection and where the Judge believes it is appropriate to do so.

There remains a lack of clarity as to what 'connection' means in this context.

If the aim of this section is to protect the best interests of the child, and in light of the judgement of Horgan J in CFA v LH and CC[16], where she sets down that, "*where a child's rights conflict with a parent's rights, the child's interests will always take priority*", it does not appear to be appropriate that proceedings could be transferred in circumstances where 'another party to the proceedings' has a 'connection'.

This provision potentially leaves the courts open to forum shopping. Further, if proceedings were to be transferred on foot of one party to the proceedings connection, is there a potential for the other party then to claim unfairness/prejudice?

The Society notes their previous support for the draft version of this section under Head 8 and 13 of the General Scheme. Under this, jurisdiction could be extended to a circuit in which a child whose welfare is the subject of the proceedings has, or had, a connection, or a circuit in which a previous order has been made in the same proceedings. The welfare of the child appears to be the guiding factor in the exercise of this discretion to transfer proceedings. From a practical point of view, this inclusion was very much welcomed.

Equally, the measures set out in Section 22(3)(a) and (b), which provide that a Judge may make an order outside of their circuit, where they are satisfied that the circumstances of the case require such an order be made as a matter of urgency, are helpful from a practical perspective. The provision for the making of Orders outside of the applicable circuit, or indeed outside of the court, in urgent cases is

16 [2017] IEDC 17

RECOMMENDATIONS

- Clarity is needed as to what 'connection' means.
- Consideration should be given to only enabling the transfer of cases where it is in the best interests of the child, whose welfare is the subject of the proceedings, in line with the judgement in CFA v LH and CC and Article 42A of the Constitution.
- More clarity is needed over circumstances where a judge can make an order outside of their circuit.

welcomed as it allows for enhanced access to justice in appropriate situations. However, in the interest of fine-tuning, these provisions are still quite vague. It is unclear under what circumstances this can happen and at whose application. Is not clear whose jurisdiction would take precedence if there was a conflict of ideas between the judge making the order and the judge charged with carriage of the case. Section 22(3)(b) empowers judges to, within their own circuit, make an order or give a direction which they otherwise would not have the power to make. It is unclear what orders are meant, where they do not otherwise have the power to make them.

FUNCTIONS OF THE PRINCIPAL JUDGE OF THE FAMILY CIRCUIT COURT (SECTION 21) (SECTION 43 FAMILY DISTRICT COURT)

This section sets out that the Principal Judge may make recommendations to the President of the Circuit Court in relation to the number of judges to be assigned and the places for holding sittings of the Family Circuit Court in or for any Family Circuit Court circuit. As with the section below, the Society queries whether there ought to be provision for consultation with the Court Service and user groups in relation to this provision so as to ensure a fair, equitable and logical spread of judges across the Circuits.

Proceedings in the Family Circuit Court (Section 24) (Section 39 Family District Court)

This section covers the place of ADR within Circuit Court proceedings. Issues arising are discussed above at 2.3 under the Guiding Principle Section.

Sittings of the Family Circuit Court (Section 25) (Section 40 Family District Court)

The Society supports this provision which envisages sittings of the Family Circuit Court not only in a different building, which would be the preferred model, but also in a different wing/part of the court building with its own entrance and separate facilities.

This section provides that if the Family Circuit Court is not in a different building, then it could instead take place on a different day or in a different room. Restructuring of the current court sittings would be required, as a number of smaller courthouses are not being used, particularly since Covid-19. In order to deal with the resulting backlog, the court is sitting for criminal and civil matters most days of the week. Separate buildings or additions to buildings would be required with separate Judges to undertake the work.

Section 25 notes that family law proceedings should be held in a different building "or a different room" to other court sittings. There is a concern that this

provision will facilitate the preservation of the status quo in the event of limited resources being made available to introduce much needed change. This may result in attempts to list Family Law matters separately but the reality is that unless the infrastructure and buildings are developed in some areas, families will not be given the space to deal with matters in a way that respects the sensitive nature of their situation.

It is an important consideration that sittings of the family court are held in a different building or room from that in which sittings of any other Court are held. Unfortunately, it is not unusual, particularly in provincial courts, that crime and family sittings would take place at the same time/venue which cannot continue if we are to provide a humane response to citizens at a vulnerable time in their lives.

Section 25(1)(a) makes provision for one of the most important improvements envisaged under the new family law system; the physical separation of the family courts from all other courts and court business. Clearly, separate family court buildings would be preferable, but resources may mean that a separate day will be the reality for many circuits and districts. In light of this reality, perhaps more clarity is needed around what type of proceedings can be held in the same building but just a different room.

Section 25(2)(b) allows for derogation from this direction, where the safety or welfare of a party to the proceedings or a child to whom the proceedings relate is likely to be adversely affected if the matter is not heard urgently, and urgency requires that the proceedings commence notwithstanding that they are in the same room as other proceedings.

However, in circumstances where much of the success or failure of the Bill rests with being adequately resourced, it seems that there will be a period of time between the Bill coming into force and the actual court buildings and resources being made available. In those circumstances there is a concern that these Sections could adversely affect family law proceedings in the intervening period. Many of the court buildings throughout the country are not adequately resourced and do not have the facilities to allow for different courts to sit in different buildings or rooms on different days and in the circumstances this should not be a barrier to a family law matter being dealt with.

Quite often in practice, judges in the District Court will facilitate the hearing of a family law case by entering it into a civil list which is beneficial to the parties of the family law proceedings. This section must not operate to prohibit this practice. While it is appreciated that exception can be made, it is contingent on the matter being urgent or there being a safety or welfare issue with one of the parties or a child relative to the proceedings. These Sections could have an unintended consequence which would have the effect of delaying family law matters.

RECOMMENDATIONS

- Clarity is needed on what constitutes 'urgency' under this section.
- These Sections should not operate to unreasonably restrict judges capacity to hear family law matters within their civil lists, where faced with the reality that the particular court building is not adequately resourced to facilitate different courts to sit in different buildings or rooms on different days.

