

**GENERAL SCHEME OF A CHILDREN AND FAMILY RELATIONSHIPS
BILL 2014**

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CHILDREN AND FAMILY RELATIONSHIPS BILL 2014

AN ACT TO PROVIDE FOR PRESUMPTIONS OF PATERNITY, THE DETERMINATION OF PARENTAGE AND DECLARATIONS OF PARENTAGE AND TO ADDRESS PARENTAGE ISSUES IN THE CONTEXT OF ASSISTED REPRODUCTION AND SURROGACY, TO PRESCRIBE THE LAW RELATING TO SURROGACY ARRANGEMENTS AND TO MAKE PROVISION FOR THE USE OF DNA TESTS TO ASSIST IN THE DETERMINATION OF PARENTAGE AND TO CONSOLIDATE AND REFORM THE LAW RELATING TO THE GUARDIANSHIP AND CUSTODY OF AND ACCESS TO CHILDREN AND TO MAKE FURTHER PROVISION IN RELATION TO THE MAINTENANCE OF CHILDREN UNDER THE FAMILY LAW (MAINTENANCE OF SPOUSES AND CHILDREN) ACT, 1976 AND TO AMEND THE LAW RELATING TO THE REGISTRATION AND RE-REGISTRATION OF BIRTHS AND TO AMEND THE LAW ON ADOPTION AND TO PROVIDE FOR CONNECTED MATTERS.

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:-

PART I

PRELIMINARY AND GENERAL

Head 1: Short title and commencement

Provide along the following lines:

- (1) This Act may be cited as the Children and Family Relationships Act 201_.
- (2) This Act shall come into operation on the day or days that the Minister may appoint by order either generally or with reference to a particular purpose or provision and different days may be so appointed for different purposes or different provisions.

Notes

This is a standard citation and commencement provision.

Head 2: Interpretation

Provide along the following lines:

(1) In this Act –

“Act of 1964” means the Guardianship of Infants Act 1964;

“Act of 1976” means the Family Law (Maintenance of Spouses and Children) Act 1976;

“Act of 1987” means the Status of Children Act 1987;

“Act of 1995” means the Family Law Act 1995;

“Act of 1997” means the Children Act 1997;

“Act of 2004” means the Civil Registration Act 2004;

“Act of 2010” means the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010;

“Ard-Chlaraitheoir” shall be construed in accordance with section 7 of the 2004 Act;

“assisted reproduction” means a method of conceiving other than by sexual intercourse;

“birth mother” means a woman who gives birth to a child;

“child” means a person who is under 18 years of age;

“civil partnership” has the meaning assigned to it by the Act of 2010;

“embryo” means a human organism during the first 56 days of its development following fertilization or creation, excluding any time during which its development has been suspended, and includes any cell derived from such an organism that is used for the purpose of creating a human being;

“human reproductive material” means a sperm, ovum or other human cell or human gene and includes a part of any of them;

“legal practitioner” means a person who is a practising solicitor or a practising barrister and a reference to a solicitor includes a reference to a firm of solicitors or a practicing solicitor or barrister currently on the Rolls of the Law Society of Ireland or the Bar Council of Ireland;

“Minister” means the Minister for Justice and Equality;

“parent” means a person determined under Part 2 or Part 3 to be a parent of a child;

“pre-commencement surrogacy arrangement” means a surrogacy arrangement entered into prior to the commencement of this Act;

“surrogacy arrangement” means an arrangement under which a woman agrees to become pregnant or to try to become pregnant and that the parentage of any child born as a result of the pregnancy is to be transferred to another person or persons;

“surrogate” means a woman who gives birth to a child as a result of assisted reproduction if, at the time of the child’s conception, she intended to relinquish that child to:-

- (i) a person or two persons whose human reproductive material was used in the assisted reproduction or whose human reproductive material was used to create the embryo in the assisted reproduction, or
- (ii) a person referred to in paragraph (i) and the person who is married to or in a civil partnership with or is cohabiting in an intimate and committed relationship with that person,

but does not include a woman who gives birth to a child conceived using her own human reproductive material.

- (2) For the purpose of this Act, if a child is born as a result of assisted reproduction, the child’s conception is deemed to have occurred at the time when the procedure was performed that resulted in the implantation of the human reproductive material or an embryo.

Notes

This Head provides definitions for the purposes of the scheme. Of particular note is the definition of “surrogate”, which expressly excludes the case of a woman who uses her own reproductive material to become pregnant – i.e. what is known as “traditional” surrogacy. There are compelling public policy reasons to exclude such arrangements even if voluntarily undertaken, as the effect would be to allow the woman to “contract out” of her parental responsibility for a child which is clearly hers both by genetics and by birth.

Subhead (2) specifies when a child born through assisted reproduction is considered to have been conceived. This is to link with the consent provisions set out in Part 3 which require that the consent of the intended parents must be valid at the time of conception.

Head 3: Repeals

Provide along the following lines:

The enactments specified in the Schedule to this Act are hereby repealed to the extent specified in the third column of that schedule.

Notes

The schedule will provide for the complete repeal of the Guardianship of Infants Act 1964 as amended, and the portions of the Status of Children Act 1987 concerning genetic testing and declarations of parentage.

Head 4: Expenses

Provide along the following lines:

The expenses incurred by the Minister for Justice and Equality or any other Minister of the Government in the administration of this Act shall, to such extent as may be sanctioned by the Minister for Public Expenditure and Reform, be paid out of monies provided by the Oireachtas.

Notes

This is a standard provision concerning the expenses of administration.

PART 2

PARENTAGE AND PRESUMPTIONS OF PATERNITY

Head 5: Parentage

Provide along the following lines:

- (1) A person is the child of his or her parents.
- (2) The parents of a child are his or her birth mother and biological father unless the child has been adopted within the meaning of the Adoption Act 2010 or the child was born as a result of assisted reproduction, including through surrogacy.
- (3) Where a child is born as a result of assisted reproduction including through surrogacy, parentage of the child shall be determined in accordance with Part 3.

Notes

This Head specifies who are considered to be the parents of a child, and the exceptions to the rule, which are –

- where a child is adopted, in which case the provisions of the Adoption Act 2010 will apply and all parental responsibilities are transferred to the adopters; and
- where a child is born through assisted human reproduction techniques, including where a child is born to a surrogate mother, in which case parentage is to be determined under Part 3 of the Scheme.

This provision is a statutory statement of the current position. Except in creating a specific exemption from the rule in relation to children born through assisted reproduction and surrogacy, it does not change the law on who a child's parents are. It does not create or confer any additional rights or obligations on parents.

Head 6: Presumptions of paternity

Provide along the following lines:

- (1) The presumptions in this Head shall be used to determine the identity of the biological father of a child as referred to in Head 5(2).
- (2) Where a woman gives birth to a child –
 - (a) during a subsisting marriage to which she is a party, or
 - (b) within 10 months after the termination, by death or otherwise, of a marriage to which she is a party

the husband of the marriage is presumed to be the father of the child unless the contrary is proved on the balance of probabilities.
- (3) Where a woman gives birth to a child in circumstances other than those set out in subhead (2), a man is presumed to be the father of the child, unless the contrary is proved on the balance of probabilities, if –
 - (a) he cohabited with the child's mother for at least 12 consecutive months prior to the child's birth and, where applicable, the cohabitation ended less than 10 months before the child's birth,
 - (b) he is registered as the father of the child at the joint request of himself and the child's mother in a register maintained under the Civil Registration Act 2004 or under similar legislation in another jurisdiction, or
 - (c) he has been found by a court of competent jurisdiction to be the father of the child for any purpose.
- (4) Notwithstanding subhead (2), where a married woman, being a woman who is living apart from her husband under a decree of judicial separation or a deed of separation or a separation agreement, gives birth to a child more than 10 months after the decree was granted or the deed or agreement executed, as the case may be, then her husband shall be presumed not to be the father of her child, unless the contrary is proved on the balance of probabilities.
- (5) Notwithstanding subhead (2), where a married woman, being a woman who is living apart from her husband, gives birth to a child more than 10 months after the last occasion when there was contact between her and the husband, then her husband shall be presumed not to be the father of the child unless the contrary is proved on the balance of probabilities.

Notes

This Head sets out the presumptions to be used in determining who the biological father of a child is. It is very similar to the rules set out in section 46 of the Status of

Children Act 1987, as amended, which is to be repealed. In general, where a married woman has a child during a subsisting marriage, her husband is presumed to be the father (subhead (2)). In other circumstances, a child's father is presumed to be a man who cohabits with the mother for at least a year provided that the cohabitation does not end (if applicable) more than ten months before the child's birth, or a man who jointly registers the birth with the mother, or a man who a court has found to be the father (subhead (3)).

The presumption of paternity in relation to a husband may be rebutted if the child's mother has a deed of separation, decree of separation or a separation agreement (subhead (4)).

The modification of the current rules is set out in subhead (5). It is to take account of circumstances where a married woman gives birth to a child after she has been separated from her husband for more than 10 months, but does not have a decree of judicial separation, a deed of separation or a separation agreement in place. Subhead (5) expands the grounds for rebuttal of the presumption of paternity in relation to a husband. It would allow a married woman to rebut the presumption of paternity in relation to her child where she can affirm that she and her husband have been separated for more than 10 months.

The modifications to the presumptions of paternity (and non paternity) are intended to help secure the right of the child to know his or her identity. This is considered to be in the best interests of the child concerned.

Head 7: Declarations of parentage other than in cases of assisted reproduction

Provide along the following lines:

- (1) Subject to subhead (2), if there is a dispute or any uncertainty as to whether a person is or is not a parent of a child, the following persons may apply to the court in such manner as may be prescribed for a declaration that the person is or is not the parent of the child:
 - (a) the child;
 - (b) a person claiming to be a parent of the child;
 - (c) a person claiming not to be a parent of the child;
 - (d) a parent of the child;
 - (e) a guardian of the child;
 - (f) a person who has custody of or care and control of the child;
 - (g) any other person who, in the opinion of the court, has a sufficient interest in the matter.
- (2) This Head does not apply where a child was born through assisted reproduction, including surrogacy, or has been adopted.
- (3) An application may be made under subhead (1) of this Head notwithstanding the fact that any person named in the application as the father or the mother or a parent, as the case may be, is not or may not be, alive.
- (4) Before determining an application under this Head in relation to a minor child whose parentage is in question and who has not been given notice of the application under subhead (5), the court shall consider whether it is appropriate, having regard to the age and best interests of the child, to direct that notice be given to the child concerned.
- (5) The court may direct that notice of any application under this Head shall be given in the prescribed manner to such other persons as the court thinks fit and where notice is so given to any person the court may, either of its own motion or on the application of that person or any party to the proceedings, order that that person shall be added as a party to those proceedings.
- (6) Where a declaration is sought under this Head, the court shall have regard to any applicable presumptions set out in Head 6 and shall, if there is a dispute as to the validity of any such presumption, direct testing to establish parentage in accordance with Part 6 of this Act.

- (7) Where a declaration is sought under this Head the court may, either of its own motion or on an application by any party to the proceedings, adjourn the hearing of the proceedings until the carrying out of testing to establish parentage in accordance with Part 6 of this Act.
- (8) The court has jurisdiction under this Head if:-
- (a) the child is born in the State, resides in the State or is a citizen of the State,
 - (b) an alleged parent resides in the State or is a citizen of the State, or
 - (c) the child's parentage is relevant in any court proceedings within the State.
- (9) Where on an application under this Head it is proved on the balance of probabilities that:
- (a) a person named in the application is the father,
 - (b) a person so named is the mother, or
 - (c) persons so named are the parents
- of a child, the court shall make the declaration accordingly.
- (10) The court shall not grant a declaration under this section that would result in the child having more than 2 parents.
- (11) Rules of court may provide that any application for a declaration under this Head shall contain such information as may be prescribed.

Notes:

This Head is intended to replace section 35 of the Status of Children Act 1987, which is to be repealed. The purpose of the Head is to allow the court state who, under the law, the legal parents of a child are. It should be noted that a declaration of parentage is not intended solely to be a statement of a child's genetic origins. However, in the case of a child born other than through assisted reproductive technologies, the two naturally coincide.

The Head includes a number of important modifications: unlike Section 35(4) of the 1987 Act, no discretion is given to the court to refuse to hear an application for a declaration of parentage. This is considered to be in the best interests of the child concerned on the grounds that even a well-intentioned decision not to hear a case facilitates the child's true identity being concealed and may have other unintended negative consequences.

Subhead (2) excludes from the scope any child who has been adopted and any child born through assisted reproduction. In the case of a child who has been adopted, the adopters are the legal parents under the Adoption Act 2010. In the case of a child born

through assisted reproduction other than surrogacy, legal parentage is assigned under Head 10 and a declaration of parentage may be sought under Head 11. In the case of a child born through surrogacy, parentage may be assigned by the court, subject to clear rules, in an order under Head 13.

Subhead (4) provides for information to be provided directly to a minor child if the court considers it appropriate. This is in line with the public policy goal of ensuring that a child of sufficient age and maturity should be informed of, and, where relevant, consulted on, legal proceedings affecting important aspects of her or his life.

Subheads (6) and (7) allow the court to require genetic testing under Part 6, and to adjourn proceedings until the testing is carried out.

Subhead (8) specifies when the court has jurisdiction.

Subhead (10) prevents the court from making a declaration which would result in a child having more than two legally recognised parents.

PART 3

PARENTAGE IN CASES OF ASSISTED REPRODUCTION

Head 8: Interpretation

Provide along the following lines:

- (1) In this Part:-
 - (a) a reference to the provision of human reproductive material by a person means the provision of the person's own human reproductive material to be used for his or her own reproductive purposes;
and
 - (b) a reference to the provision of an embryo by a person means the provision of an embryo created using the person's own reproductive material to be used for his or her own reproductive purposes.
- (2) A person who donates human reproductive material or an embryo for use in assisted reproduction without the intention of using the material or the embryo for his or her own reproductive use is not, by reason only of the donation, a parent of the child born as a result.
- (3) A person who was married to or in a civil partnership with or cohabiting with a surrogate at the time she conceives a child by assisted human reproduction is not a parent of that child.

Notes

This clarifies how terms are used in this Part. Where there are references to providing "human reproductive material" or an embryo, this refers only to provision of human reproductive material or an embryo created using that reproductive material for one's own reproductive purposes. It further specifies that donating gametes or an embryo does not confer parenthood on the donor (subhead (2)). Finally, it disapplies presumptions as to parenthood in relation to the partner of a surrogate (subhead (3)).

The provisions in subhead (2) and (3) are essential in order to allow provisions of Head 10 to have effect, and to allow the court make declarations under Head 11 or Head 13.

Head 9: Deducing of relationships

Provide along the following lines:

The relationship of parent and child and kindred relationships flowing from that relationship in cases of assisted reproduction, including surrogacy, shall be determined in accordance with this Part.

Notes

This provision is to clarify that the relationships determined in accordance with this Part are not confined to the parent-child relationship: the child's relationship with the broader family (grandparents, siblings, etc.) are also determined by reference to the parent child relationship established by the presumptions in Head 10 or under an order under Head 11 or 13.

Head 10: Parentage in cases of assisted reproduction other than surrogacy

Provide along the following lines:

- (1) This Head applies where a child is born as a result of assisted human reproduction other than through surrogacy.
- (2) If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by a man only, the parents of the child are the birth mother and, if he consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before that child's conception, the man.
- (3) If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by a female person only, the parents of the child are the birth mother and the person who:
 - (a) was married to or in a civil partnership with or cohabiting in an intimate and committed relationship with the birth mother at the time of the child's conception, and
 - (b) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before that child's conception.
- (4) If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by both a man and a woman, the parents of the child are the birth mother and, if the man consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before that child's conception, the man.
- (5) If a child is born as a result of assisted reproduction without the use of human reproductive material or an embryo provided by a person for his or her own reproductive purposes, the parents of the child are the birth mother and a person who:
 - (a) was married to or in a civil partnership with or cohabiting in an intimate and committed relationship with the birth mother at the time of the child's conception, and
 - (b) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before the child's conception.
- (6) Unless the contrary is proven, a person is presumed to have consented to be a parent of a child born as a result of assisted reproduction if the person was married to or in a civil partnership with or cohabiting in an intimate and committed relationship with the child's birth mother.

- (7) This Head applies in relation to a child born through assisted human reproduction whether before or after the commencement of this Part.
- (8) Regulations may specify the form of any consent of an intended parent for the purposes of subheads (2) to (5) and the circumstances in which that consent is deemed to be withdrawn.
- (9) The consent of an intended parent is not valid after the death of that intended parent.

Notes

This Head sets out how parentage is determined in the case of a child born through assisted reproduction other than surrogacy.

The rule set out is that the birth mother is always considered the mother whether or not she has a genetic connection to the child. This is the same as the “*mater semper certa est*” principle which until a very recent High Court judgment was considered to apply in Ireland. (See *M.R. & Anor-v- An tArd Chláraitheoir & ors* [2013] IEHC 91; the case is under appeal to the Supreme Court.) The husband, civil partner or cohabitant of the mother is considered to be the other parent of the child if he or she has given a consent which remains valid at the time the procedure leading to implantation takes place.

Subhead (2) specifies that where genetic material is provided by a man only, the child’s parents are the birth mother and the man. This refers to the situation where the embryo is created using a donor egg and the intending father’s sperm.

Subhead (3) specifies that where genetic material is provided by a woman only, the child’s parents are the birth mother and a person who was married to, in a civil partnership with, or cohabiting with her and who also consented at the time of conception to becoming a parent of the child. This provision will apply where a woman gives birth to a child conceived using her own eggs and donor sperm. This provision may not be strictly required, as the intention is that the birth mother be recorded as the mother irrespective of genetic connection. It is retained to clarify the policy intention.

Subhead (4) specifies that where a man and a woman have both provided genetic material for their own reproductive purposes, they are both the child’s parents. In this case, because there is a genetic link to both parents, there are no explicit conditions as to marriage / cohabitation.

Subhead (5) specifies that where no intending parent has provided genetic material for their own reproductive purposes – that is, where an embryo is created using donor egg and donor sperm and implanted in the uterus of the intended mother – then the birth mother is the child’s mother and the child’s other legal parent (if any) is a person who was married to, in a civil partnership with, or cohabiting with the mother and who also consented at the time of conception to becoming a parent of the child

Subhead (6) creates a rebuttable presumption of consent on the part of the mother's spouse, partner or cohabitant to becoming a child's parent. Any dispute arising would have to be ruled on by a court of competent jurisdiction and evidence provided as to the validity of any consent relied on.

Subhead (7) is intended to give these presumptions retrospective effect. With the exception of how the provisions would apply to same-sex couples, the presumptions created here do not differ from those which apply under current law. The birth mother is always presumed to be and is recorded as a child's mother, her husband (if any) is presumed to be the child's father – if not, a male partner or cohabitant may acknowledge the child through joint registration, even if he has no genetic connection.

Subhead (8) allows the Minister to make regulations on the form that consent must take. This will enable the Minister to specify minimum criteria for a valid consent. The regulations may set out conditions under which consent is considered to be withdrawn.

Subhead (9) specifies that a consent is not valid if the intending parent dies. It is not proposed to provide for posthumous conception within this Scheme.

The key change this Head makes to current legal provisions is that, in conjunction with Head 11, this would allow an order to be made as to who the child's legal parents are, which would not be rebuttable. The purpose of this is to ensure that in the event of a dispute between parents, a genetic parent cannot exclude the other parent by obtaining a declaration that s/he is not a parent of the child, nor may a parent repudiate her or his responsibilities to a child on the grounds that they are not genetically connected. This is to secure the best interests of the child by ensuring that he or she has legal links with his or her parents which cannot be undermined either by the parents in the event of dispute, or by any other person (such as in the event of a dispute over succession, for example).

It is acknowledged that this could limit the rights of a "known donor" who wishes to establish a legal connection with a child. However, there is a balance of rights to be achieved and the best interests of the child are likely to be served by having legal certainty and security in his or her family unit.

Head 11: Declarations of parentage in relation to assisted reproduction other than surrogacy

Provide along the following lines:

- (1) The following persons may apply to the court in such manner as may be prescribed for a declaration that the person is or is not the parent of the child:
 - (a) the child;
 - (b) a person claiming to be a parent of the child by virtue of the operation of Head 10;
 - (c) a person claiming not to be a parent of the child by virtue of the operation of Head 8(2);
 - (d) a parent of the child;
 - (e) a guardian of the child;
 - (f) a person who has custody of or care and control of the child;
 - (g) any other person who, in the opinion of the court, has a sufficient interest in the matter.
- (2) This Head does not apply where a child was born through surrogacy or has been adopted.
- (3) An application may be made under subhead (1) notwithstanding the fact that any person named in the application as the father or the mother or a parent, as the case may be, is not or may not be, alive.
- (4) Before determining an application under this Head in relation to a minor child whose parentage is in question and who has not been given notice of the application under subhead (5), the court shall consider whether it is appropriate, having regard to the age and best interests of the child, to direct that notice be given to the child concerned.
- (5) The court may direct that notice of any application under this Head shall be given in the prescribed manner to such other persons as the court thinks fit and where notice is so given to any person the court may, either of its own motion or on the application of that person or any party to the proceedings, order that that person shall be added as a party to those proceedings.
- (6) Where a declaration is sought under this Head, the court shall have regard to any applicable presumptions set out in Head 10 and shall give effect to the relevant presumption and make the relevant declaration accordingly.

