Law Society of Ireland

SUBMISSION OF THE

Law Society of Ireland

CHILDREN AND FAMILY RELATIONSHIPS BILL 2014

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1. Introduction

1.1. The Children and Family Relationships Bill represents the most significant change in family law in a generation and attempts to reflect the social reality of contemporary family life. In this regard, the 2011 census revealed that 35% of children born in Ireland were born outside of the traditional family unit. That said, the rights of such children have been dealt with in a piecemeal fashion to date ignoring that these children have interests that need to be recognised and safeguarded. The consolidated approach in the Children and Family Relationships Bill is to be welcomed in that it will provide a legal framework for a diverse range of family types.

1.2. The key principles underpinning the Bill demonstrate a commitment to ensuring the best interests of the child will be central in decision making and should serve to promote family stability, thereby ensuring children can have supportive relationships with parents/guardians/those acting in *loco parentis*.

1.3. This Bill is a welcome clarification on many issues affecting families today and puts children at the heart of family law reform and succeeds in rectifying the position whereby the non-marital family possessed less rights than the marital family. This Bill, as it relates to children in particular, is to be lauded and brings Ireland in line with many provisions of the United Nations Convention on the Rights of the Child ("UNCRC"). For example Article 2 which states that "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."

2. Surrogacy

2.1. Head 13 provides for applications to the court relating to parentage. The effect of the later sub-heads within this are that declarations of parentage will not be made where the mother was under age or where a payment is made outside those permitted under the Scheme. The effect of this is to deny parentage to the child. As a consequence, children may be denied a number of rights.

2.2. First, the right to citizenship and nationality in Ireland flows from the nationality of the parents and thus if the child cannot prove Irish citizen parentage, it will be denied citizenship and may be without secure rights of residence in the State. This in turn affects rights to family life including succession and descent (Head 9) and may deny such a child the same education and other rights as other children or indeed as the child's siblings.

2.3. The current proposal is motivated by the need for a sufficiently serious penalty and disincentive to commercial surrogacy. The unintended consequence of this is that the child is punished rather than those parents where the mother contravenes these provisions, contrary to the best interests of the child. It is suggested that the parents should be

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This submission is being made to the Joint Oireachtas Committee on Justice, Defence and Equality as part of its pre-legislative consultation on the Heads of the Bill.

sanctioned instead of the child. It is further suggested that care should be taken to avoid harm to the child resulting from penalising its parents.

2.4. Further issues in relation to surrogacy concern the timing of the consent of the birth mother. That consent may not be given until at least a month has passed from the time of the birth. This is to give the mother time to recover. However, as many children will be in the custody of its intended parents from the time of birth, the legislation will have to provide for who is to make decisions relating to that child pending the consent. Such decisions might include medical decisions relating to the baby.

3. Best Interests of the Child

3.1. *Head 31*

The definition of best interests should be extended to refer to "*encompass factors as set out in Head 32(3)*". The definition of custody should contain a rider *"which shall not be deemed to delimit the powers, responsibilities and rights of any joint guardian in respect of the child".*

3.2. The definition of 'father' precludes the automatic granting of guardianship rights to parties in a relationship who have never married or cohabited together. It is clear that the legislature may not wish to open the possibility of automatic guardianship to every father, particularly in circumstances of:-

a) Very casual or brief encounters resulting in pregnancy, and
b) A situation where there may be lack of clarity as to who the father actually is.

3.3. That said, there needs to be some recognition of the fact that couples who have a relationship that falls short of living together should not exclude the father from acquiring automatic guardianship rights. To do so would potentially be in breach of Article 8 of the European Convention on Human Rights.

3.4. *Paragraph 3*

The cohabitation referred to in this paragraph should be continuous. The existence of any Order under the Domestic Violence Legislation in favour of the mother of the child should be a contra-indicator to the automatic assumption of guardianship under this sub-head. It is clear that notwithstanding the cohabitation, the parties may be living in an abusive relationship and the existence of the child may be used as a further means and method of imposing or controlling the situation.

4. Guardianship, Custody and Access

4.1. Part 7 of the General Scheme deals with guardianship, custody and access. Some very important definitions are contained in Part 7 of the Bill; the definition of 'best interests', the definition of 'father' (Head 31) and the definition of 'guardianship' (Head 34). Head 31(1) defines best interests as: "in relation a child, includes the physical, emotional, psychological, educational and social needs of the child including the child's need for stability having regard to the child's age and stage of development."