Creation and alteration of Circuit Family Court Circuits (Section 26)(Section 45 Family District Court)

Although this is not ideal, if consolidating the number of smaller court circuits into larger circuits means that services can be provided such as mediation, voice of the child/welfare experts/ family therapies in a focused, holistic setting, then it may be the best available option. Rather than having numerous court circuits that do not provide the services required it would be preferable to have a more centralised circuit court that does. While resources must of course be considered, it is vital that sufficient regard will also be had to public transport and appropriate waiting facilities.

Certain members of the Law Society from provincial courts, for example in Kerry, are particularly concerned about the alteration of court circuits. We would ask the minister to be cautious of any move to what might be called centres of excellence, similar to that which is proposed for the assisted decision-making regime. Separate from the issues this would create for practitioners, there would be very significant hardship for the litigants involved. There could also be cost difficulties in bringing expert witnesses further to give their evidence. On this basis, it is suggested that any alteration/creation of circuits be based on the current District and Circuit Court circuits. Where there would be a move towards centralising hearings, in ease of administration costs, the Law Society notes no issue with same from a High Court point of view. However, this could have negative implications from a Circuit and District Court point of view.

Currently, family court users may have to wait for five to six hours for cases to be called on. There is also a lack of private consultation rooms and often instructions are taken outside the court building in full view of the general public. This situation cannot continue. This is particularly so if we are committed to protecting citizens at the most vulnerable time of their lives.

RECOMMENDATIONS

- The Law Society believes that we need to be more creative and ambitious in the services we provide to clients. For example, services such as family therapy or mediation sessions may be offered online. Also, the availability of electronic filing of documents and video links for adjournments/call overs may reduce the need for frequent travel.
- The Law Society believes that the new District and Circuit Court areas should be determined following a consultation process with key stakeholders.
- The Law Society remains to be convinced that it is prudent to include a stipulation requiring each area of a certain identified size/per capita to have access to a family court within that area.
- The Law Society is of the view that the division of these new circuits should be based on the current Circuits and Districts.
- Where Circuits and Districts are merged with others for family law purposes, the presiding Judges should still be travelling to locations across those Districts and Circuits to hear cases rather than having hearings centralised.

As previously outlined, the Law Society believes that we need to be more creative and ambitious in the services we provide to clients in family law matters. For example, services such as family therapy or mediation sessions may be offered online. Mediation services could also have more localised satellite offices so they could be more accessible to court users.

Also, the availability of electronic filing of documents and video links for adjournments or call overs may reduce the need for frequent travel, which will be addressed later in more detail.

This provision is necessary for the operation of a specialised Family Court subject to there being sufficient circuits appointed. It is unrealistic to expect that every provincial court would become a Family Circuit Court if this were not feasible in terms of resources. That said, the decision surrounding the location of the geographical Circuits should, of course, take account of necessary public transport links. Furthermore, the Law Society is of the view, as is the case with the District Court section on same (sections 44 and 45 of the Bill), that the division of these Circuits ought to be carried out by the Courts Service in consultation with Courts Service user groups so as to ensure any reconfiguration will be done in a way as to ensure a fair, equitable and logical geographical spread.

Assignment of a Principal Judge of the Family Circuit Court (Section 28)(Section 47 Family District Court) and assignment of Judges to the Family Circuit Court (Section 29)(Section 48 Family District Court)

While ultimately the Law Society supports the assignment of specifically qualified judges to the Family Courts, as set out in the introduction to this section, it is lacking in terms of setting a requirement that judges appointed to the Family Court must undergo specific training. The Society is of the view that it ought to be an explicit requirement that Family Court's judges undergo specific training or courses as was included in Head 6 (8) and 11 (8) of the General Scheme, as may be required by the Judicial Council. This would protect against the potential for inconsistencies in the depth of understanding held by each judge and thus inconsistencies in approach.

Section 28(6) enables the Principal Judge of the Family Circuit Court, from time to time, at the request of the President of the Circuit Court to sit as a judge of the Circuit Court. There is a risk that this could lead to issues of availability and distract the Principal Judge from their duties. Perhaps it needs to be laid out in the Bill which role is to take precedence if a conflict arises, with regard to the caseload of the Family Circuit Court at that time.

RECOMMENDATIONS

- The Law Society believes that the Bill ought to create a stronger requirement that the Principal Judge and Judges of the Family Courts undergo specific training as a pre-requisite to taking up appointment or at the time of appointment. This should include training on and with the other agencies, which will be available in a holistic family courts system and ADR processes within the sphere of family law. This should include training on conducting a judicial interview with a child.
- Clarity is needed as to the circumstances in which the Principal Judge can move to sit as a judge of the Circuit Court, albeit temporarily. The duties of the Principal Judge with regard to the Family Courts should take precedence.

The Society notes in passing that the Bill does acknowledge that family judges will at the same time still be entitled to exercise all of the functions of judges generally. A concern is that this still leaves the door open to An Garda Síochána and the State to bring matters before the judge on a day they are sitting as a family law judge. In practice this has from time to time resulted in, on the few family days allotted, the family proceedings being delayed as a result of somebody being brought before the court on a remand or bench warrant etc. It would be desirable that family law courts must be nothing other than a family law court, it should not be open to the authorities out of convenience to bring somebody before the family court just because the judge is available.

Assignment of persons to act temporarily as an additional Judge of the Family Circuit Court (Section 30)(Section 49 Family District Court)

This section enables the President of the Circuit Court, in certain circumstances, to assign one or more ordinary judges of the Circuit Court to temporarily act as a judge of the Family Circuit Court or to hear an individual application. Flexibility of this sort is a welcome and necessary component of ensuring the caseload of the Family Court does not fall into arrears. However, issues of practicality and training arise. How will this work in circuits where there may only be one judge appointed to the Circuit Court? Further, as these judges may not be specifically trained, could this lead to injustice on the part of the parties whose cases are being heard by these temporarily appointed judges?

RECOMMENDATION

- If this section is to be enacted, it might be prudent to include a provision for additional support to be provided to such judges by a party specifically trained in family law/ childcare matters.

