



**JUDICIAL GUIDELINES ON THE COMMISSIONING,  
PREPARATION, CONTENT AND USAGE OF EXPERT<sup>1</sup>  
REPORTS IN FAMILY LAW PROCEEDINGS**

**JANUARY 2026**

# JUDICIAL GUIDELINES ON THE COMMISSIONING, PREPARATION, CONTENT AND USAGE OF EXPERT<sup>1</sup> REPORTS IN FAMILY LAW PROCEEDINGS

## PREAMBLE

- (a) The Department of Justice, Home Affairs and Migration published a Review of the Role of Expert Reports in the Family Law Process in June 2024. This Review examined ‘welfare’ reports and ‘voice of the child’ reports in the context of private family law litigation.<sup>2</sup> One of the recommendations in this Review relating to welfare reports was that Guidelines be prepared to assist all involved in the commissioning, preparation, content and usage of such reports. These Guidelines are an attempt to fulfil this recommendation.
- (b) In July 2024, at the request of the Minister for Justice, the Chief Justice established a committee of judges (“the Committee”), all with experience in family law, to prepare such Guidelines. The Committee sought and received input from stakeholders in response to a circulated questionnaire.<sup>3</sup> A follow-up in-person forum was held in December 2024 with the support of the Department of Justice, Home Affairs and Migration. Consultation with members of the judiciary was undertaken and the Committee also received presentations from individuals with particular expertise in this area. In this regard, we were anxious to have input from children and from empirical researchers in this area. We are grateful to Dr. Aisling Parkes, Senior Lecturer in Law, UCC. We also wish to acknowledge the Barnardos Empower Kids Project. The Committee is most grateful for all submissions, observations and suggestions received.<sup>4</sup> All have been analysed and thoroughly considered. The Committee would like to thank the Department of Justice, Home Affairs

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<sup>1</sup> “Welfare Reports” for the purposes of these Guidelines means reports prepared under the jurisdiction conferred by section 47 of the Family Law Act, 1995 and section 32(1)(a) of the Guardianship of Infants Act, 1964 (as amended).

<sup>2</sup> The former term being used with reference to reports ordered by the courts and prepared pursuant to section 47 of the Family Law Act, 1995 and section 32(1)(a) of the Guardianship of Infants Act, 1964 (as amended), (“expert report(s)”), the latter referring to reports pursuant to section 32(1)(b) of the 1964 Act (as amended) and section 27(2) of the Domestic Violence Act, 2018.

<sup>3</sup> An online questionnaire seeking views on certain aspects of the guidelines was sent to family justice stakeholders with a known interest in the area. 34 responses were received.

<sup>4</sup> A broad range of stakeholders were consulted for the purposes of these Guidelines. A broad range of responses were received. These included: Government Departments (2), State agencies and bodies (6), regulatory bodies (2+), representative organisations (4), NGOs and charities in the sector (12), academic institutions (1) as well as a number of interested individuals.

and Migration for its generous assistance in progressing this task. These Guidelines are the result of the work of this Committee and represent the views of the Committee only.

- (c) We are mindful that ‘the proof of the pudding is in the eating’ and that the laws of unintended consequences may mean that certain (or all) of these Guidelines may require review if difficulties or inadequacies or better options emerge. The Committee therefore pledges to conduct a review of them, which review will include renewed stakeholder engagement, when the Guidelines have been in place for 18 months. We consider that such period will be required to properly consider their successes and shortcomings.
- (d) Of course, these are Guidelines only. The legal principles applicable to judicial guidelines have been comprehensively addressed by the Supreme Court in *Delaney v. Ireland*<sup>5</sup> and in *Kelly v. UCD and Another*<sup>6</sup>. The application of these Guidelines should take place always having regard to the curtailments, limitations and legal status of such as defined by the Supreme Court.
- (e) In conclusion, childhood is short but, regrettably, for all too many children whose families are involved in relationship litigation, childhood can be very complex and acrimonious. The aim and purpose of expert reports is to assist in the expeditious resolution of such litigation by providing expert opinion on any question affecting the welfare of the child to assist the court in determining the child’s/children’s best interests. These guidelines are intended to promote consistency and best practice in the use of welfare reports in private family law proceedings in Ireland, ultimately contributing to better outcomes for children and families.

22<sup>nd</sup> January 2026

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Sinéad Ní Chúlacháin

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<sup>5</sup> [2024] IESC 10

<sup>6</sup> [2025] IESC 6. In these two cases, the Guidelines under consideration were legislatively mandated, unlike in the present instance.

## INTRODUCTION

- (a) It is a matter for each individual court to determine whether or not it is appropriate to order the preparation of an expert report, the expert to be appointed, the issues to be addressed in the report and, if so ordered, what interim substantive and procedural steps are required. The assessment process and the report, once prepared, form part of the privacy/non-disclosure process<sup>7</sup> and are subject to the legal principles applicable in this context.<sup>8</sup>
- (b) The purpose of an expert report is to assist the court in determining issues concerning child welfare and best interests. The aim should be to achieve expeditious resolution of disputes concerning children. Such reports are not binding on a court<sup>9</sup> but form part of the evidence to which the court has regard. As stated by Denham J. in *J.McD. v. P.L. and B.M.*<sup>10</sup>:

*“The person writing the report remains an expert giving his or her opinion to the court. The report is produced to assist the court. While it is a matter to be weighed in all the circumstances of the case, it should not, as a mandatory matter, be accorded great weight. A court is neither obliged to accept the report, nor is it required to expressly specify its reasons for non-acceptance of the report. The report should be considered carefully, by the trial judge, together with all the factors and circumstances of the case, and it may assist the trial judge in determining what is in the best interests of the child, whose welfare is the paramount consideration.... The court is the decision maker. The court is required to consider all the circumstances and evidence. The section 47 report is part of the evidence to be considered by the court.”*

Further, Murphy J. in *L.D v T.D.*<sup>11</sup> makes it clear that an expert, in preparing a report, should not look to act as a judge in resolving conflicts of fact. That function is the sole prerogative of the court.

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<sup>7</sup> In this report, the term “privacy/non disclosure process” is used to encompass the *in camera* rule, the legislative provision that cases be heard “otherwise than in public” and other bases which give rise to an obligation of non-disclosure. In this regard, reference is made to section 40 of the Courts and Civil Liability Act, 2004 as amended. We have endeavoured to provide a “plain English” explanation of the *in camera* rule in Appendix 1 to these Guidelines.

<sup>8</sup> Article 42A Bunreacht na hÉireann; sections 3 and 31 Guardianship of Infants Act, 1964 (as amended). The provisions of section 31 of the Guardianship of Infants Act, 1964 are set out in Appendix 2 to these Guidelines.

