

**Hot Tips in Family Law from Ireland**

This is a can't-miss conversation with top practitioners and jurists about developments in the family law field. Stay on the cutting edge and learn about what the latest changes to court practices, court rules, new forms, and recent decisions will mean to attorneys and their clients.

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April 11, 2024

# The Science of Addiction: How Substance Use Impacts Parenting

*Balancing Safety and Access*

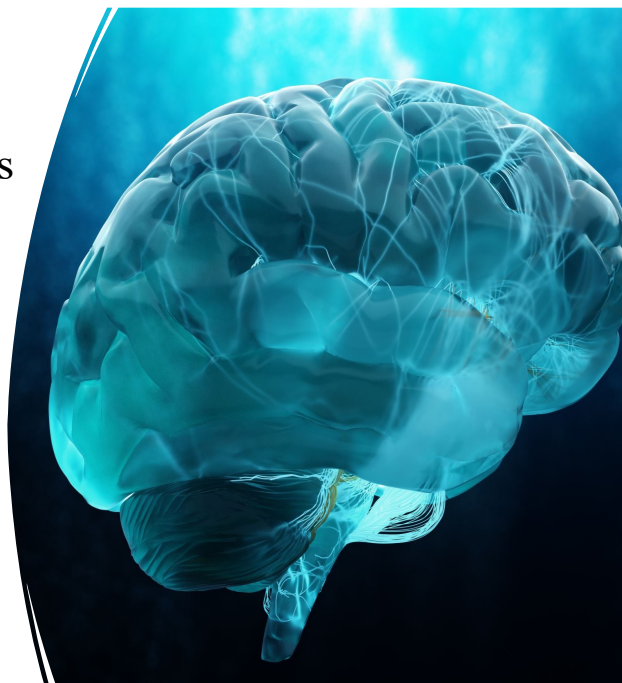
Stephanie Tabashneck, PsyD, JD  
Harvard Medical School, Center for Law,  
Brain and Behavior  
Harvard Law School, Petrie-Flom Center



MASSACHUSETTS  
GENERAL HOSPITAL



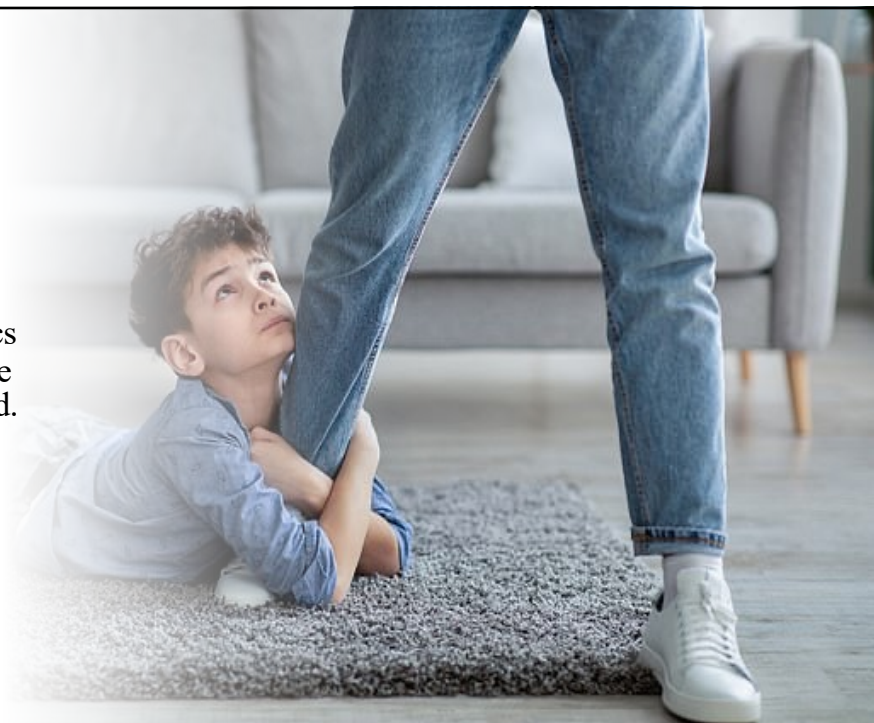
HARVARD MEDICAL SCHOOL  
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## The Problem: Uncertainty

When cases with  
substance use dynamics  
come to court, it can be  
unclear how to proceed.



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## The Problem: Uncertainty

- Is the parent still using substances?
- When did the parent last use?
- If the parent is in recovery, for how long?
- Will the parent relapse?
- Will the relapse/recurrence occur in front of the child or when the parent is caring for the child?
- How can the child be protected?
- The child wants to return home – is it better to return the child home or keep in foster care?

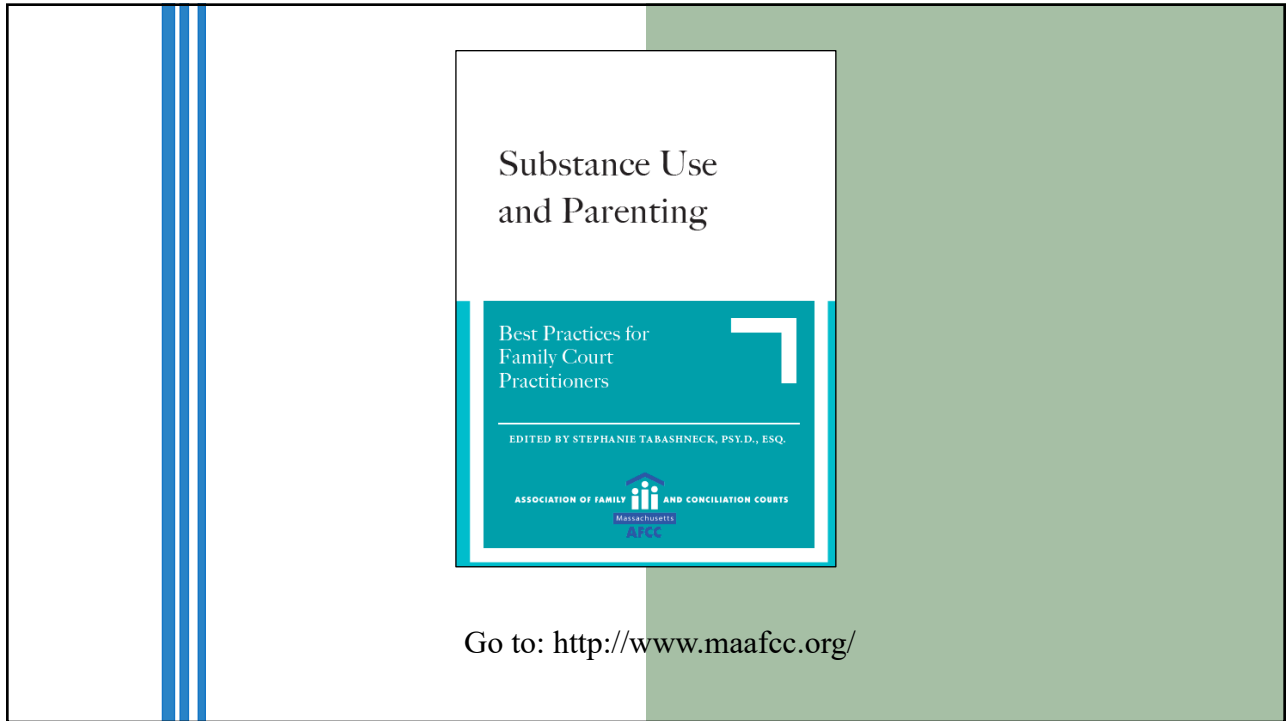
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## *Beyond Addiction: How Science and Kindness Help People Change*



by Jeffrey Foote, Carrie Wilkens , et al.

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1 in 7 people will develop a substance use disorder at some point in their lives.

The infographic features a row of seven stylized human figures holding hands. The first six are grey, and the seventh is red. To the right, the text '1 in 7 people' is displayed, with '1 in' in a red circle and '7 people' below it. Below this, the text 'will develop a substance use disorder at some point in their lives.' is written in a dark blue font.

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Coronavirus pandemic: isolation, social stress, financial stress, employment-related stress, boredom, worry about the future

The illustration shows a woman in a red shirt sitting at a desk with a laptop. A child is on the floor to the left, and a dog is on the floor to the right. The background is a blue wall with a window showing silhouettes of people. The scene is filled with abstract, chaotic lines and shapes, suggesting stress and isolation. The artist's name 'Nathalie Lees' is visible in the bottom right corner of the illustration.

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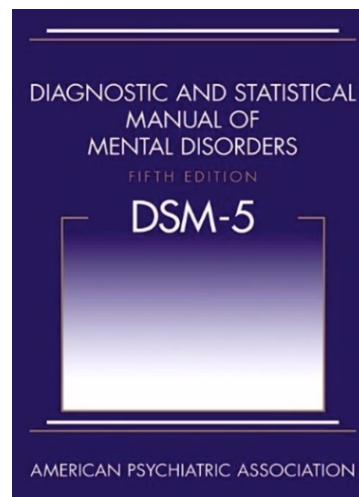
## Racism in Enforcement of Drug Laws

Studies indicate that Black and Latinx individuals experience discrimination at every stage of the criminal justice system, including increased likelihood of getting:

1. Stopped or detained
2. Searched
3. Arrested
4. Charged
5. Charged with mandatory minimums
6. Convicted
7. Harsher sentences

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## What is a Substance Use Disorder?



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DSM-V: Diagnostic Criteria for Substance Use Disorder

<b>AMOUNT</b>	<b>ACTIVITIES</b>
Take the substance in larger amounts & for longer than intended.	Stopping or reducing important social, occupational or recreational activities due to substance use.
<b>CONTROL</b>	<b>HAZARD</b>
Want to cut down or quit but are unable to.	Continually using the substance in physically hazardous situations such as driving under the influence.
<b>TIME</b>	<b>HARM</b>
Spend large amounts of time obtaining the substance.	Consistently using the substance, despite knowledge of the substance causing persistent or recurrent physical or psychological problems.
<b>CRAVINGS</b>	<b>TOLERANCE</b>
Experience cravings or strong desires to use the substance.	Building a tolerance — the need for markedly increased amounts of the substance to achieve the desired effect, or a markedly diminished effect with continued use of the same amount of the substance
<b>OBLIGATIONS</b>	<b>WITHDRAWAL</b>
Repeatedly unable to carry out major obligations at work, school or home due to substance use.	Feeling withdrawal symptoms – as either a characteristic syndrome or when the substance is used to avoid withdrawal.
<b>SOCIAL</b>	
Continuing to use the substance despite persistent or recurring social or interpersonal problems or harm to relationships.	

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## Key Principles

- Consensus in medical and scientific communities that substance use disorders should be treated like other chronic conditions
  - Like other chronic diseases such as heart disease or asthma, this is an issue with the chemicals and receptors in the brain
  - There is a genetic component
  - Treatment for drug addiction usually isn't cure but addiction can be managed



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## Key Principles

- Relapse is often a part of SUD
- Improper treatment, stress, and unmanaged co-occurring conditions can increase relapse risk

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1. All people who use drugs are addicted
2. People addicted to drugs use drugs to get high
3. People who use drugs can quit whenever they want
4. People need to hit “rock bottom” to get treatment
5. People need to want treatment for it to work
6. People need to 100% abstain from drug use to get treatment
7. “Interventions” are the best method to get a person into treatment
8. Treatment should only need to happen once
9. People who are addicted to drugs are bad, weak people, relapse is a personal moral failure – they’re not trying hard enough
10. A person must have insight into their substance use problem to make progress

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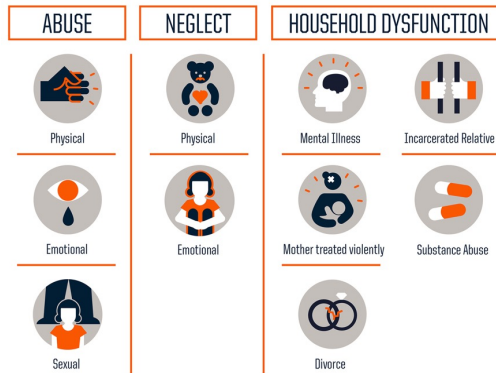
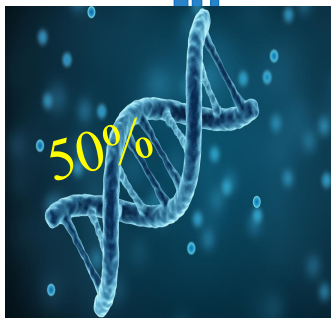
**MYTH**

It's only progress if they're abstinent

- Goals should be reachable and should not revolve solely around abstinence
- Other important incremental goals may include:
  - a decrease in use
  - changes in frequency of use
  - decrease in potency of the drug used
  - increased safety of use
  - open communication about use
  - acknowledging that things are challenging

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SUD Risk Factors: Genetics + ACEs\* + Early Use



\*ACES = Adverse Childhood Experiences

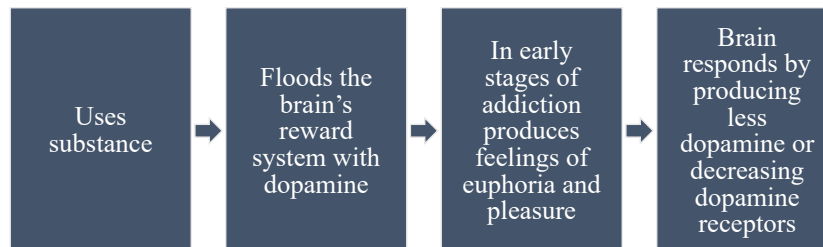
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## The Neuroscience of Addiction



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## Neurobiological Effects of Addictive Substances



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# Why SUDs Impacts functioning: Neurobiology

Disruption of the brain's reward circuit produces powerful cravings and a blunting of pleasure in other areas of one's life

Use of the addictive substance is experienced as more satisfying than other experiences typically perceived as pleasure-inducing

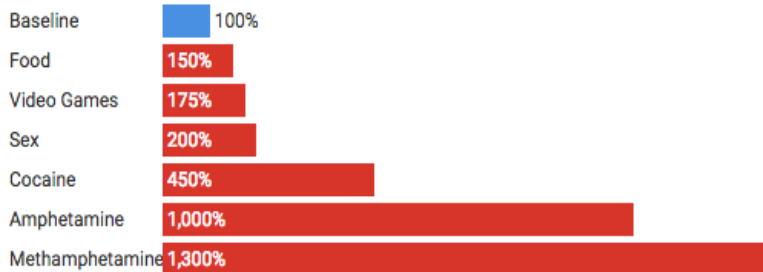
Suppresses the benefits of traditional rewards, e.g., caregiving rewards, work-related rewards



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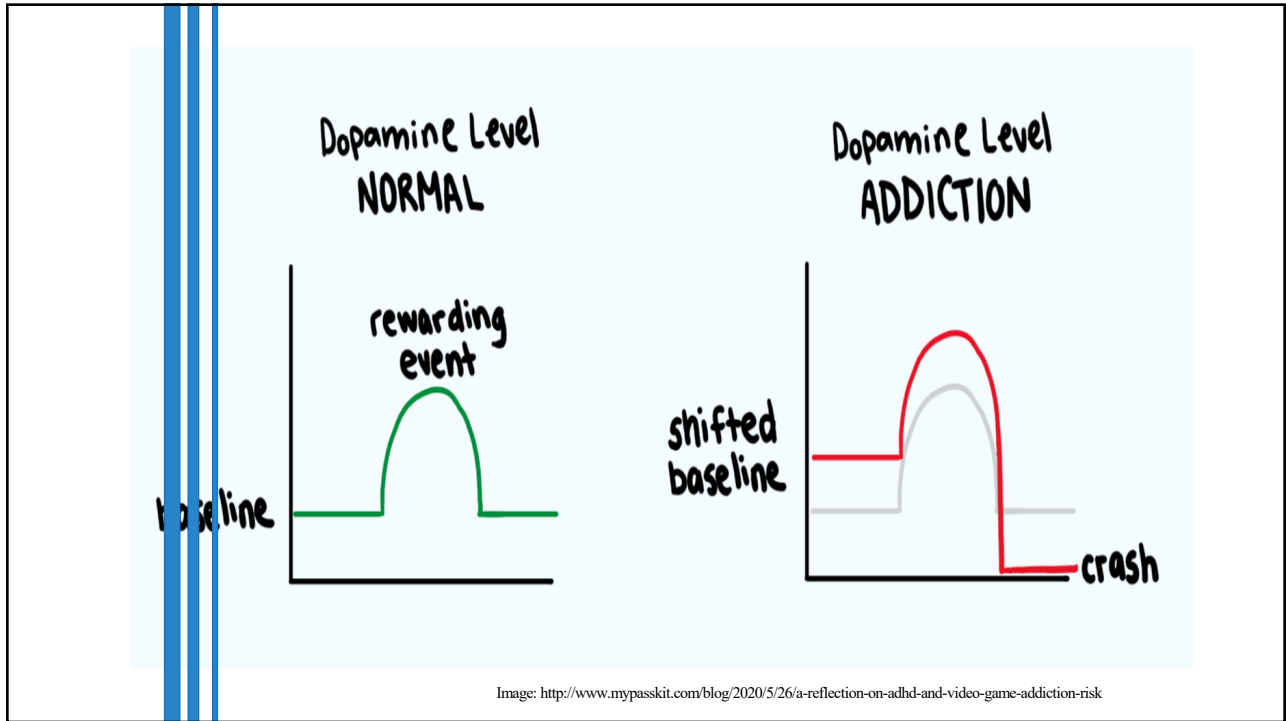
## How much dopamine does an activity release?

Various activities cause the brain to release more dopamine than usual. Enjoying food brings a 50 percent boost to dopamine levels in the brain, for instance. Video games and sex also increase dopamine, and drug use does so significantly. It's not reasonable to equate the brain response to drug use with that of video games.