3.3. PART 5 - THE FAMILY DISTRICT COURT

Sections 36 – 50 of the Bill deal with matters relevant to the establishment, jurisdiction, sittings, and proceedings in the Family District Court.

Establishment and Constitution of the Family District Court (Section 36)
This development is particularly welcome in respect of District Court hearings, particularly in circumstances where in provincial District Courts, frequently there may be criminal law matters held at the same time as family law matters which is not easy on the litigants. Thus, having a dedicated family structure and one which will treat family law separately to other areas of law will serve to protect litigants especially in these most vulnerable cases.

The establishment of a Family District Court needs to be properly resourced, both in terms of infrastructure and personnel. There are some concerns, as have been previously raised, in respect of access to justice if centralised courts are established around the country. These concerns can be mitigated by giving local District Courts jurisdiction to deal with emergency applications.

The principle of access to justice is recognised as a basic human right in our legal system, our Constitution, the European Convention on Human Rights, and other international instruments. The concept has evolved over time in our justice system. A democratic nation must provide citizens with a means by which to enforce their rights, entitlements, and obligations and to have same enforced against them. However, a functioning justice system requires a reasonable method of accessing that system, in terms of cost, physical and geographical access, and access to representatives. Justice cannot be so far removed from the reach of citizens as to make it prohibitive.

The European Court of Human Rights, in the case of *Ashingdane v. UK*[17] stated that "*...a limitation [on access to justice] will not be compatible with Article 6, Paragraph 1 (Art.6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved*".

RECOMMENDATION

- The establishment of a Family District Court needs to be properly resourced, both in terms of infrastructure and of personnel. There are some concerns regarding access to justice if centralised courts are established around the country. These concerns can be mitigated by giving local District Courts jurisdiction to deal with emergency applications.

17 *Ashingdane v. UK*, Application No. 8225/78 [1985] ECHR 8, at 57.

Creation and alteration of Family District Court Districts (Section 45)

Whilst this section is substantively similar to Section 26 covering the Family Circuit Court, a welcome difference is that under this section, Family District Court divisions are made by order of the Courts Service as opposed to the Government. However, the requirement that the Courts Service consult with Courts Service user groups is still not explicitly included.

Further, it remains to be seen in terms of the geographical location of these specialised family law Courts as to whether they will continue to provide ease of access to justice. Special consideration will need to be given, particularly in relation to the family law District Courts to provide for ease of travel in remote areas where litigants may not have access to their own transport.

Assignment of a Principal Judge of the Family District Court (Section 47 Family District Court) and assignment of Judges to the Family District Court (Section 48 Family District Court)

The assignment of specifically trained judges is particularly welcome with regard to the District Court, as frequently in District Courts in particular, there can be a series of visiting Judges each of whom hold different views with regard to access, maintenance etc. and have different requirements particularly in relation to access and Section 32 reports. It can be difficult therefore to advise a client what to expect in those circumstances. Having a dedicated family law court system with assigned family law court judges who are specially trained will certainly assist with the consistency and management of family law.

4. PART 6 - FAMILY LAW RULES COMMITTEE

Section 51 inserts new Sections 72A, 72B, and 72C into the Courts of Justice Act 1936 ('the **1936 Act**') to provide for the establishment, composition, functions, and powers of a Family Law Rules Committee (Section 72B) or, alternatively, Family Law Sub-Committees (Section 72C) of the existing Court Rules Committees. It is for the Minister to decide between the two options.

The Law Society welcomes the establishment of a new Family Law Rules Committee (**"the Committee**") to assist in overhauling the court procedures and forms. This is an important provision which should assist in ensuring rules are coherently and consistently applied in all courts throughout the country. A streamlined application of the rules is long overdue.

The work of the Committee will have a profound impact on how the family court system operates day-to-day. Any jurisdictional reorganisation should complement the procedural overhaul to be undertaken by the Committee. The potential for improvement of the family law system through the work of the Committee in terms of accessibility, efficiency, potential for early resolution, minimisation of potential for conflict and reduction of costs, cannot be overstated.

The Society submits that it could be worth considering creating one single Family Rules Committee. Section 51 unusually provides an 'either or' scenario where either one Family Law Rules Committee sets rules for all jurisdictions or otherwise each Rules Committee sets up its own sub-committee to deal with family law. If real harmonisation of practices in family law are to take hold, then we need one Rules Committee.

An example in family law of the difficulties of having different rules for different jurisdictions arose in the case of DK *v Crowley* [2002] 2 IR 744 in which the Supreme Court held that interim barring order procedure as set down in section 4(3) of the 1996 Act was unconstitutional. In fact, the Circuit Court Rules

had implemented this Section in such a way that it was constitutional while the District Court Rules had not. Had there been harmonisation of approach then it would have avoided this problem. The Supreme Court commented on the difference between the District and Circuit Court Rules treatment of the same section 4 of the 1996 Act,

> *"It is noteworthy that, in contrast to the provisions in the District Court Rules, 1997, the Circuit Court Rules (No. 1) (Domestic Violence Act, 1996), 2000, expressly require the applicant to issue a motion on notice returnable not later than eight days following the granting of ex parte relief seeking the same relief and provide that any ex parte orders obtained are to lapse upon the expiration of eight days following their having been made, unless the court otherwise directs."*[18]

Further, the Court stated that,

> *"The court has already noted that the Circuit Court Rules expressly provide that an interim barring order granted on an ex parte application is not to remain in force for longer than eight days. It is understandable that, in the light of the considerations already referred to, the rule making authority should have considered it appropriate to include that limitation. The fact remains that no such limitation is contained in the District Court Rules. It may be that this was because the rule making authority were doubtful as to whether such a time limit would have been intra vires the parent statute. The court, however, finds it unnecessary to surmise whether that was the reason for not including any such provision in the Rules or, indeed, whether the corresponding rule in the Circuit Court Rules was ultra vires the parent statute.*[19]"