<sup>9</sup> This has been recently examined by the European Court of Human Rights in *L.D. v. POLAND – 12119/14* (Article 8) [2025] ECHR 44 and the rulings in this case should inform the courts in the use of experts’ reports

<sup>10</sup> [2009] IESC 2

<sup>11</sup> [1998] IESC 40

- (c) The words of Abbott J. in *A.B. v. C.D.*<sup>12</sup> are also most instructive in understanding the expert's role:

***“Special Position of Section 47 Witness***

*10. While accepting that the s. 47 witness is in the mainstream of court witnesses, it should be noted that there are certain fundamental differences between the role of the s. 47 witness in family law proceedings and the general run of witnesses called as experts in court....*

*11. A s. 47 report features a process of interviews with the parties and their children in which subjective views and allegations are mixed with a comment which can be verified independently and objectively. Almost inevitably, a broadly focused s. 47 report will recount interviews with the two parents and sometimes the children which produce an array of conflicting allegations for the s. 47 report to reach the stage of putting on record the results of these interviews. In ordinary litigation a party decides whether or not to give evidence. The s. 47 order compels a party in family law litigation to give information which may become evidence.*

*12. The establishment of such rapport and trust leading to the pouring out of intimate details of life and wide-ranging allegations to the expert on all sides without having himself resolve the conflicting allegations between the parties in the expert's report or they might expect a court to do. Far more upsetting for the party are understandable reactions from parties which lead to unnecessary, irrelevant and prolonged wasteful cross examination of experts in court and in some instances, are very damaging to the experts themselves insofar as their interest and motivation being involved in family cases may diminish or be eliminated by reason of the lack of control of such cross examination.... The case decided by the Supreme Court in the judgment of Murphy J. in *L.D. v. T.D.* (Unreported, 9th November, 1998) is instructive in relation to how the court should approach these very common situations arising in the treatment of s. 47 expert witnesses in court.... Murphy J. pointed out that while the psychiatrist was involved to some extent in the gathering of facts and opinions of relevant persons, he was in no sense determining those matters. The procedures adopted by such a person*

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<sup>12</sup> [2011] IEHC 543 (at page 41 of the judgment)

*are not conformable to those of a court and are not to be reviewed according to criteria appropriate for courts.”*

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## 1. THE ROLE OF THE EXPERT IN PRIVATE FAMILY LAW PROCEEDINGS

1.1. It is mandated<sup>13</sup> that decisions in relation to children in family law proceedings should be governed by the principle that “*the best interests of the child*” is the paramount consideration. In this context, a court may determine that expert evidence will assist it in achieving the most appropriate result, consistent with this principle.

1.2. The role of the appointed expert is to provide an independent, objective and impartial opinion to the court in relation to the welfare of each child the subject of the assessment, drawing upon their specialist knowledge and experience, always having regard to the terms of the Order under which they are appointed and the matters which they have been requested to address in such Order.

1.3. The views of the child should also be considered as a component of welfare unless expressly excluded in the Order of appointment.<sup>14</sup>

1.4. This expert opinion should be formulated having conducted or endeavoured to conduct, in a fair and balanced manner, such oral interviews, professional testing and documentary analysis as is deemed appropriate by the expert, having regard to their professional expertise.

1.5. The investigations, methodologies and opinion (recommendations) of the expert should be contained in a report furnished to the court.

1.6. Where recommendations are based upon factual assumptions, the expert should, where possible, advise as to the implications upon such recommendations where an alternative fact-finding conclusion is made by the court.

1.7. The role of the expert is not:

- a. to be a finder of fact;

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<sup>13</sup> Article 42A Bunreacht na hÉireann; section 3 Guardianship of Infants Act, 1964 (as amended)

<sup>14</sup> The importance of ascertaining the views of the child is clearly provided for in Article 42A(4)(2) Bunreacht na hÉireann. The Guardianship of Infants Act, 1964 as amended, at section 32(1)(b), makes provision for “voice of the child” reports being directed by a court. The reports being considered in these Guidelines are general welfare reports, directed pursuant to section 32(1)(a) of the 1964 Act as amended. The views of children are, obviously, very often an important component part of such general welfare reports.

- b. to be a decision-maker;
- c. to advocate for any of the parties or the child/children concerned; or
- d. to be a therapist for any of the parties or the child/children concerned.

1.8. The expert should be mindful of the importance of fully, accurately and impartially-presenting to the court the views of the child, always being alert to issues of influence and authenticity and mindful that the views of the child and the welfare of the child may diverge.

1.9. If the expert becomes aware of any conflict of interest arising, they should notify the court of this at the earliest possible opportunity.

1.10. Experts should ensure (and should provide details if required) that all necessary steps are taken to protect the privacy of families involved in assessments and their data. Appropriate protocols should be put in place by experts in relation to data safeguarding and in relation to data retention/destruction.

1.11. The expert report is admissible as evidence in accordance with the applicable statutory provisions.<sup>15</sup> Where the parties or either of them wish to examine the expert concerning the report through oral testimony, the role of the expert and the legal rules generally applicable to expert witnesses apply. It is accepted that both parties may cross-examine the expert and the court may also ask questions of the expert if queries or clarifications arise. Further guidance on when an expert should be called as a witness is set out in section 8 below.

### **General Duties of Experts**

1.12 Continuing Professional Development: Experts providing reports in family law proceedings should maintain up-to-date knowledge of relevant legislation, case law, and best practices in their field. This should include training on child welfare, legal processes, domestic violence, coercive control, trauma-informed practice and other topics relevant to their profession and areas of expertise. This should be detailed in the expert's report to the court.

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<sup>15</sup> Section 32(4) Guardianship of Infants Act, 1964 (as amended); section 47(3) Family Law Act, 1995.

1.13 Interdisciplinary Collaboration: Experts should be open to collaborating with other professionals involved in the case, where appropriate and with the court's permission. This should be done in a cost-effective manner.

## 2. GUIDANCE ON WHEN A REPORT SHOULD BE ORDERED

2.1. In accordance with section 3 of the Guardianship of Infants Act, 1964 (as amended), the ordering of a report and its scope should be consistent with the best interests of the child/children concerned. Factors to which a court shall have particular regard in directing an expert report are set out in section 32(3) of the 1964 Act. In addition, relevant considerations in deciding whether to commission a report will include the factors set out in section 31 of the 1964 Act. Considerations of importance may include:

- a. Physical, psychiatric or psychological ill health or addiction or alleged addiction of any persons within the family being assessed;
- b. Issues giving rise to a risk of harm to the child/children;
- c. Concerns relating to the protection of children's safety and wellbeing, physical or psychological;
- d. Domestic violence or alleged domestic violence;
- e. Where both parents request such assessment and report, and this is not determined by the court to be contrary to the best interests of the child;
- f. Where concerns arise in relation to influence in the context of the actions or expressed views of the child/children;
- g. Intractable parental/guardianship conflict *inter partes*;
- h. Contact refusal or significant contact difficulties;
- i. Relocation of one of the parties such as will significantly interfere with the extant and future arrangements between the children and either parent/guardian;
- j. Other specific issues arising as identified in the Order.

### 3. CONTENTS OF THE ORDER

3.1. The contents of the Order will be revised as appropriate to the particular case. The list below refers to issues that routinely arise for consideration and should be included where appropriate.

- a. The legislative provision under which the Order is being made;
- b. The full name(s) of the child/children to whom the assessment relates, all address(es) at which they reside and their date(s) of birth;
- c. The issues to be addressed by the expert including whether a general order, general with specific issues order or specific issues only order is being made (the last-mentioned category might, by way of example only, refer to an aspect of contact (e.g. overnight/holiday or educational or medical/therapeutic disputes). It is important that the issues to be addressed are clearly stated and that the scope of the report is reflective of the issues of concern in respect of which expert assessment is required;
- d. The name, pertinent professional qualifications and contact details of the expert;
- e. The manner of instruction of the expert (e.g. joint letter; court order only; other) having due regard to the importance of expedition. In all cases, the order appointing the expert should be provided to the expert and this should be done promptly by the Courts Service (within 14 days);
- f. A list of the court documents if any (pleadings, orders, affidavits) to be provided to the expert and by whom they are to be provided;
- g. Whether or not previous court ordered reports are to be provided to the expert and, if so, details of same (expert name and date of report);
- h. Whether or not previous reports prepared concerning the child/children or their parents/guardians (not being court ordered reports) are to be provided to the expert and, if so, details of same (name of expert or author and date of previous report);
- i. The extent to which communication with third parties by the expert is permitted. The assessment process and the expert report is part of court proceedings and disclosure of the proceedings in the context of the assessment should only be in accordance

with court authorisation (which authorisation may be general in nature and permissive of communication with third parties by the expert as they, in the exercise of their professional expertise, deem appropriate and necessary);

- j. How the cost of the report is to be borne;
- k. The date or approximate date on which it is envisaged that the report will be available;
- l. If the court so determines, a “for mention” date after the envisaged completion date but proximate thereto;
- m. Email or other contact details for (i) the parties; (ii) the parties’ solicitors; (iii) the court for submission of the report or queries relating to the Order;
- n. Liberty to re-enter the motion/application should be granted save where the court otherwise directs including where the expert prepares an interim report that requires the immediate attention of the court;
- o. That the report is to be provided to the court by the expert upon completion and the steps to be taken in respect of the release of the report.