- (7) There shall be no appeal from a declaration under subhead (6), nor shall the court hear and determine any application under Head 7 in relation to a child after a declaration is made under subhead (6).
- (8) Where a declaration is sought by the person referred to in subhead (1)(c) and the court is satisfied that the presumptions set out in Head 10 are sufficient to safeguard the best interests of the child, the court may make a declaration that the applicant is not a parent of the child.
- (9) The court has jurisdiction under this Head if:-
 - (a) the child is born in the State, resides in the State or is a citizen of the State,
 - (b) an alleged parent resides in the State or is a citizen of the State, or
 - (c) the child's parentage is relevant in any court proceedings within the State.
- (10) The court shall not grant a declaration under this section that would result in the child having more than 2 parents.
- (11) Rules of court may provide that any application for a declaration under this Head shall contain such information as may be prescribed.

Notes

This proposed new Head is modelled closely on the provision on declarations of parentage generally. The intention is that it will not be necessary for parents to use these provisions. It may be used by the presumed parents to safeguard their roles in relation to the child, including in cases of a dispute between the parents. As indicated in the notes to Head 10, the presumptions set out in that Head are intended to have full retrospective effect since they generally reflect very closely the presumptions which currently benefit couples who have children through AHR other than surrogacy.

The exception to the above is where the child is born to a woman cohabiting with or in a civil partnership with another woman. In such a case, the presumptions available under current law are not available to the couple: the mother's partner cannot be registered as a parent. For these couples, it will be necessary to obtain a declaration of parentage to ensure both of them are assigned legal parentage of the child.

It is important to note that subhead (3), where it mentions the possibility that a parent or alleged parent may not be alive, is not intended to apply to posthumous conception – only to the fact that at the time a dispute arises, a parent may have died. As there are complex ethical issues concerning posthumous conception, as well as potentially significant implications for succession / property rights (raising possible constitutional issues), these Heads do not provide for posthumous conception. See also Head 10(9).

Subhead (7) proposes that a declaration will act as a blocking order in relation to any alternative attempts to determine the legal parentage of a child born through AHR. This is to ensure the child's status as the member of a particular family is safeguarded.

Subhead (8) is intended as a safeguard for a “known donor” to ensure that he or she does not acquire responsibilities for the child solely by virtue of genetic connection, to the detriment of his or her own family,

Head 12: Parentage in cases of surrogacy.

Provide along the following lines:

- (1) If a child is born as a result of a surrogacy arrangement with the use of human reproductive material provided by a man only, and the birth mother is declared under Head 13(9) not to be a parent, the parents of the child are the man and a person who:
 - (a) was married to or in a civil partnership with or cohabiting in an intimate and committed relationship with that man at the time of the child's conception, and
 - (b) consented to be a parent of a child born as a result of a surrogacy arrangement and did not withdraw that consent before the child's conception.
- (2) If a child is born as a result of a surrogacy arrangement with the use of human reproductive material provided by a woman only, and the birth mother is declared under Head 13(9) not to be a parent, the parents of the child are the woman and a person who:
 - (a) was married to or in a civil partnership with or cohabiting in an intimate and committed relationship with that woman at the time of the child's conception, and
 - (b) consented to be a parent of a child born as a result of a surrogacy arrangement and did not withdraw that consent before the child's conception.
- (3) If a child is born as a result of a surrogacy arrangement with the use of human reproductive material provided by a man and a woman, and the birth mother is declared under Head 13(9) not to be a parent, the parents of the child are the man and the woman.

Notes

This Head sets out how parentage may be assigned by the court in cases of surrogacy. It sets out the presumptions where the surrogate consents to an order declaring her not to be a parent. The rule is that the parents of the child are a man who provides human reproductive material, and his spouse, civil partner or cohabitant if that person has consented to be a parent of the child (subhead (1)), or a woman who provides human reproductive material and her spouse, civil partner or cohabitant if that person has consented to be a parent of the child (subhead (2)), or a man and woman who have each provided human reproductive material (subhead (3)). If the surrogate does not consent, she will be the child's mother.

Head 13: Applications to court relating to surrogacy

Provide along the following lines:

- (1) An application may be made to the court for a declaration that –
 - (a) a surrogate is not a parent of a child born to the surrogate as a result of assisted reproduction,
 - (b) a person or two persons whose human reproductive material or embryo was provided for use in the assisted reproduction is a parent or are the parents of that child, and
 - (c) in a case where there is only one person referred to in paragraph (b), a person who was, at the time of the child's conception, married to or in a civil partnership with or cohabiting in an intimate and committed relationship with that person is a parent of the child.
- (2) Subject to subhead (4) the following persons may make an application under subhead (1) –
 - (a) the surrogate,
 - (b) a person referred to in subhead (1)(b), or
 - (c) a person who was, at the time of the child's conception, married to or in a civil partnership with or cohabiting in an intimate and committed relationship with a person referred to in subhead (1)(b).
- (3) An application may be made under subhead (1) of this Head notwithstanding the fact that any person named in the application as the father or the mother or a parent or, in the case of a surrogate, as not being a parent, is not or may not be alive.
- (4) If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by both a man and a woman, only the surrogate, the man or the woman or the man and the woman jointly may make an application under subhead (1).
- (5) Subject to subhead (6), an application under subhead (1) may not be made less than 30 days after and not more than 6 months after the child's birth.
- (6) An application under subhead (1) in relation to a child born through a pre-commencement surrogacy arrangement may be made not more than 2 years after the commencement of this Head unless the court is satisfied that there are special circumstances and it is in the best interests of the child or children concerned, in which case the court may extend the time for the making of an application.

- (7) Unless the court directs otherwise, the following persons, must in accordance with any regulations made pursuant to this Act, be served with notice of the application:
- (a) if a surrogate brings an application under subhead (1):
 - (i) the person or both persons referred to in subhead (1)(b),
 - (ii) in a case where there is only one person referred to in subhead (1)(b), the person, if any, referred to in subhead (2)(c), and
 - (iii) any other person the court considers appropriate.
 - (b) if a person referred to in subhead (1)(b) brings an application under subhead (1):
 - (i) the surrogate,
 - (ii) the other person, if any, referred to in subhead (1)(b),
 - (iii) in a case where there is only one person referred to in subhead (1)(b), the person, if any, referred to in subhead (2)(c), and
 - (iv) any other person the court considers appropriate.
 - (c) if a person referred to in subhead (2)(c) brings an application:
 - (i) the person referred to in subhead (1)(b),
 - (ii) the surrogate, and
 - (iii) any other person the court considers appropriate.
- (8) An application under this Head shall be accompanied by evidence of the genetic relationship of the person or persons specified in subhead (1)(b) to the child and evidence that the surrogate is not the genetic mother of the child.
- (9) The court shall make the declaration applied for if the court is satisfied that:
- (a) the child was born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by a person referred to in subhead (1)(b),
 - (b) the surrogate consents, in the form prescribed by regulations made pursuant to this Act, to the application, and

- (c) it is in the best interests of the child to do so.
- (10) A person who is declared to be a parent of the child under subhead (9) is deemed to be the parent at and from the time of the birth of the child;
- (11) Any arrangement under which a surrogate agrees to give birth to a child for the purpose of relinquishing that child to a person may not be used as evidence of consent of the surrogate under subhead (9)(b), but may be used as evidence of consent for the purposes of subhead (1)(b) or (2)(b) of Head 12.
- (12) The court may waive the consent required under subhead (9)(b) if:
 - (a) the surrogate is deceased, or
 - (b) the surrogate cannot be located after reasonable efforts have been made to locate her.
- (13) If the court makes a declaration under subhead (9) the court shall identify in the declaration each person referred to in Head 12 who is parent as a result of that declaration.
- (14) The court has jurisdiction under this Head if:
 - (a) the child is born in the State, or
 - (b) an alleged parent ordinarily resides in the State or is a citizen of the State.
- (15) An application under this Head shall not be granted if the child has been adopted.
- (16) The court shall not grant a declaration under this section that would result in the child having more than 2 parents.
- (17) The court shall not grant a declaration where the surrogate was, at the time of entering the surrogacy arrangement, under the minimum age prescribed in subhead (1) or subhead (2), as the case may be, of Head 20.
- (18) The court shall not grant a declaration where any person referred to in subhead (1)(b), or a person, if any, referred to in subhead (2)(c), was, at the time of entering the surrogacy arrangement, under the minimum age prescribed in Head 21.
- (19) The court shall not grant a declaration where a payment prohibited under Head 18 is made in respect of an arrangement entered into after the commencement of this Act.
- (20) Rules of court may provide that any application for a declaration under this Head shall contain such information as may be prescribed.

Notes

This Head sets out how the orders a court may make determining the parentage of a child born through surrogacy.

The policy intention is that in a surrogacy case, the birth mother will be recorded as the child's mother. No surrogacy arrangement will be enforceable against her. However, on application to the court by the birth mother or the commissioning parents, or all of them, the court may legally assign parentage to the intending parents. The court may assign parentage on the basis of genetic connection to one of the intending parents and to the spouse, civil partner or cohabiting partner of that person. The consent of any surrogate is essential and she will be the legal mother of the child if she does not consent.

Subhead (1) sets out what the court may order, which is that the surrogate is not legally a parent of the child, and that each intending parent who has a genetic connection to the child is a parent, or, if only one intending parent has a genetic connection, then the consenting spouse, civil partner or cohabitant of that parent (if any) is also a parent of the child. Subhead (2) sets out that any of the surrogate or any intending parent may make the application – but each other party, and any other person the court considers appropriate, must be served with notice of the application (subhead (7)). Subhead (3) allows the making of an application even where any of the relevant parties has died.

Where a man and a woman both provide the genetic material for their own reproductive purposes to create an embryo, only they and the surrogate may apply for a declaration as to parentage of the child (subhead (4)).

Subhead (5) limits the timeframe for the making of an application to no earlier than 30 days after the child's birth and not later than six months after. It is considered that a birth mother should have sufficient time to recover from the rigours of pregnancy and childbirth before participating in proceedings. Subhead (6) modifies this rule in relation to pre-commencement surrogacy arrangements so that an application may be made up to 2 years after commencement of the provision, and allows the court to accept an application even later than this if the court considers there are special circumstances which must be taken into account.

An application must be accompanied by evidence of the genetic relationship of one of the intended parents to the child and evidence that the surrogate is not the genetic mother of the child (subhead (8)). "Traditional surrogacy", in which a woman becomes pregnant using her own eggs with the intention of giving up the child to commissioning parents, is excluded from the scope of these legislative proposals.

Subhead (9) mandates the court to make the order applied for if it is satisfied that the surrogate consents and that at least one of the intending parents has a genetic link to the child. Where the court makes a declaration, the parents named in that declaration are deemed to be the parents of the child from the date of the child's birth. The declaration must name each person who is a parent of the child (subhead (13)),

Subheads (11) and (12) make certain provisions as to consent. Subhead (11) establishes that a surrogacy arrangement – which is entered into before the surrogate becomes pregnant – cannot be used as evidence of the surrogate’s consent. The consent of the surrogate is valid only if it is freely given when the application is made. However, it may be used as evidence of the consent of either of the intending parents. The court may waive the consent of a surrogate who is deceased or cannot be traced (subhead (12)).

Subhead (14) confers jurisdiction if the child is born in the State or a parent is ordinarily resident in or a citizen of the State. Subhead (15) bans the making of a declaration where a child has been adopted. Subhead (16) restricts the court from making a declaration which would give a child more than two parents. Subheads (17), (18) and (19) ban the court from making any declaration under the section if the surrogate is not of at least the prescribed age (18 for pre-commencement, 24 for post-commencement), either of the intending parents has not attained the age of 21, or, in relation to an arrangement entered after the Scheme has legal effect, a payment forbidden under Head 18.

Subhead (20) provides for rules of court on the information that must be contained in any application for a declaration under the Head.

PART 4

FURTHER PROVISIONS RELATING TO PARTS 2 AND 3

Head 14: Additional orders by the court

Provide along the following lines:

- (1) When a person applies for a declaration under Head 7, 11 or 13 that he or she is a parent of a child, the court may direct the applicant to make further applications concerning guardianship and custody of the child under Part 7.
- (2) When a person applies for a declaration under Head 7, 11 or 13 and, on the direction of the court or otherwise, for guardianship and custody of the child under Part 7, the court shall consider and determine the applications in the same proceedings.

Notes

This provision is intended to streamline proceedings so that where a parent applies for a declaration of parentage and is not a guardian or entitled to lawful custody of the child, the court may, where appropriate, direct the person to make an application for guardianship and custody (subhead (1)). Subhead (2) requires the court to consider and determine such applications in the same proceedings as the application for the declaration. This is proposed as a mandatory requirement, on the grounds that the child's best interests (and those of the parents or any other parties) will be served by having all relevant proceedings heard in the round and clarity provided as to who has the rights and duties to take care of the child. It would also promote efficiency by reducing the requirement for multiple proceedings and court hearings.

Head 15: Role of the Attorney General

Provide along the following lines:

- (1) In an application made pursuant to Head 7, 11 or 13 of this Act, the court may at any stage of the proceedings, of its own motion or on the application of any party to the proceedings, direct that all necessary papers in the matter be sent to the Attorney General.
- (2) Where, on an application under Head 7, 11 or 13 of this Act, the Attorney General requests to be made a party to the proceedings, the court shall order that he or she shall be added as a party, and, whether or not he or she so requests, the Attorney General may argue before the court any question in relation to the application which the court considers necessary to have fully argued and take such other steps in relation thereto as he or she thinks necessary or expedient.
- (3) Where the Attorney General is on notice of or made a party to the proceedings, a declaration under Head 7, 11 or 13 shall be binding on the State.
- (4) Where any costs are incurred by the Attorney General in connection with any application for a declaration under Head 7, 11 or 13 of this Act, the court may make such order as it considers just as to the payment of those costs by other parties to the proceedings.

Notes

Under present law, a determination by the court under section 35 of the Status of Children Act 1987 is binding on the State if the Attorney General is a party to proceedings. This Head is intended to have the effects section 35(5), (6) and part of (9) of the 1987 Act currently have. One proposed modification is that subhead (3) provides that a declaration shall be binding on the State where the Attorney General is a party to or is on notice of proceedings. The intention is that where the Attorney General, having been put on notice and reviewed the relevant material, determines that there is no overriding matter of public interest requiring that she be a party, the proceedings will be binding on the State without the requirement for further action on her part. This is in the interests of efficiency and reducing costs.

Head 16: Effect of declaration of parentage

Provide along the following lines:

- (1) Any declaration made under Head 7, 11 or 13 shall be in a form to be prescribed and shall be binding on the parties to the proceedings and any person claiming through a party to the proceedings.
- (2) A declaration under Head 7, 11 or 13 is proof that the person named in the declaration as the parent of a child is for all purposes the parent of that child and has all the legal rights, duties and obligations of a parent in relation to that child.

Notes

This Head mirrors the balance of section 35(9) of the 1987 Act in subhead (1) including that the declaration is binding on parties to proceedings. Subhead (2) sets out the effect of the declaration. It is intentionally silent as to guardianship – a parent who would be entitled to guardianship by virtue of the provisions of Heads 30, 37 and 38 will have proof that s/he is so entitled on the making of the declaration, and a parent who would not be so entitled has all the rights and duties of a non-guardian parent – including the right to apply for guardianship if s/he wishes (if the court has not already directed her or him to apply, under Head 14).

PART 5

SURROGACY ARRANGEMENTS

Head 17: Surrogacy arrangements

Provide along the following lines:

- (1) A surrogacy arrangement is not enforceable by or against any person making it except as prescribed in this Head.
- (2) An obligation under a surrogacy arrangement to pay or reimburse the birth mother's surrogacy costs is enforceable but only if the surrogacy arrangement is an arrangement made prior to the surrogate conception.
- (3) For the purpose of this Act, the "birth mother's reasonable costs" are the birth mother's reasonable costs associated with any of the following matters:
 - (a) becoming or trying to become pregnant;
 - (b) a pregnancy or a birth;
 - (c) entering into and giving effect to a surrogacy arrangement.
- (4) The reasonable costs associated with the pregnancy or birth include the following:
 - (a) any reasonable medical costs associated with the pregnancy or birth (both pre-natal and post-natal);
 - (b) any reasonable travel or accommodation costs associated with the pregnancy or birth;
 - (c) any reasonable costs, including reasonable medical costs, incurred in respect of a child (being the child of the surrogacy arrangement);
 - (d) the cost of reimbursing the birth mother for a loss of earnings as a result of unpaid leave taken by her, but only for the following periods:
 - (i) a period of not more than 2 months during which the birth happened or was expected to happen;
 - (ii) any other period during the pregnancy when the birth mother was unable to work on medical grounds related to pregnancy or birth.
- (5) The reasonable costs associated with entering into and giving effect to a surrogacy arrangement include the following:

- (a) the reasonable costs associated with the birth mother and the birth mother's partner (if any) receiving counselling in relation to the surrogacy arrangement (whether before or after entry into the arrangement);
 - (b) the reasonable costs associated with the birth mother and the birth mother's partner (if any) receiving independent legal advice in relation to the surrogacy arrangement or a parentage order related to the surrogacy arrangement;
 - (c) the reasonable costs associated with the birth mother and the birth mother's partner (if any) being a party to proceedings in relation to making a parentage order as a consequence of the surrogacy arrangement including reasonable travel and accommodation costs.
- (6) A cost is reasonable only if:
- (a) the cost is actually incurred, and
 - (b) the amount of the cost can be verified by receipts or other documentation.
- (7) In this Head "medical costs" do not include any costs that are recoverable under any health insurance or other scheme or costs which are discharged by the State and which are not recoverable from the birth mother or her partner (if any).

Notes

This Head provides that a surrogacy arrangement is not an enforceable contract except in relation to the payment of the birth mother's reasonable expenses, and then only if the arrangement was made before the birth mother became pregnant – this is to ensure that commissioning parents cannot resile from any financial guarantee made to the birth mother after she becomes pregnant, and likewise that she cannot seek additional payment after becoming pregnant.

Head 18: Prohibition on payment for surrogacy

Provide along the following lines:

- (1) A person shall not receive or agree to receive any payment or any other reward in consideration of entering into or making or implementing a surrogacy arrangement.
- (2) A person shall not offer, make or give or agree to make or give any payment or other reward the receipt of which is prohibited by subhead (1).
- (3) A person shall not receive, make or give or agree to receive, make or give any payment or other reward in consideration of facilitating the making of a surrogacy arrangement.
- (4) Subhead (2) and subhead (3) do not apply if the payment or other reward provided for is the reimbursement of a birth mother's surrogacy costs.

Notes

This Head prohibits people from making or receiving payments in relation to a surrogacy arrangement. It is intended to prevent an intending surrogate from receiving or agreeing to receive payment (other than the birth mother's reasonable costs), to prevent intending parents from offering or making payments for someone to enter a surrogacy agreement with them, and to prevent any intermediaries from offering or making payments or receiving or agreeing to receive payments in relation to a surrogacy arrangement.

It is not intended to preclude payments to legal practitioners for giving legal advice, or to medical practitioners for treating the intending parents and / or the surrogate in relation to assisted reproduction procedures, etc.

Head 19: Prohibition on surrogacy advertisements

Provide along the following lines:

- (1) A person shall not publish or cause to be published any advertisement, statement, notice or other material that:
 - (a) states or implies that a person is willing to enter into or arrange a surrogacy arrangement,
 - (b) seeks a person willing to act as a birth mother under a surrogacy arrangement,
 - (c) states or implies that a person is willing to act as a birth mother under a surrogacy arrangement, or
 - (d) is intended or is likely to induce a person to act as a birth mother under a surrogacy arrangement.
- (2) In this Head “publish” means to disseminate or provide access, by any means, to the public or a section of the public.

Head

This Head prohibits publication of advertisements concerning entering a surrogacy arrangement.

Head 20: Minimum age for surrogate mother

Provide along the following lines:

- (1) A birth mother who after the commencement of this Act enters into a surrogacy arrangement shall, before entering that arrangement, have at least one child of which she has custody (including shared custody), and shall be at least [24] years of age.
- (2) If a birth mother entered into a surrogacy arrangement prior to the commencement of this Act, she shall have been at least 18 years of age when entering that arrangement.

Notes

Legislation in some jurisdictions sets out minimum ages for a surrogate mother, to provide safeguards for any potential surrogate mother. The minimum age proposed here is 24: this is so that an intending surrogate is likely to have a reasonable degree of maturity and some life experience.

More importantly, it is a requirement that the intending surrogate already have at least one child of which she has custody. This is to ensure that she is fully aware of the possible physical and emotional effects of pregnancy and child-birth and has the experience of bringing up her own child. Further, there is always some degree of risk associated with pregnancy (albeit usually very small, in Ireland), and it may be desirable to ensure that if complications should compromise the intending surrogate's future fertility this should not have the effect of forcing her to be childless.

Subhead (2) requires that for a pre-surrogacy arrangement, an intending surrogate shall have been no less than 18 years old, so that as a minimum she was an adult under Irish law when making the arrangement.

Head 21: Minimum and maximum ages for parenting through surrogacy

Provide along the following lines:

When entering a surrogacy arrangement, each intended parent shall be at least [21] years of age when entering that arrangement, and at least one intended parent shall be under the age of [45].

Notes

Legislation in some jurisdictions sets out minimum ages for intending parents under a surrogacy arrangement.

The minimum age criterion is intended to ensure a certain minimum level of maturity.

A maximum age is also suggested, to increase the likelihood that at least one intending parent will live well into the child's adulthood.

