



## **Covid-19 Response Steering Group**

The Family Lawyers Association (FLA) is a representative organisation of Solicitors and Barristers who work in the area of Family Law across the country. It can rightly claim to be representative of the views of the vast majority of lawyers who practice in the field of Family Law in Ireland.

The number and geographical spread of its members makes it uniquely positioned to report upon the experience of practitioners throughout Ireland in how they have been interfacing with the Courts during this time of national crisis. The FLA is uniquely placed to advance proposals and ideas for the safe working of our Family Law Courts at each level.

A subcommittee of the FLA has endeavoured to develop a detailed understanding of the current functioning of the Courts across Ireland – particularly in so far as it relates to the practice of Family Law and related areas. The results of that survey, though still incomplete, are published today and will be widely circulated. Aside from the data which we have collated, the survey reveals the tremendous commitment, selflessness and professionalism of everyone involved in the administration of Justice across the country and particularly in the field of Family Law. The survey will be updated and re-published as new data and information emerges.

Following on from that work, the subcommittee set upon the task of developing realistic ideas and practices for the reinstatement of the safe and responsible practice of Family Law for the medium future – we suggest from April 2020 to September 2020.

The suggestions set out in this submission are premised on full compliance by all parties with the Public Health Guidelines issued by the HSE. It is important that we make clear that where clients, employees of the Courts Service, members of the judiciary or practitioners have made a judgment call to take additional precautions over and above those advised by the HSE, such judgments ought to be respected.

The proliferation of free, secure video conferencing platforms presents an opportunity for all parties to continue the vital work of ensuring access to the Courts for all and to give litigants an incentive to resolve their disputes with their spouses and partners. We encourage everyone to familiarise themselves with such technology and to embrace the possibilities that it presents.

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We have appended to this document an article by Brandon James, recently published in Family Law Week which speaks to the ease with which Video Technology can be put to use<sup>1</sup>.

A very recently published paper<sup>2</sup> entitled the Remote Access Family Court by Mr Justice MacDonald, an English High Court Judge in the Family Division, clearly illustrates how resourcefulness, imagination and ambition can point us to secure, workable, solutions which will allow the wheels of Justice to turn even in the most challenging of circumstances.

While we recognise that it was vitally important to vastly scale back the normal functioning of the Courts from the 16<sup>th</sup> March onwards, and we support the arrangements put in place by the Presidents of each Court, we submit that for a multiplicity of reasons the business of the Courts can and should be safely expanded from April 23<sup>rd</sup> onwards provided that this can be achieved in a manner which is consistent with the safety and welfare of all Court users and staff.

It is almost trite to observe that, to the greatest extent possible, access to justice should be maintained for all parties involved in family law litigation and particularly for their children. The importance of the observation cannot, however, be overstated.

The Covid-19 emergency creates a very significant obstacle for families trying to resolve their difficulties. It prevents the Courts from considering and vindicating the rights and interests of many children and their parents who are in the system and awaiting access to those Courts. It will cause considerable financial hardship for parties who await child and spousal maintenance applications to be resolved. Families who may have been close to conclusion will now be forced to continue to reside in the same dwelling house or apartment in close proximity for a further number of weeks or months.

The subjective urgency of every family law dispute is mirrored by a wider objective urgency which society shares that citizens should not suffer the misery of family law disfunction in all its forms and guises, any longer than is strictly necessary.

While the Family Lawyers Association welcome the prioritisation of domestic violence cases by the District and Circuit Court, there is a strong case to be made that family law cases for separation and divorce, applications for relocation, maintenance, access, custody and guardianship can and should be progressed from April 23<sup>rd</sup> onwards, provided that this can be achieved in a manner which is consistent with the safety and welfare of all Court users and staff.

We are confident that the proposals set out in this document achieve that goal. Some are ambitious we acknowledge, but others can be put in place quite easily without legislation or changes to the Rules of Court. We do recognise that this document is likely to be the start of an engagement rather than its conclusion and that we have probably not catered for or considered absolutely every element of family law practice.

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<sup>1</sup> See Appendix.

<sup>2</sup> Published in Courts and Tribunal Judiciary 23<sup>rd</sup> March 2020.

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Above all though, this, we submit, is an engagement which cannot be avoided, a conversation which we all have to have. We believe that the proposals set out in this submission will carry the broad support of the membership of the FLA, and we commend it to them, to our clients, to the Judiciary and lastly, but not least to the staff of the Court's services up and down the country.

We are grateful for the enthusiastic support, input and co-operation which we have received from our members and stakeholders throughout the country thus far.

With all of that in mind, we welcome your feedback, commentary and suggestions.

March 26<sup>th</sup> 2020

Paul McCarthy SC  
Chairperson.

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## Appendix

From Byron James (UAE)

Covid-19/coronavirus and family law: why remote hearings are both feasible and required

### Family Law Week

The common theme with the Court and technology, where the whole thing usually falls down, is relying upon the Court to provide and facilitate the technology. As soon as parties are put in charge of providing the software and making arrangements for matters such as remote attendance of a party, it almost always works well. When one is debating the necessity of a private FDR or one through the Court, requiring the remote attendance of a party is often reason enough to tip the scales towards a private FDR. It should not be this way. There are solutions available right now that would work, it just requires Judges and practitioners to be open minded and apply what is already happening in the private sphere to Court proceedings. The chambers my firm works with most (29 Bedford Row, 36 Family, 1 King's Bench Walk, 4 Paper Buildings and St Johns Buildings) are all excellent at providing high level remote facilities; my firm, and I am sure many others, are now already well versed in providing remote attendance of parties and lawyers at hearings.

So why should this only be available in private hearings and not those arranged through the Court?