4.2 The continued used of the terms custody and access in relation to parental contact between children and their parents/guardians should be reviewed having regard to the Law Reform Commission recommendations. The terms custody and access have been in vogue particularly since the 1964 Act and over the years the concepts have been heavily weighted in favour of the "custodial parent" usually the mother, against the rights of the father and in many cases, the best interests of the child. The word "custody" is more properly suited to criminal cases and therefore gives rise to a perception that one party has more rights/entitlement over and with the children than the other. Even the use of the word joint custody does not override this perception.

4.3 The report of the Law Reform Commission on the Legal Aspects of Family Relationships[2] recommends that the terms "parental responsibility", "day to day care" and "contact" should replace the terms "guardianship, "custody" and "access".

4.4 *Head 32 -paragraph (3)(k)*

The Society suggests the inclusion of:-

(iv) to foster and encourage contact between the absent parent and the child.

4.5 *Head 32 - paragraph 4*

In addition to the matters proposed at Head 32(4) when assessing the impact of family violence, it is recommended to consider the victim of such violence and the capacity of that victim to relate with the perpetrator.

Similarly the capacity of the perpetrator of any violence to properly care for the child and the risk if any that perpetrator poses to the child and to the child's parent, should also be taken into consideration.

4.6 *Head 36 – paragraph 4*

The addition of a new paragraph is recommended as subsection 4 (c):-

(c) to obtain all relevant information from organisations or Statutory Authorities with whom the child has contact.

[2] Law Reform Commission, *Legal Aspects of Family Relationships* (Law Reform Commission, 2010 at p.7).

4.7 *Head 36 - paragraph 6*

The list of actions which each guardian may take in relation to the child could, in the absence of co-operation or consent from the other guardian, lead to confusion in the life of the child. This needs to be mitigated against.

4.8 *Head 36 - paragraph 7*

Paragraph 7 directs that a guardian who exercises any of the powers referred to in Paragraph 6 is to do so in a manner consistent with the age of maturity and evolving capacity of a child but there is no acknowledgement of the fact that while Head 36(1) is predicated on the two guardians acting jointly provisions need to be developed in the event that there is little or no co-operation between the parents.

4.9 *Head 39 - paragraph 3*

The existence of any Order under the Domestic Violence Acts should be a contra-indicator to a Court appointment of a parent as a guardian.

4.10 *Head 41*

The right on the part of a custodial parent to appoint an alternate guardian could prejudice the right of the other parent of the child to take custody of the child where the original custodial parent is unable or unwilling to exercise the rights and duties of guardianship in relation to the child. Any such appointment should be with the consent of the other parent or at the least, on due and proper notice being given to the other parent.

4.11 *Head 41 - paragraph 5*

Related to the above is Head 45. This allows for an application to Court but such a process always brings parents into direct conflict if there has to be a Court Application.

4.11.1 It is important to realise that the possibility of parental alienation is now well established, particularly in high conflict cases. While a custodial parent may well espouse contact in principle, their actions, body language and subtle remarks and tone of voice, their anxiety in relation to the child or children seeing the other parent may well cause contact to fail and eventually wither altogether. The damage to a child of a parent adopting a strategy of alienation while appearing to acknowledge and encourage contact, is both insidious and long term and the Court may find it very difficult if as a result the child is refusing all contact and seems convinced that the other parent poses a danger.

4.11.2 The dilemma is always that the Court will have to take into account, particularly now since the 31st Referendum on the Constitution (Children Referendum), the expressed wishes of the child, particularly an older child, which may result in one parent being prevented from having contact regularly or at all. It is important that recognition is given to the fact that the child has been alienated to a degree that is equivalent to emotional abuse by the custodial parent and that the Court will

appreciate the danger of leaving such abuse unresolved. It can and always will be a difficult decision for a Court to find the best solution for the long term interests and welfare of the child. It would therefore be advisable that in determining the best interests of the child the possibility of an objective expert opinion can and should be sought.

5. Guardianship Register

5.1. There is no central guardianship register. At present where parents agree to make a non-marital father the guardian of his child, they are required to sign and have witnessed a statutory form.[3] This form does not, at present, have to be lodged or registered with anybody.

