

# Child Law Project

## Observations on the Family Courts Bill 2022

Dr Maria Corbett

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## Introduction

Since the 1970s there have been calls for the establishment of a family court, including the landmark publication in 1996 of the Law Reform Commission's *Report on Family Courts*.<sup>1</sup> Over twenty-five years later, the Government has finally taken steps to implement this 1996 recommendation. In its 2020 Programme for Government, the Government committed to '[e]nact a Family Court Bill to create a new dedicated Family Court within the existing court structure and provide for court procedures that support a less adversarial resolution of disputes.'<sup>2</sup> The Child Law Project broadly welcomed the General Scheme and set out its observations in 'General Scheme of the Family Court Bill Observations to the Joint Committee on Justice' 19 February 2021.<sup>3</sup>

In September 2020, the Government approved the preparation of a Bill to establish a family court and the Minister for Justice, Helen McEntee TD, published a General Scheme of the Family Court Bill.<sup>4</sup> On 1 December 2022, the Government published the Family Courts Bill.<sup>5</sup> The Family Courts Bill 2022 comprises ten Parts, containing 103 sections. It also contains two Schedules related to repeals and amendments of enactments. The Bill runs to 114 pages. If enacted, the law will establish a Family High Court, Family Circuit Court and Family District Court as specialist divisions within current court structures. These three new divisions will comprise the 'Family Court'. Under this new model the Family Court will hear child care, adoption and private family law matters.

This paper summaries the provisions of the Family Courts Bill and explores how the Bill may impact on the conduct of child care proceedings. We believe the Bill should be enacted and commence in full as a matter of priority. In addition, we would urge consideration of adequate resourcing, both financial and ancillary, to ensure the provisions of the Bill can be implemented as envisaged. Investment in case management and court supports will be central to the success of the new Family Court.

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1 The Law Reform Commission, *Report on Family Courts* (LRC 52-1996, 1996).

2 Government of Ireland, *Programme for Government, Our Shared Future* (Government Publications 2020) 85. The commitment to publish legislation to create a Family Court is also reflected in the Objective 50 of the Department of Justice's *Justice Plan 2022*.

3 See: <https://www.childlawproject.ie/wp-content/uploads/2021/02/CCLRP-Observations-on-General-Scheme-of-the-Family-Court-Bill-February-2021.pdf>

4 A copy of the General Scheme is available at:

<http://justice.ie/en/JELR/Family%20Court%20Bill%20General%20Scheme.pdf/Files/Family%20Court%20Bill%20General%20Scheme.pdf/>

5 A copy of the Bill is available at: <https://www.oireachtas.ie/en/bills/bill/2022/113/>

## Part 1: Interpretation

Part 1, s. 2 of the Bill sets out relevant interpretations. The term “family law proceedings” is defined as those held under a specific set of statutes, including under the Child Care Act 1991, the Adoption Act 2010, the Child and Family Relationships Act 2015 as well as private family law statutes and the Domestic Violence Act 2018.

*Observation:* We echo observations we made on the General Scheme of the Bill. We believe consideration should be given to amending the phrase ‘family law proceedings’ to read ‘child and family law proceedings’ to reflect more closely the work of the Family Court and highlight the child law element of the new Court. Unlike private family law where the parties are private individuals, public child law proceedings are usually initiated by a statutory body and may involve multiple parties, including, in some circumstances, children. Child law may concern family matters such as admitting a child to care or discharging a care order in order to reunify a family. However, child law also hears matters that concern the child him or herself, not the child’s parents, such as the needs of a child in care; providing care to an unaccompanied minor; detaining a child with emotional or behavioural difficulties (special care applications); as well as hearing adoption orders.

## Part 2: Guiding Principles

Part 2, s.8 provides a set of Guiding Principles that the courts, legal practitioners and parties must have regard to when dealing with family law proceedings. This is a unified set of principles applying to child care, adoption and private family law proceedings.

Section 8(2)(a) provides that in proceedings in which “the welfare of a child is involved or likely to be affected by the outcome”, the courts and legal practitioners must ensure that -

- (i) the best interests of the child are a primary consideration in the conduct of the proceedings,*
- (ii) the child is informed, as appropriate to his or her age and capacity and the nature of the proceedings, of developments and progress in the proceedings and the outcome of the proceedings,*
- (iii) in respect of a child who is capable of forming his or her own views and where the child wishes to express such views, in so far as is practicable, the views of the child are ascertained and given due weight having regard to the age and maturity of the child, and*
- (iv) there is no unreasonable delay in determining the proceedings;*

*Observation:* We welcome this provision and believe it will further the implementation of the rights of the child under Article 42A of the Constitution and under international law and has the potential to improve the conduct of child care proceedings.