There is a suggestion amongst practitioners that you need sophisticated technology to participate and that is not widely available to everyone. I disagree. All that one needs is a secure (i.e. password protected) WIFI connection, a device that allows access to the internet with a camera and microphone/speaker (i.e. most smartphones, laptops and computers) and the software is easy to use.

Most practitioners use either Lifesize or Zoom, both of which enable people to attend without having to create an account or pay any fees, allow multiple users (the most I have had personally on Lifesize is 12).

What of the press? They could be given a link to the meeting upon request and attend in the same way as the parties. If their attendance is an issue, it can be dealt with as a preliminary issue in the same way as in hearings presently.

What of recordings? Both Zoom and Lifesize allow for hearings to be recorded. These recordings could be provided to the Court at the conclusion of the hearing, perhaps made the responsibility of the person providing the secure video link. The Judge can then approve the recording before it is provided to the Court service for archive or sent to transcribers if a transcript is deemed appropriate.

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What of cross-examination? The complaint goes that it is far harder for judges and for practitioners to pick up on the body language cues of those giving evidence remotely and makes the job of determining truth and testing that truth much harder. This is something that people are simply going to have to adapt to. It might be harder now, but how much experience do people really have? Is it that it just feels different and therefore feels less effective? It might ultimately be a necessity if a quarantine become the norm for the foreseeable future. It would be interesting to see how people feel after cross-examining and determining evidence remotely as a matter of routine for some time. Would it be seen the same way?

What of litigants in person? I accept this is more problematic where neither party is represented and a lawyer available to arrange a secure video link. Just as thought, and only as a temporary measure, could this be an opportunity for the Court to ask practitioners local to the Court to lend their facilities for the Court to use in those circumstances? Say, for example, there are two litigants in person with a First Appointment listed at the Central Family Court: could the Court ask Expatriate Law if they would be willing to facilitate the video link? Or a chambers local to the Court? I suspect in these difficult times, there will be many firms and chambers willing to help judges and litigants and provide them with the service. Having provided the secure video link, there is no reason for anyone from the chambers or firm to be involved in the substance of the hearing and therefore it can continue in private if required. An undertaking can be provided regarding ensuring the privacy/integrity of the recording of the hearing and provision to the Court forthwith following the hearing's conclusion. Ultimately, litigants in person now participate in hearings by following the Notices of Hearing provided to them. If clear guidance was provided to them in the Notice of Hearing as to how they were going to be required to attend remotely, and a requirement on them to raise any issues with the Court well in advance.

How will the Court know the parties are able to attend remotely? Maybe one could create a form similar to the Form G: instead of "*are you ready to negotiate at the First Appointment?*" it could be "*are you ready and able to remotely attend the hearing?*". Where a party indicates they are not able, they can be asked to provide the reason why not and it put to Court staff/a judge to resolve the same.

I therefore think the following steps could be taken that would provide the Court now with a workable facility for remote attendance that could be operational almost immediately:

- 1) Parties/legal representatives can informed that the Court expects the parties to facilitate remote attendance wherever possible. To this end, the current suite of family law orders can be amended to include the following new provision regarding listing remote hearings:

#### **Further hearing by way of video link**

- a) The application shall be listed for a further directions appointment/financial

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dispute resolution appointment/case management appointment/final hearing before a [District/Circuit/High Court] Judge by way of a secure video link [on the first open day after [insert date] [suitable to counsel for both parties] / [on a date to be fixed in consultation with counsel's clerks] with a time estimate of [insert]. [The parties and their legal advisors shall file their dates to avoid by [insert time and date].

b) The applicant's solicitors shall make arrangements for the secure video link and provide confirmation to the respondent's solicitors and the Court no later than three days before the hearing that:

i. the secure link has been obtained and the name of the service provider;

ii. that the link allows for the remote attendance of at least the relevant judge, counsel, solicitors and the parties;

iii. that the link allows for the hearing to be recorded (and the Court hereby gives permission for the hearing to be recorded in this way);

iv. that the link allows for the online meeting room to be locked by way of password entry; and,

v. the parties and their legal representatives shall not provide details of the link or the relevant password to any person who is not a named party or a legal representative of a named party

c) In the event that the hearing is directed to take place in private, all attendees in the online meeting room shall confirm at the commencement of the hearing that no other unauthorised person is present. Where such confirmation is not satisfactorily provided or possible to obtain the Court may either adjourn the hearing or proceed in the absence of that attendee at the discretion of the relevant judge,

d) Following the hearing, the applicant's solicitors shall ensure that the recording is provided to the Court and the respondent no later than 24 hours following the hearing.

2) The DFJ of each Court requests volunteers from local practitioners to be placed onto a list that the Court can call upon to assist arranging a video hearing where both parties are in person. In such an occurrence, the volunteering firm/chambers shall perform the same functions as the "applicant" in the above direction. Where there are no practitioners available to the Court, then volunteers can be requested nationally to see if assistance can be provided. Where no such assistance is available, only then will the Court will determine whether the hearing has to be adjourned or whether there are measures which could be put in place to allow the safe attendance of the parties and legal representatives in person at Court.

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At the time of writing, the scale of disruption to the practice of family law provided by Covid-19 is unclear. It is clear however that irrespective of measures implemented by the government, there are clearly difficult questions around the ethics and legal duty of care in requiring personal attendance of parties, professionals and the judiciary in an unregulated, physical public space. The above is intended as a guide to how those issues could be avoided forthwith, and begin the process of Court hearings utilising technology that is already used every day in the private sector.

Court hearings have to take place, family law cannot be simply adjourned barring emergencies to April or May 2020 (as presently in Ireland). The parties need decisions, resolutions, outcomes in relation to child welfare, interim and long-term financial issues and it is our responsibility to provide a facility that allows that irrespective of Covid-19 or Coronavirus.

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