5.2. Head 31(4) of the Children and Family Relationships Bill deals with guardianship by agreement and states that the (unmarried) father and mother, where they agree to make the father a guardian of his child must make a statutory declaration to that effect in the form prescribed by the Minister. This may mean that new regulations will be introduced, replacing S.I. 5 of 1998 (allowing parents to agree to appoint a father as guardian of his child). It is submitted that a central register should be created in which such declarations are to be registered. This would provide a clear and accessible register of guardians of a particular child .

5.3. At present if a couple, agreeing to the unmarried father becoming a guardian of the child, lose the written statutory declaration to that effect, there is no record of that agreement having been made.

6. Guardian *ad litem*

6.1. Head 60 empowers a court to appoint a guardian *ad litem* (GAL) if satisfied that having regard to the special circumstances of the case it is necessary in the best interests of the child and in the interests of justice to do so. Head 60(2) sets out the factors that the court must have regard to when deciding whether to appoint a GAL. It is to be welcomed that the circumstances are set out which will aid the court in its decision to appoint a GAL.

6.2. Head 60(2)(e) in particular should be commended as it vindicates the right of the child to be heard in judicial proceedings (a requirement under the UNCRC and the new Article 41A of the Constitution[4]). The duties and functions of the GAL are set out under Head 60. In particular Head 60(5) states that GAL shall, if satisfied that the adoption of a particular course of action is in the best interests of the child, make a submission of that effect to the

[3] Statutory Instrument No. 5 of 1998.
[4] Article 12 of the United Nations Convention on the Rights of the Child and Article 42A.4.2 of the Constitution.

court. This mandatory requirement on a GAL to put forward to the court any course of action which he/she believes is in the best interests of the child is to be welcomed.

6.3. The Society recommends that provisions should be made for a guardian to be appointed notwithstanding the fact that the child has been made a party to the proceedings where it is in the best interests of the child to do so.

7. Welfare Reports

7.1 Head 58 provides for the procurement of a report by the court on any question affecting the welfare of a child. The inclusion of this provision cures the anomaly that exists at present whereby such a report can only be ordered to be procured by the Circuit Court pursuant to section 47 of the Family Law Act, 1995. While the court having powers to order such Reports is undoubtedly positive, it may not be possible for parents to pay the considerable fees involved, especially since they may not have requested the report. There is a real danger that placing this expense on parents/guardians will act as a significant deterrent, stopping them from requesting such a report be compiled, even though it may be in the best interests of the child to furnish such a report to the court. It is suggested that the State should instead provide some form of funding for the Reports.

7.2 There may be now an opportunity within this Bill to also correct the anomaly within Section 47 of the Family Law Act 1995, and to extend the power to procure a welfare report to the District Court. Currently only the High and Circuit Courts enjoy this power.

8. Enforcement Orders & Mediation

8.1. *Head 63*

As a general point the provisions contained in Head 63 are to be welcomed in that they confer new powers on the courts to enforce Access Orders.

8.2. It is an unfortunate reality in family law that the parent with primary care and control of a child has been found to breach an Access Order and restrict access to the child as a means of punishing the other parent. This is difficult for a court to enforce as even where a custodial parent consistently breaks an Access Order a court has few tools at its disposal at present to penalise such a person. In the vast majority of cases the mother is the custodial parent and for obvious reasons courts are very reluctant to impose a custodial sentence even for flagrant breaches of an Order as this will adversely affect the welfare of the child in question. The provisions contained in this Head are to be welcomed.

8.3. Notwithstanding the above some concerns arise in respect of the provisions as currently drafted:

8.3.1. *Head 63(2)* permits a court to order one party to give security for the future performance of the obligation to enforce the order. It also gives a court the power to require one party to reimburse the other for expenses incurred by the Applicant in attempting to exercise access. These provisions are welcome. That said, in some cases the financial circumstances of the parties will not allow for such orders to be implemented.

8.3.2. *Head 63(3)* proposes that a court be allowed to make an order compelling the parties to attend a parenting course and/or counselling. It also proposes to allow a court to compel the parties to attend mediation. One of the basic foundational principles of mediation is that the parties attend the process voluntarily. Whilst mediation is undoubtedly a better way to resolve parental disputes, in many family law disputes mediation is simply not possible due to the animosity between the parties or because of domestic violence, addiction or mental health issues. The Head should be amended to compel the parties to attend a mediation information session rather than mediation itself.