3.2. A template Order is annexed to these Guidelines at Appendix 3.1.

3.3. Appendix 3.2 contains a non-exhaustive list of matters which a court may wish to have specifically considered in the report of the expert.

## **4. APPOINTING AND INSTRUCTING AN EXPERT**

### **Pre Appointment Duties of the Parties and Their Legal Representatives**

4.1 Where possible, when an application is being made for the appointment of an expert, the applicant should furnish the respondent and the court with the following:

- a. three names of proposed experts together with a copy of the CV of each such expert (which should include memberships of professional regulatory bodies);
- b. the cost or, estimated cost and manner of cost calculation of the report and the assessment process as provided by each proposed expert; and
- c. details of each such experts' availability in terms of commencement date, likely duration of the assessment process and completion date for the report.

4.2 In seeking information from the proposed experts as to the likely timeframe for the completion of the assessment, the expert should be appraised of any envisaged difficulties in relation to the availability of the adults or children concerned. Where such difficulties arise post appointment, the expert should be so informed at the earliest possible opportunity.

4.3 Save where necessary enquiries are being made in order to provide information to the court pertinent to the making of an order for an expert report (which enquiries should be made without disclosure of case details and anonymising the family concerned), there should not be communication between the parties and/or their legal representatives with the proposed expert(s) relating to the case prior to their appointment by the court.

### **Pre Appointment Duties of the Expert<sup>16</sup>**

4.4 The expert should not discuss or communicate concerning the substance of the report or the assessment with the parties or their legal representatives prior to appointment.

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<sup>16</sup> For further and general information on the conduct standards expected of expert witnesses, see Tottenham, M. and Others, "A Guide to Expert Witness Evidence" (Bloomsbury Professional, 2019) and to the references to Codes of Conduct for Expert Witnesses from Canada and from Australia referenced therein at Appendix 5.

4.5 Where an expert is contacted by one of the parties to the proceedings to provide a report for the court they should, at the earliest opportunity provide the following to the parties and/or their legal representatives:

- a. A CV detailing relevant qualifications, expertise and experience, and including details of the relevant professional body membership/applicable regulatory regime of the expert, and confirmation that the relevant professional body has a complaints procedure and details of those procedures;
- b. Confirmation that the expert operates to the Children First Guidelines;
- c. An approximate timeframe within which they will be in a position to start and conclude the assessment and the report finalised. It is acknowledged that the expert will generally only be able to provide a final estimated timeframe upon receipt of formal instruction.
- d. Details of how they propose to carry out their assessment to include:
  1. the likely number of meetings with each of the parties and the likely scheduling of those meetings (within the overall estimated timeframe for the assessment).
  2. A breakdown of those meetings to include:
    - i. The likely number of meetings with the parties individually;
    - ii. The likely number of meetings, if any, with the parties individually and their child. If more than one child, whether the expert will meet with the parties and the children individually or collectively;
    - iii. Meetings, if any, with the child/children alone (without parents), and if so, whether meetings with the children will be held individually or collectively;
    - iv. Meetings, if any, with the parties jointly;
    - v. Any intended meetings with any third party e.g. new partners etc;

- vi. The intended location of all meetings, if that can be ascertained at the outset;
  - vii. Whether feedback meeting(s) will be provided, with whom and the cost of same.
- e. An estimate of costs for the assessment and the preparation of the report, to include details of the required timing of the payment for the report and also costs of court attendance, if this becomes necessary. The cost of feedback sessions, if appropriate, should also be indicated. If the costs estimate provided by the expert is likely to be exceeded, the expert shall immediately notify the parties with a revised cost estimate.

4.6 It is acknowledged that the expert may not be in a position to provide all of this detail at the outset and that the assessment process may be an evolving one and, if so, details should be updated during the process as appropriate.

### **Duties of the Court in Appointing an Expert**

4.7 The court should endeavour to ensure that the professional qualifications and experience of the expert appointed are appropriate and suitable in the context of the issues to be addressed by the report.

### **Duties of the Expert Prior to Commencing the Assessment**

4.8 Before commencing the assessment, the expert should set out how they propose to communicate with the parties during the process. This should include:

- Whether communication shall be with the parties directly or, where applicable, in whole or part through their legal representatives;
- Means of communication e.g. by telephone, email, post etc.

4.9 Insofar as the expert can reasonably ascertain prior to the commencement of the assessment, specify the documentation, if any, which is to be furnished in advance to the expert, in particular any documentation covered by the non disclosure rule and, where applicable, by whom it is to be furnished.

## **Payment of the Expert's Fees**

4.10 The parties and/or their legal representatives shall put in place arrangements for the payment of the expert's fees from the outset of the process, which arrangements shall be based upon the fee estimate provided by the expert. Any difficulties arising in this regard should be notified to the other party and, if not resolved, to the court at the earliest possible opportunity. The parties and their solicitors should use their best endeavours to ensure prompt payment of the expert's fees, and both should ensure that there is no delay in the preparation and completion of the assessment and report through expert fees not being discharged in a timely manner.

## **5. COMMUNICATION**

### **Communication Between the Expert and the Parties and Their Legal Representatives**

5.1 Outside of the substantive assessment itself, it is not appropriate for either party or their legal representatives to communicate with the expert (save regarding procedural arrangements for appointments and such like) without simultaneously communicating with the other party, so all correspondence should be copied to the other party's legal representatives or the party themselves if unrepresented.

5.2 Subsequent to appointment, communication between the parties and/or their legal representatives with the expert concerning the process (as distinct from the assessment itself) should be in accordance with the order of the court. Furthermore communication should take place in a transparent manner with all written correspondence being copied to all parties/legal representatives concerned as appropriate and oral communications notified together with details of same, save where the expert determines, in the context of the assessment process, that it is inappropriate to do so and, where such a determination is made, it should be disclosed to the other side.

5.3 Any documentation, recordings or other audio, video or written communications provided by either or any of the parties to the expert (whether at the request of the expert or otherwise) should, if possible, be simultaneously furnished by that party to the other party or parties concerned and should be listed in the report, save where the expert determines, in the context of the assessment process, that it is inappropriate to so provide it. Where such a determination is made, it should be disclosed to the other side. Where simultaneously provision is not possible, such communications should, in any event, be provided to the other party or parties prior to the completion of the assessment.

5.4 Where existing documentation is sought by the expert from the parties and there is objection to the provision of such documentation, directions may be sought from the court.

5.5 The parties and the legal representatives should treat the expert in a respectful and professionally appropriate manner at all times and all communication with the expert should reflect their role as a professional witness in the case.

### **Communication Between the Expert and Third Parties**

5.6 The expert is subject to the non-disclosure rule in respect of the proceedings save and except to the extent that communication with third parties is required in order to complete the assessment and/or report (the requirement of such communication being a matter for the professional determination of the expert) and is authorised by the court. The lifting of the non-disclosure rule to this end should be addressed in the Order of the court appointing the expert where possible.

5.7 If it is the practice of the expert to seek reports or other documentation directly from third parties or institutions (e.g. school or medical reports, prior assessment(s) etc.) or to consult with such third parties or institutions, this should be made known to the parties and/or their legal representatives, prior to such steps being taken by the expert, and, if necessary, the appropriate consents or waivers of consent or court orders should be obtained.