Head 22: Legal advice relating to surrogacy

Provide along the following lines:

- (1) Each party to a surrogacy arrangement concluded after the commencement of Part 3 shall, before entering the arrangement, obtain legal advice from a legal practitioner concerning the surrogacy arrangement and its implications.
- (2) The birth mother and her partner (if any) shall obtain legal advice from a legal practitioner independent of and not practicing with the legal practitioner who provided advice to the intended parents.
- (3) If any party to a surrogacy arrangement fails to obtain legal advice in accordance with subsection (1), the court shall have regard to that fact and the reasons for it in determining any application made under this Act.
- (4) If any intended parent makes a sole application in respect of a surrogacy arrangement that involves two intended parents, the Court shall, in determining any such application and in considering all relevant matters, have regard to:
 - (a) the reason why the application is made by only one intended parent, and
 - (b) whether the intended parent who is not a party to the application obtained legal advice from a legal practitioner concerning the surrogacy arrangement and its implications before the arrangement was made and concerning any application made or to be made by the other intended parent pursuant to Head 13.
- (5) Where an application referred to in subsection (4) is made, the Court may, of its own motion or on the application of any party to the proceedings, direct that notice of the application be furnished to the other intended parent and that such intended parent be added as a party to the proceedings if the Court deems it appropriate and in the best interests of the child who is the subject matter of the application made.

Notes

Subheads (1) and (2) provide that each party to a surrogacy arrangement must obtain legal advice before making the arrangement so that they will fully understand the consequences of the arrangement for them, and that the birth mother and the commissioning parents must obtain legal advice from separate and independent legal practitioners. This is to ensure that there is no conflict of interest which might result in a party to the arrangement being less well advised.

Subhead (3) allows the court to consider as a factor that one of the parties did not obtain proper legal advice when making an order under the Act.

Subheads (4) and (5) make additional provision concerning applications under Head 13. Where only one intended parent makes an application for a declaration where the arrangement had included 2 intended parents, the court may have regard to that fact and the reasons for it – which could include break-up, death, incapacity – and may direct that the other party (if living) be put on notice of proceedings. This is a safeguard for the benefit of all parties, including the child, but particularly for an intending parent who is not a party to an application.

Head 23: Offences and penalties

- (1) A person is guilty of an offence if the person contravenes Head 18 (1), (2) or (3) or Head 19 (1).
- (2) A person guilty of an offence under subhead (1) of this Head is liable on summary conviction to a class A fine or imprisonment for a term not exceeding 12 months or both.
- (3) Where an offence under this Act is committed by a body corporate or by a person purporting to act on behalf of a body corporate or an unincorporated body of persons and is proved to have been committed with the consent, connivance or approval of, or to have been attributable to any wilful neglect on the part of, any person who, when the offence was committed, was a director, a member of the committee of management or other controlling authority of the body concerned, or the manager, secretary or other officer of the body or a person who was purporting to act in any such capacity, that person shall also be guilty of an offence and shall be liable to be proceeded against and punished as if guilty of the offence.
- (4) Where the affairs of a body corporate are managed by its members, subhead (3) shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.
- (5) In any proceedings for an offence under subhead (1) proof of things done or of words written, spoken or published, (whether or not in the presence of any party to the proceedings) by any person taking part in the management or the control of a body of persons or of any of the body or by a person doing any of the acts proscribed on behalf of the body, shall be admissible as evidence of the activities of the body.
- (6) Notwithstanding section 10(4) of the Petty Sessions (Ireland) Act, 1851, proceedings for an offence under this Act may be instituted at any time within 2 years of the date of the offence or within 2 years from the date on which evidence is first disclosed to the person by whom the proceedings were brought which is sufficient to justify the bringing of the proceedings.

Notes

Subhead (1) establishes that it is an offence to make or agree to make or receive or agree to receive any payment in relation to a surrogacy arrangement which is prohibited under Head 18. The following persons may be guilty of an offence: a surrogate or intending surrogate, intending / commissioning parents, and any intermediary. It is also an offence to publish or cause to be published certain advertisements relating to surrogacy prohibited by Head 19.

Subhead (2) establishes the relevant penalties.

Subheads (3) to (5) make certain provisions in relation to where an offence is committed by a body corporate (such as an intermediary or a publisher). Subhead (6) is a standard provision relating to the timeframes within which proceedings are brought.

PART 6

TESTING TO ESTABLISH PARENTAGE

Head 24: Definitions

Provide along the following lines:

In this Part: -

“blood samples” means blood taken for the purpose of DNA tests;

“DNA” means deoxyribonucleic acid;

“DNA test” means any test carried out under this Part and made with the objective of ascertaining a set of identification characteristics capable of comparison with similar information derived from an examination and analysis of the DNA sample for the purpose of determining whether or not it establishes the parentage of a child to a high degree of probability;

“non intimate sample” means any of the following taken or to be taken from a person for the carrying out of a DNA test:-

(a) a sample of saliva or hair (other than pubic hair);

(b) a swab taken from the mouth;

“sample” means a sample taken or to be taken from a person under this Part.

Notes

This Head provides definitions for the purposes of the Part. It differs from the definitions in section 37 of the 1987 Act in referring specifically to DNA and DNA testing, as distinct from “blood tests”. This allows the omission of the definition of “excluded” as DNA tests should still give a high degree of certainty as to parentage even where some level of mutation naturally occurs. It also provides a definition of “non-intimate samples” because blood samples are not generally necessary for the purposes of DNA testing.

Head 25: Direction for the use of DNA tests

Provide along the following lines:

- (1) In any civil proceedings before a court in which the parentage of any person is in question, the court may, either of its own motion or on an application by any party to the proceedings, give a direction for the use of DNA tests for the purpose of assisting the court to determine whether a person named in the application or a party to the proceedings, as the case may be, is or is not a parent of the person whose parentage is in question and for the taking, within a period to be specified in the direction, of blood samples or non-intimate samples from the person whose parentage is so questioned, from any person alleged to be a parent of that person and from any other person who is a party to the proceedings or from any of those persons.
- (2) Where, on the application of any party to proceedings: -
 - (a) a direction is given under subhead (1) of this Head, such party shall pay the costs of taking and testing blood samples or non-intimate samples for the purpose of giving effect to the direction (including any expenses reasonably incurred by any person in taking any steps required of him for that purpose) and of making a report to the court under Head 27(2) of this Act;
 - (b) such party obtains under Head 27(4) of this Act, a written statement explaining or supplementing any statement made in a report under the said Head 27(2), that party shall subject to any direction by the court pay the costs (if any) of obtaining the written statement (including any expenses reasonably incurred by any person in taking any steps required by him for that purpose),but any amount paid or to be paid virtue of this subhead shall be treated as costs incurred by such party to the proceedings.
- (3) In determining whether to direct the taking of blood samples or non-intimate samples, the court shall determine the samples that are appropriate having regard to the overall circumstances of the case and the best interests of the child.
- (4) The court may at any time revoke or vary a direction previously given by it under this Head.

Notes

This Head mirrors section 38 of the 1987 Act with the modification that reference is made to DNA testing rather than solely to blood tests, and subhead (3) allows the court to decide whether to direct testing by means of blood sample or non-intimate sample, having regard to the overall circumstances and the best interests of the child.

Head 26: Consent to and taking of samples

Provide along the following lines:

- (1) Subject to subhead (3), a blood sample or a non-intimate sample which is required to be taken from any person for the purpose of giving effect to a direction under Head 25 of this Act shall not be taken from that person except with his consent.
- (2) Where for the purpose of giving effect to a direction under Head 25 of this Act a blood sample or a non-intimate sample is required to be taken from a person who is not of full age and the court considers that the person is in the circumstances capable of giving or refusing the necessary consent, any consent given or refused by her or him shall be as effective as it would be if she or he were of full age.
- (3) For the purpose of giving effect to a direction under Head 25:-
 - (a) a blood sample or a non-intimate sample may be taken from a minor, other than one to whom subhead (2) of this Head relates, if the person having charge of or control over the minor consents:

Provided that where more than one person has charge of or control over the minor and they disagree as to whether consent should be given, the minor shall be treated as not having consented;

- (b) a blood sample or a non-intimate sample may be taken from a person of full age who is, in the opinion of the court incapable of understanding the nature and purpose of DNA tests if the person having charge of or control over him consents:

Provided that where more than one person has charge of or control over the person concerned and they disagree as to whether consent should be given, the person concerned shall be treated as not having consented.

Notes

The Head mirrors section 39 of the 1987 Act with the modification that it includes specific references to non-intimate samples and to DNA tests, and the reference in section 39(3)(b) to a medical practitioner having to certify that the taking of a blood sample will not be prejudicial to a person's care and treatment is now omitted. This is because virtually all DNA samples will be non-intimate samples and taking such samples cannot prejudice a person's care and treatment in any normal circumstances.

Head 27: DNA test and reports

Provide along the following lines:

- (1) Where blood samples or non-intimate samples are taken for the purpose of giving effect to a direction of a court under Head 25 (1), they shall be tested: -
 - (a) under the control of such person (including a person to whom subhead (6) of this Head relates) as all the parties to the proceedings before the court agree to, or
 - (b) where the parties are not in agreement: -
 - (i) under the control of such person to whom subhead (6) of this Head relates, or
 - (ii) under the control of such other person,

as the court shall direct.
- (2) The person under whose control blood samples or non-intimate samples are to be tested by virtue of subhead (1) shall, in a report to the court by which the direction was given, state: -
 - (a) in relation to each person from whom blood samples or non-intimate samples were so taken, the results of the tests, and
 - (b) in relation to each person (other than the person whose parentage is in question) from whom blood samples or non-intimate samples were so taken: -
 - (i) whether the DNA profile of the person to whom the report relates is or is not excluded by the results from being a parent of the person whose parentage is in question, and
 - (ii) if the person to whom the report relates is not so excluded, whether that person's DNA profile when compared with the DNA profile of the person whose parentage is in question establishes such person to a high degree of probability as a parent of the person concerned and the basis of any such determination,

and the report shall be received by the court as evidence in the proceedings of the matters stated therein.
- (3) A report under subhead (2) of this Head shall be in the form prescribed by regulations made under Head 28 of this Act.

- (4) Where a report is being made to a court under subhead (2), any party may, with the leave of the court, or shall, if the court so directs, obtain from the person who made the report a written statement explaining or supplementing any statement made in the report and that statement shall be deemed for the purpose of this Head (other than subhead (3) and subhead (6)) to form part of the report made to the court.
- (5) Where a direction is given under Head 25(1) in any proceedings and the blood samples or non-intimate samples to which the direction relates have been tested by virtue of this Head, the party to the proceedings, unless the court otherwise directs, shall not be entitled to call as a witness the person under whose control the blood samples or non-intimate samples were tested for the purpose of giving effect to that direction, or any person by whom any thing necessary for the purpose of enabling those tests to be carried out was done, unless within 14 days after receiving a copy of the report he serves notice on the other parties to the proceedings, or on such of them as the court may direct, of his intention to call that person as a witness and, where that person is so called, the party who called him shall be entitled to cross-examine him.
- (6)
 - (a) The Minister may, for the purpose of subhead (1), appoint a person or category of persons under whose control DNA tests may be carried out.
 - (b) The Minister may at any time amend or revoke an appointment under this subhead but such amendment or revocation shall not affect any DNA test carried out or the testing of any blood sample or non-intimate sample for the purpose of this Part which was submitted for testing, before such amendment or revocation.
 - (c) Notice of an appointment, or the amendment or revocation of any appointment, shall be published by the Minister in the *Iris Oifigiúil*.

Notes

This Head provides how DNA test results are to be reported to the court. It replicates section 40 of the 1987 Act with the modification that reference is made explicitly to DNA testing rather than “blood tests”, and to non-intimate samples.

Head 28: Regulations for purpose of giving effect to this Part

Provide along the following lines:

- (1) The Minister may make regulations for the purpose of giving effect to this Part.
- (2) Without prejudice to the generality of subhead (1), regulations made under this Head may in particular: -
 - (a) regulate the taking, identification and transport of blood samples and non-intimate samples;
 - (b) require the production at the time when a blood sample or a non-intimate sample is to be taken of such evidence of the identity of the person from whom it is to be taken as may be prescribed by the regulations;
 - (c) prescribe the form of any report to be made to a court under this Part.
- (3) Every regulation made under this Head shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the regulation is passed by either such House within the next 21 days on which that House has sat after the regulation is laid before it, the regulation shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.

Notes

This Head confers a power on the Minister to make detailed regulations in relation to DNA testing. It replicates section 41 of the 1987 Act with the modification that references to non-intimate samples are included.

Head 29: Failure to comply with direction on DNA tests

Provide along the following lines:

- (1) Where a court gives a direction under Head 25 of this Act and any person fails or refuses to take any step required of him for the purpose of giving effect to the direction, the court may draw such inferences, if any, from the fact as appear proper in the circumstances.
- (2) Where in proceedings on an application under Head 7 of this Act for the taking of blood samples or non-intimate samples, if any person named in the direction fails or refuses, within such period as may be specified by the court, to take any step required of him for the purpose of giving effect to the direction, the court may dismiss the application.
- (3) Where in any civil proceedings in which the parentage of any person falls to be determined by the court hearing those proceedings there is, by virtue of Head 6 of this Act, a presumption of paternity relating to such person, then if: -
 - (a) a direction is given under Head 25 of this Act in those proceedings, and
 - (b) any party who is claiming any relief in the proceedings and who for the purpose of obtaining that relief is entitled to rely on the presumption fails to take any step required of him for the purpose of giving effect to the direction,

the court may adjourn the hearing for such period as it thinks fit to enable that party to take that step, and if at the end of that period he or she has failed without reasonable cause to take it the court may, without prejudice to subhead (1) of this Head, dismiss the claim for relief notwithstanding the absence of evidence to rebut the presumption.

- (4) Where any person named in a direction under Head 25 of this Act fails to consent to the taking of a blood sample or a non-intimate sample from himself or from any person named in the direction whom he has charge of or control over, he shall be deemed for the purposes of this Head to have failed to take a step required of him for the purpose of giving effect to the direction.

Notes

This Head allows the court to draw certain inferences where a person does not comply with a direction to undertake DNA testing. It replicates section 42 of the 1987 Act.

Head 30: Penalty for personation for DNA test purposes

Provide along the following lines:

If, for the purpose of providing a blood sample or a non-intimate sample for a test under this Part of this Act, any person personates another or proffers another knowing him not to be the person named in the direction, he shall be liable –

- (a) on summary conviction, to a class C fine or to imprisonment for a term not exceeding 12 months, or to both;
- (b) on conviction on indictment to a class A fine or to imprisonment for a term not exceeding 2 years, or to both.

Notes

This Head replicates section 43 of the 1987 Act with the modification that reference is included to taking of non-intimate samples, and the penalties are replaced by bands in accordance with the Fines Act 2010.

PART 7

GUARDIANSHIP, CUSTODY AND ACCESS

Head 31: Definitions

Provide along the following lines:

(1) In this Part (unless the context otherwise requires) –

“access”, in relation to a child, includes the right of the child to maintain personal relations and contact with a parent and relatives or other person with a bona fide interest in the child on a regular basis except where such access is not in the best interests of the child;

“adoption order” includes:-

- (a) an adoption order within the meaning of the Adoption Act 2010.
and
- (b) an adoption effected outside the State and recognised under that Act;

“best interests”, in relation to 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;

“custody”, in relation to a child, includes the provision of day-to-day care of a child, to protect and supervise the child and the right to provide a residence for the child and may include providing such care for one or more specified days or parts of days;

“father” includes a male adopter under an adoption order, but does not otherwise (except as expressly provided) include the father of a child who has not married the child’s mother unless:-

- (a) an order is under Head 39 is in force in respect of the child,
- (b) the circumstances detailed in subhead (2) apply,
- (c) the circumstances detailed in subhead (3) apply,
- (d) the circumstances detailed in subhead (4) apply,
- (e) he has acquired parental responsibility corresponding to guardianship by operation of the law of another State;

“guardian” and “guardianship” have the meaning given to them by Head 34;

“mother” includes:

- (i) a female adopter under an adoption order, and
- (ii) a woman declared to be the parent of a child under Head 11 or 13,

but otherwise means the woman who gives birth to a child;

“relative of a child” includes:

- (a) a spouse or civil partner of the child’s parent [with whom the child resides or has resided?],
- (b) brother, sister, half-brother, half-sister, step-brother or step-sister,
- (c) grandparent,
- (d) uncle or aunt,
- (e) nephew or niece,
- (f) cousin;

“testamentary guardian” means a guardian appointed by deed or will.

- (2) (a) The circumstances referred to in paragraph (b) of the definition of “father” in subhead (1) are that the father and mother of the child concerned have at some time gone through a ceremony of marriage and the ceremony resulted in: -

- (i) a voidable marriage in respect of which a decree of nullity was granted after, or at some time during the period of 10 months before, the birth of the child;
- (ii) a void marriage which the father reasonably believed (whether or not such belief was due to a mistake of law or of fact) resulted in a valid marriage:
 - (I) where the ceremony occurred before the child, at some time during the period of 10 months before that birth, or
 - (II) where the ceremony occurred after the birth of the child, at the time of that ceremony.

- (b) It shall be presumed for the purposes of sub-paragraph (ii) of paragraph (a), unless the contrary is shown, that the father

reasonably believed that the ceremony of marriage to which that sub-paragraph relates resulted in a valid marriage.

- (3) The circumstances referred to in paragraph (c) of the definition of “father” in subhead (1) are that the father and mother of the child concerned:-
 - (a) have not married each other,
 - (b) cohabited for at least 12 consecutive months before the child’s birth, which cohabitation ended (if applicable) not less than 10 months before the child’s birth.
- (4) The circumstances referred to in paragraph (e) of the definition of “father” in subhead (1) are that the father and mother of the child concerned:-
 - (a) have not married each other,
 - (b) declare that they are the father and mother of the child concerned,
 - (c) agree to the appointment of the father as guardian of the child
 - (d) have entered into arrangements regarding the custody of, and, as the case may be access to the child, and
 - (e) have made a statutory declaration to that effect in a form prescribed by the Minister.
- (5) A reference, however expressed, in this Act to a child whose father and mother have not married each other shall, except in a case to which subhead (2) relates, be construed in accordance with section 4 of the Act of 1987.

Notes

This Head provides definitions for the purposes of the Part and the Act more generally. They are based in part of the definitions in section 2 of the Guardianship of Infants Act 1964 as amended, with the following key modifications:

- definitions for “custody” and “access” are based on the proposed definitions for “day-to-day care” and “contact” in the Law Reform Commission Report on Legal Aspects of Family Relationships. In addition, the definition of “custody” reflects the possibility of joint / shared custody where parents are separated. The terms “guardianship”, “custody” and “access” are retained because these are used in the Constitutional amendment;
- “mother” is defined as the woman who gives birth to a child, except in the cases of adoption, or where an order has been made under Head 13;
- the definition of “father” from the 1964 Act (which is used for the purposes of assessing what fathers are automatically guardians of their children) now includes a category of non-marital fathers who cohabit with the child’s mother for at least 12 months prior to the child’s birth, where that cohabitation ends

(if applicable) not more than 10 months prior to the child's birth. This will significantly expand the range of fathers who are automatically guardians of their children without the need to take any further action.

Head 32: Best interests of the child

Provide along the following lines:

- (1) Where in any proceedings before any court the guardianship, custody or upbringing of or access to a child or the administration of any property belonging to or held on trust for a child or the application of the income thereof, is in question, the court, in deciding that question, shall regard the best interests of the child as the paramount consideration.
- (2) In any proceedings in which any question arises concerning the guardianship, custody or upbringing of or access to a child, the court shall have regard to the general principle that unreasonable delay in determining the question may be contrary to the best interests of the child.
- (3) In determining what is in the best interests of the child, the court shall have regard, in particular, to:
 - (a) the benefit to the child of having a meaningful relationship with both of the child's parents;
 - (b) the ascertainable views of the child concerned, giving due weight to such views having regard to the age and maturity of the child;
 - (c) the physical, psychological and emotional needs of the child including the child's need for continuity and stability, taking into consideration the child's age and stage of development and the likely effect on him of any change of circumstances;
 - (d) the history of the child's upbringing and care, including the nature of the relationship between the child and each of his parents and with other relatives and the desirability of preserving and strengthening such relationships;
 - (e) the child's religious, spiritual, cultural and linguistic upbringing and needs;
 - (f) the child's social, intellectual and educational upbringing and needs;
 - (g) the child's age and any special characteristics;
 - (h) any harm which the child suffered or is at risk of suffering and the protection of the child's safety and psychological wellbeing;
 - (i) any plans proposed for the child's custody, care, development and upbringing and for access to and contact with the child having regard to the desirability of the child's guardians and parents agreeing to such arrangements and co-operating with each other;

- (j) the willingness and ability of each of the child’s parents to facilitate and encourage a close and continuing relationship between the child and other parent and to maintain and foster relationships between the child and relatives of the child;
 - (k) the capacity of each person in respect of whom an application is made under this part:
 - (i) to care for and meet the needs of the child;
 - (ii) to communicate and co-operate on issues relating to the child; and
 - (iii) to exercise the relevant powers, responsibilities entitlements to which the application relates; and
 - (l) any other fact or circumstance that the court regards as relevant.
- (4) In considering the matters detailed in subhead (3), the court shall have regard to any family violence including its impact on:
- (a) the safety of the child and other family members;
 - (b) the child’s personal wellbeing, including the child’s psychological and emotional wellbeing; and
 - (c) the victim of such violence and the capacity of the perpetrator of the violence to properly care for the child and the risk, if any, that the perpetrator poses to the child.
- (5) In this Head “family violence” includes behaviour by a parent or guardian or a household member causing or attempting to cause physical harm to the child or another parent or household member, including sexual abuse or causing the child or a parent or other household member to fear for his safety or that of another household member.
- (6) A parent’s conduct may only be considered to the extent, if any, that it is relevant to the child’s welfare and best interests.
- (7) In obtaining the ascertainable views of the child in accordance with subhead (3)(b), the court shall ensure that the manner in which such views are provided to the court facilitates the child freely expressing such views and, in so far as is practicable, that the views so expressed are not as a result of the undue influence of another, including a parent of a child.