It is interesting to contrast the fundamentally different approach of the District and Circuit Court Rules committees to the same section [4] of the 1996 Act. The Law Society is not saying the proceedings should be identical in each jurisdiction as there are obvious reasons why pleadings are different in jurisdictions, particularly within the District Court. However, there should be a harmonisation of approach. If it was decided to proceed in this direction, the Crowley case would be one case of assistance in the family law area.[20]

RECOMMENDATIONS

- The Law Society believes the Family Law Rules Committee should consider, as a matter of priority, the development of e-filing infrastructure and the use of technology for remote hearings for case management matters. As mentioned previously, this recommendation takes on an added impetus in the context of the (previously mentioned) two EU Regulations which became binding in July 2022 and makes e-filing the norm in cross-border child and family law cases (per Regulation 2020/1783 and Regulation 2020/1784).
- The Law Society is of the view that the work of the Committee will be pivotal in determining the success of the proposed family court system. In this regard, the composition of the Family Law Rules Committee should be expanded to meet the increased demands that will be imposed on the Committee.
- The Law Society suggests that there be consideration given to the creation of one single family rules committee.

18 *DK v Crowley* [2002] 2 IR 744 at Page 756.

19 Ibid at Page 761.

20 *DK v Crowley* [2002] 2 IR 744

5. PART 7 - MISCELLANEOUS

Training and education of Judges of Family High, Circuit, and District Court (Section 59)

Recalling the issues raised at Part 3 with relation to the training of judges of the Family Courts, this section potentially remedies concerns over the lack of specific requirement in Sections 29 and 48 of the Bill. This section stipulates that judges shall undertake training courses as required by the Principal Judge of each court in consultation with the President of that court and the Chief Justice. Notwithstanding this section, it is still desirable that requirements surrounding specific training of Family Court judges is set out more clearly in the Bill.

Pending proceedings under certain enactments (Section 66)

Section 66 provides that, where cases under the Judicial Separation and Family Law Reform Act 1989, the Family Law (Divorce) Act 1996 or the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 are pending before the Family Circuit Court or Family High Court, the Family District Court may hear and determine other family law proceedings involving the same parties or relating to the same children where it is in the interests of justice that those proceedings be heard before the other pending proceedings.

This provision must be welcomed as, to date, practitioners have been relying on case law with regard to due jurisdiction such as *AM v Justice Hartnett* and *KL v Judge Ni Chondhuin*. This regularly arises in circumstances where perhaps a domestic violence application has been brought in the District Court and subsequently divorce or separation proceedings issued in the Circuit Court, prior to the domestic violence being dealt with by the District Court. Section 66 brings clarity to situations where the Family Law District Court may sit to hear and determine other family law proceedings involving the same parties, who are the subject of such proceedings, where the Family Law District Court is satisfied, in the circumstances of the case, and in the interests of justice, that it is necessary to hear the other proceedings prior to the proceedings which are before the Family Law Circuit or High Court. This section provides consistency regarding those situations whereby domestic violence applications are brought prior to Circuit Court applications being initiated or indeed it provides for ease of access to the District Court to deal with issues such as access and maintenance pending the overall resolution of the issue.

6. PART 8 - JURISDICTION

There must be consistency and clarity on the jurisdiction of each court in private family law matters. In this regard, under the Scheme, nullity cases are not transferred to the District Court while separation and divorce matters can originate in the District Court. It is difficult to envisage how a District Court could afford the time necessary to deal with contested hearings for separation and divorce while simultaneously dealing with the usual District Court applications concerning access, maintenance, guardianship, and domestic violence. This could lead to a delay in the progress of cases which usually fall under the remit of the District Court.

The Law Society is concerned about expanding the jurisdiction of the District Court due to the volume of cases currently before the District Family Court in comparison with the Circuit Court and High Court. There are also more concerns with expanding the jurisdiction of the District Court which were set out by the Law Reform Commission in its *Report on the Family Courts* 1996 at paragraph 4.19, page 29:

> *"[F]undamental issues relating to the status of persons are not appropriate for determination at District Court level. Some further explanation is required. It was not intended to suggest that District Judges lack the qualifications or capacity to make such decisions. Indeed, it is important to recognise that, in the context of child protection and domestic violence, the District Court already has powers to make far-reaching decisions which may indeed have a fundamental and long- term impact on family members and their relationships. However, we remain of the view that, as long as the District Court remains a court of "summary jurisdiction" with considerable limitations in its jurisdiction generally (i.e., not only in relation to family law), it would appear, to say the least anomalous to confer upon it a comprehensive family law jurisdiction. Further, given the status and the high level of protection guaranteed to the family and its members, especially under Articles 41 and 42 of the Constitution, it would be objectionable to confer a comprehensive jurisdiction in respect of family law matters on a court of summary jurisdiction. On the other hand, it should be noted that the legislature has already gone far in the extent of the family law jurisdiction which it has conferred on the District Court."*

The Law Society restates its concern over the increase in the jurisdiction of the District Court to hear Divorce, Judicial Separation and Co-habitation cases, as envisaged in the Bill, where the value is under one million Euro. It is difficult to see without significant resources being applied towards the appointment of numerous new District Court Judges how the District Court system will be able to manage the enhanced jurisdiction and addition of workload set out under the legislation. In effect, the Law Society is concerned that this would result in a complete bottleneck at this end of the system, and it would potentially increase delays instead of alleviating them as hoped.

RECOMMENDATION

- The current jurisdiction of the District Court should not be extended, particularly in relation to Judicial Separation, Divorce, Cohabitation and Civil Partnership.

Jurisdiction of Family District Court in consent cases (Section 69)

This section is welcomed in circumstances where the parties have reached a consent and there is a consent agreement for ruling. This will provide ease of access to many practitioners and litigants in circumstances where they may have reached an agreement through mediation or alternative means, and it provides for a quick resolution of the proceedings.