5.8 Where existing documentation is sought by the expert from third parties, and there is objection to the provision of such documentation, directions may be sought from the court.

## **6. THE PROCESS OF COMPILING AND SUBMITTING A REPORT**

### **Compiling a Report**

6.1 The expert should adopt a child-centric approach to compiling their report. Throughout the assessment and report writing process, the child's best interests must remain the paramount consideration. The child's voice should be heard. In circumstances where this has not occurred, reasons should be stated clearly.

6.2 Subject to the court, it is acknowledged that the expert shall have general responsibility for, and authority over, the management of the assessment process.

6.3 The process of compiling a report is substantially a matter for the expert having regard to their professional qualifications and expertise. The expert should be aware that they occupy the role of expert witness albeit with extensive access to the parties, their children, and third parties (subject to the lifting of the non disclosure rule) together with relevant reports and other documentation. Their retainer is jointly by the parties, with their report being for the assistance of the court, regardless of the directions of the court in respect of the discharge of the cost of the assessment and report.

6.4 The expert shall endeavour to accommodate all of the reasonable requirements of the parties in terms of the conduct of the assessment, but it is a matter ultimately for the expert to determine appropriate arrangements to ensure that the assessment is conducted in a fair, transparent and expeditious manner.

6.5 The expert must at all times be mindful of the need for independence, fair procedures and objectivity in the assessment and in the preparation of their report. The process must always be informed by the advancement of the best interests of the child/children concerned.

6.6 The expert should be mindful of giving parity of opportunity to each of the parties in the context of interviews. Such parity should relate to the nature of the interview (remote or in person); venue of the interviews (at the residences of the parties or in another location); opportunity for interview accompanied by the child/children.

6.7 Unless inappropriate to do so<sup>17</sup>, a feedback interview should be offered to the parties, separately or together as considered appropriate by the expert, after the report has been finalised and submitted to the court.

## **Contents of the Expert Report**

### **Format**

6.8 A template report, to be applied and/or modified according to the particular circumstances of the case, is contained in Appendix 4.

6.9 Reports should endeavour to adopt a ‘plain English’ language style.

### **Views on Releasing the Report**

6.10 Subject to the relevant statutory provisions and to the ultimate authority of the court, the expert may express a view to the court as to whether all or part of the report may or may not be suitable for release to the parties directly and may make recommendations to the court in that regard and should highlight this recommendation on the cover page of the report.

### **Professional Declaration**

6.11 The report should contain a Professional Declaration on the part of the expert confirming that:

- a. They do not have a conflict of interest;
- b. That the assessment has been carried out and the report prepared in accordance with the best standards of their profession;

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<sup>17</sup> The Committee is mindful of the realities in this regard in terms of time and cost but is of the view that best practice should offer, where possible, an opportunity for feedback.

- c. That the report distinguishes matters of which the expert has direct knowledge and matters of which the expert has indirect knowledge only and in the latter instance the source of such indirect knowledge;
- d. That the matters set out in the Order of the court have been addressed together with any other matters arising pertaining to the child/children's welfare;
- e. That the expert has been mindful of their duties to the court and their duties to the parties and the child/children.

### **Voice of the Child**

6.12 In light of Article 42A (4)(2) of Bunreacht na hÉireann, the expert in their report shall, where appropriate, indicate how the voice of the child to whom the proceedings relate has been heard. Based upon the court's appointment, the expert should have access to the children whose best interests are to be determined. Such participation by the children cannot be vetoed by a parent or guardian as it is court ordered.

6.13 A precise and complete narrative of the child's voice (where possible, a verbatim record), as expressed to the expert, should be included save and except in circumstances in which the expert has formed the view that to do so would be contrary to the welfare of the child. If such a view has been formed, the expert should so inform the court that the view has been formed and the reasons for forming that view when the report is being submitted.

6.14 Where interviews are being conducted to ascertain the views of the child/children, the expert should be mindful to ensure that the duration, location and circumstances of such interviews are sufficient to ensure that the child/children are facilitated in expressing their authentic views, in comfortable surroundings, removed from opportunity for, or fear of, influence.

6.15 Where appropriate a feedback interview may be held with the child/children to ensure that their voice has been accurately recorded but the child/children should be reminded in this context that they are not the final decision makers nor is the expert.<sup>18</sup>

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<sup>18</sup> The Committee is mindful of the realities in this regard in terms of time and cost but is of the view that best practice should offer, where possible, an opportunity for feedback.

## **Recommendations**

6.16 The expert should endeavour to be clear in their recommendations having considered all issues directed by the court and, where appropriate, such relevant and substantive issues as have been raised by the parties and should seek to identify those relevant and substantive issues which underpin the recommendations in their report.

## **Interim Report**

6.17 The expert should have the facility to provide an interim report to the court should the expert believe that to be necessary or where the court may seek/order one (e.g. to recommend on interim custody/access issues, to make recommendations on a specific matter arising, where the expert is encountering difficulties with one or both of the parties, where there is evidence of abuse to a child requiring immediate court intervention etc.). If such issue(s) arise, the parties or their legal representatives, on their own behalf or at the request of the expert, should arrange to re-enter the matter before the court as soon as possible.

6.18 In the event that the parties fail to re-enter the matter having been requested by the expert, the expert should file an interim report to the court drawing attention to the issue(s) and seeking the court's direction relating to it.

## **General Duties of the Parties**

6.19 The parties/legal representatives of the parties should address all issues arising in the Order for the assessment or in the course of the assessment in a timely fashion.

6.20 The parties should use their best endeavours to co-operate fully with the assessment and the requirements of the expert. If difficulties arise in this regard which cannot be resolved by agreement between the parties and the expert, the matter should be brought to the attention of the court at the earliest possible opportunity.

## **Frustration of the Assessment Process**

### **Obstruction/Non-Participation**

6.21 Parties have a duty to cooperate with the expert assessment process as directed by the court. Failure to do so without reasonable excuse may be considered a frustration of the process.

Examples of frustration include:

- a. Refusal to attend appointments.
- b. Failure to provide necessary information.
- c. Obstructive or uncooperative behaviour during assessments.
- d. Failure to discharge fees due to the expert.
- e. Attempting to influence the expert inappropriately.

6.22 Full and complete participation is to be encouraged. As the assessment by the expert is court ordered, obstruction and/or non-participation is a breach of the order of the court and usual enforcement mechanisms are, in consequence, available. Parties may fail/refuse to participate for various reasons and the reason for this cannot be assumed and must be investigated. An analogous position has arisen in the context of nullity applications and has been the subject of judicial determination that the court cannot compel attendance but, in the event of a failure to attend without proven and reasonable explanation, the court may draw inferences (*JS v. CS (Orse CT)*).<sup>19</sup>

6.23 It is possible that a court may take a similar approach in this context. Alternatively, the court might see the obstruction/non-participation as another factor in the case, to be considered alongside the report of the expert on the basis of the assessment which was concluded in the absence of the party concerned and alongside the testimony of the parties including the reasons given by the absent party for adopting the course of action adopted. The guiding principle remains the same i.e. the best interests of the children and their welfare remains the paramount consideration, and it is for the court to determine the best and most appropriate route of travel to achieve this in the particular case.

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<sup>19</sup> [1997] 2 IR 506 (Budd J.)

## **Financial Constraints**

6.24 Section 32(1)(a) and Section 47 reports are currently conducted using privately retained experts. The assessment cost and the report cost must be borne by the parties. Usually, this is on an equal basis, but an inequality of means may cause this to vary.

6.25 In some circumstances, a court may be left with no alternative but to speak with the child/children directly and to try to ascertain the best interests of the children in the context of the issue arising on the basis of this interview with the child/children together with the testimony adduced by and on behalf of the parents. While direct interview is sometimes required and useful, in general, this approach is sub-optimal given the complexities of the matters involved and the requirement for professional input. If the court has to adopt this route, it needs to have regard to the comments in the judgment of Collins J. in *PIK v. DK*<sup>20</sup>.