It is important to note that principle (i) on the best interests of the child applies to the “conduct of the proceedings” in a broad range of proceedings. This does not dilute the higher statutory duty imposed on the court under certain statutes, such as the Child Care (Amendment) Act 2022 whereby the court must “regard the best interests of the child as the paramount consideration in the resolution of such proceedings”.

We particularly welcome the inclusion of principle (iv) on unreasonable delay. We had made an observation on the General Scheme of the Bill that such an inclusion would strengthen the set of principles.

Section 8(2)(b) provides additional principles relating to 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, is just, speedy and minimises costs.

*Observation:* The principle to resolve disputes using alternative dispute resolutions does not exclude child care proceedings, however, it does include the phrase that the principle only applies “unless resolution by such means would not be appropriate due to the nature of the proceeding”.

### **Part 3: Family High Court**

Part 3 establishes a Family High Court, which among things will hear special care applications under Part IVA of the Child Care Act 1991.

*Observation:* This provision is welcome and provides continuity that special care application are heard by the High Court.

### **Part 4: Family Circuit Court**

Part 4 establishes a Family Circuit Court, which among things will hear appeals from the Family District Court.

*Observation:* This provision is welcome.

## Part 5: Family District Court

Part 5 establishes a Family District Court.

Section 37 retains the jurisdiction of the Family District Court as a court of local jurisdiction. The judge has jurisdiction within a defined geographical area and can only hear applications from parties who live or work in that area or where the child whose welfare is the subject of proceedings resides or in which a previous order in the same proceedings has been made.

Under the (existing and retained) model, as a general rule, the District Court cannot transfer a case to another District. The Bill, under section 37, provides discretion to allow an application to be heard by a Family District Court judge in another district in which the child or party to proceedings has a connection, when it would be in the best interest of the child or where otherwise appropriate. The section also enables a judge of the Family District Court to make an order or give a direction in family law proceedings both within and outside of his or her district, in matters of urgency. In addition, Section 37(4) provides that a judge may on his or her own motion or on the application of any party refer any question of law arising in proceedings to the Family High Court for determination, and that determination shall be final.

*Observation:* This provision, allowing for ‘horizontal’ transfer of cases between districts and providing a clear statutory basis for stating a case to the Family High Court, is welcome. This addresses deficiencies we raised in our analytical reports and in our observations on the General Scheme.

Section 39(3) provides that a judge of the Family District Court may suspend proceedings to allow parties to resolve issues in dispute through alternative dispute resolution.

*Observation:* This provision is welcome. We have made observations that alternative dispute resolution may be appropriate to address ancillary matters that arise during child care proceedings, for example in relation to access or holiday arrangements for a child in care and their parent. We note however that at present there is no agency designated to conduct alternative dispute resolutions in child care proceedings.

Section 40 provides that the Family District Court will sit in a different building or room or on different days or at different times from other court sittings, with the exemption of Family High Court or the Family Circuit Court sittings. In addition, there is an exemption where the safety or welfare of a party to the proceedings or a child to whom the proceedings relates is likely to be adversely affected if the proceedings are not heard as a matter of urgency or due to the urgency of the case or in exceptional circumstances the court is satisfied that compliance with that subsection is not possible.

*Observations:* This provision is appropriate. However, we would urge consideration to be given to listing the hearing of scheduled child care proceedings separately from that of private family law proceedings. This does not require a legal amendment. This separation will support the objective of protecting a child's right to privacy. It will also avoid the situation where parents and children are waiting for public child care hearings in the same building as private family law parties where acrimonious disputes may break out in the environs of the court.

Section 42 provides that the Principal Judge of the Family District Court can issue practice directions. Where a conflict arises with practice directions issued by a higher court, the higher court's directions will take precedence. This provision also sets out the functions of the Principal Judge of the Family District Court which include 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.

*Observation:* This provision is particularly welcome. Under the existing District Court model, while Court Rules apply to all 24 Districts, Practice Directions only apply to the specific District which develops them. Each District is entitled to organise and put in place its own practices. This decentralised model hampers the implementation of a consistent and shared approach to the hearing of child care cases across the country. Section 42 is particularly welcome as it will empower the Principal Judge of the Family District Court to issue practice directions which will apply to all District. This provision has the potential to bring coherence to practice within this new division. We had made observations on the General Scheme of the Bill that such a power was not clear.