While there is an overall concern as to the imagined increase in jurisdiction of the District Court, this is not the case when it comes to consent cases, especially with regard to divorce and judicial separation proceedings. The rationale for this is based on the assumption that a Family District Court Judge would only deal with family law and child care cases and that the jurisdictions proposed are similar to the current Circuit Court jurisdictions. Currently the Family Law District Court in Galway sits twice a month and might have 60 cases per day, Castlebar is the same. The Family Law District Courts in Tuam, Loughrea and Ballinasloe only sit one day a month. This means the judges' workloads would have to decrease dramatically so they would have capacity to take on consent divorce and judicial separations. In Norway, the lower courts similar to the District Courts have jurisdiction to grant divorces, which seems to be successful.

It is submitted that it could be worth considering setting up a separate procedure for divorce hearings where applications are on consent and the parties do not have children or any shared assets. While the joint application procedure is noted, it is submitted that creating a new procedure in these types of cases would increase the capacity of the courts. In many countries, there is a separate procedure for such cases, and some are before the judge much quicker than divorce applications where provisions have to be made regarding children or property. The proper provision safeguard would still be in place; however, these cases could be heard by the judge much quicker than other joint applications.

Transfer of proceedings from Family District Court to Circuit Court(Section 70) and (Section 71)

This section provides that a judge of the Family District Court can order for proceedings to be heard instead at the Circuit Court, due to special circumstances in the proceedings (these can be found in practice directions issued by the Principal Judge of the District Court). While in the main this power is of practical importance, again, this section is inherently problematic as it points to the desire set in the Bill that more cases be heard at the District Court level; concerns surrounding this have been set out above. There is also a concern that the Court's ability to transfer a case to a more appropriate Court i.e. from District to Circuit or vis a versa, of its own motion may lead to a certain amount of chaos, and indeed further delay for the parties and their families. Much greater clarity is needed on the criteria for commencing proceedings in both the District Court and Circuit Court. There are many instances where cases can be transferred upwards or remitted downwards.

It is not clear from the Scheme whether, in circumstances where a case has been transferred from the Circuit Court to the District Court, there is a power to vary a previous order made by the Circuit Court. While clearly, a District Court cannot vary a Circuit Court Order, under the transfer of proceedings this may have practical implications and could lead to difficulties.

While the provision includes helpful practical considerations such as the transfer of proceedings to the Circuit Court (due to the complexity of the issues and value of the land), the Law Society believes that the District Court jurisdiction should not be extended, this is particularly so in relation to Judicial Separation, Divorce, Cohabitation, and Civil Partnership Cases.

As an incidental further point observed from practice, in family law or childcare cases concerning the welfare of children where there is a significant risk to life or limb, or where there is a suicidal child, this should result in mandatory

transfer of the matter to the High Court, from either the District Court or Circuit Court. It is submitted that such a transfer of jurisdiction would ensure that appropriate decision making with the greater resources of the High Court is made in these sensitive and difficult cases.

RECOMMENDATIONS

- Greater clarity is needed on the criteria for commencing proceedings in both the District and Circuit Court.
- Clarity is needed on what may be considered special circumstances.
- Provision should be made whereby an application can be made, in exceptional cases, to transfer cases from the District Court and/or Circuit Court to the High Court. The Society is of the view that this is particularly important in cases where there is significant risk to life or limb, or where the child is suicidal. The Law Society submits that there should be a provision for mandatory transfer to the High Court in these instances.
- The Law Society respectfully suggests that perhaps it may be useful for members of the Oireachtas to undertake a visit to Dolphin House, Phoenix House and the Bridewell Courthouse, prior to imposing any further work on these courts.

Restriction on the power to transfer under Sections 70 and 71 (Section 72)

Section 72 restricts the powers under sections 70 or 71 so that a judge of either the District or Circuit Court cannot transfer proceedings to the other court where they have already granted a decree of judicial separation, divorce, or dissolution of a civil partnership. This restriction applies only to orders made under Part II of the Family Law Act 1995, Part III of the Family Law (Divorce) Act 1996 or Part 12 of the Civil Partnerships Act 2010.

This is disappointing in circumstances where it operates to restrict the possibility for access and maintenance to be remitted to the District Court. As was the case historically, it should be possible under statute to remit access and maintenance matters to the District Court after a decree has been made. This will provide for an ease of enforcement particularly in relation to private clients in terms of maintenance and access. There is a significant prejudice between legal aid clients and private clients, particularly in relation to enforcement matters of maintenance whereby Circuit Court has granted an order for maintenance, in order to enforce that maintenance, the parties have to reapply to the Circuit Court for the enforcement procedures. With private clients they have to essentially weigh up the cost of the financial legal fees involved versus the arrears of maintenance, whereas the power to remit issues limited to access and maintenance to the District Court would provide for far speedier and cost-effective enforcement mechanisms particularly in relation to maintenance.

RECOMMENDATION

- The ability to remit access and maintenance matters to the District Court should be maintained in all circumstances.

Amendment of Guardianship of Infants Act 1964 (Section 75)

This provision substantially expands the powers of the District Court in guardianship matters, by considerable increasing the monetary jurisdiction of the Court in same. The expansion of these monetary limits is welcomed, whereby the increase of child maintenance to €500 a week from €150 and a lump sum greater than €50,000 and, the increase for provisions of spousal maintenance from €500 to €1,5000. This will provide the most cost effective applications in terms of maintenance etc.

Amendment of Section 10 of the Family Home Protection Act 1976 (Section 76)

It is noted that the District Court shall not have jurisdiction in proceedings under this Act where the market value of any land to which the proceedings relate exceeds one million. However, the Society is of the view that District Court jurisdiction should be limited to consent matters or enforcement of access and maintenance matters after a decree has been granted in the Circuit Court. Again, as set out it is difficult to see how the District Court service would be in a position to manage the additional and significant workload created under the legislation by virtue of the enhanced jurisdiction of the District Court to grant such orders on a contested basis.

Further, the introduction of Section 32 reports has had the effect of clogging up an already backlogged District Court system. Quite often in the District Court it is taking up to 18 months to 2 years to deal with access/safety order applications, for example. Section 32 reports are now being directed in the majority of cases where access is sought, irrelevant

of the issues at hand, which is adding to lengthy lists and using up much of the court resources. In light of this, it is difficult to see how the District Court has the capacity to deal with Divorce applications. Many of the District Courts have one sitting per month and have a list in excess of 70 cases to be dealt with in one day. To add Divorce applications together with other applications to this list would have the potential to compromise the administration of justice.