Notes

This Head replicates, in subhead (1), section 3 of the 1964 Act with the modification that the “best interests” of the child, as distinct from the “welfare” are the first and paramount consideration in specified types of proceedings. This change in language is to align with the language of the Constitutional amendment. Subhead (2) provides that

the court should have regard to the fact that unreasonable delay in proceedings may be contrary to the child's best interests. Subhead (3) sets out the factors to which a court should have regard when assessing a child's best interests, including the child's physical, intellectual and social needs, and further factors concerning the ability and willingness of the parents to cooperate in parenting and caring for the child.

Subhead (4) and (5) explicitly mandates the court to consider any history of family violence when assessing a child's best interests.

Subhead (6) seeks to limit the behaviour of a parent which may be considered by the court to behaviour affecting the child. This is to limit the extent to which proceedings may be used to air grievances between parents, rather than focus on the needs of the child and how the parents may best meet them.

Subhead (7) specifies that the court should obtain the views of the child without – so far as is possible – putting the child in a position where s/he is subject to undue influence, including by a parent.

Head 33: Proof of paternity in certain proceedings

Provide along the following lines:

- (1) Where in any proceedings before any court on an application for an order under this Part in respect of a child whose parents have not married each other, a person (being a party to the proceedings) is alleged to be, or alleges that he is, the father of the child but that allegation is not admitted by the child's mother or any other party to the proceedings, the court
 - (a) shall not, on that application, make any final order which imposes any obligation or confers any right on that person, and
 - (b) may direct the person to make an application under Head 7, and adjourn proceedings until that application is determined.
- (2) This Head applies only where the fact that the person is or is not the father of the child is material to the proceedings.

Notes

This Head replicates section 3A of the 1964 Act (inserted by section 10 of the 1987 Act) with the modification that subhead (1)(b) confers authority on the court to direct a person to make an application under Head 7 for a declaration of parentage and to adjourn the proceedings until the question of paternity is resolved.

Head 34: Powers, responsibilities and rights of guardianship

Provide along the following lines:

- (1) For the purposes of this Act, guardianship of a child means having in relation to the child: -
 - (a) all the duties, powers, rights and responsibilities that a parent of the child has in relation to the upbringing of the child;
 - (b) every duty, power, right and responsibility that is vested in the guardian of a child by any enactment; and
 - (c) every duty, power, right and responsibility, that immediately before the commencement of this Act was vested in the guardian of a child by any enactment or rule of law.
- (2) Guardianship also includes the rights, powers and responsibilities which a guardian of the child's estate has in relation to the child and his property.
- (3) The rights referred to in subhead (2) include, in particular, the right of the guardian to receive or recover in his own name, for the benefit of the child, property of whatever description and wherever situated which the child is entitled to receive or recover.

Notes

This Head provides a statutory interpretation for "guardianship" including providing an effective saver for the common law position in subhead (1)(c). It therefore includes all the rights and obligations of a parent (whether or not that parent is a guardian), all additional statutory powers, and any further powers under common law, including in relation to the child's estate. It is, however, modified by the limitation in Head 36(8) which disapplies from a guardian who is neither a parent nor in loco parentis to a child any requirement to maintain the child from guardian's own resources.

Head 35: Guardian to act in best interests of the child

Provide along the following lines:

- (1) A guardian shall exercise the powers, responsibilities and rights of guardianship in the best interests of the child.
- (2) A person who is not the guardian of a particular child, but has custody or care of the child may, subject to the provisions of this Act, do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's best interests.

Notes

Subhead (1) mandates a guardian to act in a child's best interests. This is a new provision: current law does not expressly direct a guardian to act in the best interests of the child although it is generally assumed that a guardian will do so (particularly as most guardians are parents). However, it seems appropriate that as a directing principle, a guardian should be specifically required to act in a child's best interest.

Subhead (2) mandates a person to do what is reasonable in the best interests of a child of whom the person has custody or care, subject to the overall provisions of the scheme. This is not intended to confer additional guardianship-like powers on such a person, but to help clarify that having custody and care of a child is itself a responsibility and that the child's best interests must be the legitimate concern of a person who has custody and care of the child.

Head 36: Guardians to act jointly

Provide along the following lines:

- (1) In exercising or continuing to exercise the duties, powers, rights and responsibilities of a guardian in relation to a child, a guardian of the child shall act jointly (in particular by consulting wherever practicable with the aim of securing agreement) with any other guardian of the child.
- (2) A guardian of a child may exercise or continue to exercise the duties, powers, rights and responsibilities of a guardian in relation to the child, whether or not the child lives with the guardian, unless the court provides otherwise.
- (3) Where a child has more than one guardian, the guardians:-
 - (a) shall provide information to any other guardian relating to the exercise of powers, rights and responsibilities of guardianship, at the request of that other guardian;
 - (b) shall use their best efforts to co-operate with one another in exercising their powers, responsibilities and entitlements of guardianship; and
 - (c) may together enter into an agreement with respect to the allocation of powers, rights and responsibilities of guardianship.
- (4) Except where otherwise stated by way of court order, each guardian is entitled –
 - (a) to be informed of and consulted about and to make all significant decisions affecting the child in the exercise of the powers, rights and responsibilities of guardianship derived in subhead (5), and
 - (b) to have sufficient contact with the child to exercise those powers, rights and responsibilities.
- (5) Except where otherwise limited by court order or by law, each guardian has the following responsibilities in respect of the child:
 - (a) to nurture the child's physical, psychological, emotional, intellectual, social and other personal development; and
 - (b) to ensure the child is properly maintained and supported and is provided with necessary medical care, food, clothing, accommodation and access to appropriate education.
- (6) Except where otherwise limited by law or court order, each guardian may:

- (a) make day-to-day decisions affecting the child, including having custody and the day-to-day care and control of the child and supervising the child's daily activities;
 - (b) decide the child's place of residence and to change the child's place of residence;
 - (c) make decisions about the child's education, including the nature, extent and place of education and any participation in extra curricular school activities;
 - (d) make decisions regarding the child's religious, spiritual, cultural and linguistic upbringing and heritage;
 - (e) decide with whom the child is to live and with whom the child is to associate;
 - (f) consent to medical, dental and other health related treatment for the child;
 - (g) grant or refuse consent where consent of a parent or guardian is required by law in any application, approval, action, proceeding or other matter;
 - (h) receive and respond to any notice that a parent or guardian is entitled or required by law to receive;
 - (i) subject to the relevant and applicable statutory and regulatory provisions, commence, defend, compromise or settle any legal proceedings relating to the child and compromise or settle any proceedings taken against the child;
 - (j) receive from third parties health, education or other information that may significantly affect the child;
 - (k) ensure the child's safety and protect the child from harm;
 - (l) appoint a person to act on behalf of the guardian in an emergency or where the guardian is temporarily absent because of illness or any other reason;
 - (m) exercise any other powers reasonably necessary to carry out the responsibilities of guardianship.
- (7) A guardian who exercises any of the powers referred to in subhead (6) shall do so in a manner consistent with the age and maturity and evolving capacity of the child.

- (8) A guardian who is neither a parent of the child nor a person who is in loco parentis to a child has no legal duty to support the child from the guardian's own financial resources.

Notes

This Head sets out an obligation for guardians to act jointly (subhead (1)), unless the court limits the powers of a guardian by order (subhead (2)). Subhead (3) mandates the guardians to cooperate and to share information and provides that they may enter an agreement between them on the exercise of guardianship powers in relation to the child. Subhead (4) provides that except where the court otherwise provides, a guardian is entitled to information and to have sufficient access to the child to enable the guardian to properly exercise the function of guardianship.

Subheads (5) and (6) set out the key responsibilities of guardianship in nurturing and providing for the child, and in making a range of decisions on behalf of the child including in relation to where and with whom the child lives, on the child's general upbringing, education and medical treatment, etc. Subhead (7) requires the guardian to exercise those functions in a way which is consistent with the age and capacity of the child.

Subhead (8) limits the responsibility for maintenance of the child so that a guardian who is not a parent and is not in loco parentis to a child is not required to maintain the child from the guardian's own resources.

Head 37: Rights of parents to guardianship

Provide along the following lines:

- (1) Subject to subhead (2) and Head 38, the father and mother of a child shall be guardians of the child jointly.
- (2) Subject to Head 38, where the mother of a child has not married the child's father, she, while living, shall alone be the guardian of the child unless the circumstances prescribed in Head 31(3) or 31(4) apply or there is in force an order under Head 39(1)(a) or a guardian has otherwise been appointed.

Notes

This Head reproduces subsections (1) and (4) of section 6 of the 1964 Act as amended, with the modifications that

- subhead (1) cross-refers to the exceptions made in subhead (2) and the different rule applying in Head 38 to assisted reproduction and surrogacy, and
- subhead (2) refers to the additional category of cohabiting fathers who are automatically guardians of their children.

Section 6(2) and (3), which refer to the surviving parent acting as sole guardian or together with any guardian appointed by the deceased or by the court, are substituted by Head 40. In addition, Head 44 now makes extensive provision on duration and termination of guardianship.

Head 38. Rights to guardianship in special cases of assisted reproduction and surrogacy

- (1) Subject to subsections (2) and (3), where a child is born through assisted reproduction other than surrogacy, guardianship of the child shall be determined in accordance with Head 37.
- (2) Where a child is born through assisted reproduction other than surrogacy and the other parent of the child determined in accordance with Head 10 is the civil partner of the mother, she shall be a guardian of the child jointly with the child's mother.
- (3) Where a child is born through assisted reproduction other than surrogacy and the other parent of the child determined in accordance with Head 10 is a woman who cohabited with the mother for at least 12 consecutive months before the child's birth, which cohabitation ended (if applicable) not less than 10 months before the child's birth, she shall be a guardian of the child jointly with the child's mother.
- (4) Where a child is born through assisted reproduction and the woman who gives birth to a child is a surrogate, she alone shall be the child's guardian until the court:
 - (a) makes a declaration under Head 13 that she is not a parent of the child and that another person is or two people are the parents of the child,
 - (b) appoints a person to be a guardian of the child in accordance with Head 39, and
 - (c) terminates the guardianship of the woman who gave birth to the child under Head 44.

Notes

This Head makes special provision for the cases of assisted reproduction. Subhead (1) will cover the majority of cases: where a man and woman have a child together by means of assisted reproduction other than surrogacy, guardianship will be determined in the usual way by reference to whether they are married / cohabiting / make a statutory declaration. Subhead (2) deals with the case where the birth mother has a civil partner: if she is determined as the other parent of the child, then she shall also be a guardian: this treats her in the same way as a spouse who is determined to be the parent of a child born through AHR. Subhead (3) deals with the case of a cohabiting female partner of the birth mother who is determined to be the other parent of the child. Subject to meeting the cohabitation requirements that would apply to a father in the same circumstances, she is to be a guardian of the child.

Subhead (4) sets out that where a surrogate gives birth to a child, she alone is the child's guardian under the court declares she is not a parent and terminates her guardianship in accordance with Head 44, and declares another person or persons to be the child's parents and appoints a guardian for the child. The intention is that the birth mother will be the child's guardian until a new guardian is appointed, to ensure continuity of protection for the child.

Head 39: Court appointments of guardians

Provide along the following lines:

- (1) The court may, on an application by a person who:
 - (a) is a parent other than a guardian of a child, or
 - (b) is an adult eligible to make such application pursuant to subhead (3);make an order appointing the person as guardian of a child.
- (2) Without prejudice to other provisions in this Act, the appointment by the court under this Head of a guardian shall not affect the prior appointment of any person as guardian of the child under this or any preceding enactment unless the court otherwise orders.
- (3) A person who is not a parent of a child is eligible to make application under subhead (1)(b) for appointment as guardian of a child where the person is:
 - (a) (i) married to or in a civil partnership with or is cohabiting for over 3 years in an intimate and committed relationship with the parent of the child, and
 - (ii) has shared with that parent responsibility for the child's day-to-day care for a period of more than 2 years,or
 - (b) (i) is an adult who has provided for a child's day-to-day care for a continuous period of more than 12 months, and
 - (ii) the child has no parent or guardian who is willing or able to exercise the powers, rights and responsibilities of guardianship in respect of the child.
- (4) A guardianship order shall not be made under this Head without the consent of:
 - (a) each guardian of the child;
 - (b) the child, if the child is over 12 years of age;
 - (c) the proposed guardiansave as is provided for in subhead (5).
- (5) The court may make an order dispensing with the consent of a person referred to in subhead (4)(a) or (b) if it is satisfied that the consent is

unreasonably withheld and that it is in the best interests of the child to do so.

Notes

This Head specifies who may apply to court to be appointed as a child's guardian. These are a parent (whether the natural father or a person declared to be a parent under Head 11 or Head 13) who is not otherwise automatically a guardian (subhead (1)), or the spouse, civil partner or cohabitant of the child's parent, who shares responsibility for the day-to-day care of the child (subhead (3)(a)), or a person who has day-to-day care of the child and the child has no parent or guardian who is prepared to fulfill their responsibilities to the child (subhead (3)(b)). The appointment of a guardian under the section does not affect the previous appointment of any other guardian (subhead (2)). The consent of any guardian, the proposed guardian, and the child (if s/he is over 12) is required for the appointment of a guardian (subhead (4)), unless the court dispenses with the consent of an existing guardian or the child on the basis that it is in the best interests of the child to appoint the proposed guardian (subhead (5)).

Head 40: Power of parents to appoint testamentary guardians

Provide along the following lines:

- (1) On the death of the guardian of a child, the guardian surviving the deceased guardian, if any, shall be guardian of the child either alone or jointly with any person or persons appointed guardian by the deceased guardian or the court.
- (2) A child's parent who is the guardian of the child may by deed or will appoint a person or persons to be guardian or guardians of the child after his or her death.
- (3) A testamentary guardian shall act jointly with the surviving parent of the child so long as the surviving parent remains alive, unless the surviving parent objects to his so acting.
- (4) If the surviving parent so objects or if a testamentary guardian considers that the surviving parent is unfit to have the custody of the child, the testamentary guardian may apply to the court for an order under this Head.
- (5) The court may:-
 - (a) refuse to make an order (in which case the surviving parent shall remain sole guardian),
 - (b) make an order that the testamentary guardian shall act jointly with the surviving parent, or
 - (c) make an order that the testamentary guardian shall act as guardian of the child to the exclusion, insofar as the court thinks proper, of the surviving parent.
- (6) In the case mentioned in paragraph (c) of subhead (5) the court may make such order regarding the custody of the child and the right of access to the child of the surviving parent as the court thinks proper, and the court may further order that the surviving parent shall pay to the guardian or guardians, or any of them, towards the maintenance of the child such weekly or other periodical sum as, having regard to the means of the surviving parent, the court considers reasonable.
- (7) An appointment of a guardian by deed may be revoked by a subsequent deed or by will.

Notes

This Head mirrors, in subhead (1), the provisions of section 6(2) and (3) of the 1964 Act although it refers to "guardian" rather than "mother" or "father" (this is not a policy change: "father" in the 1964 Act generally refers only to fathers who are guardians.) Subhead (2) allows the guardian parent of a child to appoint a

testamentary guardian to act on her or his behalf after her or his death (mirroring section 7(1) and (2) of the 1964 Act). Subheads (3) to (7) mirror the balance of section 7 of the 1964 Act.

Head 41: Power of guardian parent to appoint substitute guardians

Provide along the following lines:

- (1) A child's parent who is the guardian of the child and has custody of the child may appoint a person or persons to be guardian or guardians of the child and take custody of the child where the guardian parent is unable or unwilling to exercise the rights and duties of guardianship in relation to the child.
- (2) Where a parent makes an appointment under subhead (1), he or she may specify the period for which the appointee may exercise the rights and duties of guardianship and any limitations on the decisions the appointee may make as guardian of the child.
- (3) A parent may, in making an appointment under subhead (1), make that appointment contingent on the parent's incapacity, whether temporary or permanent, to exercise the rights and duties of guardianship.
- (4) A substitute guardian shall act jointly with any other guardian of the child, unless the other guardian objects to the appointment.
- (5) If another guardian so objects or if a substitute guardian considers that the other guardian is unfit to exercise guardianship of the child, the substitute guardian may apply to the court for an order under this Head.
- (6) The court may:-
 - (a) refuse to make an order (in which case the other guardian shall remain a guardian to the exclusion of the substitute guardian),
 - (b) make an order that the substitute guardian shall act jointly with the other guardian, or
 - (c) make an order that the substitute guardian shall act as guardian of the child to the exclusion, insofar as the court thinks proper, of the other guardian.
- (7) An appointment of a guardian under subhead (1) shall expire –
 - (a) at the end of any period specified in subhead (2), or
 - (b) when the guardian parent resumes exercise of his or her rights and duties as a guardian.
- (8) A substitute guardian may, where a question arises as to whether the guardian parent is capable of exercising the rights and duties of guardianship, apply to the court for an order –

- (a) appointing the substitute guardian as a guardian of the child to the exclusion of the guardian parent for a period and subject to conditions that the court may specify, or
 - (b) confirming that the guardian parent is so capable and discharging the substitute guardian from the rights and duties of guardianship.
- (9) An order referred to in subhead (8)(a) shall, subject to any special conditions the court may specify, be of the same effect and force as an order under Head 39.
- (10) A substitute guardian who is exercising the rights and duties of guardianship and has taken custody of the child shall –
- (a) notify any other guardian of the child, and
 - (b) notify the Child and Family Agency on the expiration of 14 days after taking custody of the child if the guardian parent has not at that date resumed exercise of the rights and duties of guardianship,
- unless, in either case, the substitute guardian cohabits with the guardian parent who appointed him or her.
- (11) The Child and Family Agency shall treat any notification made in accordance with subhead (10)(b) as though it were a notification under section 23P(2) (as inserted by section 16 of the Children Act 2001) of the Child Care Act 1991 (as amended).

Notes

This provision is intended to provide the framework for a type of “delegated guardianship”. It draws partly on the framework already established for testamentary guardianship and allows the court to intervene if there are disputes with another guardian.

The facility to appoint a substitute guardian is proposed to be limited to a guardian parent who has custody of the child (and this includes shared custody).

Appointment under subhead (2) is for a definite period and may be useful if, for example, a guardian will be out of the country for a specified duration and will be difficult to contact in case of any emergencies and unable to carry out normal functions such as signing consent forms or authorisations for a child to engage in particular activities. The nature of the appointment and the presumed ongoing capacity of the guardian parent justify allowing the appointment to be limited in its scope.

Appointment under subhead (3) is intended to allow parents to appoint substitute guardians empowered to act in their stead should they be temporarily or permanently unable to exercise guardianship (through accident, physical or mental illness or extraordinary circumstances).

Subheads (4) to (6) are based on the provisions in relation to testamentary guardianship allowing a guardian parent to object to the appointment and conferring powers on the court to determine any dispute. Subhead (7) provides for the duration of an appointment as substitute guardian. Subhead (8) makes express provision for any dispute arising as to capacity of a guardian parent to resume exercise of his or her guardianship. This may be particularly useful in the case where a guardian whose capacity is compromised (through episodic mental illness / addiction issues, for example) wishes to resume guardianship duties while the substitute guardian does not consider that s/he is capable of doing so and that the child's best interests may be compromised.

Subheads (10) and (11) are safeguards so that the Child and Family Agency will be notified of the arrangement as though it were an emergency private foster care arrangement where the substitute guardian is someone other than a person normally living in a household with the child; this means that if any welfare concerns arise the Child and Family Agency will be informed and can act on them / activate care proceedings if necessary. The provision is intended to balance respect for the autonomy of the guardian parent and the family privacy of people normally living in a household with the best interests and welfare of the child.

Head 42: Appointment of guardians to replace deceased parent or guardian

Provide along the following lines:

- (1) Where no guardian has been appointed by a deceased parent or if a guardian so appointed dies or refuses to act, the court may appoint a guardian or guardians to act jointly with the surviving parent.
- (2) A guardian appointed by the court to act jointly with the surviving parent shall continue to act as guardian after the death of the surviving parent.
- (3) A guardian appointed by will or deed or order of court or holding office by virtue of the circumstances set out in Head 31(4) or by virtue of an order made under Head 39 of this Act, may be removed from office only by the court.
- (4) The court may appoint another guardian in place of a guardian so removed or in place of a guardian appointed by any such order who dies.

Notes

This Head replicates section 8(2) to (5) of the 1964 Act as amended, and allows the court to appoint a guardian to a child if the child has no guardian. It is not considered necessary to replicate section 8(1) as the child cannot have no guardian in law unless the child's mother, or both parents, have died, in which case the Head would have automatic effect. It is assumed that since a mother has a constitutional right to have guardianship of her child, her guardianship cannot be terminated by the court under Head 44 (although the court may still limit her exercise of guardianship powers).

Head 43: Powers and duties of guardians

Provide along the following lines:

-

- (1) Every guardian under this Act shall be a guardian of the person and of the estate of the child unless, in the case of a guardian appointed by deed, will or order of the court, the terms of his appointment otherwise provide.
- (2) Subject to the terms of any such deed, will or order, a guardian under this Act: -
 - (a) as guardian of the person, shall, as against every person not being jointly with him, a guardian of the person, be entitled to the custody of the child and shall be entitled to take proceedings for the restoration of his custody of the child against any person who wrongfully takes away or detains the child and for the recovery for the benefit of the child of damages for any injury to or trespass against the person of the child;
 - (b) as guardian of the estate, shall be entitled to the possession and control of all property, real and personal, of the child, shall manage all such property and receive the rents and profits on behalf and for the benefit of the child till the child attains the age of 18 years or during any shorter period for which he has been appointed guardian and may take such proceedings in relation thereto as may by law be brought by any guardian of the estate of the child.
- (3) The provisions of this Head are without prejudice to the provisions of any other enactment or to any other powers, duties or rights conferred or imposed by law on parents, guardians or trustees of the property of children.