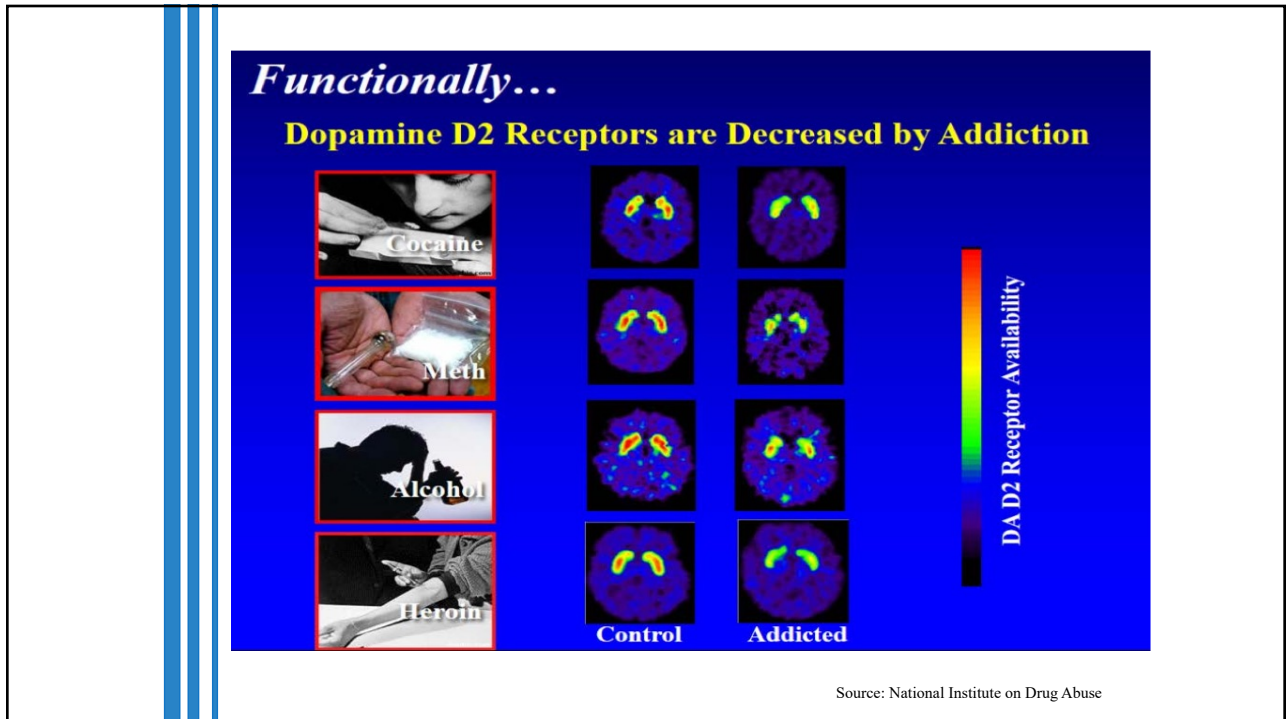


Source: National Institute on Drug Abuse

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## Also...

Fetal brain scans of those who go on to have a substance use disorder, also reflect low dopamine D2 receptors in the striatum.



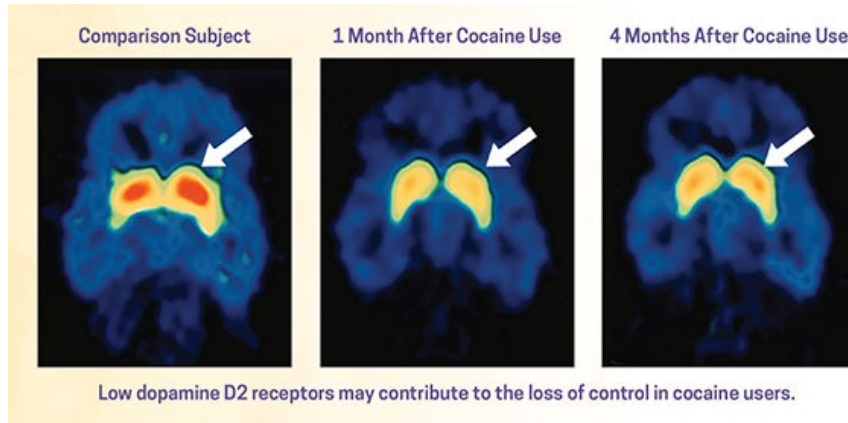
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Most individuals with a substance use disorder get better and reach prolonged recovery

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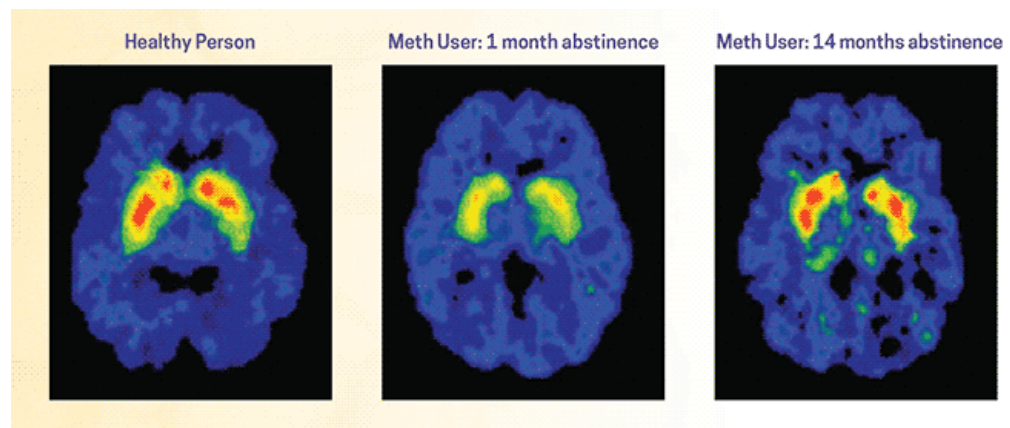
# Recovery



Source: Facing Addiction in America: The Surgeon General's Report on Alcohol, Drugs, and Health

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# Recovery



Source: The Journal of Neuroscience, 21(23):9414-9418. 2001

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# Epigenetics

Positive aspects for recovery

- Gene expression can change over time




Source: <https://nida.nih.gov/publications/drugfacts/genetics-epigenetics-addiction>

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# Neuroscience of Attachment



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## Think about Attachment


- Unnecessary changes in caregivers that occur between birth and age 5, the “zone of attachment” are toxic to development
- With each caregiver change, increased risk of disruption to developmental tasks rooted in evolution of the relationship between caregiver and their child.
- Increased risk of poor outcomes: emotional wellbeing, social relationships, cognitive development, school/learning, medical conditions, and internalizing/externalizing behavioral problems
- Even short periods of no-contact can be damaging and disruptive to children.

Source: Pilarz, A. R., & Hill, H. D. (2014). Unstable and multiple child care arrangements and young children's behavior. *Early Childhood Research Quarterly*, 29(4), 471–483. doi: 10.1016/j.ecresq.2014.05.007

Winston, R., & Chicot, R. (2016). The importance of early bonding on the long-term mental health and resilience of children. *London Journal of Primary Care*, 8(1), 12–14. doi: 10.1080/17571472.2015.1133012

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## Use Narratives with Children that mitigates feelings of Abandonment: Explaining SUD to Kids



*Dad has an alcohol use disorder. This means he cannot have alcohol or he gets sick. Do you know how Timmy at school cannot have peanuts or he gets sick? Dad can't have alcohol. But sometimes Dad's brain tells him to have alcohol. It's kind of like when you have too much dessert or ice cream and get sick. Dad is getting help and mom and dad love you and are on the same team about supporting Dad while he gets help. Everyone needs help sometimes. You can talk about this with mom, dad, etc. there are no secrets. Do you have questions?*

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## Medication-Assisted Treatment (MAT)

- MATs are a safe and effective treatment for opioid, alcohol, and nicotine use disorders
- MATs mitigate cravings and reduce withdrawal symptoms
- A shortage of providers, cost, and stigma are significant barrier to treatment

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## Relapse and MATs

- Opioid addiction is typically a relapse-filled disease
- Less than 25% of people with OUD who receive abstinence-only counseling will remain in recovery for 2 years
- 40 – 60% of people who receive medication-assisted treatment are still in recovery two years later

Center, L. A. (2015). Confronting an epidemic: The case for eliminating barriers to medication-assisted treatment of heroin and opioid addiction; Connery, H. S. (2015). Medication-assisted treatment of opioid use disorder: review of the evidence and future directions. *Harvard review of psychiatry*, 23(2), 63-75.

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## What Works? (OAT: non-opioid agonist therapy)

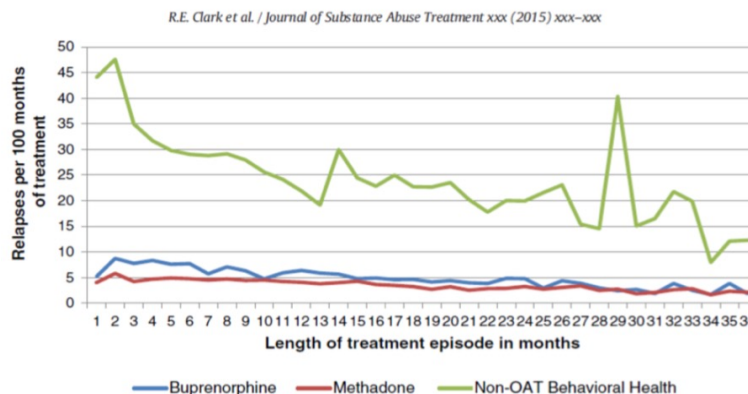


Figure 4. Clark, Robin E., et al. "Risk factors for relapse and higher costs among Medicaid members with opioid dependence or abuse: opioid agonists, comorbidities, and treatment history." Journal of substance abuse treatment 57 (2015): 75-80.

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## NIH Study on Methadone and Buprenorphine

- Methadone: decreased overdose death rate by 59 percent
- Buprenorphine: decreased overdose death rate by 38 percent

The screenshot shows the NIH National Institute on Drug Abuse website. The header includes the NIH logo and the text 'National Institute on Drug Abuse Advancing Addiction Science'. A search bar is present with the placeholder 'enter keywords'. Below the header is a navigation menu with options: Home, Drugs of Abuse, Related Topics, Publications, Funding, and News & Events. The main content area features a news release titled 'Methadone and buprenorphine reduce risk of death after opioid overdose'. A dropdown menu for 'News Releases' is open, showing the years 2018 and 2017. The news release text reads: 'NIH research confirms effective treatments for opioid use disorder are underutilized' and is dated 'June 19, 2018'.

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Characteristic	Methadone	Buprenorphine	Naltrexone
Brand names	Dolophine, Methadose	Subutex, Suboxone, Zubsolv	Depade, ReVia, Vivitrol
Class	Agonist (fully activates opioid receptors)	Partial agonist (activates opioid receptors but produces a diminished response even with full occupancy)	Antagonist (blocks the opioid receptors and interferes with the rewarding and analgesic effects of opioids)
Use and effects	Taken once per day orally to reduce opioid cravings and withdrawal symptoms	Taken orally or sublingually (usually once a day) to relieve opioid cravings and withdrawal symptoms	Taken orally or by injection to diminish the reinforcing effects of opioids (potentially extinguishing the association between conditioned stimuli and opioid use)
Advantages	High strength and efficacy as long as oral dosing (which slows brain uptake and reduces euphoria) is adhered to; excellent option for patients who have no response to other medications	Eligible to be prescribed by certified physicians, which eliminates the need to visit specialized treatment clinics and thus widens availability	Not addictive or sedating and does not result in physical dependence; a recently approved depot injection formulation, Vivitrol, eliminates need for daily dosing
Disadvantages	Mostly available through approved outpatient treatment programs, which patients must visit daily	Subutex has measurable abuse liability; Suboxone diminishes this risk by including naloxone, an antagonist that induces withdrawal if the drug is injected	Poor patient compliance (but Vivitrol should improve compliance); initiation requires attaining prolonged (e.g., 7-day) abstinence, during which withdrawal, relapse, and early dropout may occur

Source: Medication-Assisted Therapies — Tackling the Opioid-Overdose Epidemic, Volkow et al., New England Journal of Medicine

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Table 2: Signs/Symptoms of Opioid Withdrawal (Abstinence Syndrome) & Overmedication	
<b>Overmedication Signs and Symptoms</b>	Sedation (“nodding-off,” drowsy), miosis (pinpoint pupils), itching/scratching, hypotension, respiratory depression (severe in overdose), depressed mental status, flushing, spasticity. Also, mild euphoria/invigoration (temporary).
<b>Therapeutic Comfort Range</b>	<b>No withdrawal or overmedication. Ultimately, no craving or illicit opioid use.</b>
<b>Withdrawal Subjective Symptoms</b>	Drug craving, anxious feelings, depression, dysphoria, irritability, fatigue, insomnia, hot/cold flashes, myalgia/arthralgia (aching muscles/joints), anorexia, nausea, abdominal cramps, restlessness.
<b>Withdrawal Objective Signs</b>	Illicit opioid use, mydriasis (dilated pupils), piloerection (“goose flesh”), diaphoresis (perspiring), muscle tremors/twitching (shaking), diarrhea, vomiting, lacrimation, rhinorrhea, sneezing, yawning, anxiety (outward signs), fever, tachycardia, hypertension.
Sources: Health Canada 2001; Leavitt et al. 2000; Strang 1999.	

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## MAT Treatment Protocols

- If in early recovery, conduct routine drug testing.
- Require counseling (e.g., weekly, monthly depending on need as decided by the treatment team).
- Let the doctor drive medication decisions not you, do not taper off too early.
  - 50 percent of users relapse within a month of being weaned from Suboxone; the lower the dose at the time of weaning, the better the outcome.
- Remain mindful of financial and logistical barriers.

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## What does good treatment actually look like?

- 90-day program with integrated treatment for mental health and SUD
- Scheduled drug/alcohol testing (if feasible)
- Support if relapse and recurrence
- Incentives for transparency
- Individual therapy
- Peer support groups – let the individual decide what is helpful to them; it's not always AA/NA, other options include Smart Recovery, Mindfulness-based groups, etc.
- Treatment immediately available – motivation waxes and wanes
- Medication assisted treatment

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*Treatment for people with substance use disorders is most effective when family or loved ones are included.*



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### Evidence-based Interventions

*Multidimensional Family Therapy* (Liddle, 2016)

- Addresses several systems, including the person with SUDs, parent, family, and larger systems such as school and the community

*Brief Strategic Family Therapy* (Horigian, Anderson, & Szapocznik, 2016)

- Focuses on addressing and changes negative interpersonal interactions within the family

*Family Behavior Therapy* (Donohue et al., 2009)

- Uses contingency management and behavioral contracts.

Massachusetts General Hospital Psychiatry Academy, <https://mghcme.org>

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## CRAFT (Community Reinforcement and Family Training)

- Family-based intervention that increases the level of engagement for those with a substance use disorder.

### Goals:

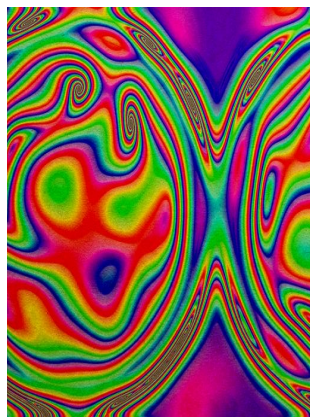
- To improve the quality of life and functioning of the concerned person
- To reduce the individual's substance use
- To increase engagement of the loved one in treatment and support.



Smith, J.E. & Meyers, R.J. (2004): *Motivating Substance Abusers to Enter Treatment: Working with Family Members*, Guilford Press: New York, NY.

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## Emerging treatments: the future of addiction treatment (maybe)



- Psilocybin
- Ibogaine
- LSD
- Ketamine
- Ayahuasca
- CBD

State of the science: an emerging body of research indicates that psychedelics may improve symptoms of SUDs and mental health. CBD is also showing promise.

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## Other Considerations

- Focus on short-term goals and swift consequences
- The average non-addicted person’s perception of “the future” is 4.7 years
- The average perception of the future for an addicted person is just 9 days



Other Considerations Petry, N. M., Bickel, W. K., & Arnett, M. (1998). Shortened time horizons and insensitivity to future consequences in heroin addicts. *Addiction*, 93(5), 729-738.

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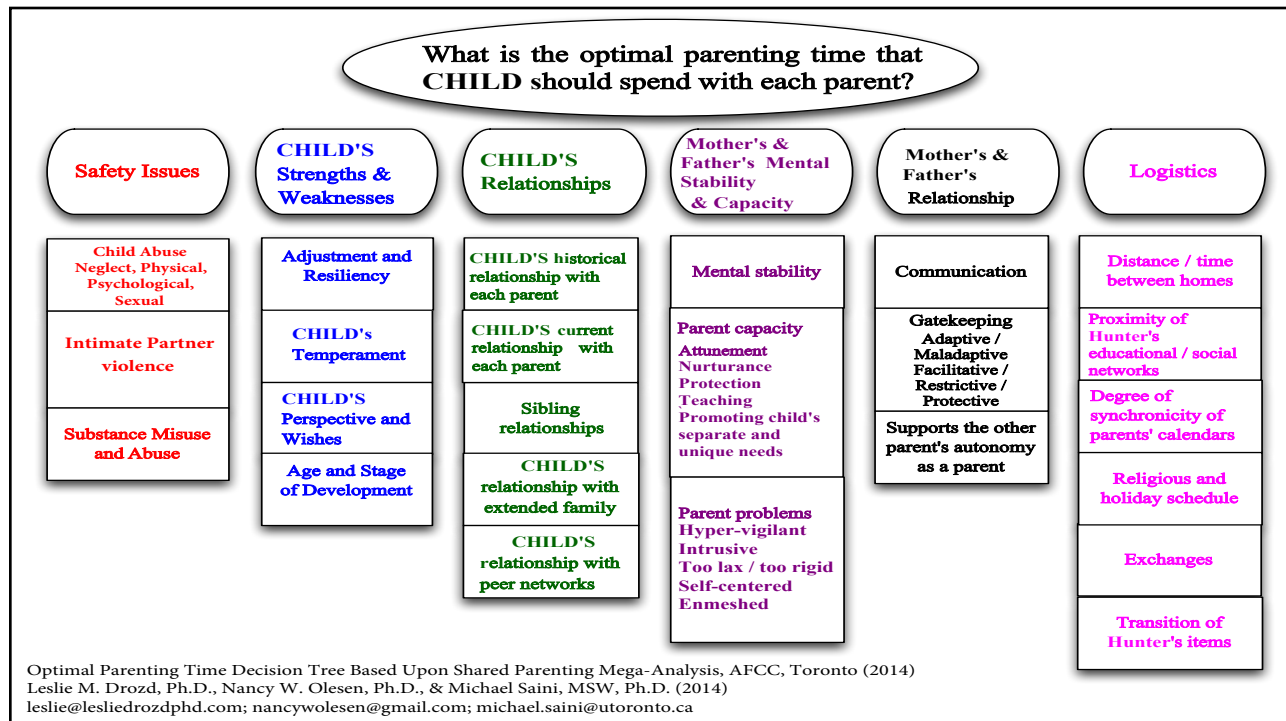


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# How to proceed when substance use is at issue....