## Part 6: Family Law Rules Committee

Section 51 provides for the establishment, composition, functions and powers of a Family Law Rules Committee or Family Law Subcommittees of existing rules committees.

*Observation:* This provision is welcome.

Section 59 provides for the training and education of the judges of the Family Court. Judges will be required to undertake a course(s) of training or education or both, as required by the Principal Judge of the relevant court in consultation with the President of that court and in consultation with the Chief Justice.

*Observation:* This provision is welcome.

## Part 8: Jurisdiction

Section 70 provides 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.

*Observation:* This provision allows for the 'vertical' transfer of cases from the Family District Court to the Family Circuit Court, is welcome. It addresses deficiencies we had raised in our analytical reports and in our observations on the General Scheme. We had observed that the current District Court is not well placed to hear complex cases which involve multiple witnesses, a high number of issues in dispute and which are likely to consume considerable court time.<sup>6</sup>

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6 See for example, Carol Coulter, 'An Examination of Lengthy, Contested and Complex Child Protection Cases in the District Court' (Child Care Law Reporting Project 2018) p.45.

## Part 9: Protection for Parties to Proceedings

Part 9 provides for rules relating to attendance at and reporting of *in camera* family law proceedings, replicating existing provisions. It permits the reporting of family law proceedings by research bodies and the media, subject to certain safeguards.

*Observations:* We welcome this provision which will permit more extensive research into family law and the continuation and expansion of the court reporting work currently carried out by the Child Law Project (CCLRP Clg).

## Child Law Project

Established in 2012, the Child Law Project examines and researches judicial child care proceedings. We attend and report on District Court child care and High Court special care hearings, relevant Judicial Reviews and wardship cases involving children and young adults who have previously been in care. We operate under a protocol to protect the anonymity of the children and their families subject to proceedings. The Protocol is available on our website at: <https://www.childlawproject.ie/protocol/>

We use information from the cases we attend to identify emerging trends. We also conduct legal and policy analysis and research to identify possible reforms to address the difficulties raised in our court reporting work. We provide information to the public on the operation of the child care system in the courts with the aim of promoting transparency and accountability.

*Remit:* Our remit is set and limited by section 3 of the Child Care (Amendment) Act 2007 and Regulation No 467 of 2012 which allows organisations named in the legislation to nominate people to attend and report on child care proceedings. Section 6 of the Child Care (Amendment) Act 2022 provides a definition of “relevant documents” which enables us to access documents as part of our reporting work.

*Governance and Funding:* In 2018, the CCLRP was established as a company limited by guarantee and is governed by a Board of Directors. The CCLRP trades as the ‘Child Law Project’ and prior to 2022 was known as the ‘Child Care Law Reporting Project’. The Child Law Project is funded by the Department of Children, Equality, Disability, Integration and Youth.

*Publications:* To date, we have published over 859 case reports from our attendance at child care proceedings. We have also published numerous analytical reports drawing on the information in these reports and observations on proposed legislative proposals. All our publications are available on our website <[www.childlawproject.ie](http://www.childlawproject.ie)>

Latest case report: <https://www.childlawproject.ie/publications/>

- [CCLRP Ripe for Reform Report October 2021](#)
- [CCLRP Observations on Child Care Amendment Bill 2019](#)
- [District Court Child Care Proceedings: A National Overview](#)
- [An Examination of Lengthy, Contested And Complex Child Protection Cases In the District Court, By Carol Coulter, March 2018](#)
- [Final Report, Child Care Law Reporting Project by Dr Carol Coulter November 2015](#)
- Child Care Proceedings: A Thematic Review of Irish and International Practice (Maria Corbett and Carol Coulter, commissioned by DCYA) <https://bit.ly/2ZASpy2>

### Contact Details

7 Red Cow Lane, Smithfield, Dublin 7, D07XN29

Website: [www.childlawproject.ie](http://www.childlawproject.ie) Twitter: @ChildLawProject

Dr Carol Coulter, Executive Director – [carol@childlawproject.ie](mailto:carol@childlawproject.ie)

Dr Maria Corbett, Chief Executive – [maria@childlawproject.ie](mailto:maria@childlawproject.ie)