Amendment to Section 12 of the Child Care Act 1991 (Section 82)

Whereas under the 1991 Act currently, the Circuit Court only has jurisdiction to hear and determine proceedings under Part III [emergency care orders], IV [care proceedings] or VI [children in the care of the Child and Family Agency] (and summary proceedings for an offence under s.23NP) on appeal from the District Court; the Bill grants concurrent jurisdiction to the Family Circuit and Family District Courts under Parts III, IV and VI; whilst still requiring that summary proceedings under s.23NP are only heard at the Family Circuit Court by appeal from the Family District Court.

In general, the Society is of the view that the issues to be determined before the Court are so fundamental and have such lasting impacts on the families before the Court that those issues should more appropriately be determined by a higher court than the District Court. However, the practical reality of the nature of child care litigation means that practitioners need speedy access to accessible courts on an almost daily basis. The Law Society's Family and Child Law Committee has experience of dealing with child care matters around the country, and while those in Dublin and Cork are lucky to have dedicated Judges who are familiar with the law, and are also willing to deal with matters very regularly on an urgent basis, even those Courts that don't have this system available are able to manage effectively to ensure that the rights of children and their families are protected (for the most part). In light of this reality and the current climate, the Society is of the view that Child Care proceedings are best placed to be dealt with at the District Court.

If there is to be a concurrent jurisdiction, further work would need to be done. Firstly, in adequate judicial training specifically for this role and secondly, the Circuit Court would need significantly increased accessibility that currently affording. For instance, currently in Dublin, if there is an appeal to the Circuit Court, persons generally have to wait a year for an appeal to come on for hearing.

In addition to this, the Assisted Decision Making (Capacity) Act 2015 was commenced on 26 April 2023, which increased the caseload thus making the Circuit Court more difficult to access.

Another issue is that the Bill is silent on how to determine when a matter should be litigated in the District Court and when a matter should be litigated in the Circuit Court. The Principal Judge of each jurisdiction is authorised to make a practice direction, but it may be helpful to have some idea of what is envisaged before the current system is changed. It is noteworthy that in the amendment to Section 12, it is clearly envisaged that an application for an Emergency Care Order will only be made to the Family District Court.

7. FURTHER RECOMMENDATIONS

7.1. THE USE OF MODERN TECHNOLOGY

The Society believes that Section 8 of the Bill should make specific reference to the promotion and use of technology to assist in remote hearings and the e-filing of papers, in particular in respect of centralised Circuit Courts so as to ease the issue of access to those Courts. There should also be a specific objective to reduce, where possible, the requirement for parties to attend in-person, particularly in respect of procedural and similar applications. The proposed Bill provides a unique opportunity to modernise the Family Court system from an IT perspective and to consider whether a Family Court Cloud might be developed for filing papers and guiding individuals (lawyers or lay litigants) through the process in tandem with offering appropriate other services. The Society believes that such an approach would ultimately save time and money and would assist in the transfer of cases to the most appropriate venue (be that the Circuit or District Court) and may also reduce the necessity for case management hearings.

Recent developments at EU level provide further impetus for change. Two new EU Regulations became binding in July of last year, which makes e-filing, e-communication, and e-transmission the norm (rather than the exception) in cross-border child and family law cases[21]. The Covid-19 Pandemic produced an unexpected but welcome momentum in enhancing the use of technology in the work of legal practitioners, with many experiencing its transformational benefits to the running of legal practices. Arguably, technology could be utilised to a greater degree in the family courts, at the very least in relation to administrative type hearings such as case progressions. The Society welcomes the fact that it is envisaged that the new court system will incorporate the use of technology in a fundamental and comprehensive way, both in relation to administrative type hearings but also in terms of how the new family court offices operate, making particular provisions for electronic filing of certain documents.

Many types of applications can take place on a remote basis. For example, Consent Rulings, Procedural Applications, Consent Non-procedural Applications, Case Progression, Case Management and List to Fix Dates. This could also apply to the ruling of routine Pension Adjustment Orders, although in Dublin at present, they are being ruled by the Judge in Chambers which is working well. Remote hearings are not suitable for contentious cases and contested interim applications. That said, during the pandemic, virtual court call-overs have been successful as have court attendances via video link for litigants in custody. Facilities such as video links can be used more often in certain circumstances beyond criminal law. In recent months, the District Court has also allowed practitioners to have matters adjourned on foot of an email to the office (subject to written consent from all parties). The foregoing innovations can save time and reduce costs for the parties. In the intended new Family Court rollout, the limited number of Family Court buildings may require technology-based outreach for certain purposes.

Technology could be used to issue applications and for the service of proceedings. The necessity of a document such as a Family Law Civil Bill needs to be re-evaluated in the context of facilitating online application forms which can be completed easily and then filed electronically with the court. This could significantly reduce solicitor time, court time and costs. Section 39(1) of the Bill provides the opportunity, perhaps, for new forms/processes for issuing proceedings. A more streamlined and simpler procedural process could reduce the amount of practitioner, Courts Service and judicial time required in proceedings.

It may be prudent to examine the process used in the jurisdiction of England and Wales and elsewhere to see whether access to the Family Court system can be simplified for each Court user, whether it is a solicitor instructed in a matter, or a lay litigant, acting on his or her own behalf. At present, there are a number of documents to be filed in the context of any given family law matter. These documents tend to be less complex for the District Court, with

21 EU Regulation 2020/1783 deals with taking evidence and EU Regulation 2020/1784 deals with the service of documents.

layers of complexity added depending on whether the matter is being litigated in the Circuit Court or in the High Court. The position is even more complex for the non-marital family parties, many of whom may find themselves issuing a number of different types of proceedings under various statutes, in order to seek relief in respect of their children, property and finances. It is submitted that many lawyers find family litigation cumbersome to navigate and the task is even more arduous and complex for lay litigants.