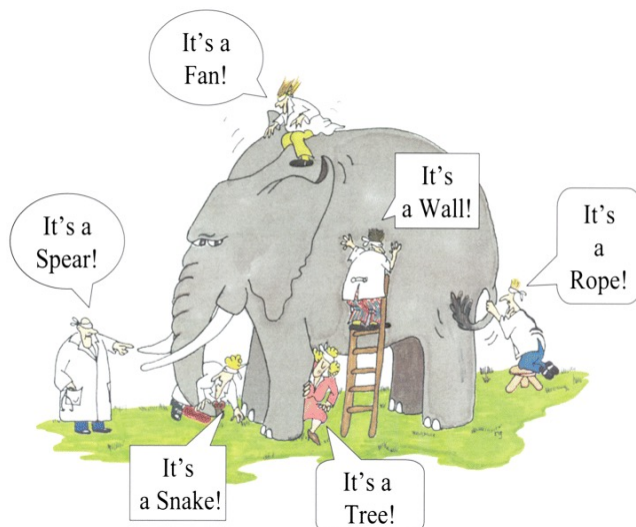
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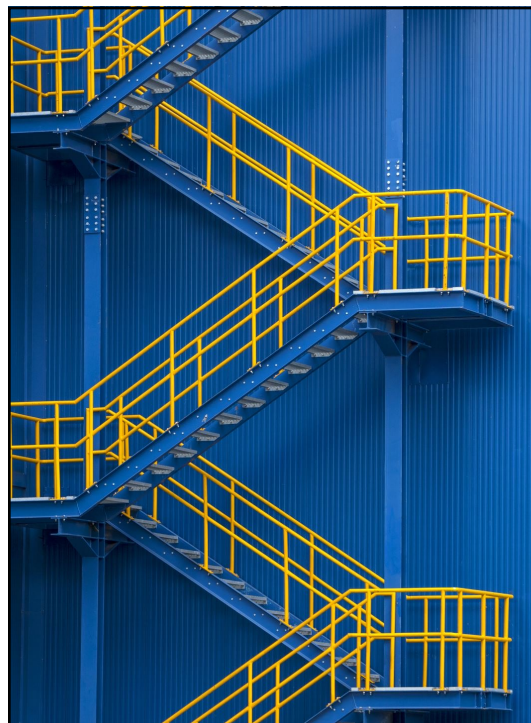


# Biases, Alliances & Polarization



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## Assessment

Self-report measures

Drug and alcohol testing

Leslie Drozd, Ph.D., Stephanie Tabashneck, Psy.D., J.D.,  
November 2, 2023

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## Questions to Think About

- What data points do you have about the parent's substance misuse? Where is the information coming from?
- What data points are missing? What other information is needed?
- Is the substance use occurring during parenting time?
- If the substance use is occurring during parenting time, is the use impairing the parent's ability to care for the child?
- Does the substance use carry an elevated risk of overdose or is the substance potentially lethal (e.g., fentanyl).
- What is the current direct harm to the child given the child's age, vulnerabilities, and developmental needs?
  - Emotional (unpredictability, failure to adhere to a schedule, inattentiveness, nonresponsive to the child's needs)
  - Physical (inadequate shelter, clothing, food, medical)
  - Safety (driving under the influence, physical violence, second-hand exposure to the substance, failure to monitor the child and protect the child from harm)
  - Other (failure to take the child to school, extracurricular activities, or medical appointments, modeling of non-prosocial behaviors)
- What is the worst-case scenario direct harm to the child?
- What is the most likely direct harm to the child?

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## Establish a Nexus

How does the nature of this parent's substance use impact this specific child based on their age, development, and unique needs.



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## Clarify the Nature of Parent's Substance Use

- Active use without regard to consequences?
- Long periods of abstinence? (common)
- Substance use prioritized over family responsibilities?
- Harm reduction strategies?
  - Only use when children are at school, with the other parent, or when child not in the home?
  - Using less when with the child?
  - Giving custody to a family member?

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## Relapse Plan

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## “Relapse Plan” (Or “Still Using” Plan)

- There must be a plan for if/when the parent relapses

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## Relapse Plan: Determine level of Intervention needed and who decides

- Parent consults with treatment team (therapist, physician, sober coach, drug counselor) (specify) to determine the level of treatment intervention that is appropriate.



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## Relapse Plan: Determine Options Ahead of Time

Parent consults with treatment team (therapist, physician, sober coach, drug counselor) (specify) to determine the level of treatment intervention that is appropriate.

Suggestions for Language

I. If an intensive outpatient program is recommended, then Parent will comply with the recommendations of the treatment team (therapist, physician, sober coach, drug counselor) (specify) and the recommendations of the program.

Below is a list of three options for an intensive outpatient programs that Parent has identified as a good fit for his/her needs and preferences:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

II. In the event of a relapse of extended duration and if a detox program is recommended, then Parent will remain at the detox program for the duration recommended by the treating physician (Note: medically supervised detox is preferred).

Below is a list of three options for a detox program that Parent has identified as a good fit for his/her needs and preferences:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

III. If an inpatient program is recommended then PARENT will comply with the recommendations of the treatment team (therapist, physician, sober coach, drug counselor) (specify) and the recommendations of the program.


Below is a list of three options for a inpatient programs:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(Insurance issues should be troubleshooted ahead of time)



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## Relapse Plan: Messaging to Child



- Conversation (depending on the child's age) where the parent, caregiver or foster parent explain:
  - that the parent had a setback
  - the parent is proactively managing it (if applicable)
  - where the parent is going (if applicable)
  - any changes in level of contact
  - that everyone is on the same team in helping the parent to get better
  - provide reassurance (e.g., "Mom/dad loves you very much and will be less available for a little while so that he/she can work on being the best parent they can be.")
  - give the child space to talk about their feelings about the relapse and the changes in contact (if applicable)
  - inform the child that they can ask questions at any time and are free to talk about what happened with anyone that they want to – avoid secrecy

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## Supervision

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## Supervision – on ramp and off ramp

- Before starting supervision (on ramp) be clear with the parent what the specific requirements are to decrease supervision and end supervision (off ramp). Include short-term incentives when possible.

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## Supervision: Considerations



- Severity of the Substance Use Disorder
- Length of the Substance Use Disorder
- Nature of the parent's substance use, including whether the parent uses when the child is in the parent's care
- Current relationship between the parent and child
- Overdose history and whether the overdose occurred when the child was in the parent's care
- Nature of relapse
  - If a parent relapses one time or after an extended period of sobriety (e.g., 4 – 6 months) and immediately communicates the relapse to their therapist, DCF, sponsor, or support system, then prolonged supervised parenting time is likely unnecessary. However, if a parent has a prolonged relapse (e.g., 2 weeks with failure to communicate relapse), supervised parenting time may be required to ensure the safety of the child.

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## Supervision: Consider Attachment



- For an infant removed from a primary caregiver that they are bonded to and placed with someone new to them or mostly new to them, if they are having contact with the primary caregiver less than daily it is likely to cause disruption to brain development.
- For a child under 5 removed from a primary caregiver that they are bonded to and placed in an unknown environment, if they are seeing the parent less than three times per week it is likely disrupt brain development.

See e.g., Parenting Plan Guide has been prepared by the Ontario Chapter of the Association of Family and Conciliation Courts, 2020; Lahousen, T., Unterrainer, H. F., & Kapfhammer, H. P. (2019). Psychobiology of Attachment and Trauma-Some General Remarks From a Clinical Perspective. *Frontiers in psychiatry*, 10, 914. <https://doi.org/10.3389/fpsyt.2019.00914>

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## Supervision: Considerations



- How can supervision be calibrated to account for progress?
  - Can a visit occur in a public place?
  - Can the visit occur at a Center but the worker leaves the room for 15 minutes of the visit gradually increasing over time
  - Is there a less restrictive reasonable option to progress to that maintains safety?

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## Supervision: Plan B



- There should always be a plan B and the steps for implementing plan B should be clear to everyone
- This plan can be implemented if the parent relapses, arrives at the visit under the influence of a substance, or the parent cancels the visit

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## Supervision: Plan B



- Ask the parent with SUD to provide three videos of them saying hello to the child, explaining that they cannot make the visit, and e.g., reading a story
- Have the SUD parent collect books or items to give the child in case the visit does not happen. The current caregiver can keep this on hand.
- This way, the child still has a “touch point” to their parent and does not feel like their parent failed them or abandoned them.

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## Supervision: Other Options – Get Creative



- If in-person supervised parenting time is not a viable option, court practitioners should consider intermediary measures, such as:
  - drawing pictures
  - writing letters
  - reading the child a story over videoconferencing
  - engaging in parallel activities over videoconferencing (e.g., playdough, painting, dancing, singing, playing instruments)
  - sending a video of parent to the child with the video taken during a period where the parent is not using
  - phone call

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## Tips for lawyers and judges

JUDGE'S COMMENT	PERCEPTION OF TRAUMA SURVIVOR	TRAUMA-INFORMED APPROACH
"Your drug screen is dirty."	"I'm dirty. There is something wrong with me."	"Your drug screen shows the presence of drugs."
"Did you take your pills today?"	"I'm a failure. I'm a bad person. No one cares how the drugs make me feel."	"Are the medications your doctor prescribed working well for you?"
"You didn't follow the contract, you're going to jail; we're done with you. There is nothing more we can do."	"I'm hopeless. Why should I care how I behave in jail? They expect trouble anyway."	"Maybe what we've been doing isn't the best way for us to support you. I'm going to ask you not to give up on recovery. We're not going to give up on you."
"I'm sending you for a mental health evaluation."	"I must be crazy. There is something wrong with me that can't be fixed."	"I'd like to refer you to a doctor who can help us better understand how to support you."

Substance Abuse and Mental Health Services Administration, SAMHSA's National Center on Trauma-Informed Care and SAMHSA's National GAINS Center for Behavioral Health and Justice: Essential Components of Trauma-Informed Judicial Practice. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2013.

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*“It is important for judges to understand the key role they play in assisting parents in taking the first steps towards recovery. Judges should be encouraging and supportive of parents’ recovery and should seek to develop rapport with them. Research shows that drug court participants are more likely to comply with treatment and have better outcomes when the judge communicates respect and support to them.”*

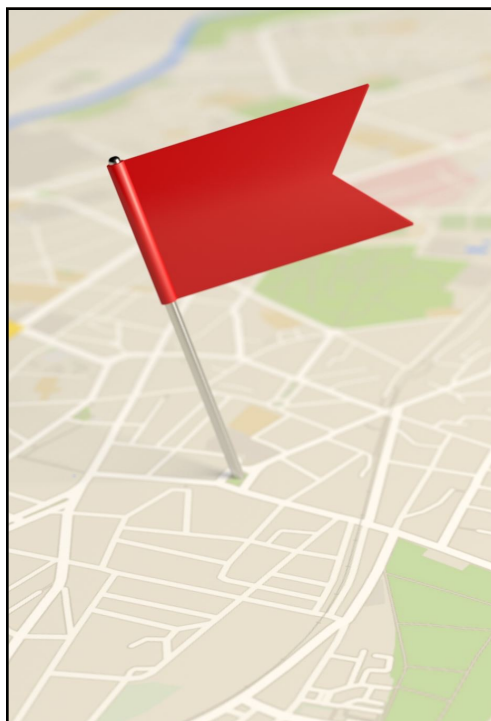
-Judge Beth A. Crawford (ret.), Franklin Family Drug Court; see Substance Use and Parenting, Best Practices for Family Court Practitioners

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## Resource List

- American Society of Addiction Medicine, [www.asam.org](http://www.asam.org)
- Center for Disease Control and Prevention, [www.cdc.gov](http://www.cdc.gov)
- Center on the Developing Child at Harvard University, [www.developingchild.harvard.edu/](http://www.developingchild.harvard.edu/)
- Guidelines for Court Practices for Supervised Visitation, [www.mass.gov/files/documents/2018/11/29/supervised-visitation-guidelinesfinal%20%281%29.pdf](http://www.mass.gov/files/documents/2018/11/29/supervised-visitation-guidelinesfinal%20%281%29.pdf)
- National Association for Children of Addiction: [www.nacoa.org](http://www.nacoa.org)
- National Institute on Drug Abuse, [www.drugabuse.gov](http://www.drugabuse.gov)
- National Institute of Mental Health, [www.nimh.nih.gov](http://www.nimh.nih.gov)
- Ruth Potee, M.D., [www.ruthpotee.com/](http://www.ruthpotee.com/)
- Smart Recovery, [www.smartrecovery.org](http://www.smartrecovery.org)
- Standards for Supervised Visitation Practice, [www.svnworldwide.org/attachments/standards.pdf](http://www.svnworldwide.org/attachments/standards.pdf)
- Substance Abuse & Mental Health Services Administration, [www.samhsa.gov](http://www.samhsa.gov)
- Substance use and parenting: Best practices for family court practitioners. <https://www.afcnet.org/LinkClick.aspx?fileticket=-RkXrNzIkr8%3d&portalid=0>
- Tabashneck, S., Drozd, L. & Soilson, J. (in press), Substance Use Disorders: A Primer for Family Dispute Resolution Practitioners, book chapter: The Family Dispute Resolution Handbook. (editors: P. Salem. & K. Brown-Olson).

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# Family Courts Bill 2022

Bill No. 103 of 2022

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31 January 2023

## Abstract

The [Family Courts Bill](#) provides for the establishment of a Family High Court, Family Circuit Court and Family District Court as divisions of the current court structures; the assignment of Principal Judges and other judges to the family courts; guiding principles regarding the conduct of family law proceedings and the establishment of a Family Law Rules Committee or Family Law Sub-committees of existing rules committees, as well as other miscellaneous and transitional provisions.



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## Summary and Key messages

- The [Family Courts Bill 2022](#) (the Bill) and the [Explanatory and Financial Memorandum](#) were published on Thursday 1 December 2022 with Second Stage debate scheduled in the Seanad on Thursday 2 February 2023. The [General Scheme](#) of the Bill was published on 29 September 2020. The name of the Bill changed from the Family Court Bill in the General Scheme to the Family Courts Bill in the final Bill published on 1 December 2022.
- The Bill is comprised of 10 Parts, which in turn contain 103 sections. It also contains two Schedules related to repeals and amendments of enactments respectively. The Parts of the Bill are divided as follows:
  - Part 1: Preliminary and General (sections 1-7)
  - Part 2: Guiding Principles (section 8)
  - Part 3: Family High Court (sections 9-18)
  - Part 4: Family Circuit Court (sections 19-35)
  - Part 5: Family District Court (sections 36-50)
  - Part 6: Family Law Rules Committee (sections 51-54)
  - Part 7: Miscellaneous (sections 55 -68)
  - Part 8: Jurisdiction (sections 69- 95)
  - Part 9: Protection for Parties to Proceedings (sections 96-98)
  - Part 10: Transitional Provisions (sections 99 -103)
- The Bill seeks to address the fact that, unlike many other European and common law jurisdictions, Ireland does not currently have a specialised family law court system.
- As set out in Minister McEntee's [announcement of government approval](#) to publish the Family Court Bill, the primary aims of the Bill are to:
  - provide a set of guiding principles to help ensure that the Family Court system will make the best interests of the child a primary consideration in all family law proceedings, operate in an efficient manner, and encourage active case management by the courts.
  - provide for the establishment of a Family Court as divisions within the existing court structures with a Family High Court, a Family Circuit Court, and a Family District Court, each dealing with family law matters as appropriate to its jurisdiction.
  - assign judges on a full-time basis to the Family Court divisions. These will be judges who, by reason of their training or experience, are suitable to deal with matters of family law. Ongoing professional training in the area of family law will be required.



- ensure proper and effective management of these Courts, with the creation of the new positions of Principal Judge of the Family High Court, Principal Judge of the Family Circuit Court and Principal Judge of the Family District Court.
- enable a greater proportion of non-contentious family law matters to be dealt with at District Court level, thus minimising the costs for litigants.
- have proceedings, in a different building or room from that in which other court sittings are held or on different days or at different times from other court sittings.
- allow for joint applications to be made by both spouses for judicial separation, divorce, and dissolution of civil partnership. This will support mediation and alternative dispute resolution in such cases.
- establish a “dedicated Family Law Rules Committee, or alternatively, Family Law Sub-Committees of the existing Courts Rules Committees, to ensure that the rules of court in relation to family law proceedings are coherent and applied with consistency across all levels of the family courts”.

## Introduction

**“The Family Court Bill will form an intrinsic part of the reform of the family justice system and will provide many of the building blocks essential to these reforms.”**

(Minister for Justice, Helen McEntee, TD., [Press Release](#), 16 November 2022)

Minister Helen McEntee TD received [Cabinet approval](#) on 16 November 2022 to publish the Family Courts Bill and the first National Family Justice Strategy. In contrast to many other European and common law jurisdictions, Ireland does not currently have a specialised family law court system. Cases concerning children are mainly heard in the general courts in the same buildings as other cases, by judges who do not specialise in

family or child law.<sup>1</sup> The Bill seeks to provide for the establishment of a “Family Court as a separate division within the existing court structures.”<sup>2</sup>

As stated in the Government Legislation Programme for the Autumn Session 2022, the Heads of Bill were approved on 29th September 2020 and Pre-Legislative Scrutiny was waived.<sup>3</sup> The [General Scheme](#) of the Family Court Bill provided for the establishment of a District Family Court, a Circuit Family Court and a Family High Court as divisions within the existing court structures. Minister McEntee noted how the publication of the General Scheme was a “first step in an ongoing process” and that “the development of sensible, comprehensive and sensitive family law procedures, particularly for vulnerable families, will be central to the new system.”<sup>4</sup>

As part of the announcement of approval to publish the Bill in November 2022, Minister McEntee acknowledged the current reality for many families navigating the family law system:

“Long waiting times to access the court, multiple journeys to court buildings as well as overly bureaucratic processes, a lack of available information about the system, and at times high legal costs add to the already heavy burden of stress on families.”<sup>5</sup>

Central to the transformation of the family law system is the construction of a purpose-built Family Law Court complex at Hammond Lane in Dublin which will replace the current fragmented and sub-standard family law facilities scattered across Dublin in Dolphin House (District Court), Phoenix House (Circuit Court) and Chancery Street Courthouse (District Court).<sup>6</sup> While Dolphin

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<sup>1</sup> [Opening Statement of Dr Geoffrey Shannon](#), former Special Rapporteur on Child Protection to the Joint Committee on Justice and Equality, 8 March 2019, available here.

