

## **Family Lawyers Association - Covid 19 Response Steering Group**

### **Circuit Family Court - Suggestions for Future Functioning starting 20<sup>th</sup> April until end of Trinity term 2020.**

We recognise that the following proposals will require specific adaptation on a Circuit by Circuit (and perhaps even County by County) basis, and some may be less suited to use in provincial settings than others.

The Family Lawyers Association will, if asked, nominate a Solicitor and Junior Counsel in each County to liaise with the local Office Manager, County Registrar and Judge to fine-tune and adapt local working practices.

From a procedural perspective, we recognise that at least some of the following suggestions may require a Rules change (or, in certain circumstances, could perhaps be covered by a Practice Direction) and again, the Family Lawyers Association will, if asked, nominate practitioners to assist the Courts Service in this regard.

#### **Communication of Consent to the Courts Service Office (“the Office”).**

At all times where consent is required/forthcoming, it is suggested that the following “Consent Protocol” be followed:

- one Solicitor corresponds with the Office by email and copies the other Solicitor in on that email;
- the other Solicitor simply replies to that email (by way of “reply all”, to include a reply to the Office) to indicate his/her consent/client’s consent as appropriate;

It is suggested that practitioners do their utmost to achieve consent where possible and as soon as possible in any given matter.

#### **Issuing of Proceedings.**

We suggest that consideration be given to issuing proceedings (by way of Family Law Civil Bill, Cohabitation Civil Bill etc) by emailing the documentation to the relevant Office with a covering letter from the Applicant’s solicitor and also attaching Affidavits of Means/Welfare, together with Section 5/6 Certificates.

In circumstances where it has not been possible to have an Affidavit of Means/Welfare sworn, a signed unsworn Affidavit of Means/Welfare (in line with a Protocol to be agreed) could accompany the Family Law Civil Bill to be issued.

Where applicable, a copy of the marriage certificate of the parties could be accepted, provided that it is accompanied by the Solicitor’s certificate that they hold the original marriage certificate and that they will lodge same as soon as practicable.

The foregoing could also apply to a Defence/Counterclaim, Respondent’s Affidavit of Means/Welfare and the Respondent’s Solicitor’s Section 6/7 Certificate.

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#### **Motions.**

Motions could be accepted by the Office on the basis that they are emailed with a covering letter from the Solicitor acting for the Applicant in the Motion.

Grounding Affidavits could be signed by the Deponent and furnished on the basis that they are unsworn (in line with a Protocol to be agreed).

Exhibits could be referred to as “when produced” in the Grounding Affidavit and sent with the Grounding Affidavit.

Any Replying Affidavits could be furnished in the same manner.

Consents (if forthcoming) could be indicated using the Consent Protocol and where evidence is not required for the making of a Consent Order, it is suggested that an Order could be made by a Judge sitting in Chambers.

So as to avoid delays in progressing matters between date of issue and date of return, we suggest that on issuing all Motions, a *pro forma* direction of the Court (to accompany the issued Motion) would be served on the Respondent to the Motion stipulating that any replying Affidavit must be furnished to the Applicant’s side and filed with the Court no later than 7 days prior to the return date.

#### **Section 32/47 Motions/Reports.**

If by consent, the appointment of an Assessor could be accepted by way of a Motion (without the need for a Grounding Affidavit) utilising the Consent Protocol (with the email to the Office confirming the name of the Assessor and the basis upon which the assessment is to proceed (i.e. both parties to share the costs/one party to pay), and the Office could then email both Solicitors confirming the approval of the appointment.

Similarly, in relation to reports that are being released by Assessors the following protocol could apply:

- the Assessor to email the report to the Office;
- the Office to release the report (without the need for an *ex-parte* application) to both Solicitors “on the usual terms” i.e. that they can read out the terms of the report to their clients, but they cannot send them a copy of the report.
- an undertaking from each solicitor to that effect.