A simple question and answer form could be completed by each new applicant (or solicitor) in order to commence a family law matter. Alternative dispute resolution (ADR) could be built into this model such that the individual user would be given information about personal counselling, relationship counselling, addiction services, parenting advice, mediation, and collaborative law while navigating the first phase of the Family Court portal. It may be that a small financial payment would be required in order to actually issue proceedings to avoid multiple applications or abuse of process. The Family Court portal could be a means of ensuring that the totality of a dispute between any given set of parties is dealt with by the same forum, rather than having a situation whereby the same parties can litigate separate issues in three different courts simultaneously – which can occur at present in highly litigious cases. This portal could be developed to enable the parties to upload essential documents such as the marriage certificate and birth certificates of their children. Declarations as to the truth of an affidavit of means and/or affidavit of welfare could also be provided for together with a function enabling the uploading of financial documentation, vouching and other proofs. Where a child expert is required, this could be considered by inserting relevant questions. Likewise, the form could contain a list of the various reliefs sought and indeed each party could tick a box indicating the precise grounds for an application. Moreover, the respondent could complete his/her form online.

The service of documents could be examined but it would likely involve giving the respondent notice of the private log-on details to access the forms that have been served on him/her through the portal. It is submitted that a well-designed set of questions would ensure that cases are managed appropriately at every stage of the process. Unless waived by the parties, an order for discovery of 12 months vouching documentation should issue in every case. A fast-track system could be considered for parties who reach agreement. Early dates should be considered

RECOMMENDATIONS

- Development of a cloud-based document management system should be considered for family law cases at District Court, Circuit Court, and High Court level.
- Some of the Superior Courts have dealt with cases on the basis of pleadings being available online with great success and this is a matter that the Courts Service should be asked to invest in.
- Separately, there should be a similar cloud-based document management system for the Appellate Courts. While this submission focuses on family law at first instance, it does not intend to diminish the importance of decisions of precedent value which emanate from the Court of Appeal, the Supreme Court and indeed, the High Court, on appeal.

for a round table assessment of progress made in negotiations together with early case management/ progression. The ratio contained in the Supreme Court decision of *G v G*[22] needs to be applied at all levels in the family court system to ensure that family proceedings are not unnecessarily protracted and that, wherever possible, a genuine effort is made, both by lawyers and clients, to resolve matters by agreement.

7.2. THE PROVISION OF FACILITIES AND SUPPORTS AT THE NEW FAMILY COURTS

The 2019 Joint Committee on Justice and Equality Report on Reform of the Family Law System highlighted the fact that many of the Court buildings and resources are "not fit for purpose with major issues of overcrowding and environments that are unsuitable for children and the sensitivity of family law proceedings". Currently, both the District Court and the Circuit Court have burdensome caseloads. Covid-19 clearly created even greater difficulties. It is submitted that these difficulties are exacerbated by the poor state of the physical infrastructure. The 2019 Report found that: "Key ancillary services and agencies, such as legal aid and mediation services, as well as the courts and courts offices, should all be housed under one roof. Accommodation should incorporate appropriate areas for private consultation, child and welfare assessment services, ADR facilities, child-friendly spaces, crèche facilities, disability access and supports and guides for navigation through the process for lay-litigants. Translators should be readily available to courts to avoid lengthy delays when there are language problems."

Conducting proceedings in a family-friendly way to reduce conflict and minimise costs is dependent on the availability and input of agencies and professionals who can provide accompanying services and assessments. How these essential components can be included as part of a new system needs to be very clearly identified and planned for. One of the significant obstacles which the Society envisages with the proposed reforms is resource issues including the physical infrastructure requirements of a new Family Law system. For example, the space to consult with vulnerable clients, especially in domestic violence or child care cases, is very important and many existing court buildings do not lend themselves to an acceptable level of privacy or respect.

All lawyers bar rooms should be equipped with appropriate facilities for remote working such as printers, scanners, and photocopiers, so that

22 [2011] IESC 40.

settlement terms can be typed and provided to the parties and to the Judge in that form.

There needs to be sufficient space and designated consultation rooms for settlement negotiations as the current practice is simply outmoded, unacceptable and rife with potential for breaches of the Data Protection Act 2018 and the in camera rule. For instance, in Phoenix House, Dublin, adequate rooms for the number of parties involved in proceedings are rarely, if ever, available. Consideration needs to be given to how best to provide some form of privacy to the parties. The Bill highlights the importance of mediation/non-adversarial options. In this regard, every courthouse should have dedicated mediation/collaborative rooms to facilitate such meetings.

A Public Announcement system should be installed in every courthouse in the country to call family law cases or to announce when the Judge is doing a call-over.

It is imperative that supports are available for families when attending family courts. A holistic programme which could provide information, mediation, court, and other services such as counselling, a contact centre to support access and parenting support to children and families would work best.

Some courthouses have mediation services and frequently the Judge refers parties to that service to mediate and to revert when they have reached a settlement for a ruling. It should be possible to provide a service within the court setting to arrange to meet with parents and children outside court and, if necessary, provide a short report to the court recommending arrangements to try to resolve issues between the parties. Referrals from such a service could be made to psychologists (if required) and domestic violence services.

Having specialist Child Court Liaison Officers, a support service such as Cafcass, domestic violence services, and a team of experts readily available to the court for parenting capacity assessments, attachment assessments and child welfare reports, would be helpful. If possible, all agencies and services should be housed under one roof (or, at a minimum, signposting should be available to assist the public to access all these services in the family justice locations). The prior involvement of the Probation Service proved to be a great asset for the District Court.

RECOMMENDATIONS

- Appropriate facilities are required to facilitate family law proceedings. This may include the availability of domestic violence services and waiting rooms that avoid situations where victims of domestic abuse often have to wait, sometimes for hours, in proximity to their abusers. A holistic approach to proceedings must also be adopted.
- Advocacy services for child care clients or clients with impaired capacity should be available in court settings.
- Other practical considerations which are necessary to ensure that child and family law matters proceed smoothly include having translators and sign language interpreters within easy reach to avoid lengthy delays or adjournments and providing sufficient private space for parties to consult with their legal representatives.