<sup>2</sup> Department of the Taoiseach, Office of the Government Chief Whip, Jack Chambers TD, ‘Government Legislation Programme: Autumn Session 2022’ (14 September 2022) available [here](#).

<sup>3</sup> Department of the Taoiseach, Office of the Government Chief Whip, Jack Chambers TD, ‘Government Legislation Programme: Autumn Session 2022’ (14 September 2022) available [here](#).

<sup>4</sup> Department of Justice, [Reform of Family Justice System announced by Minister McEntee](#), *Press Release*, 30 September 2020.

<sup>5</sup> Department of Justice, [Minister McEntee receives government approval to publish Family Court Bill and first National Family Justice Strategy](#), *Press Release*, 16 November 2022.

<sup>6</sup> Department of Justice, [National Family Justice Strategy 2022 - 2025](#), at 21.

House deals solely with family and childcare cases with daily court sittings, many courts outside of Dublin only deal with family law cases once or twice per month.<sup>7</sup>

Currently, the District Court has jurisdiction to hear family law proceedings in relation to domestic violence, guardianship, maintenance and childcare. It is organised into 23 District Court Districts, as well as the Dublin Metropolitan District.<sup>8</sup> The Circuit Court has concurrent jurisdiction with the High Court in the area of family law and can hear proceedings in a wide range of family law proceedings including judicial separation, divorce, nullity and appeals from the District Court.<sup>9</sup> The High Court has full jurisdiction in and power to determine all matters and questions whether of law or fact, in civil (including family law) or criminal matters. It can also hear questions about the validity of a law.<sup>10</sup> The High Court can hear proceedings including judicial separation, divorce, nullity, child abduction, adoption and appeals from the Circuit Court. While normally based in Dublin, the High Court does sit in provincial venues to hear civil appeals, including in family law cases.<sup>11</sup>

The [Bill](#) and [Explanatory and Financial Memorandum](#) were published on the Oireachtas website on Thursday 1 December 2022 and the Bill is scheduled for Second Stage Debate in the Seanad on Thursday, 2 February 2023.

The Bill contains 10 Parts, encompassing 103 sections. This Bill Digest focuses on the substantial changes which the Bill will bring. It contains the following sections:

- Summary and Key Messages offers a concise overview of the key changes introduced by the Bill.
- Background Policy and Legislative Context sets out the main developments relating to the reform of the family courts system and includes a visual representation of this timeline. It includes an overview of the key reviews of the family justice system outlining various recommendations made on reforming the system. It also sets out the steps taken by Government to address family law reform as well as proposals from the Courts Service.
- The Section on Other Jurisdictions provides an overview of how family law systems operate in three other jurisdictions – England and Wales, New Zealand and Australia.
- Review of the General Scheme of the Bill. As no public PLS process for the Bill took place and there are no recommendations, it is not possible to conduct the usual traffic light analysis. Instead, a table comparing the key areas of the General Scheme and the Bill is provided.
- The Section on Principal Provisions sets out and analyses the main provisions of the Bill. It includes commentary on issues raised by relevant stakeholders and highlighting, where relevant, the difference in approach in three other jurisdictions.

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<sup>7</sup> Department of Justice, '[National Family Justice Strategy 2022 - 2025](#)', at 15.

<sup>8</sup> Citizens Information, [District Court](#).

<sup>9</sup> Courts Service, What the Courts Do- [The Circuit Court](#).

<sup>10</sup> Courts Service, What the Courts Do – [The High Court](#)

<sup>11</sup> Courts Service, What the Courts Do – [The High Court](#)

## Background

### Policy and legislative context

Reform of the family courts system has been mooted for some time. In 1996, the Law Reform Commission (LRC) in its [Report on Family Courts](#) (LRC Report) described the family justice system as “a system in crisis”. The wide-ranging criticisms of the system documented in the LRC Report, which the Report observes were “widely endorsed” by judges, members of the legal profession and others at the time, culminated in a suite of recommendations that would, if implemented, see a restructuring of the family courts system.<sup>12</sup>

Some of the “serious deficiencies” in the family justice system at the time are captured in the following extract from the LRC Report:

“The courts are buckling under the pressure of business. Long family law lists, delays, brief hearings, inadequate facilities and over-hasty settlements are too often the order of the day. At the same time too many cases are coming before the courts which are unripe for hearing, or in which earlier non-legal intervention might have led to agreement and the avoidance of courtroom conflict. Judges dealing with family disputes do not always have the necessary experience or aptitude. There is no proper system of case management. Cases are heard behind closed doors, protecting the privacy of family members but offering little opportunity for external appreciation, criticism, or even realisation, of what is happening within the system. The courts lack adequate support services, in particular the independent diagnostic services so important in resolving child-related issues. The burden placed on those who operate the system, especially judges and court officials, has become intolerable. Legal aid and advice services, despite substantial recent investment, continue to labour under an expanding case-load, and too many litigants go to court unrepresented. An unhealthy two-tier system of family justice is developing in which poorer often unrepresented litigants seek summary justice in the District Court while their wealthier neighbours apply for the more sophisticated Circuit Court remedies. Finally, there is to the whole family justice system a negative ethos which does little to encourage the responsible resolution and management of family conflict by family members themselves.”<sup>13</sup>

Concerns raised in the LRC Report related to a “fragmented court system”, deemed to be under “considerable strain”, owing to an increase in family law litigation, as well as inadequate “poor physical conditions” of some of the courts.<sup>14</sup> However, a complete restructuring of the courts system, considered by the LRC as the most “radical and costly solution”, was rejected by the LRC as “infeasible and unnecessary”.<sup>15</sup>

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<sup>12</sup> Law Reform Commission, [Report on the Family Courts](#) (LRC 52 – 1996), [4.01].

<sup>13</sup> Law Reform Commission, [Report on the Family Courts](#) (LRC 52 – 1996), p iii.

<sup>14</sup> Law Reform Commission, [Report on the Family Courts](#) (LRC 52 – 1996), [2.02] – [2.11].

<sup>15</sup> Law Reform Commission, [Report on the Family Courts](#) (LRC 52 – 1996), p iii.

Instead, the LRC recommended:

“... the development of a discrete family courts system with a unified jurisdiction, as a branch of an existing court, making use as far as possible of existing resources, but at the same time offering a more specialist service and one which would accord to family law cases the priority and attention they deserve.”<sup>16</sup>

It was noted by the Oireachtas Joint Committee on Justice and Equality in 2019 (the Joint Committee) in their Report on Reform of the Family Law System (the 2019 Report) that some of the concerns encompassed within the 67 recommendations for structural and legal reform made in the LRC Report are just as relevant over twenty years later.<sup>17</sup>

## Protection of the Family in Law

The primary source of fundamental rights for the family in Ireland is the Constitution of Ireland. [Article 41](#) of the Constitution “recognises the Family as the natural primary and fundamental unit group of society” and further “guarantees to protect the Family in its constitution and authority”. The rights protected under Article 41 relate to the family unit, although an individual may invoke them on behalf of the family.<sup>18</sup> [Article 42](#) of the Constitution, although titled ‘Education’ has as Dr Geoffrey Shannon SC, a leading authority in Child Law and Family Law<sup>19</sup> observes, “more to do with the family than with the substantive right to education” and “signifies the upbringing of the child, which it holds not only to be a right, but also a duty, of parents.”<sup>20</sup>

In 2012, the Irish people voted to amend the Constitution to make explicit provision for the rights of children.<sup>21</sup> Pursuant to [Article 42A.1](#) of the Irish Constitution, “the State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights”.<sup>22</sup> As Shannon has noted, “Article 42A. explicitly establishes the “best interests” principle as a central pillar in the legal framework regulating the State’s interactions with children and families in Ireland.”<sup>23</sup> Furthermore, [Article 42A.4.2](#) requires that legislation is passed for the purpose of securing, insofar as practicable, that in all relevant proceedings, the views of child, who are capable of forming same, are ascertained. The [Children and Family Relationships Act 2015](#) is, according to Shannon, a “central part of the legislative programme” to implement the State’s obligations under Article 42A.<sup>24</sup>

The rights of the family are also protected by various international and European laws including the [Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice](#) and the

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<sup>16</sup> Law Reform Commission, [Report on the Family Courts](#) (LRC 52 – 1996), p iii.

<sup>17</sup> Houses of the Oireachtas, Joint Committee on Justice and Equality, [Report of the Family Law System](#) (October 2019) 8.

<sup>18</sup> See Costello J. in *Murray v. Ireland* [1985] ILRM 542 and *Ryan v. Attorney General* [1965] IR 294.

<sup>19</sup> Former Special Rapporteur on Child Protection and Dr Shannon has led several independent reviews.

<sup>20</sup> Shannon, *Child and Family Law*, 3<sup>rd</sup> Edition, 2020 at 3.

<sup>21</sup> [Thirty-first Amendment of the Constitution Act, 2012](#).

<sup>22</sup> [The Irish Constitution 1937](#).

<sup>23</sup> Geoffrey Shannon, *Child and Family Law* (Round Hall 2020) [1 – 196].

<sup>24</sup> Geoffrey Shannon, *Child and Family Law* (Round Hall 2020) [1 – 201].

[European Convention on Human Rights](#) under Article 8, which guarantees respect for private and family life, home and correspondence. Shannon observes how Article 8 makes no distinction between the family life of a married couple and those who are not married and the “existence of family life is a question of fact and degree”.<sup>25</sup>

## Previous legislation related to the current Bill

In the intervening period, since the publication of the LRC Report in 1996, family law has undergone legislative reform, including the introduction of the following laws:

- [Family Law \(Divorce\) Act 1996](#);
- [Protection of Children \(Hague Convention\) Act 2000](#);
- [Civil Liability and Courts Act 2004](#);
- [Civil Registration Act 2004](#);
- [Adoption Act 2010](#);
- [Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010](#);
- [Children and Family Relationships Act 2015](#);
- [Gender Recognition Act 2015](#); and
- [Domestic Violence Act 2018](#).

## Regulatory Impact Analysis (RIA)

The Department of Justice confirmed that no Regulatory Impact Analysis was undertaken in relation to the Family Courts Bill 2022.<sup>26</sup> However, as outlined in the background to the Digest, calls for reform including a dedicated Family Court system in Ireland have been on-going for several decades. The Department of Justice has acknowledged this need on many occasions, including in a recent speech by Minister McEntee in the context of tackling gender-based violence and abuse.<sup>27</sup>

## Recommendations for reform

Since the publication of the LRC Report in 1996, several reviews of the family justice system have been undertaken with subsequent reports outlining various recommendations on reforming the system. An overview of some of the reviews, since the 1990s to present, is provided in this part of

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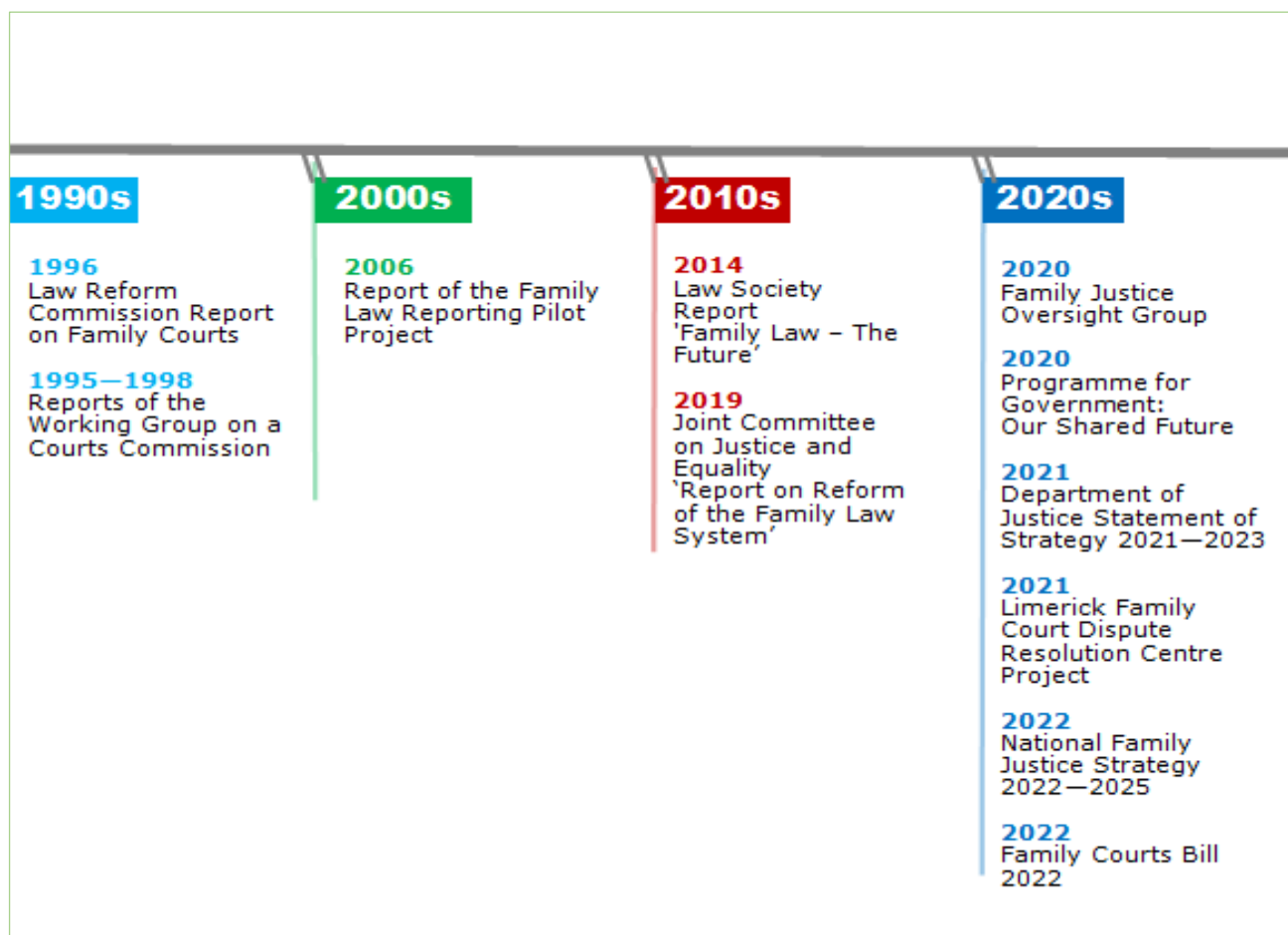
<sup>25</sup> Shannon, *Child and Family Law*, 3<sup>rd</sup> Edition, 2020 at 109. Other relevant international and EU laws include the [UN Convention on the Rights of the Child 1989](#), [Hague Convention on the Civil Aspects of International Child Abduction 1980](#), and [The Charter of Fundamental Rights of the European Union](#).

<sup>26</sup> Email communication from the Department of Justice to L&RS, 7 November 2022.

<sup>27</sup> Department of Justice, '[Address by Minister Helen McEntee to Shared Island Dialogue on Tackling Gender-Based Violence and Abuse](#)', *Press Release*, 4 October 2022.

the Bill Digest. Provided below is a visual representation of the evolution of the main actions taken over the course of nearly four decades driving the case for reform.

### Recommendations for reform – A Timeline



Source: Compiled by the L&RS

In the [2019 Report](#), the Joint Committee on Justice and Equality referred to previous reports undertaken, such as those published by the [Working Group on a Courts Commission](#) (WGCC), established in 1995, which was tasked with reviewing the family courts system and making recommendations regarding same. The WGCC published six Reports and two Working Papers.<sup>28</sup> As stated in the [Sixth Report](#) of the WGCC, published in 1998, having identified “particular and special problems” associated with the Courts dealing with family law, the WGCC established a subcommittee on Family Courts.<sup>29</sup> The WGCC found “[t]he criticisms made by the Law Reform Commission were echoed by many of the groups dealing with the family law system who made both written and oral submissions to the Working Group.”<sup>30</sup>

<sup>28</sup> For a links to all Working Group on a Courts Commission Reports, please see the [Courts.ie policy report webpage](#).

<sup>29</sup> Working Group on a Court Commission, [Sixth Report](#) (November 1998) 26.

<sup>30</sup> Working Group on a Court Commission, [Sixth Report](#) (November 1998) 27.

In 2006, the [Family Law Reporting Pilot Project](#) (the Pilot Project) was set up under newly made Regulations<sup>31</sup> arising out of the *Civil Liability and Courts Act 2004 (2004 Act)*.

Until the [2004 Act](#) the category of persons eligible to attend family law proceedings was very limited owing to the sensitivity surrounding these types of proceedings.<sup>32</sup>

As stated in Murdoch and Hunt's Encyclopaedia of Irish Law:

“Where a case is heard *in camera*, the public must be excluded; the only persons permitted to be present are the parties directly concerned, their legal representatives and officers of the court.”<sup>33</sup>

[Section 40](#) of the 2004 Act which provided for the modification to the *in camera* rule – which was also a recommendation in the LRC Report – to provide for a family law reporting regime.<sup>34</sup>

The [Courts and Civil Law \(Miscellaneous Provisions\) Act 2013](#) amended the [Civil Liability and the 2004](#), the [Child Care Act 1991](#) and the [Adoption Act 2010](#) to, among other things, allow bona fide representatives of the Press to attend court during proceedings heard otherwise than in public except in certain circumstances.