Notes

This Head replicates the provision of section 10 of the 1964 Act and refers to the powers of a guardian to act for a child in a legal capacity and as manager of the child's property. It is separate and distinct from the provisions in Heads 34-36 which are more focussed the physical, emotional, social and intellectual needs of the child, rather than the property and financial interests of the child.

Head 44: Duration and termination of guardianship

Provide along the following lines:

- (1) The court may on application by a guardian or a proposed guardian make an order terminating the guardianship of a guardian appointed pursuant to Head 39 or Head 40 of the Act or who is a guardian by virtue of the circumstances set out in Head 31(4), including the guardianship of the applicant, if there is a guardian in place or about to be appointed and if the court is satisfied that it is in the best interests of the child that such guardianship be terminated, and:-
 - (a) the guardian whose guardianship is to be terminated consents to the termination,
 - (b) the guardian whose guardianship is to be terminated is unable or unwilling to exercise the powers, responsibilities and entitlements of guardianship in respect of the child,
 - (c) the guardian whose guardianship is to be terminated has failed in his duty towards the child to such extent that the safety or welfare of the child is likely to be prejudicially affected if the guardianship is not terminated, or
 - (d) for substantial reasons that appear to it to be sufficient, the court considers it necessary or desirable to do so.
- (2) Where the birth mother of a child is a surrogate and she consents to the court making a declaration under Head 13(9) that she is not a parent of the child, her guardianship is terminated on the making of that declaration or, if the court does not in the same proceedings appoint a guardian or guardians for the child, on the appointment of a guardian or guardians for the child.
- (3) Subject to subheads (1) and (2), a person continues to be a guardian of a child until whichever of the following occurs first:-
 - (a) the guardian dies;
 - (b) the child attains the age of 18 years;
 - (c) the child marries.

Notes

Subhead (1) elaborates the provision for removal by the court (referred to in Head 42(3)) of a guardian appointed under Head 39 or Head 40. An application may be made if there is a guardian to be appointed and the guardian to be removed consents to removal, or is unable, unwilling or has failed to exercise guardianship of the child, or the court otherwise considers it necessary or desirable.

Subhead (2) is intended to ensure that the child born through surrogacy always has a guardian – guardianship is vested in birth mother until the court both declares her not to be a parent and also appoints another guardian or guardians. This is to ensure protection for the child. For example, if intending parents before an application under Head 13 is determined, the court may declare the birth mother not to be a parent, declare (now deceased) intending parents to be parents, but, until it appoints guardians to act in place of the deceased, the birth mother remains the guardian.

Subhead (3) provides for the duration of guardianship in all other cases.

Head 45: Applications to court concerning welfare of child.

Provide along the following lines:

- (1) The court may, on application by a guardian or any person or on its own motion:-
 - (a) review a significant decision of a guardian, whether or not it has been implemented, confirm, reverse or vary that decision, and
 - (b) provide advice and direction in respect of that decision.
- (2) In this Head “significant decision” means a decision that:-
 - (a) could seriously damage or cause a serious risk to the health or safety of a child, or
 - (b) is likely to have serious long-term consequences for the child.
- (3) Any person being a guardian of a child may apply to the court for its direction on any question affecting the welfare of the child and the court may make such order as it thinks proper.

Notes

This provision allows the court, on application to it, to review the decision of a child’s guardian where that decision may have long term consequences including as to the child’s health (subhead (1)). It extends to parties other than a child’s guardian access to court where the child’s well-being is in question but where it may not be appropriate to seek review in public law proceedings (subhead (2)). In addition, a guardian may always apply to court for direction on a matter concerning the welfare of a child (subhead (3) – based on section 11(1) of the 1964 Act).

Head 46: Applications to court by child's parents concerning custody and access

Provide along the following lines:

- (1) On application to it by either of a child's parents, the court may by an order under this Head give such directions as it thinks proper regarding the custody of the child and the right of access to the child of the parents of the child.
- (2) An order under this Head may be made on the application of either parent of the child notwithstanding that the parents are then residing together, but an order made under subhead (2) shall not be enforceable and no liability thereunder shall accrue while they reside together and the order shall cease to have effect if for a period of 3 months after it is made they continue to reside together.
- (3) The parent of a child has a right to make an application under this Head regarding the custody of the child and the right of access to the child, whether or not the parent concerned is a guardian of the child.
- (4) When the court grants custody of a child to the child's parents jointly, it shall:-
 - (a) specify the residential arrangements in respect of the child where they are not agreed as between the parents, and
 - (b) specify the contact to take place between the child and the parent from time to time with whom the child is not residing.

Notes

This Head is based on certain of the provisions of section 11 of the 1964 Act. Subhead (1) is based on section 11(2)(a) which confers on the court power to rule on matters of custody and access. It is not proposed to replicate paragraph (b) of that subsection as maintenance payments are adequately dealt with in other legislation.

Subhead (2) replicates section 11(3) of the 1964 Act as substituted by section 6 of the Age of Majority Act 1985.

Subhead (3) is a simplified version of section 11(4) and is cast in gender-neutral terms given the potential for same-gender parents under the Scheme.

Subhead (4) allows the court to determine the detailed residential arrangements of a child when granting joint custody – but only to the extent that they are not agreed between the parents – and to specify what contact the child is to have with the parent with whom, at any particular time, the child is not living (e.g. phone calls where the child is with one parent for most of the week or spends most of his or her holidays with one parent rather than the other).

Head 47: Application to a court for custody by relative of child or person acting in loco parentis

Provide along the following lines:

- (1) The court may, on application by a person who:-
 - (a) is a relative of a child, or
 - (b) has acted in loco parentis to a child and is eligible to make such application pursuant to subhead (2),make an order regarding the custody of the child.
- (2) A person who has acted in loco parentis to a child is eligible to make application under subhead (1)(b) for custody of a child where the person is:
 - (a) (i) married to or in a civil partnership with or is cohabiting for over 3 years in an intimate and committed relationship with the parent of the child, and
 - (ii) has shared with that parent responsibility for the child's day-to-day care for a period of more than 2 years,or
 - (b) (i) an adult who has provided for a child's day-to-day care for a continuous period of more than 12 months, and
 - (ii) the child has no parent or guardian who is willing or able to exercise the powers, rights and responsibilities of guardianship in respect of the child.
- (3) Subject to subhead (4), the court shall not make a custody order under this Head without the consent of:
 - (a) each guardian of the child;
 - (b) the child, if the child is over 12 years of agesave as is provided for in subhead (4).
- (4) The court may make an order dispensing with the consent of a guardian or of the child if satisfied it is in the best interests of the child to do so.
- (5) The court in making an order in respect of a person referred to in subhead (2)(a) may grant custody of a child to the child's parent and such person jointly but where a court does so, it shall:-

- (a) specify the residential arrangements in respect of the child where they are not agreed, and
- (b) specify the access and contact to take place between the child and any parent with whom the child is not primarily residing.

Notes

This Head allows certain persons other than a child's parents to seek custody of the child, where the person is either a relative of the child or has been in loco parentis to the child and meets additional criteria (subhead (1)). These are reforms broadly in line with the recommendations of the Law Reform Commission.

Subhead (2) sets out the additional criteria for an application on the basis of being "in loco parentis" as follows:

(A) the person has been the spouse or civil partner of the child's parent or cohabiting with the child's parent for at least three years, and in each case has shared day-to-day care of the child with the child's parent for at least two years, or

(B) the person has taken care of the child on a day-to-day basis for at least 12 months and the child has no parent or guardian willing and able to exercise his or her guardianship responsibilities including taking day-to-day care of the child.

In the case at (A), this would allow a person who has had a quasi-parental role in relation to a child to apply for custody, including shared custody, on the break-up of a relationship with the child's parent; in the case at (B) where there may be problems in the child's birth family, a person who has taken care of the child may be able to apply for legal custody.

Subhead (3) restrains the court from making a custody order under the Head unless all the guardians and any subject child over the age of 12 consent to it, unless the court dispenses with the consent under subhead (4) on the basis that the child's best interests are served by its making the order.

Subhead (5) provides for the court to specify the detailed residential and contact and access arrangements, if it decides to grant joint custody of the child to a person who has been in loco parentis to a child, and the child's parent.

Head 48: Application to court for access by relative of a child or person acting in loco parentis

Provide along the following lines:

- (1) Any person who:-
 - (a) is a relative of a child, or
 - (b) has acted in loco parentis to a child, including a person to whom Head 47(2)(b) does not apply,may apply to the court for an order giving that person access to the child on such terms and conditions as the court may order.
- (2) In determining whether to grant an application under this Head, the court shall have regard to all the circumstances, including in particular:-
 - (a) the applicant's connection with the child;
 - (b) the significance of the relationship, if any, between the child and the applicant;
 - (c) whether it is necessary to make an order to facilitate access between the child and the applicant;
 - (d) the risk, if any, of disruption to the child's life resulting from the granting of the application;
 - (e) the nature of the relationship between the child's guardians and the applicant and the wishes of the child's guardians;
 - (f) the views of the child.
- (3) Before the court makes an access order, the court shall satisfy itself that access between the child and the applicant is in the best interests of the child, including whether:-
 - (a) the child's physical, psychological or emotional health may be detrimentally affected if access between the child and the applicant is denied, and
 - (b) the guardians' denial of access between the child and the applicant as proposed is unreasonable.

Notes

This Head substitutes for the provisions under section 11B of the 1964 Act which allow certain persons to apply for access to a child. It implements a recommendation of the Law Reform Commission in removing the former "two step" process under which an applicant had first to seek leave to make the application. Subhead (1)

specifies that a relative or a person who has been in loco parentis may make an application. Subhead (2) specifies the factors the court must consider in deciding whether or not to make an order as they relate to the relationship between the applicant and the child, including the child's own views. Subhead (3) additionally mandates the court to consider the best interests of the child and whether the denial of access by the child's guardians is unreasonable.

Head 49: Additional powers of the court in relation to applications under this Part

Provide along the following lines:

- (1) In making any order under this Part, the court may impose such conditions as are necessary in the best interests of the child.
- (2) The court may, if it considers it necessary and appropriate in order to protect the child's best interests and the child's right to the care and custody of both of the child's parents, impose conditions in relation to the holding of the passport of a child.
- (3) The conditions referred to in subhead (2) include that a passport may be retained by the court or held by a specified person and may be released subject to such further conditions as may be determined by the court.
- (4) Where, in any proceedings pursuant to this Part, any applicant or any other person raises welfare concerns in relation to a child, the Court shall, if it considers it appropriate to do so, exercise the powers conferred on it by section 20 of the Child Care Act, 1991.

Notes

Subhead (1) confers a general authority on the court to include conditions in orders it makes concerning guardianship, custody and access where it considers that necessary in the best interests of the child. This could include conditions as to sharing of custody, locations of access, limitations on the exercise of guardianship by one of a child's guardians, etc.

Subhead (2) and (3) are intended to place on a statutory footing a power that is sometimes used by the courts if they consider that a child's parent may take the child to live in another country in breach of rights of custody or access of the child's other parent.

Subhead (4) does not confer any new function on the court, but is intended to serve as a clear signposting both to judges and to legal representatives of the powers already available to it under the Child Care Act 1991.

Head 50: Making of interim custody or access orders

Provide along the following lines:

- (1) Pending the determination of an application to the court regarding the guardianship or custody of or right of access to a child, the court may give such directions and make such interim custody or access orders as it thinks proper in the best interests of the child.
- (2) The operation of an order under this Part shall not be stayed pending the outcome of an appeal against the order unless the court that made the order or the court to which the appeal is brought direct otherwise.

Notes

Subhead (1) allows the court to make interim custody or access orders. This is to help address the problem that waiting lists can cause where there is a dispute about custody and access: an applicant may be denied access for a period of weeks or months, which can be very disruptive of his or her relationship with a child, particularly with a very young child. If the court has the facility to make interim orders, this can help maintain the relationship between the applicant and the child pending the full determination of the dispute.

Subhead (2) provides that an interim order shall not be stayed on appeal unless the court that makes the order or the court to which the appeal is made specifically direct otherwise. A complete ban on staying an order would not be appropriate given that this would not allow the court to consider the best interests of the child concerned, but this gives a clear signal that lodging an appeal is not to constitute a stay on the order unless a stay is expressly granted.

Head 51: Power of court as to production of child

Provide along the following lines:

Where, upon any application by a guardian or parent of the child for an order for the production of the child, the court is of the opinion that it is contrary to the best interests of the child that the guardian or parent have custody of the child due to the conduct of the guardian or parent, the court shall refuse to enforce any right the applicant has to custody of the child and the court may make such order as it deems proper in respect of the guardianship, custody and access to the child.

Notes

This is an updated version of section 14 of the 1964 Act. That section confers on the court the power to refuse to enforce an applicant's rights of custody in respect of a child where it is of the opinion that the applicant has abandoned or deserted the child. The power granted under this Head varies somewhat in that if the court considers that the behaviour of a parent or guardian means it is contrary to the child's best interests that the applicant parent have custody, it is required to refuse any right of custody to that parent. In addition, the court is given power to make whatever orders it considers appropriate in respect of guardianship, custody and access.

Head 52: Validity of separation or parenting agreements

Provide along the following lines:

A provision contained in any separation or parenting agreement made between the parents of a child shall not be invalid by reason only of its providing that one of them shall give up the custody or care and control of the child to the other.

Notes

This Head replicates section 18(2) of the 1964 Act.

PART 8

SAFEGUARDING INTERESTS OF CHILDREN

Head 53: Safeguards to ensure applicant's awareness of alternatives to custody, access and guardianship proceedings and to assist attempts at agreement

Provide along the following lines:

- (1) In this Head 'the applicant' means a person who has applied, is applying or proposes to apply to the court for directions under Part 4 of this Act in relation to any matter concerning the guardianship, custody, upbringing of or access to any child.
- (2) If a solicitor is acting for the applicant, the solicitor shall, before the institution of proceedings under Part 7, discuss with the applicant the possibility of the applicant:
 - (a) engaging in counselling to assist in reaching an agreement with the respondent about the custody of the child, the right of access to the child or any other question affecting the welfare of the child and give to the applicant the name and address of persons qualified to give counselling on the matter,
 - (b) engaging in mediation to help to effect an agreement between the applicant and the respondent about the custody of the child, the right of access to the child or any question affecting the welfare of the child, and give to the applicant the name and addresses of persons qualified to provide an appropriate mediation service, and
 - (c) where appropriate, effecting a deed or agreement in writing executed or made by the applicant and the respondent and providing for the custody of the child, the right of access to the child or any question affecting the welfare of the child.
- (3) If a solicitor is acting for the applicant:-
 - (a) the original documents by which the proceedings under Part 7 are instituted shall be accompanied by a certificate signed by the solicitor indicating, if it be the case, that the solicitor has complied with subhead (2) in relation to the matter and, if the document is not so accompanied, the court may adjourn the proceedings for such period as it considers reasonable to enable the solicitor to engage in the discussions referred to in subhead (2),
 - (b) if the solicitor has complied with paragraph (a), any copy of the original document served on any person or left in an office of the court shall be accompanied by a copy of that certificate.

- (4) The solicitor shall be deemed to have complied with subhead (3) in relation to the requirement of a certificate where the application under Part 7 is made in proceedings for the grant of:-
- (a) a decree of judicial separation under the Act of 1989 and section 5(2) of that Act has been complied with by the solicitor, or
 - (b) a decree of divorce under the Act of 1996 and section 6(4) of that Act has been complied with by the solicitor.

Notes

This Head reproduces the provisions of section 20 of the 1964 Act (as inserted by section 11 of the Children Act 1997) with minor amendments to cross references. It provides for a solicitor to inform an applicant of various possible alternatives to legal proceedings, and the certification of same.

Head 54: Safeguards to ensure respondent's awareness of alternatives to custody, access and guardianship proceedings and to assist attempts at agreement

Provide along the following lines:

- (1) In this Head 'the respondent' means a respondent in proceedings brought under Part 7 of this Act.
- (2) If a solicitor is acting for the respondent, the solicitor shall, as soon as practicable after receiving instructions from the respondent in relation to proceedings under this Part, discuss with the respondent the possibility of the respondent:-
 - (a) engaging in counselling to assist in reaching an agreement with the applicant about the custody of the child, the right of access to the child or any other question affecting the welfare of the child and give to the respondent the name and addresses of persons qualified to give counselling on the matter,
 - (b) engaging in mediation to help to effect an agreement between the respondent and the applicant about the custody of the child, the right of access to the child or any question affecting the welfare of the child and where appropriate give to the respondent the name and addresses of persons qualified to provide an appropriate mediation service, and
 - (c) where appropriate, effecting a deed or agreement in writing executed or made by the respondent and the applicant and providing for the custody of the child, the right of access to the child or any question affecting the welfare of the child.
- (3) If a solicitor is acting for the respondent:-
 - (a) the memorandum or other documents delivered to the appropriate officer of the court for the purpose of the entry of an appearance by the respondent in proceedings under Part 7 shall be accompanied by a certificate signed by the solicitor indicating, if it be the case, that the solicitor has complied with subhead (2) in relation to the matter and, if the document is not so accompanied, the court may adjourn the proceedings for such period as it considers reasonable to enable the solicitor to engage in the discussions referred to in subhead (2),
 - (b) if the solicitor has complied with paragraph (a), any copy of the original document given or sent to the applicant or his solicitor shall be accompanied by a copy of that certificate.

- (4) The solicitor shall be deemed to have complied with subhead (3) in relation to the requirement of a certificate where the application under Part 7 is made in proceedings for the grant of:-
- (a) a decree of judicial separation under the Act of 1989 and section 6(2) of that Act has been complied with by the solicitor, or
 - (b) a decree of divorce under the Act of 1996 and section 7(4) of that Act has been complied with by the solicitor.

Notes

This Head reproduces the provisions of section 21 of the 1964 Act (as inserted by section 11 of the Children Act 1997) with only minor amendments to cross references. It provides for a solicitor to inform a respondent of various possible alternatives to legal proceedings, and the certification of same..

Head 55: Adjournment of proceedings to assist agreement on custody or guardianship of or access to children

Provide along the following lines:

- (1) Where, in proceedings under Part 7 it appears to the court that agreement between the parties on the subject matter of the proceedings may be effected, it may adjourn or further adjourn the proceedings for the purpose of enabling attempts to be made by the parties, if they wish, to reach agreement, with or without the assistance of a third party, on some or all of the issues which are in dispute.
- (2) If proceedings are adjourned pursuant to subhead (1), any party may at any time request that the hearing of the proceedings be resumed as soon as practicable and, if such a request is made, the court shall, subject to any other power of the court to adjourn proceedings, resume the hearing.
- (3) The powers conferred by this Head are additional to any other power of the court to adjourn proceedings.
- (4) Where the court adjourns proceedings under this Head, it may, at its discretion, advise the parties concerned to seek the assistance of a third party in relation to the effecting of an agreement between them on all or any of its terms.

Notes

This Head reproduces the provisions of section 22 of the 1964 Act (as inserted by section 11 of the Children Act 1997) with only minor amendments in cross references. It allows proceedings to be adjourned to allow the parties try to reach agreement.

Head 56: Non-admissibility as evidence of certain communications relating to attempts to reach agreement

Provide along the following lines:

- (1) An oral or written communication between any of the parties concerned and a third party for the purpose of seeking assistance to reach agreement between them regarding the custody of a child, the right of access to the child or any question affecting the welfare of the child (whether or not made in the presence or with the knowledge of the other party) and any record of such communication, made or caused to be made by any of the parties concerned or such a third party, shall not be admissible as evidence in any court.
- (2) Subhead (1) does not apply to:
 - (a) an admission by a party that indicates a child under 18 has been abused or is at risk of abuse; or
 - (b) a disclosure by a child that indicates the child has been abused or is at risk of abuse.

Notes

Subhead (1) reproduces the provisions of section 23 of the 1964 Act (as inserted by section 11 of the Children Act 1997). It provides that communications in an attempt to reach agreement on custody, access or other dispute concerning a child are not admissible in court: the exemption is mandatory in order to allow for the most open possible dialogue between the parties and any mediator / adviser assisting the, Subhead (2) clarifies that this general and mandatory exemption of communications between the parties or either of them and third parties does not apply to any admission of abuse (or risk of abuse) or disclosure of abuse. This is to prioritise child protection and comply with the Children First guidelines.

Head 57: Orders in respect of custody or access agreements

Provide along the following lines:

Where:-

(a) the parties to a dispute relating to the welfare of a child enter into an agreement in writing that includes:-

(i) a provision whereby one party undertakes, or both parties undertake, to take custody of the child, or

(ii) a provision governing the rights of access of parties,

and

(b) an application is made by any party to the court for an order making the agreement a rule of court,

the court may make such an order if it is satisfied that the agreement is a fair and reasonable one which in all the circumstances adequately protects the interests of the parties and is in the best interests of the child, and such order shall, insofar as it relates to a provision specified in subparagraph (i) or (ii) of paragraph (a), be deemed to be an order under Part 7.

Notes

This Head reproduces the provisions of section 24 of the 1964 Act (as inserted by section 11 of the Children Act 1997) with the small but important amendment that it refers to the best interests of the child. Essentially, an agreement concerning custody and access may, on application by one of the parties, be made a rule of court, provided the court is satisfied it protects the interests of the parties and is in the best interests of the child.