### **Submitting a Report to the Court**

6.26 Any report prepared by the expert is a report for the court and the expert must submit any report prepared to the relevant court/court office only.

6.27 The expert must not release the report directly to the parties or their legal representatives. However, the expert must inform the parties or legal advisers when the report has been lodged in court.

6.28 Any views or recommendations of the expert in respect of the release of the said report to the parties by the court, should be **clearly set out on the cover page** of the report. However, the expert must be mindful that the release of any part or all of the report to the parties is solely a matter for the relevant court to determine in accordance with the applicable legislation.

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<sup>20</sup> [2021] IECA 54

## **7. RELEASE OF THE REPORT TO THE PARTIES BY THE COURT**

7.1 Any report prepared by the expert is a report for the court and the expert must submit any report prepared to the relevant court/court office only. The expert must not release the report directly to the parties or their legal representatives.

7.2 When the court receives the report and considers the recommendations of the expert, the court shall either:

(a) direct restricted release only (whether in accordance with the recommendations of the expert or otherwise) having regard to the best interests of the child/children concerned with liberty to apply to the court for directions, or

(b) direct release on a read-only basis for a period of 14 days with general release thereafter subject to any application which may be made in accordance with Paragraph 7.4 below.

7.3 In cases of release in accordance with (b) above, if no application for continued read-only or other restricted release is made within such 14 day period, the general release of the report may take place without further application to the court.

7.4 Any application for continued read-only or other restricted release should be made within the 14 day period referenced in Paragraph 7.2 above on notice to the other party. If application for continued read-only or other restricted release is made within such period, the read-only order will continue to apply until the general release application is heard and determined by the court.

7.5 Where reports are being released to the parties, such release should only occur following completion of a signed undertaking to the court given to their solicitors (where legally represented) or to the relevant court office where they are litigants in person that they understand the privacy/non-disclosure rule and that they will not disseminate the report or discuss it with any third party and in particular to or with the child/children concerned. A template undertaking is contained in Appendix 6.

## **8. GUIDANCE ON WHEN AN EXPERT SHOULD BE CALLED AS A WITNESS**

8.1 An expert appointed under the legislative provisions under consideration is an expert witness. The caselaw is clear that the expert is not the Court’s witness, although appointed by the Court. The expert is in the nature of a single joint expert appointed to independently report to the Court and affording the Court the benefit of professional assessment and opinion. As with any other expert witness, the evidence (which will include opinion evidence) of the expert may be challenged at hearing.

### **What is an Expert Witness? <sup>21</sup>**

8.2 The essential difference between an expert witness and other witnesses is that the expert may give opinion evidence as well as evidence of fact. In consequence of this special position, the expert witness must (a) have specialist expertise in the area in which they opine and (b) they must abide by obligations of independence and impartiality.

### **What are the Unique Features of an Expert Appointed Pursuant to Section 47 of the 1995 Act or Section 32(1)(A) of the 1964 Act When Called as a Witness?<sup>22</sup>**

8.3 The unique feature of the expert appointed in the manner under discussion is that the expert, based upon the Court’s appointment, has access to the children whose best interests are to be determined. Such participation by the children cannot be vetoed by a parent or guardian

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<sup>21</sup> At paragraph [1.21] of “A Guide to Expert Witness Evidence” (Bloomsbury Professional, 2019), Tottenham, M references Hardiman A. in “The Role of the Expert Witness” p. 345 where he stated:

‘The function of the expert witness is to assist the tribunal of fact, whether judge or jury, in arriving at its own conclusion on the technical matter at issue.’

Tottenham then continues:

“An expert witness is a person with the appropriate specialist knowledge to give evidence to a court in relation to a factual matter that is in dispute.

Like most witnesses, they are normally called by one of the parties to the case, although there is provision for Irish courts to call an independent expert or to retain an ‘assessor’ to assist the court in understanding specialist matters.”

<sup>22</sup> *Mc D v. L and M* [2009] IESC 2; *AB v. CD* [2011] IEHC 543 (Abbott J.)

as it is Court ordered. Additionally, the expert has access to interviews and submissions from all of the adult parties to the proceedings although attendance by such adults may not be compelled. Non-attendance or a lack of co-operation will not terminate the assessment, but it will mean that the views and information received by the expert are curtailed and this may operate to the detriment of the non-participating party.

### **Whose Witness?**

8.4 The expert is not the Court's witness. The expert is the witness of both (and neither) of the parties. If the parties are in agreement with the report and do not wish to contest any or all of same, the report is admissible as evidence and may be so received without it being proved by its author as would be the usual requirement in relation to professional reports.

8.5 It should be noted that requiring the attendance of an expert at court comes at a cost to the parties and should be avoided where possible.

8.6 If either or both of the parties take issue with the report, it is open to them to have the expert attend for oral examination in court which examination can be in the form of direct examination, cross-examination or both.

8.7 As the expert is appointed to assist the Court in determining the best interests of the child through the provision of evidence relating to aspects of the child's welfare, the Court may, in appropriate cases, seek to hear from the expert even if the parties do not desire or require this.

### **Who Should Take Responsibility for Calling the Witness?**

8.8 The legislation is clear that the report of the expert is admissible without the necessity of the expert attending to prove it. Therefore, if a party does not contest any element of the report or is in agreement with it, that party does not need to call the expert as a witness. If a party contests the report or parts of it such that it is desired to challenge the contents or conclusions in it, whether in whole or in part, that party will have to orally examine the expert in order to put such challenges to the expert. The primary responsibility for calling the expert

in such circumstances rests with the challenger who will also be responsible for attendance costs. This sometimes causes difficulties especially where the challenging party is a litigant in person. It is important that the time which the Court has allocated for the hearing of the case not be lost and wasted and, importantly, that decision-making relating to children is not delayed due to the unavailability of the expert on the day of hearing. Therefore, where it is known that the report is being challenged by one or both of the parties, there is an obligation all parties on to ensure that the expert is available on the day of hearing. Attendance costs may arise in such circumstances and, in cases where there is a lack of clarity in this regard, application for directions should be made to the Court in advance of the hearing.

### **Direct Examination or Cross Examination?**

8.9 In most instances, the oral examination of the expert, will be an amalgam of direct and cross-examination.

### **Challenging the Evidence of the Expert**

8.10 The evidence of the expert will be by way of cross-examination where the contents of it are being materially challenged in whole or in part. It is important to reflect upon the external information (documents or interviews) relied upon by the expert. Subject to the provisions of the non-disclosure rule and the extent to which it is lifted by the Court, the reference by the expert to third party (or any) documents and interviews does not convert such documents or interviews into what is legally recognized as evidence. These third party communications remain, for the most part, hearsay. If challenged as to veracity, the proving of such communications will be a matter for the party seeking to rely upon them. It is the Court which is the fact finder, and such determinations are subject to the usual rules of evidence in terms of the proving and admissibility of documents and oral communications tendered as “evidence”.

### **The Report as Evidence – Admissibility**

8.11 Section 47(3) of the 1995 Act and section 32(4) of the 1964 Act provide that expert reports may be received in evidence in the proceedings. There is no need for them to be

formally proved under oath which means that the attendance of the expert is not required to prove the report.