Part 2 of the Pilot Project Report provides observations and recommendations on the family law system. Identifying various “inefficiencies and anomalies in the family law system”, the author of the report, Dr. Carol Coulter, considered that, to achieve the required change “a total reorganisation of the family courts system is required”.<sup>35</sup> Concerns arising from case management systems, delays, long family law lists (all family law actions), and the lack of judicial training in relation to family law issues and alternative dispute resolution methods were raised in the Pilot Project Report.<sup>36</sup>

The Pilot Project Report observed that the majority of the LRC's recommendations were not implemented. However, some exceptions were highlighted in the Pilot Project Report including the establishment of a special family Circuit Court in Dublin where three members of the judiciary sit on a rotating basis, as well as facilitating the hearing of District Court family law applications in the special family District Court in Dolphin House “again with judges allocated there for a period [...]”.<sup>37</sup> However, Coulter qualified these developments by stating:

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<sup>31</sup> [SI 337 of 2005](#) - Civil Liability and Courts Act 2004 (Section 40(3)) Regulations 2005.

<sup>32</sup> As stated by Carol Coulter in her Opening Statement to the Joint Committee of Justice and Equality on 6 March 2019: “The first change, introduced in 2004 by then Minister for Justice, Michael McDowell, was designed to permit reporting of private family law proceedings without allowing the media attend. This was extended in 2007 to cover public family law, with the Child Care (Amendment) Act.” Available [here](#), 88.

<sup>33</sup> Brain Hunt, *Murdoch and Hunt's Encyclopaedia of Irish Law* (Bloomsbury 2021) “[in camera](#)”.

<sup>34</sup> Dr Carol Coulter, [Family Law Reporting Project: Report to the Board of the Courts Service](#) (October 2008) 7.

<sup>35</sup> Dr Carol Coulter, [Family Law Reporting Project: Report to the Board of the Courts Service](#) (October 2008) 39.

<sup>36</sup> Dr Carol Coulter, [Family Law Reporting Project: Report to the Board of the Courts Service](#) (October 2008) 39 – 50.

<sup>37</sup> Dr Carol Coulter, [Family Law Reporting Project: Report to the Board of the Courts Service](#) (October 2008) 58.



“[f]amily law competes for resources with other areas of law in District and Circuit Courts around the country. The case for a separate family law division of the Circuit Court, along with an enhanced family law service in the District Court, is compelling.”

Among the 27 recommendations arising from Part 2 of the Pilot Project Report were:

- To set up a family court division of the Circuit Court based on a network of regional family courts;
- Case management to be built into the system;
- The establishment of a panel of judges with interest or knowledge in family law; and
- The expansion of the family mediation service.

The [Family Law Reporting Project Committee](#) were tasked with considering the recommendations in the Pilot Project Report and making proposals to the Board of the Courts Service in relation to same. However, the primary focus was on the more administrative aspects of family law.<sup>38</sup>

Many of the same systemic issues raised in the LRC Report were raised by the Law Society of Ireland in its 2014 publication to the Department of Justice, entitled “Family Law – The Future”, and again in 2019 when Members of the Law Society of Ireland’s Family and Child Law Committee raised concerns in advance of a meeting of the Joint Committee on Justice and Equality.<sup>39</sup>

[As stated by the Chair of the Law Society’s Child Law Committee](#), Keith Walsh:

“The family courts system is in crisis. It is chronically underfunded, lawyers and judges are over-stretched, and our clients are often highly vulnerable – children and adults in need of urgent assistance, specialised care and dedicated facilities.”<sup>40</sup>

## Joint Committee Report on Reform of Family Law System

On [20 February](#), [6 March](#) and [13 March 2019](#), the Joint Committee held public meetings with stakeholders<sup>41</sup> to review the family law system, identify the deficiencies associated with the system, and identify measures for improving same.<sup>42</sup>

Chairman of the Joint Committee, Caoimhghín Ó Caoláin TD, said:

“Over the course of these engagements, it became abundantly clear that the family law system requires fundamental and ambitious reform. The current system, for a variety of

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<sup>38</sup> [Report of the Family Law Reporting Project Committee to the Board of the Courts Service](#), 1.

<sup>39</sup> Law Society of Ireland, [“Law Society of Ireland highlights crisis in family law system”](#) (20 February 2019).

<sup>40</sup> Law Society of Ireland, [“Law Society of Ireland highlights crisis in family law system”](#) (20 February 2019).

<sup>41</sup> The Joint Committee on Justice and Equality held public engagements during 2019 with the following stakeholders: Children’s Right Alliance; The Law Society of Ireland; Rape Crisis Network Ireland; Dr Conor O’Mahony, School of Law, UCC; Child Care Law Reporting Project; Arc Mediation; Council of the Bar of Ireland; Treoir, Free Legal Advice Centres (FLAC); Men’s Voices Ireland; Dr Kenneth Burns, UCC; Dr Geoffrey Shannon, Social Rapporteur on Child Protection.

<sup>42</sup> Houses of the Oireachtas, Joint Committee on Justice and Equality, [Report on Reform of the Family Law System](#) (October 2019) 3.

reasons, fails to provide a user-friendly and efficient service to those engaged in it, at what can be an extremely difficult and emotive time in peoples' lives."<sup>43</sup>

Having considered the issues relating to the family law system, and concluded consultation with the various stakeholders, the Joint Committee made 38 recommendations concerning matters relating to court structures and facilities; transparency and the *in camera* rule; alternative dispute resolution; resourcing and delays; the voice of the child; and imbalance in the court system.<sup>44</sup> Some of the key recommendations of the Joint Committee are set out in the table below.

### Key Recommendations from the 2019 Joint Committee Report on Reform of the Family Law System

- The Committee calls upon the Minister for Justice and Equality and the Government to make the setting up of specialised family courts, commonplace in other jurisdictions, a matter of urgent legislative priority, backed up with the necessary resources and implementation.
- A thorough review of the physical infrastructure of family law courts should be carried out, with a view to producing a blueprint for a modern, efficient and family-friendly courts infrastructure. Key ancillary services and agencies, such as legal aid, mediation services, courts and courts offices, should all be housed under one roof.
- A public information campaign should be launched, similar to that introduced in Australia, to ensure better provision of information about the family law system.
- Reform of the *in camera* rules and establishment on a permanent basis of a dedicated reporting body, to include both public and private family law proceedings, while maintaining the anonymity of parties.
- Parties to Family Law proceedings should be advised at the outset that they would be exposed to less stress, cost, time and risk if they could reach a settlement amongst themselves through Alternative Dispute Resolution, rather than persisting with an

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<sup>43</sup> Houses of the Oireachtas, Joint Committee on Justice and Equality, [Report on Reform of the Family Law System](#) (October 2019) 3.

<sup>44</sup> Houses of the Oireachtas, [Press Release: Joint Committee on Justice and Equality recommends overhaul of the Family Law System](#) (October 2019).

adversarial process in which a Court will ultimately impose a decision that will seek to balance the respective rights and interests of all affected parties.

- A full review of the legal aid scheme be conducted, with particular regard to means test rates, contribution requirements and eligibility, in order to ensure that the scheme is meeting the needs of those most vulnerable in society. The Committee believes that the current threshold for legal aid needs to be raised significantly.
- In addition to structural reforms, a substantial increase in the number of judges is essential – particularly at District Court level – to address the backlog of cases and relieve pressure on the judiciary.<sup>45</sup>

## Government actions

Since the Joint Committee's consideration of the matter, a clear commitment by Government to reforming the family courts system is apparent. Included in the [Programme for Government: Our Shared Future](#) (PfG), published in October 2020, is a commitment by Government to courts reform with a specific focus on the family court system which included a commitment to “enact a Family Court Bill to create a new dedicated Family Court within the existing court structure”.

Having secured approval from Cabinet for the drafting of the Family Courts Bill in September 2020, Minister McEntee stated her determination that:

“reforms of the family justice system will lead to the development of a more efficient and user-friendly family court system that puts families at the centre of its activities and will:

- provide access to specialist supports
- encourage the use of alternative dispute resolution in family law proceedings
- streamline family law court processes to make them more efficient and more user-friendly, while encouraging greater use of alternative dispute resolution”<sup>46</sup>

To “drive progress on the development of a national family justice service”, Minister McEntee also established the Family Justice Oversight Group:

“Membership of the Oversight Group, chaired by a senior official of the Department of Justice and Equality, includes representatives from the key State actors including the judiciary, the Courts Service, the Legal Aid Board and the Department of Children and Youth Affairs.”<sup>47</sup>

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<sup>45</sup> Houses of the Oireachtas, [Press Release: Joint Committee on Justice and Equality recommends overhaul of the Family Law System](#) (October 2019).

<sup>46</sup> Department of Justice, [“Reform of Family Justice System announced by Minister McEntee”](#) (30 September 2020).

<sup>47</sup> Ibid.

Part of the remit of the Oversight Group included consideration of the recommendations in the Report of the Joint Committee on the Reform of the Family Law System.<sup>48</sup> The Oversight Group has been supported in its work by two expert advisory groups, comprising stakeholder representatives from NGOs, legal practitioners, researchers and academics who have shared their insights with them on family justice.<sup>49</sup>

The [Department of Justice Statement of Strategy 2021 – 2023](#) included in its vision for ‘a safe, fair and inclusive Ireland, a commitment to reforming the family courts system.’

The purpose of the draft Bill, as stated in the [Department of Justice Annual Plan 2022](#) (the Justice Plan 2022), which seeks to guide the implementation of the Department of Justice’s Statement of Strategy 2021 – 2023, is outlined as follows:

“The Bill will establish a District Family Court, a Circuit Family Court and a Family High Court as divisions within the current court structures, each dealing with family law matters as appropriate to its jurisdiction. The Bill will also provide for court procedures that support a faster and less adversarial resolution of disputes in specialised centres. The Family Court Bill is a key element of the transformation of the family justice system being led by the Family Justice Oversight Group.”<sup>50</sup>

A commitment to establish a Family Court as a separate division within the existing court structures, as a priority, is also evident in the [Government Legislation Programme: Autumn Session 2022](#).

On 16 November 2022, as well as giving approval to publish the Bill, the Government also approved the publication of the first [National Family Justice Strategy 2022 - 2025](#) (Family Justice Strategy), which was developed by the Oversight Group. There are nine goals in the Family Justice Strategy that set out various tasks and actions to meet the overarching commitment to reforming the family justice system. Outlined at Goal 9 is “legislative reform” which is one of the key elements to modernising the family justice system.

Goal 9 describes the type of legislative reform required; the actions necessary to achieve it; the participating organisations involved; and the proposed start and end dates regarding delivery of these reforms. In terms of supporting the development and drafting of the Family Court Bill, the proposed date for delivery was Q4 2022.

There is currently no finalised delivery date for the following actions:

- progressing the development of a general scheme(s) relating to legislative requirements identified via other actions under this strategy (e.g., data collection system, contempt) and;
- supporting the Courts Service modernisation and relevant legislation to ensure delivery.

The strategy indicates that they are "ongoing".<sup>51</sup> [with the accompanying citations in footnotes

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<sup>48</sup> Department of Justice, [“Reform of Family Justice System announced by Minister McEntee”](#) (30 September 2020).

<sup>49</sup> Department of Justice, [‘National Family Justice Strategy 2022 - 2025’](#), at 10-11.

<sup>50</sup> [Department of Justice Annual Plan 2022](#), 18.

<sup>51</sup> [National Family Justice Strategy 2022 - 2025](#), 50.

## Family Law Reform in the Courts Service

As part of the programme for transforming the family law system in Ireland, the Courts Service [Corporate Strategic Plan 2021 – 2023](#) was laid before the Houses of the Oireachtas on 15 February 2021. The Strategic Plan is the first major part of the Courts Service Modernisation Programme 2020 -2030, “which aims to bring new digital technology and modern ways of working to the administration of justice, making access to justice easier and quicker to navigate, better responding to the needs of court users.”<sup>52</sup>

Emer Darcy, Head of Family Law Reform in the Courts Service, has spoken at several events advising of the work and the role that the Courts Service will play in reforming family law. At a One Family webinar in 2021<sup>53</sup>, she set out the approach of the Courts Service in reforming the family law system, noting that the Modernisation Programme would involve incremental steps over the coming years until 2030, and emphasised the long-term nature of the transformation. The Family Law Reform Programme Team of the Courts Service, set up in March 2021, is a multidisciplinary team including various Courts Service Business units and ICT together with their Transformation Partner, Deloitte. Emer Darcy advised that the vision of the Family Law Reform Programme Team is to create:

“a system that supports and empowers people to choose the best path for their individual circumstances.

We will deliver this vision through human centred design, evidence based decision making and with a focus on best outcomes for children, people and families.”<sup>54</sup>

Some of the initial steps undertaken by the Family Law Reform Programme Team included a survey with frontline court staff whose findings gave an insight into the state of the current family law system. These findings included:

- 61% of staff felt that court buildings don’t support people in the family law process
- 90% of staff felt technology is not being used in the best way to support people
- Overall, staff felt that the system was not best supporting the broader needs that families have.<sup>55</sup>

The Family Law Reform Programme will include several stages of transformation including:

- provision of information to the public,
- buildings and facilities
- court room layout
- process and digitalisation

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<sup>52</sup> Courts Service of Ireland, '[Courts Service Strategic Plan 2021 – 2023 published](#)', *Announcements*, 15 February 2021.

<sup>53</sup> One Family, '[Building a Family Law System for Children](#)', Webinar, 2 June 2021.

<sup>54</sup> Ibid.

<sup>55</sup> One Family, '[Building a Family Law System for Children](#)', Webinar, 2 June 2021.

- designing for inclusion<sup>56</sup>

Consultations are also planned with the team who are leading the development of the new Family Court at Hammond Lane to ensure that the facility is fit for purpose and inclusively designed.<sup>57</sup> The plan for Hammond Lane as a dedicated Family Court was first announced in December 2014, with construction to start in 2017. However, to date the site has remained unbuilt. The Department of Justice has indicated that construction is due to begin in 2023<sup>58</sup> and the Minister for Justice, Helen McEntee TD suggesting it could be completed by 2026.<sup>59</sup> Once built, this will replace the existing sub-standard family law facilities at Dolphin House, Phoenix House and Chancery Street Courthouse.<sup>60</sup> The Reform team is also exploring ideas, including developing a step-by-step guide to the family law system - potentially in the form of an app with links to supports at each stage, creating a 'Children's Hub' containing age-appropriate information about the family court, and developing remote or digital processes to reduce court time. Following the completion of a highly successful pilot programme, the Courts Service has committed to becoming a trauma informed organisation with the introduction of mandatory training for all staff.<sup>61</sup>

## Other Jurisdictions

Specialised family courts are common in other jurisdictions. For the purposes of this Digest, an overview of three jurisdictions will be given to consider how their systems operate and the lessons that might be learned for Ireland's experience. These are England and Wales, New Zealand and Australia.

### England and Wales

In England and Wales, there are specialist Family Courts and the Family Division of the High Court. Nearly all cases are heard in the Family Court, while a small number of cases such as those involving international child abduction are heard in the Family Division of the High Court. Lawyers are specially trained to represent parties in family law cases. Children who are the subject of these cases have their own lawyer in public law cases and can have a lawyer in private cases if the judge thinks they require it. In both cases, the judge will request a report from an expert court adviser from Cafcass, who will speak with the children to find out their wishes.<sup>62</sup>

Cafcass provides independent and experienced Family Court Advisers to advise the family courts about what is in the best interests of the child. It stands for Children and Family Court Advisory and Support Service. Cafcass is sponsored by the Ministry of Justice and is a non-departmental public

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<sup>56</sup> One Family, '[Building a Family Law System for Children](#)', Webinar, 2 June 2021.

<sup>57</sup> One Family, '[Building a Family Law System for Children](#)', Webinar, 2 June 2021.

<sup>58</sup> Cormac O' Keeffe, '[Seven years on, 'not a sod turned' on family courts site](#)', *Irish Examiner*, 16 December 2021.

<sup>59</sup> Law Society Gazette, '[2026 'at latest' for opening of new family court](#)', 2 December 2021.

<sup>60</sup> Department of Justice, '[Family Justice Strategy 2022 – 2025](#)', November 2022 at 21.

<sup>61</sup> One Family, '[Building a Family Law System for Children](#)', Webinar, 2 June 2021.

<sup>62</sup> Courts and Tribunals Judiciary, '[The Family Division and the Family Court](#)'

body which was formed in 2001 as part of the Government's commitment to supporting families and children.<sup>63</sup>

Magistrates<sup>64</sup> and judges in the Family Court and the Family Division of the High Court receive specialised training from the Judicial College to deal with issues affecting families, including training on domestic abuse and coercive and controlling behaviour. They receive regular training to ensure their expertise in family law remains up to date.<sup>65</sup>

In England and Wales, there is a dedicated Board called the [Family Justice Board](#) (the 'Board'), which was set up to improve the performance of the family justice system and to ensure the best possible outcomes for children who come into contact with the family court system. The Board is jointly chaired by Ministers from the Ministry of Justice and the Department for Education, with members comprising stakeholders from across the family justice system. The Board has several subgroups, including the [Family Justice Council](#), which provides independent expert advice to the Board, and the [Family Justice Young People's Board](#), which is comprised of 50 young people with either direct experience of the family justice system or with an interest in children's rights and the family courts.<sup>66</sup>

## New Zealand

New Zealand also has a dedicated Family Court which is a division of the District Court. Family Court judges need at least seven years' experience as a lawyer, and must also have the right training, experience and personality for dealing with family disputes.<sup>67</sup>

Family Dispute Resolution is offered in New Zealand to assist parents in coming to an agreement regarding the care of their children. Most people need to attend a Parenting Through Separation course and try Family Dispute Resolution before they can ask the Family Court to settle their parenting dispute. Mediation will not be required in certain urgent cases where there are allegations of violence, or where a child is at risk.<sup>68</sup>

An independent lawyer for a child/children can be appointed to communicate their needs and to act in their best interests. Each Family Court has a list of experienced family lawyers who can be appointed as the lawyer for a child. All have had specific training in representing children and are familiar with children's issues.<sup>69</sup>

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<sup>63</sup> Cafcass, '[About Cafcass](#)'

<sup>64</sup> See Courts and Tribunals Judiciary, '[Magistrates, Who are they?](#)'. Magistrates, also known as Justices of the Peace, are individuals who are not legally trained and volunteer for at least 13 days a year, plus training, to hear a variety of cases in the UK courts. Magistrates sit in the Magistrates' courts, dealing with criminal and civil proceedings, or the Family Court, or both. The role is unpaid and many magistrates are employed alongside their role. Once appointed, magistrates undertake mandatory training to develop the necessary skills to sit in court, and are supported in court by a legally qualified justice's adviser to help guide them on points of law, procedure, and the sentencing structure.