Head 58: Procuring by court of report on question affecting the welfare of a child

Provide along the following lines:

- (1) In proceedings to which this Act applies, the court may, of its own motion or on application to it in that behalf by a party to the proceedings, by order give such directions as it thinks proper for the purpose of procuring a report in writing on any question affecting the welfare of the child from:-
 - (a) such person as may be nominated by the Child and Family Agency at the request of the court, being a person who, in the opinion of the Child and Family Agency, is suitably qualified for the purpose, or
 - (b) any other person specified in the order deemed suitably qualified by the court for the purpose.
- (2) In deciding whether or not to make an order under subhead (1), the court shall have regard to any views expressed to it in relation to the matter by or on behalf of a party to the proceedings concerned or any other person to whom they relate but shall not be bound by such views.
- (3) A copy of a report under subhead (1) shall be given to the parties to the proceedings concerned and (if he or she is not a party to the proceedings) to the person to whom it relates (save as is detailed hereunder) and may be provided in evidence in the proceedings.
- (4) In determining whether the report obtained under subhead (1) should be furnished to the child, the court shall have regard to the following matters:
 - (a) the age and maturity of the child and the capacity of the child to understand the report;
 - (b) the impact on the child of reading of the report and the effect it may have on his relationship with his guardians/parents;
 - (c) the best interests of the child, and
 - (d) whether, in the circumstances, such report should be furnished to the child's parent, guardian or next friend or a guardian ad litem appointed pursuant to Head 60, and should not be furnished to the child.
- (5) The fees and expenses incurred in the preparation of a report under subhead (1) shall be paid by such parties to the proceedings concerned and in such proportions, or by such party to the proceedings, as the court may determine.

- (6) The court or a party to proceedings to which this Head applies may call as a witness in the proceedings a person who prepared a report under subhead (1) pursuant to an order under that subhead in those proceedings.
- (7) The function conferred on the Child and Family Agency by subhead (1) shall be a function of the Chief Executive Officer of the Child and Family Agency

Notes

This provision is broadly analogous to section 47 of the Family Law Act 1995. The insertion of subhead (4) relates to the access a child who is the subject of the report may have to it and the factors the court must consider in determining whether to grant such access.

The direct inclusion of this provision in the Scheme will have the effect of extending the court jurisdiction. At present, the circuit court may order a section 47 report, but the district court may not.

The powers are provisionally conferred on the Child and Family Agency.

Head 59: Whether to proceed in the absence of the child

Provide along the following lines:

- (1) It shall not be necessary in proceedings under this Act for the child to whom the proceedings relate to be brought before the court or to be present for all or any part of the hearing unless the court, either of its own motion or at the request of any of the parties to the proceedings, is satisfied that it is necessary for the proper disposal of the proceedings.
- (2) Where the child requests to be present during the hearing or a particular part of the hearing of the proceedings, the court shall grant the request unless it appears to it that, having regard to the age of the child or the nature of the proceedings, it would not be in the child's best interests to accede to the request.

Notes

This Head mirrors section 27 of the 1964 Act and provides that a child is not required to attend proceedings but is entitled to do so on her or his request unless the court considers that attendance would not be in the child's best interests.

Head 60: Power to appoint a guardian *ad litem*

Provide along the following lines:

- (1) If, in proceedings under this Act, the child to whom the proceedings relate is not a party, the court may, 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, appoint a guardian *ad litem* for the child.
- (2) Without prejudice to the generality of subhead (1), in deciding whether to appoint a guardian *ad litem*, the court shall, in particular, have regard to:-
 - (a) the age and understanding of the child,
 - (b) the nature of the issues in dispute in the proceedings,
 - (c) any report on any question affecting the best interests of the child that is furnished to the court under Head 58 of this Act,
 - (d) the best interests of the child,
 - (e) whether and to what extent the child should be given the opportunity to express the child's wishes in the proceedings, taking into account any statement in relation to those matters in any report under Head 58 of this Act, and whether the expression by the child of the child's wishes in the proceedings and consideration of same requires assistance being given to the court by a guardian *ad litem*, and
 - (f) any submission made in relation to the matter of the appointment of a guardian *ad litem* that is made to the court by or on behalf of a party to the proceedings or any other person to whom they relate.
- (3) For the purposes of this Head, the court may appoint as a guardian *ad litem* the person from whom, under Head 58 of this Act, a report on any question affecting the best interests of the child was procured, or such other person as it thinks fit.
- (4) The guardian *ad litem* shall: -
 - (a) form an independent view, based on the evidence and information available to the guardian *ad litem*, of what is in the best interests of the child, and
 - (b) act in relation to the proceedings in what the guardian *ad litem* believes to be in the best interests of the child.

- (5) The guardian *ad litem* shall, if satisfied that the adoption of a particular course of action is in the best interests of the child, make a submission to the court suggesting the adoption of that course of action.
- (6) The guardian *ad litem* is an independent officer of the court and is not the child's legal representative and is not obliged to act on the child's instructions in relation to the proceedings.
- (7) The guardian *ad litem* shall:-
 - (a) act impartially in dealing with the parties to the proceedings,
 - (b) ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court,
 - (c) if a report or other document that relates to the child is to be used in the proceedings:
 - (i) analyse the report or other document to identify those matters in the report or other document that the guardian *ad litem* considers to be the most significant ones for determining what is in the best interests of the child, and
 - (ii) ensure that those matters are properly drawn to the court's attention,
 - (d) endeavour to minimise the trauma to the child associated with the proceedings, and
 - (e) facilitate an agreed resolution of matters at issue in the proceedings to the extent to which doing so is in the best interests of the child.
- (8) The fees and expenses of a guardian *ad litem* appointed pursuant to subhead (1) shall be paid by such parties to the proceedings concerned, and in such proportions, or by such party to the proceedings, as the court may determine.

Notes

This provision is broadly analogous to section 29 of the 1964 Act, which has not been commenced. There is an important difference in that provision is not made for legal representation of a guardian *ad litem*. The guardian *ad litem* is defined in subhead (6) as an independent officer of the court and is neither a party to nor the subject of proceedings. Accordingly, it is not considered necessary that the guardian *ad litem* have separate legal representation. Subheads (4) to (7) set out the functions of the guardian *ad litem*.

Head 61: Cost of mediation or counselling services

Provide along the following lines:

The cost of any mediation or counselling services provided for an applicant or respondent who is or becomes a party to proceedings under Part 7, or for the child to whom the proceedings relate, shall be in the discretion of the court concerned.

Notes

This Head replicates the provisions of section 29 of the 1964 Act with cross-references modified, and gives the court discretion in any award of costs in respect of counselling or mediation for a party or a child involved in proceedings.

PART 9

MAKING PARENTING ORDERS WORK

Head 62: Definitions

Provide along the following lines:

In this Part:-

“compensatory time” means time with the child that may be given in substitution for a denial of time spent with the child by way of custody or access;

“family counselling” is a process in which a family counsellor helps:

- (a) one or more persons to deal with personal and interpersonal issues in relation to their marriage, civil partnership, cohabitation or parenting of a child, or
- (b) one or more persons (including children) who are affected or are likely to be affected by separation or divorce to deal with either or both of the following:
 - (i) personal and interpersonal issues;
 - (ii) issues relating to the care of children;

“necessary expenses” include the following: -

- (a) travel expenses;
- (b) lost remuneration;
- (c) any other expenses the court may allow;

“post-separation parenting program” means a program:

- (a) that is designed to help to resolve problems that adversely affect the carrying out of their parenting responsibilities (including by providing counselling services or by teaching techniques to resolve disputes),
- (b) that consists of lectures, discussions (including group discussions) or other activities, and
- (c) that is provided by an organisation designated for such purposes by the Minister under this Act.

Notes

This Head provides definitions for the purposes of the Part. The aim of the Part is to provide a route to enforcing orders relating to parenting, particularly custody and access orders.

Head 63: Enforcement orders

Provide along the following lines:

- (1) On application by the guardian or parent of a child for a right to custody of or access to a child, the court may, if it is satisfied that the applicant, without reasonable excuse, was denied custody of or access to the child by another guardian or parent make such enforcement order as is appropriate in the circumstances.
- (2) An enforcement order under subhead (1) may contain any one or more of the following provisions:
 - (a) a provision requiring the respondent to give the applicant compensatory time;
 - (b) a provision requiring the respondent to give security, in the form and amount and under the conditions determined by the court, for the future performance of the obligation to implement the order or orders made by the court;
 - (c) a provision requiring the respondent to reimburse the applicant for any necessary expenses actually incurred and relating to the applicant's attempt to exercise custody or access;
 - (d) a provision directing the respondent or the applicant or both, to do anything that the court considers appropriate in the circumstances that is intended to ensure compliance with the custody or access order made;
 - (e) a variation or discharge of any previous order made or the terms of any agreement concluded with regard to the custody of or access to a child.
- (3) The direction made by the court pursuant to subhead (2)(d) may include but is not confined to the following:
 - (a) a direction that one or both parties either individually or together attend a post-separation parenting program;
 - (b) that one or both parties attend either individually or together for family counselling;
 - (c) that both parties participate in a mediation process concerning issues in dispute between them impacting on their parenting capacities.
- (4) If the court is of the opinion that the denial of custody or access was reasonable in the particular circumstances, the court may: -

- (a) refuse to make an enforcement order, or
 - (b) make the enforcement order that it considers is appropriate in the circumstances.
- (5) Where a guardian or parent who has a right to spend time with the child by way of a custody or access order fails, without reasonable notice to another guardian or parent, to exercise that right the court may, on application by that other guardian or parent, make an order requiring the first-mentioned guardian or parent to reimburse to the second mentioned guardian or parent any necessary expenses actually incurred by that guardian or parent as a result of the failure of the first-mentioned guardian or parent to exercise that right.
- (6) The provisions contained in this Head are without prejudice to the law as to contempt of court and a person shall be deemed to have been given or shown a copy of an order made under this Act if that person was present at the sitting of the court at which such order was made.

Notes

The policy intention of this and related Heads are to allow for enforcement of access and of shared custody orders. There is a significant level of non-compliance with access and shared custody orders, and under the law as it stands, the remedy is most likely to be to find the non-compliant party in contempt of court. However, judges are understandably unwilling to go straight to contempt proceedings.

This power conferred on the court here is to allow it to intervene, on application by the party whose rights have been breached (subhead (1)), by ordering any of a range of measures in an enforcement order, including that the respondent must allow the applicant compensatory access time, or must lodge a security with the court, or reimburse the applicant for expenses incurred in attempting to exercise custody or access; the court is also given a wide discretion in the directions it may give to the applicant and respondent, and may vary or discharge any custody or access order (subhead (2)). Subhead (3) specifies that the discretion of the court in subhead (2) includes the power to order the parties to engage, together or separately, in a parenting programme or in counselling or mediation insofar as that relates specifically to parenting.

Subhead (4) allows the court to refuse to make an order where it considers the denial of custody or access was reasonable, but also allows it to make the enforcement order it considers reasonable – this will allow it to vary or discharge custody / access orders if it considers it appropriate in the circumstances.

Subhead (5) allows a parent or guardian to apply for reimbursement of expenses in relation to the failure, without reasonable notice, by the other parent or guardian to exercise his or her custody / access rights. This might arise, for example, if the applicant incurs transport or child-minding costs due to the respondent's failure.

Subhead (6) clarifies that this provision does not affect the existing law on contempt of court.

Head 64: Supplementary enforcement orders where enforcement orders are breached

- (1) Where the court has made an order under Head 63 and the court is satisfied, on application to it in that behalf, that the respondent has, without reasonable excuse and in breach of that enforcement order, denied custody of or access to the child by the applicant, it may make a further enforcement order under Head 63 and may include such additional provisions under subhead (2) as it considers appropriate.
- (2) An enforcement order referred to in subhead (1) may contain any one or more of the following provisions:
 - (a) a provision imposing on the respondent a penalty not exceeding €200 for each day there has been or is a denial of the custody or access rights of the applicant to a maximum of €5,000;
 - (b) a provision requiring the undertaking by the respondent of community service pursuant to a community service order under the supervision of the Probation Service for a period of up to 100 hours in respect of the first such supplementary enforcement order made and for a period or periods of up to 240 hours for any second or further such enforcement order made;
 - (c) where the court is satisfied based on the respondent's history of preventing or disrupting custody or access or based on other reasonable and probable grounds that a denial of custody or access will occur, a provision directing a member of An Garda Síochána to act in accordance with Head 66.
- (3) Any community service order made pursuant to subhead (2)(b) shall be deemed to be an order made under the Criminal Justice (Community Service) Act 1983 and community service and community service order shall be interpreted and applied as in the aforesaid Act and the provisions contained in that Act shall apply to any community service order made pursuant to the aforesaid subhead.
- (4) A provision referred to in subhead (2)(c) may be included in an enforcement order only if the court is satisfied that none of the other provisions provided for in subhead (2) or Head 63 would be effective.
- (5) If an enforcement order contains a provision referred to in subhead (2)(c) the court shall include sufficient particulars of time, days, dates or periods of time to be enforced.

Notes

This Head gives the courts discretion to make supplementary orders where an enforcement order is itself breached (subhead (1)), with additional remedies including fining the respondent, requiring the respondent to undertake community service, or, in extreme cases and subject to the additional provisions of subhead (4) and (5),

directing a member of An Garda Síochána to assist in enforcing access in accordance with Head 66 (subhead (2)). The provisions of the Criminal Justice (Community Service) Act 1983 apply to any community service order under subhead (2)(b) as though it was an order under that Act.

Head 65: Power of court to vary or terminate custody or access enforcement order

Provide along the following lines:

- (1) The court may, on application by a person with a right to custody of or access to a child, make an order varying or terminating an enforcement order or any part of that order.
- (2) When a person applies to court to vary or terminate a custody or access order, the court may in the same proceedings vary or terminate an enforcement order which relates to that custody or access order.

Notes

This Head gives the court power to change an enforcement order or terminate the order or a part of it (subhead (1)), and to vary or terminate an enforcement order in the same proceedings that it varies or terminates a custody order or an access order in relation to which the enforcement order was made (subhead (2)).

Head 66: Assistance by an Garda Síochána pursuant to enforcement order

Provide along the following lines:

- (1) Where an enforcement order contains a provision referred to in Head 64 (2)(c), a member of An Garda Síochána shall, at the request of the applicant and on the production of a certified copy of the enforcement order, give assistance to the applicant, comply with the directions of the court and take all reasonable steps to find the child to whom the enforcement order relates and to bring the child to the applicant.
- (2) Where a member of An Garda Síochána is denied entry into or is otherwise unable to enter premises where the member has reasonable and probable grounds for believing that the child to whom the enforcement order relates may be found, the member may, if the member wishes to enter the premises, apply to a court for an order authorising the member to enter the premises and to bring the child to the applicant.
- (3) A member of An Garda Síochána to whom a certified copy of an enforcement order is furnished under subhead (1) is not required to bring the child to whom the enforcement order relates to the applicant if the member determines that, in the immediate circumstances, it is not in the best interests of the child to do so.
- (4) Where the court makes an order under subhead (2) authorising entry into a premises, the member of An Garda Síochána may enter the premises with such assistance and using such force as is reasonably necessary.
- (5) An entry referred to in subhead (4) may be made only between the hours of 8am and 9pm unless the court, in the order made under subhead (2), authorises entry at another time.
- (6) No action lies against a member of An Garda Síochána, or a person giving assistance under subhead (4) by reason of anything done or caused, permitted or authorised to be done, attempted to be done or omitted to be done by any of them in good faith pursuant to or in the exercise or purported exercise of any power conferred by this Head.

Notes

This Head confers on An Garda Síochána the function of assisting in enforcing access or custody, where a supplementary enforcement order under Head 64 specifically authorises them to do so (subhead (1)). It is envisaged that this remedy be available as a last resort where the access and custody rights of the applicant are persistently breached and the court considers that this is the only effective enforcement mechanism.

Subhead (2) allows a Garda to apply for a court order authorising the Garda to enter the premises where s/he believes the child to be, in order to remove the child and bring her or him to the applicant. Subhead (3) gives the Garda some discretion to determine whether to bring the child to the applicant, where s/he believes it is not in

the child's best interests in the circumstances – these could be circumstances relating to the applicant or to the child,

A Garda who has obtained an order for entry under subhead (2) may obtain the necessary assistance and may use reasonable force in effecting entry, should that be necessary (subhead (4)), but unless specifically authorised to do so, only between 8 a.m. and 9 p.m. (subhead (5)).

No-one may take an action against An Garda Síochána and the person giving assistance in accordance with subhead (4), acting in good faith in accordance with the Head (subhead (6)).

Head 67: Report by an Garda Síochána

Provide along the following lines:

- (1) The member of An Garda Síochána shall prepare a report in accordance with regulations to be made under this Act, that includes a statement that describes the events and circumstances relating to the assistance that was provided and where the member makes a determination under Head 66(3) and so acts, the report shall detail the reasons for such determination.
- (2) A copy of the report prepared by the member must be made available to the applicant, the respondent and to the court.
- (3) The report referred to subhead (1) purporting to be signed by the member is admissible in evidence at any subsequent proceedings relating to the enforcement of the custody or access order relating to the child as prima facie proof of the contents of the report without proof of the signature or official character of the person signing the report.
- (4) A member of An Garda Síochána who has prepared a report under subhead (1) shall not be required to attend proceedings brought in relation to the enforcement order under which assistance was provided or the custody or access order the subject of that enforcement order unless the court orders otherwise on application by the applicant, the respondent or of its own motion.

Notes

Where a Garda assists in enforcing custody or access in compliance with Head 66, s/he is to prepare a written report, in a manner to be prescribed by regulations, of what happened in the course of providing assistance. If s/he decides to exercise the discretion conferred by Head 66(3) not to bring the child to the applicant, must explain why (subhead (1)). The report must be made available to the applicant, the respondent and the court (subhead (2)).

Subhead (3) allows the report to be entered in evidence in any subsequent proceedings without proof of the signature or official character of the Garda making the report. Subhead (4) provides that the Garda is not required to attend proceedings relating to the enforcement order unless the court orders his or her presence, of its own motion or on application by the applicant or the respondent. Except where the account in the report is specifically in dispute, it is intended that the court will rely on the written report without requiring the Garda to be available to give evidence.

PART 10

CERTAIN PROVISIONS CONCERNING CHILD MAINTENANCE

Head 68: Interpretation

Provide along the following lines:

In this Part: -

“cohabitant” has the meaning assigned to it in section 172 of the Act of 2010;

“dependent child” means any child (including a child whose parents are not married to each other nor civil partners) who is under the age of 18 years, or, if he has attained that age: -

- (a) is or will be or, if an order were made under this Act providing for periodical payments for support, would be receiving full-time education or instruction at any university, college, school or other educational establishment and is under the age of 23 years, or
- (b) is suffering from mental or physical disability to such extent that it is not reasonably possible for him to maintain himself fully;

“dependent child of the family” means –

- (a) in relation to spouses, any dependent child: -
 - (i) of both spouses or adopted by both spouses or in relation to whom both spouses are in loco parentis, or
 - (ii) of either spouse or adopted by either spouse or in relation to whom either spouse is in loco parentis, where the other spouse being aware that he or she is not the parent of the child, has treated the child as a member of the family,
- (b) in relation to civil partners, any dependent child: -
 - (i) of both civil partners or in relation to whom both civil partners are in loco parentis, or
 - (ii) of either civil partner in relation to whom either civil partner is in loco parentis where the other partner has treated the child as a member of the family,
- (c) in relation to cohabitants, any dependent child:
 - (i) of both cohabitants or in relation to whom both cohabitants are in loco parentis, or

- (ii) of either cohabitant or adopted by either cohabitant in relation to whom either cohabitant is in loco parentis where the other cohabitant being aware that he or she is not the parent of the child has treated the child as a member of the family.

Notes

These are crucial definitions for the purposes of the Part. The purpose is to extend maintenance liabilities for a child to certain persons who are not the biological or adoptive parents of the child. Such liabilities already exist for spouses in relation to a child who is treated as a “child of the family”.

These new maintenance liabilities may apply to civil partners and to cohabitants.

Head 69: Maintenance liability in respect of dependent child

Provide along the following lines:

- (1) Without prejudice to the general provisions of the Family Law (Maintenance of Spouses and Children) Act 1976, as amended, the Maintenance Act 1994, as amended, or any other enactment or rule of law, the spouse, civil partner or cohabitant of a child's parent may, if the child is a dependent child of the family, have the same responsibilities as a parent of the child to maintain and provide for the child.
- (2) Where, in proceedings before the court, the question arises as to whether a child is or is not a dependent child of the family in relation to a person, the court shall, in determining that question, have regard to all of the circumstances of the case and in particular to the following factors:
 - (a) the nature and duration of the relationship between the child and the person and whether the child regards the person as a parent;
 - (b) the length of time for which the child has lived in a household with the person and the proportion of the child's life which that constitutes;
 - (c) the responsibility and ability of each parent of the child to maintain and provide for the child.

Notes

This Head establishes the principle that a spouse, civil partner or cohabitant of a child's parent may be liable for maintenance where the child is a dependent child of the family as defined in Head 68 (subhead (1)).

Subhead (2) provides factors for the court to consider in determining whether a child is a "dependent child of the family". The factors refer to the relationship between the child and the adult concerned, but also allow the court to take account of the responsibilities of each parent of the child.

It is assumed that where a civil partner or same-sex cohabitant of a child's parent is also a parent by virtue of Head 10 or Head 13, section 5A of the Family Law (Maintenance of Spouses and Children) Act 1976 (as amended) will apply to them as it does to any non-marital parent.