### **Where the Entirety of the Report is Agreed Between the Parties?**

8.12 In these circumstances, the report, as admissible evidence, becomes uncontested evidence. The role of the Court in the context of uncontested evidence varies depending upon the nature of the application before it. In the case of divorce, the Court is constitutionally mandated to make proper provision<sup>23</sup>. In this context, the Court may determine that it requires further evidence, beyond what is contained in the expert's report, in order to carry out this duty. In the case of judicial separation, there is a similar responsibility upon the Court to make proper provision which responsibility derives from statute<sup>24</sup>. Matters pertaining to guardianship, custody and access to children also find the Court exercising its jurisdiction subject to a constitutional and statutory obligation<sup>25</sup> to determine these issues in accordance with the best interests of the child. These obligations placed upon the Court, which are independent of the agreement of the parties<sup>26</sup>, may result in the Court requiring oral testimony from the expert in order to probe or further investigate the recommendations of the expert in determining the best interests of the child/children concerned.

### **Where the Recommendations are Agreed but the Factual Narrative is Disputed?**

8.13 The fact finder is the Court. The expert does not determine what facts are proved. It is a matter for each party to determine whether or not their case requires them to dispute the factual narrative. Where they do not contest the recommendations, they should consider whether the particular factual narrative is material to the recommendations reached or otherwise material to the issues which the Court must determine. Issues of practicality, reduction of acrimony and cost may arise and dictate or influence decisions made in this regard. It is a matter for the parties to determine whether or not they wish to challenge all or any part of the expert report, whether recommendations or narrative.

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<sup>23</sup> Article 41.3.1 Bunreacht na hÉireann and section 5 of the Family Law (Divorce) Act, 1996

<sup>24</sup> Section 3(2)(a) Judicial Separation and Family Law Reform Act, 1989

<sup>25</sup> Article 42A Bunreacht na hÉireann and section 3 Guardianship of Infants Act, 1964 (as amended)

<sup>26</sup> Although in many cases the decisions of the Court and the views of the parties may align.

### **Where Certain Recommendations Only are in Dispute?**

8.14 In this instance, identifying the recommendation(s) which are disputed to the Court in advance of calling the expert as a witness may afford an opportunity, dependent on the view of the Court, to obviate the need to call the witness.

### **Where the Court has Questions or Queries Arising From the Report – the Inquisitorial Role of the Court.**

8.15 The Constitutional and legislative obligations on the Court endorse such an inquisitorial role being adopted where the best interests of the child/children so requires. While it is not envisaged that this will often occur, the obligations of the Court in relation to the wellbeing of the children demands that the Court is entitled to probe the report even where the parties both accept it or do not wish to challenge it.

### **Costs of Court Attendance by Expert**

8.16 The costs of attendance by the witness in the first instance are the responsibility of the party who calls the witness. If both parties require the expert to attend, the matter of costs must be shared as determined between them or directed by the Court. Of course, the Court may direct an alternative distribution of the attendance-cost responsibility and application to Court may be made in this regard. Such costs will be costs in the proceedings and the Court may make orders in this regard after the hearing. Where the Court requires to hear from the expert, but the parties do not intend to call such expert, the Court should direct how the attendance costs are to be discharged in default of agreement between the parties.

## **9. THE COMPLAINTS MECHANISM**

9.1 The expert is appointed by the court, and it is for the court to oversee the assessment process of the expert always having regard to the fact that the expert is an independent professional and is a specialist charged with carrying out an assessment and providing a report with recommendations. It is not for the court to interfere with this process.

9.2 It is important to record that the court is not a regulatory body in the context of expert report preparation, and it does not assume such a role in ordering such a report. The jurisdiction of the court is limited to making further directions in relation to the assessment process or, in extreme instances, making a new appointment of an alternative expert.

9.3 The court has an important role to play in supervising the assessment process and has jurisdiction to make directions in this regard. Where it has been found necessary by the court to appoint a replacement expert, the court is within its authority to do so. In doing so, the court may have regard to the regulatory and/or professional association complaints regimes of the expert.

### **Types of Complaints**

9.4 Inevitably, situations arise where parties (or the child/children) are dissatisfied with the report. In this instance, it is important to distinguish a number of distinct situations:

- a. Dissatisfaction with outcome of assessment – this is a matter for challenge and cross-examination at the hearing;
- b. Dissatisfaction with the methodology or process used by the expert – this is a matter for challenge and cross-examination at the hearing;
- c. Allegations of bias or conflict on the part of the expert – this is a matter to be determined by the court;
- d. Allegations of misconduct by the expert in the course of the carrying out of the report (not being matters relating to (a) and (b) above) – this is a matter to be determined by the court;

- e. In addition, there are instances where it may arise that misconduct is such as gives rise to possible professional regulatory infringement on the part of the expert. This would be a matter for the applicable regulatory code (if one arises) subject always to the non disclosure rule and the exceptions to it as provided for by section 40 of the Civil Liability and Courts Act, 2004.

### **Complaints and the Privacy/Non-Disclosure (*In Camera*) Rule – Section 40 Civil Liability Courts Act, 2004**

9.5 The proceedings in respect of which expert reports are prepared are proceedings to which the non-disclosure/privacy rule applies (being *in camera* proceedings or which have been designated by legislation to be heard otherwise than in public). Exceptions to these non-disclosure/privacy-type rules have been provided for in section 40 of the Civil Liability and Courts Act, 2004. In the context of the exceptions contained in section 40(4) of the 2004 Act, reference to S.I. No. 338/2005 - Civil Liability and Courts Act 2004 (Section 40(4)) Order 2005 made under this provision is informative. In the context of complaints, section 40(6) and section 40(7) are particularly relevant and these provisions, together with the entirety of section 40 of the 2004 Act, should be carefully considered in this context. These provisions have also been considered by the High Court in *SM v. SL*<sup>27</sup> and in *AX v. BX*<sup>28</sup> and by the Court of Appeal in *AX v. BX*.<sup>29</sup>

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<sup>27</sup> [2022] IEHC 449 (Butler J.)

<sup>28</sup> [2022] IEHC 584 (Barrett J.)

<sup>29</sup> [2023] IECA 109 (Collins J.)

## **10. SHARING REPORTS WITH THE PARTIES AND/OR THE CHILDREN AND/OR THIRD PARTIES (DISCLOSURE OF REPORTS)**

10.1 As has been indicated earlier, reports when completed should be furnished to the court directly by the expert (paragraph 6.26. and 7.1.). The applicable rules relating to the release of such reports to the parties is discussed at paragraph 7.1. – 7.5. above.

10.2 The general non-disclosure rules applicable to family law proceedings are applicable to these reports and therefore any further dissemination of them is prohibited without the consent of the court. It is the view of the Committee that particular regard should be had to ensuring that reports are not disclosed to or discussed with children save in accordance with the rules and principles applicable to such disclosure or discussion.

10.3 Section 47(3) of the Family Law Act, 1995 provides:

*(3) A copy of a report under subsection (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 and may be received in evidence in the proceedings.*

10.4 Section 32(4) and 32(5) of the Guardianship of Infants Act, 1964 as amended provides:

*(4) A copy of a report under subsection (1)(a) may be provided in evidence in the proceedings and shall be given to—*

*(a) the parties to the proceedings concerned, and*

*(b) subject to subsection (5), if he or she is not a party to the proceedings, to the child concerned.*

*(5) In determining whether a report obtained under subsection (1)(a) should be furnished to the child to whom it relates, the court shall have regard to the following:*

*(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 the report and the effect it may have on his or her relationship with his or her parents or guardians;*

*(c) the best interests of the child;*

*(d) whether the best interests of the child would be better served by the furnishing of the report to the parent, guardian, next friend of the child or an expert appointed under subsection (1)(b), rather than to the child himself or herself.*

10.5 The Committee is of the view that these provisions must be considered in the context of the overarching requirement that proceedings of this nature be conducted in accordance with the best interests of the child. In fulfilment of this principle, it would appear appropriate that reports would not be released to children except upon application to and with permission of the court. The relevant considerations are clearly and amply set out in section 32(5) of the 1964 Act as amended.