<sup>65</sup> Courts and Tribunals Judiciary, '[Family Judges](#)'

<sup>66</sup> Gov.UK., '[Family Justice Board](#)'

<sup>67</sup> [Section 5](#) *Family Court Act 1980*

<sup>68</sup> Ministry of Justice NZ, '[Mediation to work out parenting disagreements](#)'

<sup>69</sup> New Zealand Law Society, '[Family Law Section- Lawyer for the Child](#)'

In New Zealand, a Family Court Coordinator is present in most Family Courts. They provide families with information about the court and its services, and also interact with other people including relevant experts, social workers and lawyers appointed for children. If the Family Court is small, it may not have a Family Court Coordinator but the court manager will be able to provide similar support.<sup>70</sup>

In early 2021, the introduction of a new role of Family Court Navigator, or Kaiārahi in Maori, was announced.<sup>71</sup> Kaiārahi provide free guidance and information about the resolution/support options available to parents and caregivers who are considering applying to the Family Court. The aim of Kaiārahi is to improve family justice outcomes for relevant court users by empowering families to make informed decisions on the best pathways to justice and how to access them. They also provide information about how to engage with the court for legal matters or how to access out-of-court services.<sup>72</sup>

## Australia

Prior to September 2021, the Family Law Courts consisted of the Family Court of Australia and the Federal Circuit Court of Australia, with both having jurisdiction in family law matters in all states and territories in Australia, except for Western Australia, which has its own Family Court. From 1 September 2021, the Federal Circuit and Family Court of Australia (FCFC) commenced operation under a unified administrative structure. Each court continues to exist as divisions of the FCFC.

The FCFC comprises 2 divisions as follows:

Division 1 is a continuation of the Family Court of Australia and while it has no Appeal Division, it retains jurisdiction to hear family law appeals, either as a single judge or as part of a Full Court.

Division 2 is a continuation of the Federal Circuit Court of Australia and deals with family law and general federal law matters.

Judges must satisfy additional appointment criteria to ensure that they have the necessary knowledge, skills, experience and aptitude to deal with family law matters including those matters involving family violence.<sup>73</sup>

The Government has acknowledged that the former family court system “led to significant inefficiencies, confusion, delays, additional costs and unequal experiences for many families. This resulted in poor outcomes for some children and families, including those affected by family violence.”<sup>74</sup>

The Australian Government claims that the reforms have achieved the following:

- “established a single point of entry for federal family law matters
- established a single set of court rules, forms, practices, and procedures

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<sup>70</sup> Community Law NZ, [‘Overview of Family Law’](#)

<sup>71</sup> Ministry of Justice NZ, [‘Kaiārahi - Family Court Navigator role announced’](#), *Press Release*, 30 April 2021.

<sup>72</sup> Ministry of Justice NZ, [Kaiārahi o te Kooti-a-Whānau | New Zealand Ministry of Justice](#)

<sup>73</sup> Australian Government, Attorney-General’s Department, [Structural reform of the Federal Courts](#).

<sup>74</sup> Australian Government, Attorney-General’s Department, [Structural reform of the Federal Courts](#).



- strengthened judicial appointment criteria
- streamlined the family law appeals pathway.<sup>75</sup>

The Australian Government provides a variety of free or low costs services to families including Family Dispute Resolution Services, a specialist mediation process conducted by independent, accredited practitioner(s) and the Family Advocacy and Support Service, a free service, providing assistance on family law matters to families who have been affected by family violence.<sup>76</sup>

The Family Law Council advises and makes recommendations to the Attorney-General about how the [Family Law Act 1996](#) and other legislation relating to family law operates, how legal aid works in relation to family law, and any other matters relating to family law. The Council is comprised of family law experts who are appointed by the Attorney General and who provide advice and recommendations to the Attorney-General. Members must include a judge of the Federal Circuit and Family Court of Australia.<sup>77</sup>

## General Scheme of the Bill

Although the Legislative Programme for Autumn 2022 stated that PLS was waived, the Committee wrote to the Minister for Justice on 16th December 2021, advising that PLS was concluded on the General Scheme at its meeting on Wednesday 15th December 2021. The Committee advised that it had received a number of submissions in relation to the General Scheme and these were referred to the Minister for her information and assistance in finalising the Bill.<sup>78</sup>

As no specific recommendations were published by the Committee, it is not possible to conduct the usual L&RS traffic light dashboard comparison of the Bill as published against the Committee PLS recommendations. However, a table has been compiled comparing the General Scheme and the Bill across five key themes to provide an insight into how the Bill has evolved between the drafting of the General Scheme in September 2020 and the publication of the Bill in December 2022.

## Comparison of General Scheme and Bill

Key theme	General Scheme of the Family Court Bill	Family Courts Bill
Court Structure	Part 2 provides for the establishment of Family Courts as specialist divisions within current court structures.	Parts 3 – 5 provides for the establishment of the Family High Court, the Family Circuit Court and the Family District Court as specialist divisions within current court structures.

<sup>75</sup> Australian Government, Attorney-General's Department, [Structural reform of the Federal Courts](#)

<sup>76</sup> Australian Government, Attorney- General's Department, ['Family Law Services and Support Fact Sheet'](#), last updated 5 September 2022.

<sup>77</sup> Australian Government, Attorney- General's Department, ['Family Law Council'](#).

<sup>78</sup> Joint Committee on Justice, ['Pre-Legislative Scrutiny Report on the General Scheme of the Family Court Bill'](#), 17 December 2021.

Key theme	General Scheme of the Family Court Bill	Family Courts Bill
	Part 2 provides that certain private family law cases are removed from the jurisdiction of the High Court.	High Court jurisdiction is retained in judicial separation and divorce cases involving property worth more than €3 million.
Specialisation and training	Heads 6 and 11 provide that a judge of the Family District Court and a judge of the Family Circuit Court must take a course(s) of training or education or both, as required by the Judicial Studies Committee <sup>79</sup> .	Section 59 of the Bill provides that judges of the Family High Court, Family Circuit Court and Family District Court, must take a course(s) of training or education or both, as required by the Principal Judge of that Court, in consultation with the President of that Court and the Chief Justice, at times specified by the Principal Judge.
Guiding Principles	<p>Encompassed in Part 2 under 'Establishment of Family Court'.</p> <p>Only includes reference to principles being applicable to the Court.</p> <p>Concise guiding principles including 'best interests of the child'.</p>	<p>Set out as a separate Part 2 of the Bill dealing only with Guiding Principles.</p> <p>Provides for principles that are applicable to the Court and legal practitioners. Provides for separate principles applicable to parties to proceedings.</p> <p>Additional expanded guiding principles including greater focus on the welfare and rights of the child as well as best interests. Includes ascertaining views of the child and ensuring they are kept informed in an age-appropriate manner.</p>
Protection for Parties to Proceedings	Part 4 provides for rules relating to attendance at and reporting of <i>in camera</i> family law proceedings, largely restating the provisions of <a href="#">section 40</a> of the <i>Civil Liability and Courts Act 2004, as amended</i> .	Part 9 provides for rules relating to attendance at and reporting of <i>in camera</i> family law proceedings, largely restating the provisions of <a href="#">section 40</a> of the <i>Civil Liability and Courts Act 2004, as amended</i> .

<sup>79</sup> The Judicial Studies Committee was established on the 10th of February 2020. Its function is to provide for the continuing education of judges. See The Judicial Council, [Judicial Studies Committee](#).

Key theme	General Scheme of the Family Court Bill	Family Courts Bill
	<p>Includes a defence for a person charged with an offence of publication or broadcasting of information which would likely lead the public to identify the parties to proceedings to which the <i>in camera</i> rule applies.</p> <p>The defence involves proving that at the time of the alleged offence the person was not aware, and neither suspected nor had reason to suspect, that the matter alleged to have been published or broadcast was held <i>in camera</i>.</p>	<p>Section 98 of the Bill includes a defence for a person charged with an offence of publication or broadcasting of information which would likely lead the public to identify the parties to proceedings to which the <i>in camera</i> rule applies.</p> <p>The defence involves proving that at the time of the alleged offence the person was not aware, and neither suspected nor had reason to suspect, that the matter alleged to have been published or broadcast was held <i>in camera</i>.</p>
Alternative Dispute Resolution	<p>Head 5 includes specific reference to the Court encouraging and facilitating as far as possible the resolution of issues in dispute by means of alternative resolution methods, such as mediation, where appropriate.</p> <p>Heads 10 and 15 provide for a judge of the District or Circuit Court respectively to suspend proceedings, to allow parties to resolve issues through alternative dispute resolution.</p>	<p>Part 2 includes specific reference to the Court and legal practitioners encouraging and facilitating as far as possible the resolution of issues in dispute by means of alternative resolution methods, such as mediation, where appropriate.</p> <p>Part 2 also includes specific reference to parties to proceedings attempting alternative dispute resolution ahead of the courts, where appropriate.</p> <p>Provides for a judge of the Family High Court (section 10), Family Circuit Court (section 24) or the Family District Court (section 39) to suspend proceedings, to allow parties to resolve issues through alternative dispute resolution.</p>

**Source: Compiled by the L&RS from the General Scheme and the Bill**

As there is no PLS Report on the Bill, this Digest instead incorporates commentary from relevant stakeholders on family law reform into the following section on Principal Provisions to assist members in their scrutiny and analysis of the Bill.

## Principal provisions of the Bill

This section of the Bill Digest examines selected provisions of the Bill from Parts 2, 3, 4, 5, 7, 8 and 9, i.e. the principal provisions of the Bill. Part 1, which includes standard legislative provisions, Part 6 which provides for the establishment of a Family Law Rules Committee/Family Law sub-committees, and Part 10 which mainly relates to transitional provisions are not considered. These Parts involve minor consequential amendments which are non-contentious. This section of the Digest considers whether the Bill addresses the policy objectives that it is intended to meet and also the extent to which the Bill has evolved in response to concerns raised by stakeholders during sustained calls for reform of the family law system. It also includes commentary from relevant stakeholders and where appropriate, reference and comparison to other selected family law systems.

### Part 2: Guiding Principles

Part 2, comprising of section 8 of the Bill provides for the Guiding Principles. **Section 8** sets out the principles that the courts, legal practitioners and parties must have regard to when dealing with family law proceedings. Subsections (1) to (2) apply to the court and legal practitioners, and the principles contained therein concern-

- where proceedings involve the welfare of a child:
  - the best interests of the child are a primary consideration
  - child must be kept informed in age-appropriate manner
  - where appropriate and possible, views of the child are ascertained and given due weight, having regard to the age and maturity of the child
  - no unreasonable delay in determining the proceedings.
- encouraging and facilitating alternative dispute resolution
- promoting and engaging in active case management
- conducting proceedings in a manner that is
  - user-friendly
  - swiftly identifies the issue in dispute
  - facilitates agreement on the resolution of the issues in dispute
  - just, speedy and minimises costs

Subsections (3) and (4) relate to the principles that parties to proceedings must have regard to as follows:

- trying to achieve consensus to resolve family law disputes
- where it involves the welfare of a child/likely affected by outcome, participating in a manner where:
  - the best interests of a child are a primary consideration
  - child must be kept informed in an age-appropriate manner
  - facilitates agreement on the resolution of the issues in dispute
  - minimises conflict between parties
  - just, speedy and minimises costs

## Commentary on Guiding Principles

### Voice of the Child

While the presence of the guiding principles represents an important step in ensuring that the rights of the child are protected in family law proceedings, as Shannon has noted, vindicating the right of the child to be heard in real terms can be difficult. He states that:

“the vindication of the child’s right to be heard has proved problematic. The implementation of the existing right to be heard has proved haphazard and inconsistent and there are gaps in the extent to which children are in fact heard in cases concerning welfare and wellbeing.”<sup>80</sup>

There are a number of channels through which the voice of the child may be heard including via the direct input of the child in court; however, owing to the “intimidating nature” of the court setting, this method may not be in the best interests of the child.<sup>81</sup> An indirect method of ascertaining the views of the child by the court is through an independent expert and subsequent report which allows the child’s view to be expressed.<sup>82</sup> This mechanism has been available to the court via various other statutes. For example, [Section 32 of the Children and Family Relationships Act 2015](#) provides that the court may do either or both of the following:

- (a) give such directions as it thinks proper for the purpose of procuring from an expert a report in writing on any question affecting the welfare of the child; or
- (b) appoint an expert to determine and convey the child’s views.

Shannon has also highlighted cost as an important factor when engaging an expert to hear the views of the child and raises concerns that children could be denied the chance to have their views heard because of this.<sup>83</sup> Payment for the reports falls to the parents and he notes that “[w]ithout a properly resourced system, and clarity around how the costs of hearing children are to be covered, children will not effectively enjoy this right”.<sup>84</sup>

Similar concerns around cost and accessibility have also been raised by Dr Conor O’ Mahony and FLAC in their respective submissions to the Joint Oireachtas Committee on Justice and Equality and Family Justice Oversight Group on reform to the family justice system.<sup>85</sup> One of the recommendations of the 2019 Report from the Joint Oireachtas Committee included the following:

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<sup>80</sup> Geoffrey Shannon, *Child and Family Law* (Round Hall 2020) [1 – 158].

<sup>81</sup> Geoffrey Shannon, *Child and Family Law* (Round Hall 2020) [1 – 159].

<sup>82</sup> Geoffrey Shannon, *Child and Family Law* (Round Hall 2020) [1 – 161].

<sup>83</sup> Ibid.

<sup>84</sup> Geoffrey Shannon, *Child and Family Law* (Round Hall 2020) [1 – 161].

<sup>85</sup> Opening Statement of Dr Conor O’Mahony, Senior Lecturer, School of Law, University College Cork, Joint Committee on Justice and Equality (2019), available [here](#). FLAC [Submission to the Department of Justice: Family Justice Oversight Group Phase 1 Consultation](#) (February 2021).

“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.”<sup>86</sup>

Recent research undertaken by Trinity College Dublin and University College Cork, commissioned by One Family Ireland, “highlights a “stark absence” of input from young children in family law cases when decisions on access are being made and finds this is contrary to international law.”<sup>87</sup> The research which focused on the experience of children under seven years old, revealed that the experts providing these reports are unregulated and charges varied greatly as well as the quality of reports with generic forms widely used. One of the lead researchers, Dr Simone McCaughren emphasised how “[l]ife-changing decisions are made based on these reports but the system is not fit for purpose”.<sup>88</sup> In contrast, as highlighted in the section on comparative jurisdictions, in England and Wales, CafCass, a non-departmental public body, provides independent experienced advice through qualified social workers to the family courts about what is safe for children and in their best interests.

### Commentary on Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution (ADR) “[r]efers to systems for the resolution of disputes without recourse to formal legal proceedings”.<sup>89</sup> As the Law Society of Ireland highlighted in their submission to the Joint Committee, ADR “includes collaborative law, mediation, potentially arbitration as well as lawyer assisted settlements.”<sup>90</sup>

In its submission to the Joint Committee, Men’s Voice’s Ireland, on the matter of ADR claimed that: “ADR produces far better, more conciliatory results in far shorter time and costs far less.”<sup>91</sup> The Association of Collaborative Practitioners describe it as a way of resolving matters that:

“is less aggressive and confrontational than the traditional legal approach. The focus is put on finding solutions, rather than gaining advantage. It involves treating each other respectfully and trying to satisfy the interests of all family members, rather than trying to gain individual advantage. It is child centred.”<sup>92</sup>

Dr Carol Coulter, in her submission to the Joint Committee in March 2019, stated that whilst ADR is “clearly desirable”, an important distinction needs to be drawn between private and public family law, e.g. disputes between private individuals versus situations in which the State must intervene in family matters and thus involve constitutional right of the adult(s) and/or child. In the latter case,

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<sup>86</sup> Houses of the Oireachtas, Joint Committee on Justice and Equality, [Report on Reform of the Family Law System](#) (October 2019), Recommendation 30 at 49.

<sup>87</sup> Mark Tighe, “[Family law system is 'bad for parents, children, lawyers, judges'](#)”, Independent.ie, 11 December 2022.

<sup>88</sup> Ibid.

<sup>89</sup> [Murdoch and Hunt's Encyclopaedia of Irish Law](#), “[alternative disputes resolution; ADR](#)”.

<sup>90</sup> Houses of the Oireachtas, Joint Committee on Justice and Equality, [Report of the Family Law System](#) (October 2019) 69.

<sup>91</sup> Ibid at 111.

<sup>92</sup> Association of Collaborative Practitioners, [‘Is Collaborative Practice the Right Choice?’](#)

Coulter cautions that ADR may not be the most suitable in terms of upholding an individual's right to fair procedures.<sup>93</sup>

“When a constitutional right is at stake it is particularly important that an individual's right to fair procedures is upheld, including the right to adequate legal representation and to a hearing before a court.”

Concerns were raised by various stakeholders including the Bar Council on the suitability of ADR in certain family law proceedings, noting that there will “be some family law cases that are simply not suitable for” ADR.<sup>94</sup>

In its submission to the Family Justice Oversight Group, [Rape Crisis Network Ireland](#) (RCNI) acknowledge the benefits of ADR in terms of cost and time savings but also highlight that ADR can be used maliciously “as part of a wider pattern of domestic violence and abuse”.<sup>95</sup> Referring to Head 5(3)(a) of the General Scheme, the RCNI welcomed the exclusion from the General Principle to employ ADR methods in cases where it “would not be appropriate due to the nature of the proceedings”. However, the RCNI is concerned that the arguably unclear wording here poses potential risks to victims of abuse “through manipulation of the process by the abuser” and stated that:

“RCNI's view is that the wording of this guiding principle should make it clear that there is no question of a mandatory ADR process being imposed on the parties in any family law proceedings.”<sup>96</sup>

[Women's Aid](#), in its submission to the Family Justice Oversight Group, take a similar view to RCNI on the risks posed by ADR being established as one of the Guiding Principles that be given effect by rules of court for family law proceedings. Women's Aid cite Article 48 of the [Convention on Preventing and Combating Violence Against Women and Domestic Violence \(Istanbul Convention\)](#)<sup>97</sup> which prohibits mandatory ADR in cases involving violence against women.<sup>98</sup> It should be noted that the wording remains unchanged under section 8(2)(b) of the Bill.