Head 70: Amendment of the 1976 Act

Provide along the following lines:

- (1) Section 3 of the 1976 Act is amended
 - (a) by the substitution for the definition of “dependent child of the family” (as substituted by section 16 of the 1987 Act) of the following definition:

“ ‘dependent child of the family’ means –

 - (a) in relation to spouses, any dependent child: -
 - (i) of both spouses or adopted by both spouses or in relation to whom both spouses are in loco parentis, or
 - (ii) of either spouse or adopted by either spouse or in relation to whom either spouse is in loco parentis, where the other spouse being aware that he or she is not the parent of the child, has treated the child as a member of the family,
 - (b) in relation to civil partners, any dependent child: -
 - (i) of both civil partners or in relation to whom both civil partners are in loco parentis, or
 - (ii) of either civil partner in relation to whom either civil partner is in loco parentis where the other partner has treated the child as a member of the family,
 - (c) in relation to cohabitants, any dependent child:
 - (i) of both cohabitants or in relation to whom both cohabitants are in loco parentis, or
 - (ii) of either cohabitant or adopted by either cohabitant in relation to whom either cohabitant is in loco parentis where the other cohabitant being aware that he or she is not the parent of the child has treated the child as a member of the family.”
 - (b) by the substitution for the definition of “maintenance order” (as substituted by section 16 of the 1987 Act) of the following definition:

“ ‘maintenance order’ means, where the context requires, an order under section 5, 5AA or 5A of this Act; ”.
- (2) The 1976 Act is amended by the insertion after section 5 of the following section:

“Maintenance order (provision for certain dependent children of the family)

“5AA.—(1) Subject to subsection (3) of this section, where, in respect of a dependent child of the family, it appears to the Court on application to it by a parent of the child that the cohabitant or civil partner of a parent of the child has failed to provide such maintenance for the child as is proper in the circumstances, the Court may make an order (in this Act referred to as a maintenance order) that the cohabitant or civil partner make to the applicant parent periodical payments, for the support of the child as aforesaid, for such period during the lifetime of the applicant parent, of such amount and at such times, as the Court may consider proper.

(2) Subject to subsections (3) and (4) of this section, where, in respect of a dependent child of the family, it appears to the Court on application to it by a person other than a parent of the child that the cohabitant or civil partner of a parent of the child has failed to provide such maintenance for the child as is proper in the circumstances, the Court may make an order (in this Act referred to as a maintenance order) that the cohabitant or civil partner make to the applicant periodical payments, for the support of the child as aforesaid, for such period during the lifetime of the applicant, of such amount and at such times, as the Court may consider proper.

(3) The Court, in deciding whether to make a maintenance order under this section and, if it decides to do so, in determining the amount of any payment, shall have regard to all the circumstances of the case and, in particular, to the following matters—

(a) the income, earning capacity (if any), property and other financial resources of—

(i) each parent of the child,

(ii) the cohabitant or civil partner from whom maintenance is sought,

(iii) the dependent child in respect of whom the order is sought,

(iv) any other dependent children of either parent, and

(v) any other dependent children of the cohabitant or civil partner from whom maintenance is sought,

including income or benefits to which either parent, the cohabitant or civil partner, the dependent child as aforesaid or such other dependent children are entitled by or under statute, and

(b) the financial and other responsibilities of each parent and the cohabitant or civil partner from whom maintenance is sought towards—

(i) a spouse, cohabitant or civil partner,

(ii) the dependent child in respect of whom the order is sought, and

(iii) any other dependent children of either parent, cohabitant or civil partner,

and the needs of any dependent child as aforesaid or of any such other dependent children, including the need for care and attention.

(4) The Court shall not make a maintenance order under subsection (2) of this section in relation to the cohabitant or civil partner of a parent of a dependent child if a maintenance order under subsection (1) of this section requiring that person to make periodical payments for the support of the child is in force unless—

(a) the person is not complying with the order under the said subsection (1), and

(b) the Court, having regard to all the circumstances, thinks it proper to do so,

but, if the Court makes the order under the said subsection (2), any amounts falling due for payment under the order under the said subsection (1) or the agreement, as the case may be, on or after the date of the making of the order under the said subsection (2) shall not be payable.

(5) In this section, ‘cohabitant’ includes a former cohabitant, and ‘civil partner’ includes a former civil partner.”

Notes

The intention here is to amend the 1976 Act so that a cohabitant or a civil partner of a child’s parent who is not a child’s parent may, in certain circumstances, have a maintenance obligation to the child. Under present law, section 5A (as inserted by the Status of Children Act 1987) of the 1976 Act gives rise to a non-marital parent’s maintenance liability. However, a person who lives in a close family / marriage-like unit with a child’s parent does not have any maintenance liability in respect of the child no matter what the circumstances, unless the couple marry.

Subhead (1) inserts the required new definitions in section 3 of the 1976 Act, while subhead (2) inserts a new section 5AA in the Act. Section 5AA closely mirrors section 5A of the Act, which deals with dependent children of non-marital parents. It is modified in subsection (3) of the proposed insertion by the removal of references to agreements on maintenance. It is considered unlikely that such agreements would be made in the case of children who are treated as a child of the family, but in relation to whom the cohabitant or civil partner is not assessed as a parent under other provisions of this Scheme.

Head 71: Amendment of the 1995 Act

Provide along the following lines:

- (1) The Act of 1995 is amended in section 41 by the deletion of all text after “treated the child as a member of the family,” and the substitution of the following:

“or

- (c) by the cohabitant or civil partner of a parent to the parent or to another person specified in the order of periodical payments for the support or maintenance of a child of that parent or adopted by that parent where the cohabitant or civil partner, being aware that he or she is not the parent of the child, has treated the child as a member of the family,

the court by which the order was made may in those proceedings or subsequently, on application to it by any person having an interest in the proceedings, order the spouse, parent, cohabitant or civil partner liable to make the payments under the order to secure them to the other spouse or parent or the other person specified in the order to the satisfaction of the court.”

- (2) The Act of 1995 is amended by the substitution for section 42 of the following sections:

“Lump sum maintenance orders

42.—(1) Where, in proceedings under any other Act, including the *Family Relationships and Children Act 201*, an order providing for the periodical payments referred to in *paragraph (a), (b) or (c) of section 41* could be made, the court may in addition to, or instead of such an order, make such order as the court deems proper in the circumstances providing for the making by the person concerned to the person concerned of a lump sum payment or lump sum payments of such amount or amounts and at such time or times as may be specified in the order.

(2) The amount or aggregate amount of a lump sum payment or of lump sum payments provided for in an order of the District Court under this section shall not exceed €15,000.

Conditions which may apply to certain orders under section 42.

42A.—(1) Where the court makes a lump sum maintenance order in respect of a dependent child under section 42, it may specify in that order how the sums are to be applied for the benefit of the child including in providing suitable accommodation for the child.

(2) If the court directs that the lump sum be applied to purchase property, it may direct that the property in question be held in trust for the child and may confer a right of residence in the property on the custodial parent for a period either definite or contingent.

(3) Where the court directs that the property be held in trust for a child it may further direct when and how the trust may be wound up including setting terms as to the person to whom the property should revert if the child and parent cease to reside there or if the child dies before reaching the age of majority. ”

Notes

There is a lack of clarity in current law as to the circumstances in which a court may make a lump sum order for the benefit of a child in maintenance proceedings. It is not certain whether the law can be applied to children born outside marriage in the same way as it applies to children born within marriage. The amendments here clarify the jurisdiction of the court and ensure that all children are treated equally regardless of the circumstances of their birth.

Subhead (1) is a consequential amendment to section 41 of the 1995 Act. It reflects the policy outlined in Heads 69 and 70, which are intended to create maintenance liabilities for a cohabitant or civil partner who has treated the child of the other cohabitant or civil partner as a “child of the family”.

Subhead (2) substitutes section 42 of the 1995 Act with a revised provision. This is also a consequential amendment, reflecting both the policy outlined in Heads 69 and 70, and the amendment of section 41 of the 1995 Act. The revised provision refers to this Scheme and the maintenance liability under section 41. This is intended to ensure that a lump sum order may be made not only in respect of the child of a marital family, but also in relation to a child whose parents are not married, and may be made where the cohabitant or civil partner of a parent is liable for maintenance.

It also adds a new section 42A which allows the court to direct how lump sums may be applied. This is for the protection of the child, to ensure that the sums are applied for the child’s direct benefit. The policy intention here is also to ensure that in an ample means case, it should be possible for a child’s parent to provide secure long-term accommodation in which the child can live with her or his custodial parent. The provision is intended to be for the benefit of the child rather than creating a new right for a parent who would not otherwise be entitled to apply for maintenance or a property adjustment order. This is why the provision also allows the court to set conditions on the application of funds. In particular, it allows the court to determine how to treat any residential property in the event of the child’s death or the child’s ceasing to live there with a custodial parent.

PART 12
AMENDMENT OF THE ACT OF 2010

Head 72: Amendment of Section 2, Interpretation

Provide along the following lines:

Section 2 of the Act of 2010 is amended by the insertion after the definition of “civil partnership registration” of the following definition —

“‘dependent child of the family’, in relation to a couple who are civil partners of each other, has the same meaning that it does in *Head 68* of the *General Scheme of the Children and Family Relationships Bill*”.

Head 73: Amendment of Part 4, Shared home

Provide along the following lines:

- (1) Section 29 of the Act of 2010 is amended in subsection (2) by the substitution for paragraph (a) of the following subsection —
 - “(a) the respective needs and resources of the civil partners and of the dependent children (if any) of the family, and”
- (2) Section 30 of the Act of 2010 is amended—
 - (a) in subsection (1), by the insertion after “applicant” of “or a dependent child of the family” at each place where it occurs; and
 - (b) in subsection (2), by the insertion after “applicant” of “or a dependent child of the family” at the first and third places where it occurs.
- (3) Section 34 of the Act of 2010 is amended —
 - (a) in subsection (1), by the insertion after “applicant” of “or a dependent child of the family”; and
 - (b) in paragraph (b) of subsection (5), by the insertion after “applicant” of “or a dependent child of the family”.

Notes

The changes to this part mirror the provisions which are made in the Family Home Protection Act 1976 to the needs of a dependent child of the family, defined in that Act so as to include a child who is not a child of the constitutional family based on marriage but who is treated by the other spouse as though he or she was a member of the family.

When the provisions of the Family Home Protection Act 1976 were in large part replicated for civil partners in Part 4 of the 2010 Act, the references to the needs of dependent children of the family were not included as a result of a policy decision at the time.

Section 29 of the 2010 Act refers to the requirement for the consent of a spouse to the conveyance of a family home. The court may dispense with this consent, only if it considers that the consent is unreasonably withheld having regard, among other factors, to the respective needs and resources of the civil partners. This factor is now modified so as to refer to the needs and resources of the civil partners and of any dependent children of the family.

Section 30(1) allows the court to order a civil partner to stop behaviour which may make a home unsuitable for habitation by the civil partner. The proposed amendment extends this to behaviour rendering the home unsuitable for a dependent child of the family. Subsection (2) enables the court to order a civil partner who has deprived the other civil partner of his or her residence in the shared home to pay compensation. The proposed amendment allows the court also to order compensation if a dependent child is deprived of his or her home.

Section 34 allows the court to order a civil partner not to dispose of chattels without which it would be difficult to live in the shared home, and, if he or she does so (whether or not in breach of an order of the court), to order that civil partner to provide household chattels or to pay money to restore the position,. At present, only the needs of the other civil partner are taken into account; the proposed amendments would ensure that the court could also take into account the effects of any proposed or actual disposal of chattels on a dependent member of the family.

The importance of these amendments is that the needs of a dependent member of the family may, depending on the circumstances, be impinged on without affecting the other civil partner. These amendments ensure that the court can take the needs of a dependent member of the family into account, and therefore that where only the child is seriously affected by a particular course of action by one of the civil partners, a case can be brought on behalf of that child to secure his or her interests.

Head 74: Amendment of Part 5, Maintenance

Provide along the following lines:

- (1) Section 45 of the Act of 2010 is amended —
- (a) by the substitution for subsection (1) of the following subsection —
- “(1)(a) Subject to *subsection (3)*, where it appears to the court, on application to it by a civil partner, that the other civil partner has failed to provide maintenance for the applicant and any dependent children of the family that is proper in the circumstances, the court may make an order that the other civil partner make to the applicant periodical payments for the support of the applicant and of each of the dependent children of the family, for the period during the lifetime of the applicant, of the amount and at the times that the court may consider proper.
- b) Subject to subsection (3) of this section, where a civil partner—
- (i) is dead,
- (ii) has deserted, or has been deserted by, the other civil partner, or
- (iii) is living separately and apart from the other civil partner, and there are dependent children of the family (not being children who are being fully maintained by either civil partner), then, if it appears to the Court, on application to it by any person, that the surviving civil partner or, as the case may be, either civil partner has failed to provide such maintenance for any dependent children of the family as is proper in the circumstances, the Court may make an order (in this Act referred to as a maintenance order) that that civil partner make to that person periodical payments, for the support of each of those dependent children, for such period during the lifetime of that person, of such amount and at such times, as the Court may consider proper.
- (c) A maintenance order under this section or a variation order shall specify each part of a payment under the order that is for the support of a dependent child under this section and may specify the period during the lifetime of the person applying for the order for which so much of a payment under the order as is for the support of a dependent child shall be made.”;
- (b) in subsection (3)(b), by the substitution for subparagraph (i) of the following subparagraph —
- “(i) the civil partners towards each other and towards any dependent member of the family,”.
- (2) Section 48 of the Act of 2010 is amended—
- (a) in subsection (1), by the insertion after “interests of the civil partners” of “and the dependent children (if any) of the family”; and

(b) in subsection (2)(a), by the insertion after “other civil partner” of “or of any dependent children of the family or of both that other civil partner and any dependent children of the family”.

Notes

These are the changes necessary to bring Part 5 broadly into line with the provisions of the Family Law (Maintenance of Spouses and Children) Act 1976. The amendments to section 45 create a specific maintenance liability for each civil partner in respect of dependent children of the family – including in situations where the parent civil partner deserts the family or dies. The proposed substituted text will ensure that the other civil partner may be ordered to provide maintenance for a dependent child of the family.

Section 48 of the 2010 Act allows an agreement between civil partners governing maintenance between them to be made a rule of court (and therefore to become an enforceable maintenance order). The proposed amendments would allow clauses relating to maintenance for any dependent children equally to become a rule of court and be enforceable, bringing the section into line with section 8 of the 1976 Act as amended.

Head 75: Amendment of Part 12, Dissolution of civil partnership

Provide along the following lines:

- (1) Section 110 of the Act of 2010 is amended in paragraph (b) by the insertion after “for the civil partners” of “and any dependent children of the family”.
- (2) Section 116 of the Act of 2010 is amended—
 - (a) by the insertion after subsection (1) of the following subsection—

“(1A) Where an application is made to the court for the grant of a decree of dissolution, the court may make an order requiring either of the civil partners, where appropriate, to make to a person specified in the order periodical payments for the benefit of a dependent member of the family.”, and
 - (b) by the insertion after “subsection (1)” of “or subsection (1A)”.
- (3) Section 117 of the Act of 2010 is amended —
 - (a) by the insertion after subsection (1) of the following subsection —

“(1A) On granting a decree of dissolution or at any other time after granting the decree, the court, on application to it in that behalf by either of the civil partners or by a person on behalf of a dependent member of the family may, during the lifetime of the respondent civil partner, make one or more of the following orders:

 - (a) an order that the civil partner make to a person specified in the order the periodical payments for the support of the dependent member of the family in the amounts, during the period and at the times that may be specified in the order;
 - (b) an order that the civil partner secure to a person specified in the order, to the satisfaction of the court, the periodical payments for the support of the dependent member of the family of the amounts, during the period and at the times that may be specified in the order; and
 - (c) an order that the civil partner make to the person specified in the order a lump sum payment or lump sum payments for the support of the dependent member of the family of the amount or amounts and at the time or times that may be specified in the order.”;
 - (b) in subsection (2),
 - (i) by the insertion after “himself or herself” of “and any dependent member of the family”, and
 - (ii) by the insertion after “subsection (1)(a)” of “or subsection (1A)(a)”;
 - (c) by the insertion after subsection (4) of the following subsection —

“(4A) The period specified in an order under *subsection (1A)(a)* or *(b)* shall begin not earlier than the date of the application for the order and shall end not later than the date on which the dependent member of the family ceases to be dependent, the death of the respondent civil partner or the death of the dependent member of the family, whichever first occurs.”;

(d) by the insertion in subsection (7) after “subsection (1)(a)” of “or subsection (1A)(a)” in each place where it occurs.

(4) Section 118 of the Act of 2010 is amended by the substitution for paragraphs (a) and (b) of subsection (1) of the following paragraphs —

“(a) an order transferring specified property in which a civil partner has an interest either in possession or reversion from that civil partner to the other or to any dependent member of the family or to any other specified person for the benefit of such a member;

(b) an order settling specified property in which a civil partner has an interest either in possession or reversion for the benefit of the other or the benefit of any dependent member of the family, to the satisfaction of the court;”.

(5) Section 119 of the Act of 2010 is amended —

(a) in subsection (1), by the insertion after “by either of the civil partners” of “or by a person on behalf of a dependent member of the family”; and

(b) in paragraph (b) of subsection (2), by the insertion after “dependent on the other civil partner” of “and for any dependent member of the family”.

(6) Section 120 of the Act of 2010 is amended —

(a) by the substitution for subsection (1) of the following subsection —

“(1) If the court is of the view that one of the reasons set out in *subsection (2)* exists, the court, on application to it in that behalf by either of the civil partners or by a person on behalf of a dependent member of the family, during the lifetime of either of the civil partners, may make, on granting a decree of dissolution or at any time after granting it, one or more of the following orders:

(a) an order requiring the other civil partner to effect a policy of life insurance for the benefit of the applicant civil partner or a dependent member of the family;

(b) an order requiring the other civil partner to assign to the applicant or to a person specified in the order for the benefit of a dependent member of the family the whole or a specified part of the interest in a policy of life insurance that he or she has effected or that both of the civil partners have effected; and

- (c) an order requiring the other civil partner to make or to continue to make to the person by whom a policy of life insurance is or was issued the payments which he or she or both of the civil partners is or are required to make under the terms of the policy.”;
 - (b) in subsection (2), by the insertion after “the applicant” of “or the dependent member of the family” in each place where it occurs;
 - (c) in subsection (3), by the insertion after “the civil partner concerned” of “or the dependent member of the family concerned”;;
 - (d) in subsection (4), by the substitution for “of the applicant” of “of an applicant civil partners insofar as it relates to that civil partner”.
- (7) Section 121 of the Act of 2010 is amended —
- (a) in subsection (2) —
 - (i) by the insertion after “by either of the civil partners” of “or by a person on behalf of a dependent member of the family”, and
 - (ii) by the insertion after “to the other civil partner” of “to a person specified in the order for the benefit of a dependent member of the family, during the period of that member’s dependency”;
 - (b) in subsection (3)(b), by the insertion after “other civil partner” of “or dependent member of the family”; and
 - (c) in subsection (5) —
 - (i) by the insertion after “by either of the civil partners” of “or by a person on behalf of a dependent member of the family”, and
 - (ii) by the insertion after “to the other civil partner” of “to a person specified in the order for the benefit of a dependent member of the family”.
- (8) Section 122 of the Act of 2010 is amended by the substitution for subsection (2) of the following subsection —
- “(2)(a) An order referred to in *subsection (1)* for the benefit of the civil partner of the member civil partner ceases to have effect on the entry into a new civil partnership, marriage or death of the applicant.
 - (b) An order referred to in *subsection (1)* for the benefit of a dependent member of the family ceases to have effect on the death of the dependent member.”.
- (9) Section 123 of the Act of 2010 is amended in subsection (5) by the substitution for paragraph (a) of the following paragraph —
- “(a) if the trustees and the person in whose favour the order is made, in providing a benefit for or in respect of that person that is of the same actuarial value as the transfer amount, or”.

- (10) Section 125 of the Act of 2010 is substituted by the following section

—
“Costs

125.— (1) The court may determine the manner in which the costs incurred by the trustees of a scheme further to an order under section 121 are to be borne, including by the member civil partner or by the other person concerned or by both of them in the proportions that the court may determine, and in default of a determination, they shall bear the costs equally.

(2) The court may, on application to it by the trustees, order that an amount ordered to be paid by person under subsection (1) that has not been paid be deducted from any benefits payable to the person —

(a) pursuant to an order made under section 121 , if the person is the beneficiary of the order; and

(b) pursuant to the scheme, if the person is the member civil partner.”

- (11) Section 129 of the Act of 2010 is amended —

(a) in subsection (1), by the insertion after “for the civil partners” of “and any dependent member of the family”;

(b) in subsection (2) —

(i) in paragraph (c), by the substitution for all the words after “civil partners” of “and any dependent member of the family before the proceedings were instituted or before the civil partners commenced to live apart”;

(ii) in paragraph (f), by the insertion after “shared home” of “or caring for a dependent member of the family”; and

(iii) in paragraph (g), by the insertion after “shared home” of “or care for a dependent member of the family”; and

(c) by the insertion after subsection (3) of the following subsection —

“(3A) Without prejudice to the generality of subsection (1), in deciding whether to make an order referred to in that subsection in favour of a dependent member of the family and in determining the provisions of such an order, the court shall, in particular, have regard to the following matters:

(a) the financial needs of the member,

(b) the income, earning capacity (if any), property and other financial resources of the member,

(c) any physical or mental disability of the member,

(d) any income or benefits to which the member is entitled by or under statute,

(e) the manner in which the member was being and in which the civil partners anticipated that the member would be educated or trained,

(f) the matters specified in paragraphs (a), (b) and (c) of subsection (2) and in subsection (3),

(g) the accommodation needs of the member.”.

(12) Section 131 of the Act of 2010 is amended —

(a) in subsection (2)(b), by the insertion after “interest in the matter” of “or by a person on behalf of a dependent member of the family”;

(b) by the insertion after subsection (2) of the following subsection —

“(2A) Without prejudice to the generality of section 116 or 117, that part of an order to which this section applies which provides for the making of payments for the support of a dependent member of the family shall stand discharged if the member ceases to be a dependent member of the family by reason of his or her attainment of the age of 18 years or 23 years as may be appropriate, and shall be discharged by the court, on application to it under subsection (2), if it is satisfied that the member has for any reason ceased to be a dependent member of the family.”.