### **Release of Reports Outside of the Proceedings**

10.6 Reports prepared under section 47 of the 1995 Act or section 32(1)(a) of the 1964 Act are subject to the non disclosure/privacy rules attaching to such proceedings. Therefore, they cannot be released to third parties without the consent of the court. Section 40 of 2004 Act details the circumstances in which there may be a lifting of the non-disclosure status attaching to such reports. In this regard, the provisions of sub-sections (6) – (9) of Section 40 are particularly informative and engaged.

*(6) Nothing contained in an enactment that prohibits proceedings to which the enactment relates from being heard in public shall operate to prohibit the production of a document prepared for the purposes or in contemplation of such proceedings or given in evidence in such proceedings, to—*

*(a) a body or other person when it, or he or she, is performing functions under any enactment consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter, or*

*(b) such body or other person as may be prescribed by order made by the Minister, when the body or person concerned is performing functions consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter as may be so prescribed.*

*(7) Nothing contained in an enactment that prohibits proceedings to which the enactment relates from being heard in public shall operate to prohibit the giving of information or evidence given in such proceedings to—*

*(a) a body or other person when it, or he or she, is performing functions under any enactment consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter; or*

*(b) such body or other person as may be prescribed by order made by the Minister, when the body or person concerned is performing functions consisting of the conducting of a hearing, inquiry or investigation in relation to, or adjudicating on, any matter as may be so prescribed.*

*(8) A court hearing proceedings under a relevant enactment shall, on its own motion or on the application of one of the parties to the proceedings, have discretion to order disclosure of documents, information or evidence connected with or arising in the course of the proceedings to third parties if such disclosure is required to protect the legitimate interests of a party or other person affected by the proceedings.*

*(9) A hearing, inquiry or investigation referred to in subsection (6) or (7) shall, in so far as it relates to a document referred to in subsection (6) or information or evidence referred to in subsection (7), be conducted otherwise than in public and no such document, information or evidence shall be published.*

10.7 The applicable principles for the exercise of the discretion in subsection (8) are that disclosure must be required “*to protect the legitimate interests of a party or other person affected by the proceedings*”. Such legitimate interests may arise in relation to an adult or in relation to a child. In the context of the exercise of such discretion in relation to the legitimate interests of a child, the best interests and/or welfare tests widely applied in legislation and decision-making concerning children is likely to be the applicable standard. As with all decisions in private or public civil proceedings concerning children, the best interests of child is the applicable principle. This should likewise be the primary focus in any decision to release a report to third parties.<sup>30</sup>

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<sup>30</sup> Section 31 of the Guardianship of Infants Act, 1964 as amended refers to “the best interests of the child”. Section 24 of the Child Care Act, 1991 as amended likewise refers to “the best interests of the child”.

10.8 There are a huge range of circumstances in which such release might be sought. The release may be in part or in full. Examples include<sup>31</sup>:

- a. In furtherance of an order made in the proceedings e.g. to a therapist;
- b. By way of assistance to a further or subsequent expert appointed to prepare a report in the proceedings;
- c. In the context of criminal proceedings;
- d. In the context of child care proceedings;
- e. In the context of other civil proceedings;
- f. In the context of regulatory proceedings;
- g. In the context of child abduction proceedings or proceedings concerning the children in another jurisdiction;
- h. In the context of medical, educational, therapeutic or other needs of the child/children (e.g. accessing of services).

10.9 There is a balancing of rights to be carefully considered:

- a. The rights of the child under Article 42A and legislation;
- b. The right of all persons to fair procedures;
- c. The legal nature of the report. The expert is not a determiner of fact. That is the duty and role of the court and is not for delegation (see *L.D. v. T.D.*).<sup>32</sup> Therefore, if a report is being released it should be clearly stated that, save to the extent that a court has determined, the facts asserted therein must not be viewed as facts which have been legally proven. The expert is an expert witness in legal terms and as determined in *McD v. L*, their report (as to fact and opinion) has no special or mandatory or exceptional weight.
- d. Consideration ought to be given to the extent to which an expert report should be disclosed. Partial release (e.g. recommendations or child's views only) or redacted release may be sufficient. If the expert has recommendations in this regard in the

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<sup>31</sup> This is a non-exhaustive list.

<sup>32</sup> [1998] IESC 40 (Murphy J.)

context of the welfare and/or best interests of the child/children, these should be clearly indicated, with reasons, on the cover of the report when furnished to the court.

## 11. DATA PROTECTION (GDPR)

11.1 In the case of personal data processed by or on behalf of a court when acting in its judicial capacity, the data subject's rights and the obligations of the controller of that personal data (as referred to in section 158(1) of the Data Protection Act 2018) are restricted to the extent that the restrictions are necessary and proportionate to safeguard judicial independence and court proceedings. Reference should be made to the Guidance Note from the Data Protection Commission, “The supervision of personal data in the courts and certain statutory bodies exercising decision-making functions”, (January 2022).<sup>33</sup>

11.2 It is likely that an expert carrying out an assessment is to be considered as processing data on behalf of a court and that the work being undertaken in this context is necessary and proportionate to safeguard court proceedings.

11.3 Further information on the application of GDPR in the context of court proceedings may be found at <https://www.courts.ie/data-protection>. Where additional guidance is sought, reference is directed to the Data Protection Commission at <https://www.dataprotection.ie/en/contact/how-contact-us>.

11.4 Experts should ensure (and should provide details if required) that all necessary steps are taken to protect the privacy of families involved in assessments and their data. Appropriate protocols should be put in place by experts in relation to data safeguarding and in relation to data retention/destruction/extinction.

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<sup>33</sup> See: <https://www.dataprotection.ie/en/dpc-guidance/supervision-personal-data-courts-and-certain-statutory-bodies-exercising-decision-making-functions>

## **12. CONCLUSION**

### **Review of Guidelines**

12.1 These guidelines will be subject to periodic review and amendment to reflect changes in legislation, case law, and best practice. The first such review will take place 18 months from the date of publication of these guidelines.

## **APPENDIX 1: *IN CAMERA* RULE – WHAT IS IT?**

Article 34.1 of the Irish Constitution provides that justice must be “*administered in public*”. Article 34.1 also provides that there may be exceptions to this rule “*in such special and limited cases as may be prescribed by law.*”

Where an exception to the rule is made, a case can be heard in private, without members of the public being present. This is known as being heard “*in camera*”. Legislation in the family law arena refers to proceedings being heard “*otherwise than in public*”. While these two phrases are often viewed as meaning the same thing, there may be some distinctions between them but these are not of concern in the current context. “*In camera*” is a Latin phrase that translates to “*in chambers*” or “*in a private room*”. It does not mean that there is a camera in court recording the proceedings.

Generally, only the parties in the case, their legal representatives, officers of the court, witnesses (as required) and other persons that the Judge may allow, can be present in court when the case is being heard. The privacy/non-disclosure *in camera* rule also prohibits any person who is present at the hearing from sharing information that was heard in the court with anyone outside of court, except in very limited circumstances. Likewise, information and documentation generated in the context of the proceedings, may not be shared or discussed with non-parties, save in very limited circumstances. This is why the term “*non disclosure/privacy rule*” is used in these Guidelines.

Family law, domestic violence and cohabitation proceedings (and such other proceedings as is provided for in legislation) are subject to these restrictions.

### **May I bring a support person to court?**

Generally, no, but there are some exceptions to this rule that are provided for in legislation. For example, under s.26 of the Domestic Violence Act 2018, a person applying for a domestic violence order can be accompanied in court by a person of his or her choice. This is usually a support worker from a domestic violence support service. Where a support person is in court, the Judge has the power to exclude that person if he or she feels that it is in the interests of justice to do so.

For other family law applications such as applications for custody, access or maintenance, generally, only the parties in the case, their legal representatives, officers of the court and witnesses can be present in court.