7.3. KEEPING CHILDREN INFORMED IN THE FAMILY COURT SYSTEM

Divorce and judicial separation are not one-off events. Children will have many questions before, during and after proceedings have concluded. We could therefore consider those various stages and what supports could be provided. The following are some suggestions:

1. Written information should be provided about parental separation in all its forms in the following:
   - Schools;
   - Libraries;
   - GP surgeries;
   - Mediation centres;
   - Citizens Information Centres; and
   - Child and Adult Mental Health Services.

Such information could provide children with neutral and informative advice from a trusted source. Parents themselves can be overwhelmed by the emotional turmoil of a separation. For the children, it leads, at least temporarily, to a major disruption in their daily lives which can impact their education; friendships and even their mental health; so, having information readily available is key.

2. We need to review the impact of technology and the internet in relation to the provision of information about separation and divorce and consider setting up safe 'hubs' to be accessed by children. This needs to be undertaken by a trusted source, for example with pro bono support from law firms and/or the Legal Aid Board. There can be a confusing mass of information. Therefore, the setting up of a trusted source/resource for children could prove very effective.

3. Parents should be provided with access to interdisciplinary resources in the Court venue itself. This could take the form of a one-off consultation with legal advisors, mediators and/or guardians *ad litem*.

4. Guardians *ad litem* have a very significant role in hearing the voice of the child. Their capacity to assess what is happening for children can provide judges with invaluable information to assist the court in its decision-making process. At the moment, as stated earlier, the GAL system is largely unregulated. When regulated, all children should have a GAL appointed so that the principle, that all children should be heard in cases which impact them, is put into practice. Currently, in private law proceedings, the burden of financing a report falls on individual parents. If they cannot pay, as previous stated, the child's voice is not heard which is in breach of international treaties, domestic legislation, and our Constitution. All children who are the subject of proceedings should be given the choice to be heard. In public law cases, GALs should be appointed in all cases where children are the subject of care proceedings. Those proceedings will affect one of the most important issues for a child i.e., whether they live with, or are removed from, their family.

5. The legal system could benefit from information from other systems of thought, for example, educators; mental health specialists; GPs and GALs. This could ensure that we develop, in practice, an interdisciplinary approach so that the legal system does not remain the dominant force. This could, in turn, benefit those children impacted by court proceedings.

6. It would be helpful to review over time what works and what does not. Therefore, pilot studies should be conducted by academic institutions to look at what methods and strategies are most effective. This could be achieved by interviewing all the participants in the family justice system, including children, as to their experiences and what might have improved matters for them.

7.4. EMPLOYMENT OF SPECIALIST CHILD COURT LIAISON OFFICERS

The 2019 Report recommended the employment of specialist child court liaison officers to provide procedural information and support to children and families during the course of family law proceedings. This aspect is not covered by the Bill.

General Recommendations

Any new Family Court structure must recognise and actively promote an interdisciplinary system to ensure effective communication between all the disciplines involved in family law e.g., medical, law, education, guardians *ad litem* and social services. Restructuring of the family law court without the involvement and promotion of a system of interdisciplinary information sharing will not achieve the objective of meeting the particular needs of the users of the family court structure.

In private family law matters, key services should be available to permit family law judges to refer couples or parties to skilled personnel to:

- draw up parenting plans;
- carry out parenting capacity assessments;
- deal with anger management programmes in domestic violence cases;
- monitor custody and access orders when they break down and facilitate their restoration;
- engage in family therapy; and
- implement supervised access orders.

This interdisciplinary approach involves an acceptance that simply making a court order is not sufficient and that further work needs to be undertaken by specialists with a range of non-legal skills to ensure that the needs of clients are met. It would require a problem-solving court where, for example, judges would be in a position to order a mental health assessment. Without this type of addition, any new system remains as flawed as the current one.

The key ancillary services referred to earlier in this submission are an essential part of any new family law court system and the success of this approach, when introduced at District Court level as part of the Dolphin House initiative, demonstrates the value of having a variety of agencies (such as legal aid, mediation services and the courts and courts offices) under one roof.

The new family courts should be located separately from existing courts with sufficient rooms for private consultations and a welfare assessment service to support public and private family law proceedings. ADR facilities should be located in the new family law courthouses.

Experts in the area of attachment, child development and the impact of abuse ranging from neglect to sexual abuse should be provided to judges who are allocated to deal with childcare matters in light of the fact that decisions made by these judges have lifelong consequences for children and families.

8. CONCLUSION

While the overall objective of this Bill is commendable, there are significant concerns arising on what the Society might term as the "*Gap in Resources*". The Bill pre-supposes the existence of suitable venues for family law matters to be heard at each level within the court system. The Bill also pre-supposes the existence of a purpose-built IT system or Family Court Cloud, through which the parties, their lawyers and the judiciary would have ready access to the papers and forms relevant to each matter. Most importantly, the Bill pre-supposes the existence of a suitably qualified panel of regulated professionals who are properly trained in interviewing and assessing children in the context of family law proceedings. The Bill imagines that such a facility is available to each family coming before the court.

It is apparent that heavy investment in infrastructure, IT, and provision of a panel of child experts (including regulation of same) will be required at all levels of the Family Court, if the true objectives of this Bill are to become realisable. It is submitted that the current workloads experienced at District and Circuit Court level could not sustain the imposition of the heavier workload anticipated by this proposed legislation.

The guiding principles contained in the Bill will become a false promise to litigants and their families where there is no change to the family court infrastructure. Changing the name of each court without provision of appropriate resources will not solve the problem. Ireland must invest the resources necessary to ensure that its family court system is fit for purpose and the aspirations set out in the Bill are implemented in reality.

The new Family Courts system should ensure that the requirements set out under the United Nations Convention on the Rights of the Child, the Council of Europe Guidelines, and other international standards are met, while implementing a holistic approach to family law proceedings. Overall, the Law Society welcomes the proposed reforms to the family law system but would advise for each of the aforementioned recommendations to be considered.

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