(13) The Act of 2010 is amended by the insertion after section 131 of the following section —

“Restriction in relation to orders for the benefit of dependent members of the family.

131A.— In deciding whether —

(a) to include in an order under section 116 a provision requiring the making of periodical payments for the benefit of a dependent member of the family,

(b) to make an order under section 117(1A)(a), (b) or (c),

(c) to make an order under section 131 varying, discharging or suspending a provision referred to in paragraph (a) or an order referred to in paragraph (b),

the court shall not have regard to conduct by the spouse or spouses concerned of the kind specified in section 129(2)(i).”

Notes

All of the changes proposed in this Head are intended to bring the law on dissolution of civil partnership more closely in line with the law on divorce, insofar as it relates to dependent members of the family. On divorce, particular care is taken to ensure that provision is made for dependent members of the family. However, the definition of dependent members of the family in that context is not narrowly focussed on members of the constitutional family: it includes the child of either spouse who the other spouse, knowing he or she is not the child’s other parent, treats as a member of the family. Thus – and depending on the circumstances of the individual case – step-parents may have a responsibility to provide maintenance and accommodation for their step-children.

The policy intention of this Head is to ensure that children being raised by civil partners have not less than the level of protection a step-child is afforded. Elsewhere it is provided that the civil partners may jointly be legally parents of a child and it would be fundamentally inequitable that they would have a lesser responsibility than a spouse would for a step-child. We also consider that where a civil partner who is not legally recognised as a child's parent has nonetheless fulfilled a parental role, he or she should continue to have responsibilities to the child in no less a way than a spouse would to a step-child.

Subhead (1). Section 110 of the 2010 Act, Grant of decree of dissolution, provides that a dissolution of a civil partnership may be granted by the court if certain conditions are met – that the couple have been separated for 2 of the previous 3 years, and that proper provision exists or will be made for each of the civil partners. The proposed change at subhead (1) will modify the latter provision so that a civil partnership cannot be dissolved if proper provision has not also been made for any dependent children of the family.

Subhead (2). Section 116 of the 2010 Act, Maintenance pending suit, allows the court to order maintenance pending suit for a civil partner – i.e. where a civil partner applies for the grant of a decree of dissolution, the court may order either of the civil partners to pay maintenance to the other until it determines that application and decides what ancillary orders to make on grant of dissolution. The proposed change at subhead (2) will enable the court to include provision for a dependent member of the family when making a maintenance order under section 116.

Subhead (3). Section 117 of the 2010 Act, Periodical payments and lump sum payments, allows the court, on or after granting a decree of dissolution, to make a periodical payments order, a secured periodical payments order or a lump sum order directed to one civil partner for the maintenance of the other civil partner. The proposed changes at subhead (3) will enable the court to direct either of the civil partners to make or secure periodical payments or pay a lump sum towards the support of a dependent member of the family. As with section 13 of the Family Law (Divorce) Act 1996, provision is made in the amending text that, in addition to the civil partners, a person other than one of the civil partners may make the application and the court may direct payment to be made to that other person. This could happen if, for example, the child was being cared for by another member of the wider family.

Subhead (4). Section 118 of the 2010 Act, Property adjustment orders, allows the court, on or after granting a decree of dissolution, to transfer a property from one civil partner to the other, to settle the property for the benefit of one, varying a settlement or changing the terms of a settlement. The proposed change at subhead (4) will allow such orders to be made for a dependent member of the family, as is currently the case under section 14 of the Family Law (Divorce) Act 1996.

Subhead (5). Section 119 of the 2010 Act, Miscellaneous ancillary orders, allows the court to make a range of orders relating to the shared home of civil partners, including as to rights of residency in the shared home and exclusion from it, or for sale of the property and distribution of the proceeds. The proposed changes at subhead (5) refer particularly to rights of residency in the shared home, and the purpose of the amendments is firstly to allow a person make an application on behalf of a dependent member of the family if that is required, and secondly to mandate the court to take into account the position of a dependent member of the family, in deciding whether or not to make an order for a right of residence or sale of the property. This is in line

with the current provision on divorce, in section 15 of the Family Law (Divorce) Act 1996.

Subhead (6). Section 120 of the 2010 Act, Financial compensation orders, allows the court to require a civil partner to put in place or to continue paying a life insurance policy for the benefit of the other civil partner. This is so where a civil partner dies, and the other civil partner has been wholly or partly dependent on him or her, the survivor's financial needs will be partly met by the proceeds of the policy. The proposed changes set out in subhead (5) allow the court to require similar insurance provisions in relation to a dependent member of the family. This is in line with the current provision on divorce, in section 16 of the Family law (Divorce) Act 1996.

Subheads (7)--(10). Sections 121-126 of the 2010 Act deal with pension adjustment orders. The amendments proposed in subheads (7) to (10) allow payments to be ordered in relation to dependent members of the family, in the same circumstances that payments may be ordered under the pension adjustment provisions in the Family Law (Divorce) Act 1996.

Subhead (11). Section 129 of the 2010 Act, Provisions relating to certain orders, sets out factors the court must consider in deciding whether to make an order and determining its provisions. The amendments proposed in subhead (11) allow the court to consider the responsibilities of a civil partner in caring for a dependent member of the family when considering whether to make an order for that civil partner's benefit. Factors are also provided for the court to take into account in relation to the needs of a dependent member of the family, where the court is considering making an order explicitly for the benefit of such a dependent. This is in line with the current provision on divorce, in section 20 of the Family Law (Divorce) Act 1996.

Subhead (12). Section 131 of the 2010 Act, Variations etc., of certain orders, sets out what orders may be varied by the court on application to it, and particular considerations it must make where the orders to be varied concern property rights, especially in registered property. The amendments proposed in subhead (12) are consequential amendments reflecting that provision is being made for the court to make orders for the benefit of dependent members of the family, and, in relation to maintenance payments for a dependent member, the same termination of payments criteria are established as apply to other children and young adults in further education. This is in line with the current provision on divorce, in section 22 of the Family Law (Divorce) Act 1996.

Subhead (13). Insertion of new section 131A of the 2010 Act, Restriction in relation to orders for the benefit of dependent members of the family. The purpose of this new section is to ensure that the behaviour of the civil partners towards each other is not a factor to be considered by the court in deciding whether or not to make an order for the benefit of a dependent member of the family. This is in line with section 23 of the Family Law (Divorce) Act 1996.

PART 12

AMENDMENT OF THE ADOPTION ACT 2010.

Head 76: Amendment of section 3, Interpretation

Provide along the following lines:

Section 3 of the Adoption Act 2010 is amended by the insertion after the definition of “child” of the following definition –

“ ‘civil partner’ and ‘civil partnership’ have the same meanings as they have in the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010;”.

Notes

This is a definition required for the amendments proposed to the Adoption Act 2010 by Heads 77 onward.

Head 77: Amendment of section 20, Authority’s power to make adoption order or recognise intercountry adoption effected outside the State

Provide along the following lines:

Section 20 of the Adoption Act 2010 is amended –

- (a) in subsection (1), by the insertion after “married couple” of “or a couple who are civil partners of each other”; and
- (b) in subsection (3), by the insertion after “married couple” of “or a couple who are civil partners of each other”.

Notes

Section 20 of the Adoption Act refers to the Authority’s power to make or recognise an adoption order, and the power to make or recognise a joint adoption is confined to where the adopters in question are a married couple. In order to allow civil-partnered couples to adopt jointly, references to civil partners must be included where there are references to married couples.

Head 78: Amendment of section 32, Religion

Provide along the following lines:

Section 32 of the Adoption Act 2010 is amended by the insertion after “married couple” of “or a couple who are civil partners of each other”.

Notes

Section 32 of the Adoption Act requires that the Authority does not place a child for adoption with an adopter, or each of them in the case of a married couple, who is not of the same religion as the child’s mother or (in the case of the child of a married couple) parents, unless each person whose consent is required to the adoption is aware, when consenting, of the religion of each proposed adopter.

The amendment proposed is to ensure that if a child is to be adopted jointly by a civil partnered couple, then the mother of the child or any other person whose consent is required must also be informed of the religion of each of the civil partners, where they are not both of the same religion as the child’s mother or parents.

Head 79: Amendment of section 33, Persons eligible for adoption order or recognition of intercountry adoption effected outside the State

Provide along the following lines:

Section 33 of the Adoption Act 2010 is amended –

- (a) by the insertion after subparagraph (i) of subsection (1)(a) of the following subparagraph:
 - “(ia) the applicants are civil partners of each other who are living together.”;
- (b) by the insertion after subsection (3) of the following subsection:
 - “(3A) Where an applicant for an adoption order is a party to a civil partnership, or an applicant, other than an applicant who is a person referred to in *paragraph (a) or (c) of section 90(3)*, for the recognition of an intercountry adoption effected outside the State a party to a civil partnership, the Authority shall not make the adoption order, or recognise the intercountry adoption effected outside the State, without the consent of the applicant’s civil partner, given in the manner determined by the Authority, unless—
 - (a) the couple are living apart under a deed of separation,
 - (b) the civil partner has deserted the applicant, or
 - (c) conduct on the part of the civil partner results in the applicant, with just cause, separating from the civil partner and living apart from him or her.”;
- (c) in subsection (4)(a), by the insertion after “married couple” of “or a couple who are civil partners of each other”;
- (d) in subsection (5), by the insertion after “married couple living together” of “or a couple who are civil partners of each other who are living together”;
- (e) in subsection (6), by the insertion after “married couple living together” of “or a couple who are civil partners of each other who are living together”.

Notes

Section 33 of the Adoption Act specifies who is eligible to apply for an adoption order or recognition of an intercountry adoption. At present, the categories who may adopt are a married couple, as joint adopters; a person who is a relative of the child as a sole adopter; and a person other than a relative who can satisfy the Authority that the adoption is in the best interests of the child. There has never been any stipulation as to the sexual orientation of a sole adopter who is a relative or can otherwise satisfy the authority that the adoption is in the best interest of the child.

The amendments proposed above to section 33 are designed to allow a couple who are civil partners of each other to apply together as potential joint adopters in the way that married couples currently may. It is important to note that assessment of adopters would continue to be on the basis of whether the proposed adopters are able to provide a suitable home and parenting skills, as adoption is a child-centred construct and the best interests of the child are the primary consideration in assessing any individual or couple as possible adopters.

The reason for allowing civil partnered couples – as distinct from any other non-marital couple who would not, therefore, qualify as a “constitutional family” – to apply jointly to adopt is that civil partners have entered into a legally binding relationship with extensive concomitant rights and responsibilities. The protection afforded to the child by the existence of this legal relationship if adopted jointly by the couple is somewhat less than would be afforded if the child were adopted by a married couple. However, it is considered that it affords a higher level of protection than adoption by a sole adopter and, if the adoption concerned is otherwise considered to be in the best interests of the child, it gives the child greater protection and security than adoption by one of the couple as a sole adopter.

Head 80: Amendment of section 34, Persons suitable for adoption order or recognition of intercountry adoption effected outside the State

Provide along the following lines:

Section 34 of the Adoption Act 2010 is amended by the insertion after “married couple living together” of “or a couple who are civil partners of each other who are living together”.

Notes

Section 34 of the Adoption Act sets out the criteria for assessment of the suitability of a potential adopter or adopters. The amendment here is a consequential amendment to make reference to a civil partnered couple as potential joint adopters in assessing their suitability.

No amendment is proposed to the criteria themselves, which are child-centred and require the assessment of any adopter in terms of their ability to parent and provide for a child, support his or her development, provide for his or her educational, social and health needs, safeguard his or her welfare and support and value the child’s identity and ethnic, social and cultural background. These child-centred criteria will continue to apply to all adopters in order to ensure that adoption and the assessment of adults as potential adopters remains focussed on the needs of children proposed to be adopted rather than becoming focussed on the aspirations of the adults.

Head 81: Amendment of section 37, Application to Child and Family Agency for Authority to issue declaration of eligibility and suitability

Provide along the following lines:

Section 37(1) of the Adoption Act 2010 is amended by the insertion after “married couple married to each other” of “or a couple who are civil partners of each other”.

Notes

Section 37 of the Adoption Act specifies how an application is to be made for a declaration of eligibility and suitability, as assessed under section 33 and 34 of the Act. It is a largely technical provision which does not include additional criteria as to the eligibility or suitability of a person as an adopter, other than in relation to habitual residence conditions which will continue to be the same for all intending applicants. The proposed change simply reflects the amendments to section 33 to allow civil-partnered couples to be eligible for consideration as joint adopters.

Head 82: Amendment of section 40, Authority may issue declaration of eligibility and suitability

Provide along the following lines:

Section 40 of the Adoption Act 2010 is amended –

- (a) in subsection (1), by the insertion after “married couple married to each other” of “or a couple who are civil partners of each other”;
- (b) in subsection (2)(a), by the insertion after “married couple living together” of “or a couple who are civil partners of each other who are living together”;
- (c) in subsection (2)(b), by the insertion after “married couple living together” of “or a couple who are civil partners of each other who are living together”; and
- (d) in subsection (4), by the insertion after “married couple” of “or couple who are civil partners of each other”.

Notes

Section 40 sets out to whom the Authority may issue a declaration of eligibility and suitability as potential adopters, and (in subsection (4)) that it may refuse to issue a declaration of eligibility and suitability if it is not satisfied that the applicant or applicants are eligible within the meaning of section 33 or suitable adopters within the meaning of the child-centred criteria set out in section 34.

The amendments proposed in this Head are consequential amendments reflecting the proposal that civil partnered couple should be eligible to apply to adopt, and would allow the Authority to issue or refuse to issue a declaration in respect of a civil partnered couple as joint adopters in the same way it may issue or refuse to issue a declaration to a married couple.

Head 83: Amendment of section 41, Expiration of declaration of eligibility and suitability

Provide along the following lines:

Section 41 of the Adoption Act 2010 is amended –

- (a) in subsection (1)(b), by the insertion after “married couple” of “or couple who are civil partners of each other”;
- (b) in subsection (2)(ii), by the insertion after “married couple” of “or couple who are civil partners of each other”; and
- (c) in subsection (2)(ii)(I), by the insertion after “married couple” of “or couple who are civil partners of each other”.

Notes

Section 41 of the Adoption Act sets out when and why a declaration of eligibility and suitability made by the Authority shall expire, whether on the grounds of the elapse of time or new information coming to the attention of the Authority.

The amendments proposed here are to ensure that the same conditions shall apply to any declaration of eligibility and suitability issued to a civil-partnered couple as apply in relation to a married couple.

Head 84: Amendment of section 58, Parental rights and duties

Provide along the following lines:

Section 58 of the Adoption Act 2010 is amended by the substitution for paragraph (a) of the following paragraph:

“(a) the child concerned shall be considered, with regard to the rights and duties of parents and children in relation to each other, as:

- (i) in the case of a child adopted by a married couple, the child of the adopters born to them in lawful wedlock,
- (ii) in the case of a child adopted by a couple who are civil partners of each other, as the child of each of them, or
- (iii) in the case of a child adopted by a sole adopter, as the child of the adopter,

and”

Notes

Section 58 of the Adoption Act is concerned with who has parental responsibilities for a child who is adopted. It specifies that the adopters have parental responsibility as though the child were born to them as married adopters, and that the birth parents no longer have parental responsibility for the child.

The amendments proposed above will clarify that whether the child is adopted by a married couple, a civil partnered couple or a sole adopter, the adopters assume parental responsibility for the child.

Head 85: Amendment of section 60, Property rights

Provide along the following lines:

Section 60 of the Adoption Act 2010 is amended –

(a) by the substitution for paragraph (a) of subsection (2) of the following paragraphs:

“(a) (i) the child of the adopters born in lawful wedlock, or
(ii) the child of the adopters born while the adopters were civil partners of each other,
and”

(b) by the substitution for subparagraph (i) of subsection (3)(c) of the following subparagraphs –

“(i) the child of the adopters born in lawful wedlock, or
(ii) the child of the adopters born while the adopters were civil partners of each other,
and”

(c) in subsection (4), by the insertion after paragraph (i) of the following paragraph:-

“(ia) where the adopters are a couple who are civil partners of each other and the other person is legally the child or adopted child of both civil partners, as brother or sister of the whole blood, and”, and

(d) by the insertion after subsection (7) of the following subsection:-

“(8) In this section references to adopters being a couple who are civil partners of each other shall be read as including references to adopters who were civil partners of each other at the time the adoption order concerned was made or the intercountry adoption effected outside the State concerned was recognised, as the case may be, but who are no longer civil partners of each other at the time of the disposition of property concerned.”

Notes

Section 60 of the Adoption Act 2010 refers to property rights, and most particularly to rights arising under a will or under the Succession Act 1965 on intestacy. It stipulates how the child is considered to be related to the adopters and the wider family. This has implications for the child’s rights in property on succession to the estate or part of the estate of a family member (which also has consequences for tax liability). It also has consequences in relation to the child’s own estate if his or her estate goes to members of the adoptive family either by will or intestacy.

The amendments proposed are to ensure that if a child is adopted by a civil-partnered couple, the child has the same legal relationship with each of the adopters and their wider families as the child would have to joint adopters who are married.

Head 86: Amendment of section 61, Stamp duty on land

Provide along the following lines:

Section 61 of the Adoption Act 2010 is amended by the insertion after the words “lawful wedlock” of the phrase “or, in the case of a child jointly adopted by civil partners, as the child of the adopters born while the adopters were civil partners of each other”

Notes

Section 61 of the Adoption Act is a technical provision relating to liability to stamp duty on conveyances or transfers of land within a family. Reduced rates of stamp duty may apply where land is transferred between parent and child. This amendment is to clarify that where the child is jointly adopted by a civil partnered couple, the child will be treated as a child of each of the adopters for those purposes.

PART 13
JURISDICTION AND OTHER RELATED AND MISCELLANEOUS MATTERS

Head 87: Jurisdiction

Provide along the following lines:

- (1) Subject to subheads (2) and (3) of this Head, the jurisdiction conferred on a court by this Act may be exercised by the Circuit Court or the District Court.
- (2) The jurisdiction conferred on a court under Parts 2 and 3 of this Act shall be exercised by the Circuit Court.
- (3) The District court and the Circuit court on appeal shall not have jurisdiction to make an order under this Act for the payment of a periodical sum at a rate greater than €200 per week towards the maintenance of a child or a lump sum order greater than €15,000 for the benefit of a child.
- (4) The jurisdiction conferred by this Act is in addition to any other jurisdiction to appoint or remove guardians or as to the wardship of children or the care of children's estates.
- (5) The jurisdiction of the Circuit court shall be exercised by the judge of the Circuit in which the Applicant or the Respondent ordinarily resides or carries on a business, profession or occupation.

Notes

This Head confers jurisdiction on the courts. Subhead (2) requires that applications in relation to declarations of parentage and applications concerning surrogacy must be made in the circuit court. Subhead (3) set out the financial limits for maintenance applications initiated in the District Court.

Head 88: Hearing and conduct of proceedings.

Provide along the following lines:

- (1) The Circuit court shall sit to hear and determine proceedings under this Act in a different place or at different times or on different days from those on which the ordinary sittings of the Circuit court are held.
- (2) Proceedings under this Act shall be as informal as is practicable and consistent with the proper administration of justice.
- (3) A judge sitting to hear and determine proceedings under this Act and a barrister or solicitor appearing in the proceedings shall not wear a wig or a gown.

Notes

This provision requires that, as is usual in family law proceedings, proceedings be on a different day from other types of proceedings and be as informal as possible.

Head 89: Costs

Provide along the following lines:

- (1) The costs in proceedings under this Act are at the discretion of the court.
- (2) The costs of mediation services or counselling services provided for a party to the proceedings under this Act are in the discretion of the court.

Notes

This Head confers jurisdiction on the courts to make orders as to costs of proceedings and related mediation or counselling services.

Head 90: Rules of court

Provide along the following lines:

Rules of court shall provide for the documentation required for the commencement of proceedings under this Act in a summary manner.

Notes

This provision specifies that rules of court shall allow for summary proceedings.

Head 91: Regulations

Provide along the following lines:

- (1) The Minister may make regulations for the purpose of giving effect to this Act.
- (2) Without prejudice to the generality of subhead (1), regulations under this Head may provide for:-
 - (a) the regulation of guardians ad litem to address issues including:-
 - (i) eligibility to be a guardian ad litem and nature of qualifications;
 - (ii) the training of guardians ad litem;
 - (iii) establishment of a register of guardians ad litem;
 - (iv) detailing the work to be undertaken by guardians ad litem;
 - (v) prescribing the fee structure applicable to guardians ad litem;
 - (b) the registration of organisations approved to provide post-separation parenting programs as referenced in Head 52(1)(c);
 - (c) the registration of organisations and individuals approved to provide family counselling, child counselling and mediation services for the purposes of the Act.
- (3) Every regulation made under this Act shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the regulation is passed by either such House within the next 21 days on which that House has sat after the regulation is laid before it, the regulation shall be annulled accordingly but without prejudice to anything previously done thereunder.

Notes

This Head provides for regulations under the Scheme generally. This provision confers the power to make regulations referred to at various points in the Scheme. In addition, it sets out in subhead (2) the parameters for regulation of Guardians ad litem, and that regulations may provide for registration of organisations providing post-separation parenting programmes and organisations providing counselling and mediations services.

SCHEDULE

Enactments Repealed

Number and Year	Short Title	Extent of Repeal
(1)	(2)	(3)
No. 7 of 1964	Guardianship of Infants Act 1964	The whole Act
No. 26 of 1987	Status of Children Act 1987	Parts III, IV, VI, VII and VIII