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#### **Hearings.**

For Motions, it is suggested that matters be listed for either morning or afternoon hearings, with a maximum of 10 Motions per half day. Nothing from the morning list would carry over into the afternoon list. Matters not reached or dealt with would be listed for the next sitting, depending upon venue.

It is suggested that it would not be necessary for litigants who are represented to attend Court on the first return date of any Motion, including one for their attachment and committal.

Matters considered to be objectively urgent by the Court may, on the first return date be adjourned to later in the week for hearing if the Court so directs, in which case the personal attendance of the party shall ordinarily be required.

For substantive hearings, it is suggested that they be listed for not more than one day and no more than "X" hearings should be listed for the same Court on any one day

Parties waiting for hearings should respect spatial distance and utilise the common areas, consultation rooms and other available areas in the Courthouse, with the use of mobile phones to alert parties when they are required to come in to Court.

No family/friends should be permitted into the Court building.

#### **Case Progression.**

No clients should attend Case Progression hearings. Solicitors only to attend.

Consideration could be given to holding Case Progressions by audio/video conference call.

The Applicant's Solicitor could email the County Registrar using the Consent Protocol, confirming agreement on matters such as vouching completed, Notice to Trustees served etc and that the case is ready for hearing.

If all matters are in order the County Registrar could then allocate a date for hearing (e.g. list the matter in the next call-over list or list to fix dates) and the Solicitors would then be emailed in respect of same.

#### **Rulings on Consent.**

Where evidence is required for the making of Consent Orders, the following is suggested:

- a Motion to be emailed to the Office with a copy of the Consent Terms (with an undertaking by the Applicant's Solicitor to bring the original Consent Terms to Court);
- the party from whom evidence is required to attend Court in the usual manner;

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- the other party and his/her legal representative/s to be excused from attending;

A further suggestion is that the Court might consider (if it is unsafe for a moving party to attend Court), granting an Order for Judicial Separation/Divorce on the basis of a sworn statement (an alternative to a sworn statement might be an unsworn declaration, certified by that party's Solicitor) of evidence from the Applicant confirming the statutory evidence and that he/she is satisfied that the Terms of Consent constitute proper provision in context of the Divorce. This would be accompanied by a letter from the Respondent's solicitor confirming that, having taken legal advice, the Respondent also confirms that he/she is satisfied with the Terms and that they constitute proper provision within the meaning of the Act. This proposal would only operate as a last resort in exceptional circumstances.

### **Pension Adjustment Orders.**

No pension adjustment applications would be listed until all proofs are in order, to be indicated by email to the Office.

Applications for consent Pension Adjustment Orders could be made by emailing an *ex-parte* docket, together with a booklet incorporating all proofs and the draft Pension Adjustment Orders, to the Office seven days in advance of the date on which the Orders are required to take effect and could be made by a Judge sitting in chambers, without the requirement for parties or their representatives to attend.

The proofs required are

1. A copy of the relevant Court Order/Terms of Settlement.
2. The Notice(s) to Trustees.
3. Affidavit(s) of service of the Notice(s) to Trustees.
4. The Pension Adjustment Order(s), which it is proposed will be made in this case.
5. Letter(s) of acknowledgement from the Pension Provider(s) indicating that they have received the draft Order(s) and confirming that they will be in a position to implement the Order(s) when served upon them.

### **Adjournments.**

Consent Adjournments can be applied for by email using the Consent Protocol and should be for a minimum of four weeks or to the next LTFD/call-over/sessions as appropriate.

Consent adjournment of cases listed for hearing will be automatically sent to the next LTFD/call-over/sessions as appropriate, unless case progression is sought by one party.

### **Use of video technology and remote hearings.**

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We urge that consideration be given to facilitating proceedings (or part thereof) being heard and determined by video link.

The Family Lawyers Association are also open to exploring other means by which work might continue, including perhaps a procedure whereby hearings could be dealt with remotely. While this has certain challenges, it is evident that this is already happening in other jurisdictions and in certain circumstances (e.g. young witnesses may be cross-examined by way of video link) in this jurisdiction.