8.4. *Head 63(3)(c)* provides as follows:

> *'that both parties participate in a mediation process concerning issues in dispute between them impacting on their parenting capacities'.*

8.5. Although the proposed use of mediation as a dispute resolution mechanism is to be welcomed it is respectfully submitted the following section should be substituted having regard to the principles outlined below.

8.6. *Head 63(3)* could be amended to read as follows:

> (3) the direction made by the court pursuant to subhead (2)(d) may include but is not confined to the following:
>
> > (c) that both parties participate in a mediation information meeting and/or ADR information meeting which may lead to a mediated outcome or ADR outcome concerning issues in dispute between them impacting on their parenting capacities.

Voluntary Nature of Mediation

8.7. The Explanatory Memorandum of the Council of Europe's 1998 Recommendation No R (98) 1 on family mediation states that:[5]

[5] Explanatory Memorandum to Recommendation No R (98) 1 on Family Mediation at 27 and 28. See also Council Resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes (2000/C155/01) which states that any initiative should 'be based on voluntary participation'.

'the essence of mediation itself rests in its voluntary character and on the fact that the parties themselves try to reach an agreement and if they refuse or feel unable to mediate, it is counter-productive to attempt to compel them'.

8.8. The Law Reform Commission, in its Report on Alternative Dispute Resolution: Mediation and Conciliation[6] refers to the EU Commission's 2004 European Code of Conduct for Mediators which also recognises the principle of voluntary participation in mediation stating that:

'the parties may withdraw from the mediation at any time without giving any justification.'[7]

8.9. The Mediators' Institute of Ireland (the MII)'s Code of Ethics and Practice also provides at Section 62 that: [8]

'Mediation is voluntary. Any party to mediation including the Mediator may leave the process at any time without having to give reasons.'

8.10. As the LRC stated in its Consultation Paper, there is an important distinction to be noted between mandatory attendance at an information session about any alternative dispute resolution (ADR) process (including mediation) and voluntary participation in an ADR process.[9] The general scheme of the Mediation Bill 2012 does not make provision for mandatory information mediation sessions.

8.11. Head 63(3)(c) sits uneasily with the principles of mediation. Mediation arises from the parties involved freely and decisively choosing it as a process that might resolve their dispute. A genuine compromise cannot therefore be reached by unwilling parties. It is instead suggested that the Court could compel attendance at information sessions for mediation, with the final decision on whether to engage in it being left to the parties themselves. Courts could also be encouraged to suggest mediation as a viable and beneficial course of action at any stage of the proceedings.

Mandatory ADR Information Meetings

8.12. Mandatory ADR information meetings should be introduced prior to any client issuing family law proceedings and a certificate of exemption produced in exceptional circumstances. The Report of the Family Law Reporting Committee recommended the following exemptions from mandatory mediation information sessions:

i. Where the proceedings involve an application for a safety order, a barring order or a protection order under the Domestic Violence Act, 1996;

[6] LRC 98-2010.
[7] LRC 98-2010.
[8] The Mediators' Institute of Ireland Code of Ethics and Practice (December 2009) Available at: www.themii.ie.
[9] The Mediators' Institute of Ireland Code of Ethics and Practice (December 2009) Available at: www.themii.ie.

i. Where a party satisfies the court that his or her personal safety, or the safety of his or her children is or are at risk.[10]

8.13. The LRC further recommends that the person providing the information session may give those attending the information session one of the following certificates:

i. A certificate stating that the person did not attend the information session; or
ii. A certificate stating that the person attended the information session.[11]

Inclusion of all ADR Mechanisms in Referral by Judge

8.14. The Law Reform Commission (LRC) in its Report on Alternative Dispute Resolution: Mediation and Conciliation (LRC 98-20100 defines ADR as:[12]

'….a broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked to or integrated with litigation, and which involves the assistance of a neutral third party, and which empowers parties to resolve their own disputes'.