In its submission to the Family Justice Oversight Group, [FLAC raised concerns](#) about the use of ADR in family cases where power disparities exist between parties:

“The literature on alternative dispute resolution models reveals that: “the apparent informality of alternative processes can replicate existing power disparities”. In FLAC's experience this is particularly true for more vulnerable claimants attending mediation who

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<sup>93</sup> Houses of the Oireachtas, Joint Committee on Justice and Equality, [Report of the Family Law System](#) (October 2019) 87.

<sup>94</sup> Ibid at 109.

<sup>95</sup> Rape Crisis Network Ireland (RCNI), [RCNI Submission to the Family Justice Oversight Group Consultation Topics – Phase 1 Consultation](#), 4.

<sup>96</sup> Rape Crisis Network Ireland (RCNI), [RCNI Submission to the Family Justice Oversight Group Consultation Topics – Phase 1 Consultation](#), 5.

<sup>97</sup> Council of Europe Treaty Series – No 210, [Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence](#) (Istanbul 11.V.2011).

<sup>98</sup> Women's Aid, [Submission to the Family Justice Oversight Group Consultation](#) (February 2021) 18.

may not have access to legal advice, and who may have language, literacy or mental health issues.”<sup>99</sup>

### Part 3: Family High Court; Part 4: Family Circuit Court; Part 5: Family District Court

Parts 3, 4 and 5 of the Bill deal with the establishment and operation of the Family High Court, the Family Circuit Court and the Family District Court respectively. They set out the jurisdiction, proceedings and sittings for each of the new Courts, providing for a Principal family law judge of each along with separate dedicated family law judges.

#### Family High Court

**Part 3**, which encompasses **sections 9 to 18**, establishes the Family High Court. **Section 9** amends [section 2](#) of the *Courts (Establishment and Constitution) Act 1961* to introduce a new Principal Judge of the Family High Court and ordinary judges of the Family High Court. This includes provision for the temporary reassignment of an ordinary judge of the High Court to the Family High Court at the request of the Principal Judge of the Family High Court where for illness or other reasons, an insufficient number of judges of the Family High Court are available. The President of the High Court will select the judge whom they believe to be a suitable person based on training or experience. It also provides that ordinary judges of the High Court may hear urgent applications without delay when there is no judge of the Family High Court available. In such circumstances, they will be considered an additional judge of the Family High Court for all the purposes of that Court.

**Section 10** provides for the insertion of a new section 8A to C after [section 8](#) of the *Courts (Supplemental Provisions) Act 1961*. The new section 8A provides that the Family High Court can exercise, in addition to the original and inherent jurisdiction of the High Court, exclusive jurisdiction in family law proceedings for which jurisdiction of the High Court was previously provided for in:

- [Adoption Act 2010](#)
- [Child Abduction and Enforcement of Custody Order Act 1991](#)
- [European Communities \(Decisions in Matrimonial Matters and in Matters of Parental Responsibility and International Child Abduction\) Regulations 2022](#) (S.I. no. 400 of 2022)
- Part IVA of the [Child Care Act 1991](#)

The Family High Court will also hear appeals from the Family Circuit Court and cases stated from the Family District Court and Family Circuit Court. The new section 8B provides for an exception to the normal single judge sitting so that 2 or more judges may sit together for the purpose of a particular case where the Principal Judge directs it.

The new section 8C includes the obligation to state in the originating document commencing proceedings whether mediation has been attempted. This does not apply to an application to commence proceedings in relation to 12 specified pieces of legislation including:

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<sup>99</sup> FLAC [Submission to the Department of Justice: Family Justice Oversight Group Phase 1 Consultation](#) (February 2021) 22.



- the [Child Care Act 1991](#),
- the [Children and Family Relationships Act 2015](#),
- the [Gender Recognition Act 2015](#), and the
- [Domestic Violence Act 2018](#).

Section 8C also provides that a judge of the Family High Court has the power at any stage to suspend proceedings to allow the parties to explore alternative dispute resolution to resolve the issues, where the judge feels it would assist. The new section 8C also provides that proceedings must be made as informal as possible with no wigs or gowns worn by judge or practitioners. Proceedings must also be held in different buildings or rooms or on different days or times from sittings of other courts. There is an exception to this where proceedings must be heard urgently in order to ensure that the safety or welfare of a party to the proceedings or a child to whom the proceedings relate is not adversely affected, or where the court considers that due to the urgency or exceptional circumstances of a case, it is not possible to comply with the provision. **Sections 11 and 12** relate to the functions of the Principal Judge of the Family High Court and to the power of the Principal Judge or a Judge of the Family High Court nominated by the Principal Judge to issue orders or give directions in family law proceedings.

Under **section 13**, the Principal Judge of the Family High Court has the power to issue practice directions regarding the conduct of appeals or applications made to the Family High Court. **Sections 14 and 15** sets out the steps to be taken for assignment as Principal Judge of Family High Court, including that the President of the High Court must follow the selection process recommended by the Judicial Appointments Commission. **Section 16** provides for the assignment and reassignment of suitable judges of the High Court as judges of the Family High Court by the President of the High Court. **Section 17** provides that the Courts Service may in consultation with the President of the Family High Court and the Principal Judge of the Family High Court divide the State into Family High Court Circuits. It also provides for the alteration of the composition of a circuit and for the sitting of the Family High Court on Circuit. **Section 18** amends sections 25 and 50 of the [Courts and Court Officers Act 1995](#) to provide for the functions of the Master of the High Court in family law proceedings.

### Family Circuit Court

**Part 4**, which encompasses **sections 19 to 35**, is divided into 2 Chapters. Chapter 1 deals with the establishment, jurisdiction and proceedings of the Family Circuit Court. **Section 19** establishes the Family Circuit Court and as with the Family High Court, includes the introduction of a new Principal Judge and ordinary Judges through the insertion of a new section 1A into [section 4](#) of the *Courts (Establishment and Constitution) Act 1961*. **Section 20** inserts a new section 22A into the [Courts \(Establishment and Constitution\) Act 1961](#), which provides that jurisdiction is exercisable in the circuit in which a party to the proceedings ordinarily resides or works in or where a child whose welfare is the subject of the proceedings resides, has resided or proposes to reside. It also provides that a judge from another circuit may exercise jurisdiction where it would be in the best interests of a child who is the subject of the proceedings. **Sections 21 and 22** sets out the function of the Principal Judge of the Family Circuit Court and provides for the power of the Principal Judge or a Judge of the Family Circuit Court nominated by the Principal Judge to issue orders or give directions in family law proceedings.

**Section 23** gives the Principal Judge of the Family Circuit Court the power to issue practice directions. Where a conflict arises between practice directions issued by the Principal Judge of the Family Circuit Court and the Principal Judge of the Family High Court, the practice direction issued

from the Principal Judge of the Family High Court will take precedence. **Section 24** deals with proceedings in the Family Circuit Court and includes exceptions to the requirement that an application to commence proceedings has to state that mediation was attempted. It also provides, as with proceedings before the Family High Court, for the informality of proceedings. **Section 25** provides that proceedings must be held in different buildings or rooms or on different days or times from sittings of other courts, with the same exception as is set out in respect of proceedings before the Family High Court (due to safety/welfare concerns or urgency/exceptional circumstances of the case).

Chapter 2 deals with the creation and alteration of Family Circuit Court circuits and assignment of judges. **Section 26** amends the [Courts \(Supplemental Provisions\) Act 1961](#) to provide for the creation of Family Circuit Court circuits. It also provides that the Government, in consultation with the President of the Circuit Court and the Principal Judge and ordinary judges of the Family Circuit Court, can divide the State into geographical areas known as Family Circuit Court circuits. Provision is also made for the alteration of the composition of a circuit or the substitution of a circuit's name. **Section 27** provides for the qualification of an ordinary judge of the Circuit Court for assignment as Principal Judge of the Family Circuit Court by the President of the Circuit Court.

**Section 28 and 29** deal with the assignment of the Principal Judge and the ordinary judges of the Family Circuit Court respectively. **Section 28** sets out the steps to be taken for assignment as Principal Judge of the Family Circuit Court, including that the President of the Circuit Court must follow the selection process recommended by the Judicial Appointments Commission. **Section 29** provides for the assignment of judges of the Circuit Court as judges of the Family Circuit Court by the President of the Circuit Court. It also provides for the reassignment of a judge of the Family Circuit Court and a new judge to be assigned in their place. **Section 30** provides for the temporary reassignment of a judge of the Circuit Court to the Family Circuit Court under similar circumstances as those concerning the Family High Court – due to an increase of business or in urgent circumstances where there is no Family Circuit Court judge available. **Sections 31 – 35** provides for various miscellaneous amendments, including setting out certain orders that a County Registrar may make (**section 32**) and amending [section 38\(2\)](#) of the *Court Officers Act, 1926* which relates to the duties of a County Registrar to hear and determine applications as assigned by rules of Court (**section 33**).

## Family District Court

**Part 5**, which comprises **sections 36 to 50**, also includes 2 Chapters. Chapter 1 provides for the establishment, jurisdiction and proceedings of the Family District Court. **Section 36** provides for the establishment of the Family District Court, and the introduction of a new Principal Judge and ordinary Judges of the Family District Court by amending [section 5](#) of the *Courts (Establishment and Constitution) Act 1961*. **Section 37** inserts a new section 34A into the [Courts \(Supplemental Provisions\) Act 1961](#) providing for the geographical jurisdiction of the Family District Court where a party to the proceedings lives or works there or where a child whose welfare is the subject of proceedings resides or where a previous order in the same proceedings has been made. It also gives discretion for an application to be heard by a Family District Court judge in another district where it is in the best interests of the child and the child or party to the proceedings has a connection. In matters of urgency, a judge of the Family District Court can make an order or give a direction outside of their Family District Court district. **Section 38** provides that any judge of the Family District Court can make an order under the *Guardianship of Infants Act 1964* as a matter of urgency by amending [section 79\(5\)](#) of the *Courts of Justice Act 1924* to substitute “Family District Court” for “District Court”.

**Section 39** provides that the requirement to include a reference to whether mediation has been attempted does not apply to an application to commence proceedings under 5 Acts identified in the section, including the *Civil Registration Act 2004*. As with the Family High Court and Family District Court, it provides that proceedings must be as informal as possible and the judge and barristers and solicitors should not wear wigs or gowns. **Section 40** also provides for the sitting of the Family District Court in a different building or room or on different days or times to other court sittings. It also provides for the same exception, as set out above in respect of proceedings before the Family High Court and the Family Circuit Court, due to safety/welfare concerns or the urgency/exceptional circumstances of the case. Sections 41 to 43 deal with the powers and functions of the Principal Judge of the Family District Court. **Section 41** provides that the Principal Judge of the Family District Court or any judge nominated by the Principal Judge, can make an order or give a direction regarding the conduct of proceedings.

**Section 42** gives the Principal Judge of the Family District Court the power to issue practice directions. Where a conflict arises between practice directions issued by either a Principal Judge of the Family High Court or a Principal Judge of the Family Circuit Court and practice directions issued by a Principal Judge of the Family District Court, the practice direction issued by the appropriate higher court will take precedence. **Section 43** inserts a new section 36A into the [Courts \(Supplemental Provisions\) Act 1961](#) providing for the functions of the Principal Judge of the Family District Court, including making recommendations to the President of the District Court regarding the number of judges to be assigned to a Family District Court district, and locations for holding sittings of the Family District Court.

Chapter 2 deals with the creation and alteration of Family District Court districts and the assignment of judges. **Section 45** inserts a new section 26B into the [Courts of Justice Act 1953](#) which provides that the Courts Service in consultation with the Principal Judge of the Family District Court and the President of the District Court can divide the Family District Court circuits into districts for the conduct of the business of the Family District Court. It also provides that it can vary or abolish a Family District Court district. **Sections 46 and 47** provide for the qualification and assignment of the Principal Judge of the Family District Court including how the President of the District Court must follow the selection process recommended by the Judicial Appointments Commission. **Section 48** provides for the assignment of judges of the District Court to the Family District Court and the temporary assignment of a judge(s) of the District Court to the Family District Court. **Section 49** provides that an ordinary judge of the District Court can hear an urgent application when no Family District Court judge is available. **Section 50** inserts a new section 71A into the [Courts of Justice Act 1924](#) providing that, so far as may be practicable, a judge assigned to a Family District Court district including an area where the Irish language is generally used must be able to hear evidence in Irish without the assistance of an interpreter.

### Commentary on separate specialised courts

The Joint Committee on Justice published its [Report on Courts and Courthouses](#) on 14 July 2022, examining the state of courts and courthouses throughout Ireland. One of the Committee's recommendations included encouraging "the swift development and progression of the family law

centre at Hammond Lane.”<sup>100</sup> In particular, it noted that Hammond Lane has been assigned €100 million funding in the National Development Programme and that it will be a joint project with the Department of Justice on a Public Private Partnership basis. The Department will oversee this project with input from the Courts Service and An Garda Síochána.<sup>101</sup> The Report also referred to a two year pilot programme carried out in Limerick called the Family Court Dispute Resolution Centre Project. This involves a joint sponsorship between the Legal Aid Board and the Courts Service with the intention of developing an optimum model that can become the standard across the country.<sup>102</sup>

Keith Walsh SC, a leading family law solicitor notes how the Bill envisages a small number of specialist family courts based in a reduced number of districts and circuits around Ireland which will deal with all the family law cases. Family District and Family Circuit courts would be located in one site within each new enlarged family district or circuit. The number of new districts and circuits or location of any of these new Family Law Court Houses has not yet been announced. Walsh expresses concern that existing “[l]ocal courts would lose their jurisdiction to deal with family law”, meaning only specialist Courts would be able to deal with family law matter.<sup>103</sup> He suggests that this would be of particular concern in cases of domestic violence and that a significant amount of resources and reorganisation is required to establish such Family Law hubs.<sup>104</sup>

Conor O’Mahony, Professor of Law at UCC and former Special Rapporteur on Child Protection, in his [submission](#) to the Joint Committee flagged that there may be a limit to the number of specialist regional family courts that can in reality be developed due to the imbalanced distribution of population in Ireland, as each centre requires a certain population to justify the investment in resources and buildings. Professor O’ Mahony did note that while this has been possible to a certain extent in Dublin due to its large population and density, it would prove challenging for families if they were required to travel to dedicated courts instead of their local District Court. He suggested that this could be counteracted by “combining specialist regional facilities in some areas with travelling specialist judges and refurbished facilities in existing court buildings in other areas.”<sup>105</sup>

## Part 7: Miscellaneous

Part 7 provides for miscellaneous matters and comprises 13 sections.

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<sup>100</sup> Houses of the Oireachtas, Joint Committee on Justice, ‘[Report on Courts and Courthouses](#)’, 14 July 2022, p. 8.

<sup>101</sup> Houses of the Oireachtas, Joint Committee on Justice, ‘[Report on Courts and Courthouses](#)’, 14 July 2022, p.24.

<sup>102</sup> Legal Aid Board, ‘[Limerick Family Court Dispute Resolution Centre Project](#)’.

<sup>103</sup> Keith Walsh SC, ‘Hammond Lane finally gets go-ahead and new Family Court Bill published’, [The Parchment, Winter 2022](#) at 40-41.

<sup>104</sup> Keith Walsh SC, ‘Hammond Lane finally gets go-ahead and new Family Court Bill published’, [The Parchment, Winter 2022](#) at 41.

<sup>105</sup> [Opening Statement of Dr Conor O’Mahony](#)’, Senior Lecturer, School of Law, University College Cork, Oireachtas Committee on Justice and Equality, 20 February 2019, at p.6.

**Section 55** provides for precedence between judges whereby [section 9 of the Courts of Justice Act 1924](#) is amended to include the Principal Judge of the Family High Court, and the Principal Judge of the Family Circuit Court, for the purpose of ranking of judges.

**Section 56** provides for references to senior ordinary judges and amends the [Courts \(No 2\) Act 1997](#) to include a reference to the Principal Judge of the Family High Court.

**Section 57** provides for the duties and powers of the Principal Judges of the Family High Court, Family Circuit Court and Family District Court to be discharged by other senior judges where the relevant Principal Judge is unable to act or where the relevant office is vacant.

**Section 58** provides for the amendment of the *Courts and Court Officers Act 2002* to include reference to the Principal Judges of the Family High Court, Family Circuit Court and Family District Court in respect of the register of reserved judgments. **Section 59** sets out that “a judge of the Family High Court, the Family Circuit Court or the Family District Court **shall** take such course or courses of training or education, or both, as may be required by the Principal Judge of that Court [...]”. Section 59 thus appears to set a mandatory requirement for training of judges of the Family courts. **Commentary on specialist training for the judiciary is outlined below.**

**Section 60 – 65** provide for minor amendments to relevant statutes for the purpose of including references to the Family High Court, Family Law Rules Committee, and Family Courts Act 2022.

**Section 66** provides for matters relating to pending proceedings under certain enactments including the *Judicial Separation and Family Law 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* (regardless of whether such proceedings were initiated before, on or after the date of coming into operation of the section).

**Section 67** provides for that a judge of the Family High Court, Family Circuit Court and Family District Court shall retain all of the powers of a judge in the High Court, Circuit Court of District Court.

**Section Section68** provides for matters relating to family law proceedings where concurrent jurisdiction is conferred on the Family High Court, the Family Circuit Court and the Family District Court. The provisions require that, in circumstances where the courts have concurrent jurisdiction, an applicant may not initiate the proceedings in the Family High Court unless there is a special reason for doing so.

### Commentary on specialist training

The Bar Council of Ireland in their [submission](#) to the Joint Committee on Equality and Justice on the reform of the family law system acknowledged how family law cases would most likely be dealt with more efficiently where a specialist division of courts and judges were created. It suggested that this would only work where adequate resources were provided to ensure that such efficiencies would be experienced in practice:

“ensure that the same Judges would deal with family law lists on an ongoing basis which would not only ensure greater efficiency but also greater consistency. It is not envisaged that specialist Judges would be confined to family law but would be assigned to family law from the pool of general Judges. Such a family law division exists de facto in Dublin and

can operate within existing structures. However, such a division is meaningless unless adequate resources are allocated to it.”<sup>106</sup>

The Judicial Studies Committee was established on 10 February 2020 as provided for under the [Judicial Conduct Act 2019](#). It delivers ongoing professional development and judicial training with current training and education programmes including Judicial Conduct and Ethics, Avoiding Re-traumatisation, Unconscious Bias and Vulnerable Witnesses, all of which are relevant in the context of family law.