#### **Broader considerations beyond the scope of this submission<sup>1</sup>.**

We urge that consideration be given to how proceedings might be issued by electronic filing.

We urge that consideration be given to how Affidavits might be sworn/affirmed by e-signature.

We urge that consideration be given to a Rules-based use of email.

#### **Swearing of Affidavits.**

We suggest that consideration be given to developing a Protocol (“a Protocol”) for assuring the veracity of Affidavits in the absence of Affidavits being sworn in the usual manner.

#### **Discussion and engagement.**

The Family Lawyers Association are open to discussing all of the above. This document is intended to suggest practical ways in which practitioners will be enabled to service their clients’ needs and also ensure access to justice while also dealing with significant challenges facing all parties involved in the administration of justice in the family law sphere.

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<sup>1</sup> See appendix to this submission for initial analysis of the steps to be taken to give effect to these considerations.

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**Appendix**

**Circuit Court Rules and procedures for issuing and service of documents**

**Issuing of Family Law Civil Bills by e-mail**

<b>What is currently permitted/ required by the CCR</b>	<b>What is suggested and amendments necessary to facilitate same</b>
Order 59 Rule 7 requires that a copy of the Family Law Civil Bill be filed in the Office but does not prescribe how this should occur and therefore could be interpreted as permitting filing by email	Arguably no action but perhaps a Practice Direction permitting filing of the FLCB online in the form of a scanned signed copy FLCB would secure uniformity of practice in the various Circuit Court Offices
Affidavits of Means and Welfare, although these documents on a reading of Order 59 these not strictly a pre- condition to <i>issuing</i> a FLCB, are required to be filed and are required to be served with the FLCB and in any event are necessary in order to progress the proceedings to a hearing before the Court	Amendment to the Rules to provide for:-  Unsworn Statement/ Declaration of Means;  Unsworn Statement/ Declaration of Welfare
Requirement for Solicitor's Statutory Declaration pursuant to s5 of the 1989 Act / s6 of the 1996 Act  Order 59 Rule 7 states:- Where required, the appropriate statutory declaration made pursuant to section 5 of the Judicial Separation Act or section 6 of the Divorce Act, which shall be in the Form 37D of the Schedule of Forms, shall be filed together with the Family Law Civil Bill.	This is a statutory requirement set out at s. 5(2) of the Judicial Separation and Family Law Reform Act 1989 and s. 6(4) of the Family Law (Divorce) Act 1996 and therefore amending legislation would be required to allow the previous system of Solicitor's Certificate/ unsworn Declaration.  (it does however appear that the statutory consequence of not complying with s5 1989 / s6 1996 is that the Court may adjourn the proceedings for such period as it considers reasonable to enable the solicitor to discuss these matters with his/ her client and maybe therefore there could be an amendment to the Court Rules to enable proceedings to be issued without this Declaration where compliance presents a difficulty as this is a matter that can be remedied by the trial Judge being satisfied by, for example oral

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	evidence from the solicitor, that the provisions of the section has been complied with)
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**Appearance**