8.15. Furthermore, the LRC notes that some ADR processes, such as collaborative practice, do not necessarily involve the assistance of a neutral and independent third party[13]. In order to reflect these observations, the LRC defines ADR as a broad spectrum of structured binding and non-binding processes, including mediation, conciliation and arbitration, but does not include litigation, though it may be linked to or integrated with litigation.[14]

8.16. Any referral by a Judge to mediation should be deleted and amended with the term 'ADR'. All forms of ADR should be available to a client including arbitration, mediation (which can be converted into a conciliation if all parties agree in writing) and collaborative law.

Recommendations in respect of Mediation/ADR

1. Mandatory information sessions on ADR and mediation should be introduced prior to the issue of proceedings under the proposed Bill.

2. Section 63(3) could be amended to read as follows:

(3) the direction made by the court pursuant to subhead (2)(d) may include but is not confined to the following:

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[10] Report, p 108. As the Commission noted in its Consultation Paper, some family law cases will and should be resolved in court and may not be appropriately resolved by mediation. Such cases, as previously noted by the LRC, include those where there is serious violence against one of the spouses, or where there are allegations of child sexual or physical abuse. LRC CP 50-2008, para 5.43.
[11] Ibid.
[12] LRC CP 50-2008, para 2.12.
[13] LRC 98-2010, para 2.13.
[14] Ibid.

(c) that both parties participate in a mediation information meeting and/or ADR information meeting which may lead to a mediated outcome or ADR outcome concerning issues in dispute between them impacting on their parenting capacities.

9. Assistance by An Garda Síochana pursuant to an Enforcement Order

9.1. Head 66(1) directs that An Garda Síochana shall, at the request of the Applicant and on the production of a certified copy of the enforcement order, give assistance to the Applicant to give effect to an Access Order.

9.2. This provision could be amended to the effect that the Applicant must first apply to the court to seek the assistance of An Garda Síochana. It is submitted that it would be better if a court first heard the extent of any alleged breaches of an Enforcement Order and that An Garda Síochana only be compelled to assist the Applicant if requested to do so by the court. The reasoning behind this is that some breaches of an enforcement order may be relatively minor yet as currently drafted An Garda Siochana must assist the Applicant. This may involve An Garda Siochana in relatively minor disputes between parents and it would be better if a court first heard the nature of the alleged breaches of the Enforcement Order before An Garda Siochana get involved in enforcing the Enforcement Order.

10. Maintenance in respect of a dependent child

10.1 Head 68 extends the obligation to pay maintenance to civil partners and cohabitants (as defined in the 2010 Civil Partnership and Certain Rights and Obligations of Cohabitants Act). Some reservations arise about the concept of cohabitants being possibly obliged to pay maintenance for a non-biological child. Obviously where the cohabitant is the biological parent of the child it is proper that they have a maintenance obligation to the child as heretofore. However, arguably only biological parents should be held liable for maintenance unless the aforementioned cohabitants have entered into the commitments of marriage or civil partnership.

11. Adoption

11.1 The proposal to amend the Adoption Act for 2010 to put civil partners living together on the same footing as married coupled living together is welcomed.

11.2 While the Adoption Act 2010 allows an adoption by a sole applicant, joint adoption is only possible where the adopters are married to each other. While in principle there is nothing to prevent a person who is a civil partner or a person who is gay or lesbian from adopting as a sole applicant, it is not possible for civil partners to adopt jointly. The current proposals for

reform broadly seek to equate civil partners and married couples. They propose to render civil partners eligible to adopt as a couple, provided they are civil partners of each other and are living together. This, of course, is subject to the requirement in section 34 that the couple be suitable to be adopters.

12. Further suggestions for amendment

- At page 5 of the Bill there is a typographical error as there are two parts 11; this should be corrected and a part 12 inserted.

- A further definition of "surrogacy" should be included at Head 2. It is submitted that further consideration should be given to the definitions relating to surrogacy at Head 2 of the Bill.

- It is submitted that a definition of "genetic testing" should be included in Head 2. There are numerous references to genetic testing throughout the Bill and it is suggested that a definition of same would ensure clarity of interpretation.

- It is suggested that the use of the word "shall" at Head 11(6) should be replaced with "may".

The Law Society of Ireland welcomes the opportunity to work with the Oireachtas Committee on Justice, Defence and Equality and Government Departments on this defining Bill.

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