Other jurisdictions also provide specialised training to family law judges. In England and Wales, judges receive specialised training in family law including induction courses for newly appointed judges authorised to hear private family law and public family law cases in the County Court, and for the district bench of the Family Proceedings Court. These involve a 4-day residential course consisting of small group work and lectures.<sup>107</sup>

Professor Conor O’Mahony in his [submission](#) to the Joint Committee highlighted the on-going calls for reform of the family law system including a specialised court system as well as noting that “specialisation in the area of family law is now commonplace among judges and courts across Europe.”<sup>108</sup> He went on to note that it is not simply a matter of having separate facilities:

The establishment of a separate court or court division dedicated to cases concerning families or children will not, in itself, rectify the difficulties identified above unless it is properly designed and resourced. Specialisation, rather than mere separation, is what really matters in this context.<sup>109</sup>

However, as noted in the section on comparative jurisdictions and highlighted by Professor O’ Mahony in his [submission](#), a specialised family law system did not preclude Australia from encountering difficulties such as efficiencies, delays and poor outcomes for families.

## Part 8: Jurisdiction

**Part 8** of the Bill provides for the jurisdiction of the newly established family courts, comprising **sections 69 to 95**. It provides for several substitutions in various relevant statutes for ‘Family Circuit Court’ instead of ‘Circuit Court’ and ‘Family District Court’ instead of ‘District Court’.

**Section 69** provides that the Family District Court has unlimited monetary jurisdiction where agreement is reached by the parties on the matters which are the subject of the proceedings, and they provide consent. **Sections 70 and 71** provide for the transfer of proceedings from the Family District Court to the Family Circuit Court and vice versa. There are limitations on this under **section 72** where an order for judicial separation, divorce or dissolution of a civil partnership has been granted by a judge of either Court, proceedings must not be transferred under section 70 or

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<sup>106</sup> Bar Council of Ireland, ‘[Submission by Council of The Bar of Ireland to the Joint Oireachtas Committee on Justice and Equality: Reform of the Family Law System](#)’, 4 March 2019.

<sup>107</sup> Courts and Tribunal Judiciary, ‘[Family Training Overview](#)’

<sup>108</sup> ‘[Opening Statement of Dr Conor O’Mahony](#)’, Senior Lecturer, School of Law, University College Cork, Oireachtas Committee on Justice and Equality, 20 February 2019, at p.5.

<sup>109</sup> ‘[Opening Statement of Dr Conor O’Mahony](#)’, Senior Lecturer, School of Law, University College Cork, Oireachtas Committee on Justice and Equality, 20 February 2019, at p.5.

71 in relation to orders made under [Part II](#) of the *Family Law Act 1995* (judicial separation), [Part III](#) of the *Family Law (Divorce) Act 1996* (divorce) or [Part 12](#) of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* (dissolution of a civil partnership) .

**Section 75** substitutes a new subsection (2) into [section 5](#) of the *Guardianship of Infants Act 1964* to increase the monetary jurisdiction of the Family District Court in relation to maintenance and lump sum payments to €500 per week and €50,000 respectively. **Section 76** substitutes a new subsection (2) into [section 10](#) of the *Family Home Protection Act 1976* (the Act of 1976) to provide for the concurrent jurisdiction of the Family High Court, Family Circuit Court and Family District Court under that Act. It also substitutes a new subsection (4) to provide that the Family District Court will not have jurisdiction where the market value of any land to which the proceedings relate exceeds €1 million. It also provides where the court is of the view, on the basis of the evidence before it, that the market value of the land to which the proceedings relate exceeds €1 million, it must transfer the proceedings to the Family Circuit Court. The Minister for Justice can by order, increase this limit to a maximum of €2 million.

**Section 77** substitutes a new paragraph (a) into [section 23\(2\)](#) of the *Family Law (Maintenance of Spouses and Children) Act 1976* to increase the monetary jurisdiction of the Family District Court in relation to maintenance to €1,500 per week for the support of a spouse or €500 per week for the support of a child.

**Section 78** provides for the concurrent jurisdiction of the Family High Court, Family Circuit Court and the Family District Court under the [Family Law Act 1981](#). It also provides that the Family District Court does not have jurisdiction to hear proceedings where the amount claimed exceeds €1 million. Where the Family District Court believes, based on evidence before it, that the market value of the land to which the proceedings relate, exceeds €1 million, it must transfer the proceedings to the Family Circuit Court. The Minister for Justice can by order, increase this limit to a maximum of €2 million.

**Section 79** inserts appropriate references to the Family Circuit Court and circuits into the [Status of Children Act 1987](#) including the geographical jurisdiction of Judges of the Family Circuit Court in relation to proceedings under the Act.

**Section 80** inserts a new section 1A into the [Judicial Separation and Family Law Reform Act 1989](#) providing for joint applications for judicial separation. It also provides that the Family District Court does not have jurisdiction to hear proceedings under the [Judicial Separation and Family Law Reform Act 1989](#) involving land valued over €1 million. Where the Family District Court believes, based on evidence before it, that the market value of the land to which the proceedings relate, exceeds €1 million, it must transfer the proceedings to the Family Circuit Court. The Minister for Justice can by order, increase this limit to a maximum of €2 million.

**Section 81** inserts appropriate references to the Family High Court and Family District Court into the [Child Abduction and Enforcement of Custody Orders Act 1991](#) and substitutes a new subsection 5 in [section 37](#) of the Act to provide that the Family District Court or the District Court, if necessary where no Judge of the Family District Court is available, can exercise jurisdiction under that section. Section 37 relates to the power of Garda Síochána to detain a child they reasonably suspect is about to be or is being removed from the State in breach of certain orders.

**Section 83** inserts appropriate references to the Family Circuit Court and Family District Court into the [Maintenance Act 1994](#). **Section 84** inserts a new section 5A into the [Family Law Act 1995](#) providing for joint applications for ancillary orders made under a judicial separation.

**Section 85** amends the [Family Law \(Divorce\) Act 1996](#) to provide for joint applications for divorce and ancillary orders. It also provides for the concurrent jurisdiction of the Family High Court, Family Circuit Court and the Family District Court under that Act and that the Family District Court will not have jurisdiction where the market value of any land to which the proceedings relate exceeds €1 million. Where the court is of the view, on the basis of the evidence before it, that the market value of the land to which the proceedings relate exceeds €1 million, it must transfer the proceedings to the Family Circuit Court. The Minister for Justice can by order, increase this limit to a maximum of €2 million.

**Section 86** inserts appropriate references to the Family High Court, Family Circuit Court and Family District Court into the [Jurisdiction of Courts and Enforcement of Judgments Act 1998](#).

**Section 87** inserts appropriate references to the Family Circuit Court and Family District Court into the [Protection of Children \(Hague Convention\) Act 2000](#). **Section 88** inserts appropriate references to the Family High Court, Family Circuit Court and Family District Court into the [Civil Registration Act 2004](#). **Section 89** amends [section 3](#) of the [Land and Conveyancing Law Reform Act 2009](#) to insert appropriate references to the Family High Court, Family Circuit Court and Family District Court regarding proceedings under [section 31](#) of that Act arising from divorce, judicial separation or civil partnership dissolution.

**Section 90** provides for the concurrent jurisdiction of the Family High Court, Family Circuit Court and Family District Court and inserts appropriate references to those courts into the [Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010](#). **Sections 91 to 95** insert appropriate references to the relevant Family Court in respect of proceedings under various enactments.

### Commentary on jurisdiction of the Courts

The LRC Report in 1996 concluded that a unified family courts system drawing on the resources of both the District Court and Circuit Court would work well but noted that:

On balance, we believe that our provisional recommendation in favour of a Circuit level Family Court is correct. We do not believe that remedies such as divorce, annulment or judicial separation should be made available at the level of a court of summary jurisdiction. Therefore, if there is to be a unified family law jurisdiction, as we strongly believe there should be, it must at this time be established at Circuit level.<sup>110</sup>

Several family practitioners and organisations have expressed concern over what they envisage as difficulties with the jurisdiction of the new specialised Family Courts system. Keith Walsh, a leading family law solicitor and senior counsel, has observed what he calls “a fatal flaw” in the Family Courts Bill. This relates to the section of the Bill which gives the Family District Court the jurisdiction to deal with divorce, judicial separation and other cases with a value up to €1m. This will effectively mean that in practice the Family District Court will be dealing with the majority of cases, a system which is already overworked and facing substantial delays.<sup>111</sup>

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<sup>110</sup> Law Reform Commission, [Report on the Family Courts](#) (LRC 52 – 1996) para. 421, at 29.

<sup>111</sup> Mary Carolan, ‘[Plan to move most divorce and judicial separation cases to District Courts a ‘fatal flaw’ in new Bill](#)’, *The Irish Times*, 12 December 2022.



Walsh, in his review of the Family Courts Bill for *The Parchment*<sup>112</sup> observes that several stakeholders including the Law Society of Ireland and the Dublin Solicitors Bar Association expressed serious concerns over the potential removal of the jurisdiction of the High Court in the General Scheme. The practical implication is that parties would have been unable to originate cases in the High Court, effectively placing additional strain on the Circuit Court. This could also have constitutional implications as Article 34.3.1° of the Constitution provides that the High Court enjoys “full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal”.<sup>113</sup> Such concerns appear to have been taken into consideration and the Bill retains the jurisdiction of the High Court in relation to judicial separation and divorce cases where the market value of property is over €3 million.

Walsh also raises concerns around the introduction of the proposal of joint applications for judicial separation, divorce or dissolution of a civil partnership, observing that it warrants closer scrutiny as it raises arguments around basic legal principles such as equality of arms, independent legal advice and separate legal representation.<sup>114</sup> This would be particularly significant in circumstances where one partner was in a more vulnerable position than the other, whether that be financial or otherwise as there could be potential for unfairness and discrimination.

Community Law and Mediation, an independent community law centre have also commented on the potential implications for cases involving care of a child that remain within the jurisdiction of the District Court:

Jurisdiction in private family law is determined based on the financial assets of the family, and the bill contains no provision for complex high-conflict private family law cases – where care of a child or children is the source of the complexity – to be directed to the Circuit Court...

Furthermore, the bill does not provide for the separation of public and private family-law proceedings in the court lists of the new family-law courts ...

This has the effect that families and children who are in court to address child-protection issues may have their cases listed alongside families and children who are in court to address custody and access.<sup>115</sup>

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<sup>112</sup> Keith Walsh SC, ‘Hammond Lane finally gets go-ahead and new Family Court Bill published’, [The Parchment, Winter 2022](#) at 40.

<sup>113</sup> See Law Society of Ireland, ‘[Submission to the Joint Oireachtas Committee on Justice: General Scheme of the Family Court Bill](#)’, February 2021 at 20.

<sup>114</sup> Keith Walsh SC, ‘Hammond Lane finally gets go-ahead and new Family Court Bill published’, [The Parchment, Winter 2022](#) at 43.

<sup>115</sup> ‘[Bill lacks Circuit Court referral mechanism](#)’, Law Society Gazette, 18 November 2022. Section 70 of the Bill does provide that a judge of the Family District Court may send forward proceedings to the Family Circuit Court where there are special circumstances in the proceedings that would make it more appropriate for the proceedings to be dealt with by that court. There is no specific mention of care of a child or an automatic process for a referral of such a case.

## Part 9: Protection for Parties to Proceedings

Part 9 of the Bill concerns matters relating to protection for parties to proceedings.

Part 9 comprises three sections:

- **Section 96** provides definitions for terms used within Part 9;
- **Section 97** provides for matters relating to proceedings heard otherwise than in public; and,
- **Section 98** provides for the prohibition on publication or broadcast of certain matters.

**Sections 96 – 98** of the Bill largely mirror sections 39, 40 and 40A of the [Civil Liability and Courts Act 2004](#) (2004 Act) which provide for definitions, matters relating to proceedings heard otherwise than in public and the prohibition on publication or broadcast of certain matters, respectively.

Schedule 1 of the Bill seeks to repeal *sections 40 and 40A* of the *Civil Liability and Courts Act 2004*.

In defining “relevant enactment”, a list of, largely family law related–statutes to which this part relates is provided at **section 96 (a) – (l)**.

**Section 97** of the Bill outlines the rules relating to attending, and reporting on, proceedings that are heard otherwise than in public or “*in camera*”. Section 97 enables, among other things, the preparation and publication of reports of proceedings, provided that the report does not identify any child to which the proceedings related, and the report is subject to any directions the court may give in that regard. Mirroring section 40 of the *2004 Act*, section 97(3) provides for attendance of bona fide representatives of the Press. The court may, on its own motion or on application to it by a party to the proceedings or by a person on behalf of a child to whom the proceedings relate, exclude or restrict the attendance of bona fide representatives of the Press from the court or prohibit or restrict the publication or broadcasting of any evidence given or referred to during the proceedings.

As noted in the [explanatory memorandum](#) of the Bill, section 97 “largely restates” the provisions of section 40 of the *2004 Act*.

**Section 98** of the Bill provides for matters relating to the prohibition on publication or broadcast of certain matters. Section 98 largely mirrors the contents of section 40A of the *2004 Act*. Section 98(1) provides for the prohibition on publication or broadcasting of information which would be likely to lead members of the public to identify the parties to proceedings to which a relevant enactment relates or any child to whom those proceedings relate.

Section 98(2), mirroring section 40A(2) of the *2004 Act*, provides for the offence of publishing or broadcasting in contravention of subsection (1). A person found guilty of an offence shall be liable: (i) on summary conviction, to a class A fine or to imprisonment for a term not exceeding 12 months or both, or (ii) on conviction on indictment, to a fine not exceeding €50,000 or to imprisonment for a term not exceeding 3 years or both. These penalty ranges are the same as those provided at section 40A of the *2004 Act*.

Whilst section 40A of the *2004 Act* is largely replicated in the Bill at section 98, a defence is introduced by section 98(5) of the Bill which provides a “defence for a person who is charged with an offence under this section to prove that at the time of the alleged offence the person was not aware, and neither suspected nor had reason to suspect, that the matter alleged to have been published or broadcast was a matter specified in this section.”

Aside from the proposed defence at section 98(5), following an assessment of the current regime under sections 39, 40 and 40A of the *2004 Act* and the proposed regime as provided at sections 96 – 98 of the Bill, it appears the regime envisaged by the Bill does not represent a significant divergence from the current rules.

### Commentary on proceedings otherwise than in public

Views from various commentators on the matter of proceedings heard otherwise than in public, or the *in camera* rule, have been heard by the Joint Oireachtas Committee on Justice and Equality on the reform of the family law system (2019) and the Family Justice Oversight Group (2021).

Dr Carol Coulter, who at the request of the Courts Service conducted the Family Law Reporting Project and the Child Care Law Reporting Project, discusses the *in camera* rule in her submissions to the Joint Committee.

Coulter distinguishes between the two regimes brought about in 2004 and 2013 respectively: the 2004 regime permitted reporting on family law proceedings by nominated parties including the Courts Service, the LRC, and the Economic and Social Research Institute (the ESRI); the 2013 regime permitted bona fide members of the press to attend, monitor and report on family law proceedings. However, in the latter case, a number of restrictions is placed on the media in terms of what can be reported (as well as penalties for breaching the legislation with fines of up to €50,000 and / or three years imprisonment).<sup>116</sup> Thus, according to Coulter, there has “understandably, been little media attendance at family law proceedings. In any case, no media organisation has the resources to provide comprehensive coverage.”<sup>117</sup>

Coulter states that, owing to the heavy workload of the judiciary, the provision of written judgments on all family law cases is not practical.<sup>118</sup> Coulter states that the only way to “ensure balanced and systematic reporting” of family law proceedings is through a dedicated reporting body.<sup>119</sup>

In their submission to the Joint Committee, on behalf of Rape Crisis Network Ireland (RCNI), on the *in camera* rule, Dr. Clíona Saidléar said “[a] thorough review of how the *in camera* rule impacts on transparency and accountability should be considered.”

Dr. Kenneth Burns, Senior Lecturer in Social Work at University College Cork, in his submission to the Joint Committee on 13 March 2019, stated that the “*in camera* rule is poorly defined in Irish law” and the “precise parameters ... largely comes down to the subjective opinion of individual judges.”<sup>120</sup>

Burns states that:

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<sup>116</sup> Carol Coulter in her Opening Statement to the Joint Committee of Justice and Equality on March 6, 2019, 88.

<sup>117</sup> Carol Coulter in her Opening Statement to the Joint Committee of Justice and Equality on March 6, 2019, 88.

<sup>118</sup> Carol Coulter in her Opening Statement to the Joint Committee of Justice and Equality on March 6, 2019, 88 – 89.

<sup>119</sup> Carol Coulter in her Opening Statement to the Joint Committee of Justice and Equality on March 6, 2019, 88 – 89.

<sup>120</sup> Joint Committee on Justice and Equality Debate, Wednesday 13 March 2019, “Reform of Family Law System: Discussion (Resumed)”, [here](#).

“The law neither clearly allows nor prohibits interviews with children, young people and their parents. In the absence of clarity, researchers, children, young people and parents are at risk of being held in contempt.”<sup>121</sup>

On the *in camera* rule, in its submission to the Family Justice Oversight Group, RCNI’s view is that there should be a “thorough overhaul of the current system”, including by the introduction of “easily comprehensible rules setting out clearly what can and cannot be discussed or shared”.<sup>122</sup> The RCNI also believe the current *in camera* rules have a “dampening effect” on research capabilities and the potential to inform family law policy and service provision.<sup>123</sup>

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<sup>121</sup> Houses of the Oireachtas, Joint Committee on Justice and Equality, [Report of the Family Law System](#) (October 2019) 115.

<sup>122</sup> Rape Crisis Network Ireland (RCNI), [RCNI Submission to the Family Justice Oversight Group Consultation Topics – Phase 1 Consultation](#), 9.

<sup>123</sup> Rape Crisis Network Ireland (RCNI), [RCNI Submission to the Family Justice Oversight Group Consultation Topics – Phase 1 Consultation](#), 9.

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