<b>What is currently permitted / required by the CCR</b>	<b>What is suggested and amendments necessary to facilitate same</b>
<p>Order 59 Rule 30. (1) A Respondent shall enter an Appearance in the Office within 10 days of the service upon him of a Family Law Civil Bill.</p> <p>The amendments to the CCR effected by SI 378 / 2018 permit service of documents (other than originating documents) by email with the consent of the parties. However, the Defendant is still required to lodge or send by post the Appearance to the Court office, even where serving same by email on the Plaintiff</p>	<p>Amend CCR to permit entry of Appearance in the Office by email</p>
<p>Order 59 (2) Where required, the appropriate certificate pursuant to section 5 of the Judicial Separation Act or section 6 of the Divorce Act, which shall be in the Form 37D of the Schedule of Forms, shall be filed together with the Appearance.</p>	<p>This is a statutory requirement set out at s. 6(2) of the Judicial Separation and Family Law Reform Act 1989 and s. 7(4) of the Family Law (Divorce) Act 1996 and therefore amending legislation is required allow the previous system of Solicitor's Certificate/ unsworn Declaration.</p> <p>(it does however appear that the statutory consequence of not complying with s6 1989 / s7 1996 is that the Court may adjourn the proceedings for such period as it considers reasonable to enable the solicitor to discuss these matters with his/ her client and maybe therefore there could be an amendment to the Court Rules to enable proceedings to be issued without this Declaration where compliance presents a difficulty as this is a matter that can be remedied by the trial Judge being satisfied by, for example oral evidence from the solicitor, that the provisions of the section has been complied with)</p>

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### Defence

<b>What is currently permitted/ required by the CCR</b>	<b>What is suggested and amendments necessary to facilitate same</b>
Order 59 Rule 31(2) In any proceedings in which financial relief is sought, an Affidavit of Means, in compliance with rules 42 and 43, sworn by the respondent shall be filed and served together with the Defence.	Amendment to the Rules to provide for:-  Unsworn Statement/ Declaration of Means; Unsworn Statement/ Declaration of Welfare

### Issuing of Motions by email

<b>What is currently permitted/ required by the CCR</b>	<b>What is suggested and amendments necessary to facilitate same</b>
There is nothing in the Rules that expressly prevents a Notice of Motion from being issued by email	Practice Direction to the effect that Notices of Motion can be sent to the Circuit Court Office for issuing by email and returned to the solicitor by email for service
	Rules of Court permitting Motions that are currently required to be grounded upon Affidavit to be grounded upon an unsworn Declaration / Statement, where swearing in the conventional manner is not possible/ practicable.

### Service of originating documents by email

<b>What is currently permitted/ required by the CCR</b>	<b>What is suggested and amendments necessary to facilitate same</b>
Service by email not permitted	Amend Circuit Court Rules to permit service of originating documents by email upon another firm of solicitors / Respondent personally where he the firm / Respondent consents to such service by email and provide a secure email address at which to serve such proceedings



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	Section 7 of the Courts Act 1964 as amended by s16 of the Civil Law (Miscellaneous Provisions) Act 2008 provides for service, in addition to the traditional methods “ by such other means as may be prescribed by rules of court”.
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**Service of Motions by email**

<b>What is currently permitted/ required by the CCR</b>	<b>What is suggested and amendments necessary to facilitate same</b>
The amendments to the CCR effected by SI 378 / 2018 permit service of documents (other than originating documents) by email with the consent of the parties.	Rules of Court permitting service of Motions by email , regardless of whether/ not the other party consents, where service by any other method is not possible/ practicable

**Service of Notice to trustees by email**

<b>What is currently permitted / required by the CCR</b>	<b>What is suggested and amendments necessary to facilitate same</b>
Order 59 Rule 8(2) Where pension relief is sought, notice of the relief sought in accordance with Form 37C of the Schedule of Forms shall also be served on the trustees of the pension scheme in question in accordance with Order 11, rule 17, and an Affidavit of such service sworn and filed within 14 days of service of the Civil Bill.	Service of Notice to trustees by email on the trustees of the pension scheme in question  Unsworn Declaration of Service to which is appended an email from the trustees acknowledging receipt of Notice to trustees

**Applicable to all of the above**

Where a document to be filed requires a signature, the Court Office to accept a scanned signed copy of the document by email.

**E- signature of unsworn Declarations and other documents**

Section 9 of the Electric Commerce Act 2000 (ECA) provides that

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Information ..... shall not be denied legal effect, validity or enforceability solely on the grounds that it is wholly or partly in electronic form, whether as an electronic communication or otherwise.

Provisions for signature, witnessing, acknowledgment and admissibility of electronic documents are set out at ss12- 23 of the ECA.