A party to the proceedings can only be accompanied in court by someone that is not involved in the case if they get permission from the Judge. However, as the Judge has a duty to protect the privacy of the proceedings, other persons that are not directly involved in the proceedings are generally not allowed in court, unless the Judge feels there are special circumstances in the case. An example of this might be if a person has a disability.

### **Why are newspapers allowed to refer to family law proceedings?**

Another exception to the privacy/non-disclosure/*in camera* rule allows accredited members of the press to attend court and to report on family law proceedings provided the report does not contain any information that could identify any of the parties or any child in the proceedings.

However, the Judge can still exclude journalists and prohibit publication of a report on proceedings. The Judge may decide to do this if he or she feels that the report may identify any of the parties or any child in the proceedings, or if he or she believes it is in the interests of justice to do or for other reasons that are specific to that case.

A similar exception allows legal reports and decisions of the court in family law proceedings to be published. Again, the report must not contain any information that could identify any of the parties or any child in the proceedings.

### **“Lifting” the non-disclosure/*in camera* rule**

The Judge can order that any documents, information, or evidence in the proceedings can be disclosed to third parties if he or she feels that is necessary to make that order to protect the parties.

### **Exceptions to the non-disclosure/*in camera* rule**

Parties to the proceedings can also apply to the Judge to allow any documents, information, or evidence in the proceedings to be disclosed to third parties. For example, if parties agree to

attend mediation, they will need to apply to the Judge to lift the *in camera* rule to be able to discuss the proceedings with the mediator.

The non-disclosure/*in camera* rule does not prevent a document, information or evidence being given to a certain persons or organisations conducting a hearing, inquiry or investigation, or adjudicating on any matter, or anyone else that the Minister for Justice, Home Affairs and Migration allows.

There is no need to make an application to the Judge to disclose a document, information or evidence in these circumstances. If a document, information or evidence is shared for this purpose, the contents of that document, information or evidence is still subject to the privacy/*in camera* rule, and the hearing, inquiry or investigation must be held in private.

If you are unsure as to whether any documents, information, or evidence can be shared you should first seek legal advice.

### **What happens if there is a breach of the *in camera* rule?**

It is a criminal offence to breach the *in camera* rule. Anyone who is found by a court to have breached the privacy/non-disclosure/*in camera* rule may be fined and/or imprisoned.

The Judge may also decide that a person is acting “in contempt of court” if they breach of the privacy/non-disclosure *in camera* rule and this could also result in a fine and/or imprisonment.

**APPENDIX 2 – SECTION 31 OF GUARDIANSHIP OF INFANTS ACT, 1964 (AS AMENDED)**

**Determination by court of best interests of child**

*31. (1) In determining for the purposes of this Act what is in the best interests of a child, the court shall have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family.*

*(2) The factors and circumstances referred to in subsection (1) include:*

*(a) the benefit to the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child's upbringing and, except where such contact is not in the child's best interests, of having sufficient contact with them to maintain such relationships;*

*(b) the views of the child concerned that are ascertainable (whether in accordance with section 32 or otherwise);*

*(c) the physical, psychological and emotional needs of the child concerned, taking into consideration the child's age and stage of development and the likely effect on him or her 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 or her parents and the other relatives and persons referred to in paragraph (a), 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 has suffered or is at risk of suffering, including harm as a result of household violence, and the protection of the child's safety and psychological well-being;*

*(i) where applicable, proposals made 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 parents or guardians of the child agreeing to such proposals and co-operating with each other in relation to them;*

*(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 the other parent, and to maintain and foster relationships between the child and his or her relatives;*

*(k) the capacity of each person in respect of whom an application is made under this Act—*

*(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 and entitlements to which the application relates.*

*(3) For the purposes of subsection (2)(h), the court shall have regard to household violence that has occurred or is likely to occur in the household of the child, or a household in which the child has been or is likely to be present, including the impact or likely impact of such violence on:*

*(a) the safety of the child and other members of the household concerned;*

*(b) the child's personal well-being, including the child's psychological and emotional well-being;*

*(c) the victim of such violence;*

*(d) the capacity of the perpetrator of the violence to properly care for the child and the risk, or likely risk, that the perpetrator poses to the child.*

*(4) For the purposes of this section, a parent's conduct may be considered to the extent that it is relevant to the child's welfare and best interests only.*

*(5) In any proceedings to which section 3(1)(a) applies, the court shall have regard to the general principle that unreasonable delay in determining the proceedings may be contrary to the best interests of the child.*

*(6) In obtaining the ascertainable views of a child for the purposes of subsection (2)(b), the court—*

*(a) shall facilitate the free expression by the child of those views and, in particular, shall endeavour to ensure that any views so expressed by the child are not expressed as a result of undue influence, and*

*(b) may make an order under section 32.*

*(7) In this section "household violence" includes behaviour by a parent or guardian or a household member causing or attempting to cause physical harm to the child or another child, parent or household member, and includes sexual abuse or causing a child or a parent or other household member to fear for his or her safety or that of another household member.*

### APPENDIX 3.1: TEMPLATE ORDER

[Title to proceedings]

Guardianship of Infants Act 1964, section 32(1)(a)/Family Law Act, 1995 [if the report is additionally pursuant to another statutory provision, insert provision]

Order directing report

\*UPON APPLICATION made to the Court on this date by the above-named

\*applicant/\*respondent of ..... \*(in the [insert jurisdictional details] court), for an order(s) under section 32(1)(a) of the Guardianship of Infants Act 1964

\*WHEREAS THE COURT having heard the parties [or what has been submitted on behalf of the parties] considers it appropriate to do so under section 32(1)(a) of the Guardianship of Infants Act 1964 THE COURT Having regard to:

(a) the age and maturity of the child(ren) concerned, namely ..... \*born on ....., \* ..... born on ....., (a) child(ren) residing at .....

(b) the nature of the issues in dispute in the proceedings;

(c) any previous report under section 32(1)(a) of the Guardianship of Infants Act 1964 on a question affecting the welfare of the said child(ren);

(d) the best interests of the said child(ren);

(e) whether the making of the order will assist the expression by the said child(ren) of \*his/\*her/\*their views in the proceedings;

(f) the views expressed to it in relation to the matter by or on behalf of \* the applicant/\*the respondent/\* ..... of ....., being a person to whom the proceedings relate

Hereby adjourns the proceedings to the Court sitting at ..... on the .... day of ..... 20... and directs under section 32(1)(a) of the Guardianship of Infants Act 1964 the procurement of a report in writing on the following question(s) affecting the welfare of the said child(ren) from \*..... of ....., [insert contact details of expert] whom the Court considers a suitable expert (*state capacity or qualification*). **The report, upon completion, should be submitted by the expert to the Court ONLY (contact details below) for release in accordance with the directions of the Court.**

Question(s) to be addressed in said report:-

1 .....

6. ....

(Samples of issues which a Court may wish to address are set out in **Appendix 3.2** below. These are, of course, not exhaustive but indicative only.)

AND THE COURT FURTHER DIRECTS, for the purpose of procuring said report, that .....

- i. Insert manner of instruction of expert (joint letter; court order only; other)
- ii. List of court documents, if any (pleadings, orders, affidavits) to be provided to the expert and by whom
- iii. Details of whether or not previous court ordered reports are to be provided to the expert and, if so, details of same
- iv. Details of whether or not other reports are to be provided to the expert and, if so, details of same
- v. Directions, if required, in relation to communication between the expert and third parties
- vi. Directions in relation to the cost of the report and the discharge of such cost
- vii. Directions as to when it is envisaged that the report should be completed and available to the Court

*(insert any further directions under section 32(1)(a))*

The report is to be \*lodged with the [insert Court details] at ..... not later than \*handed into Court on the .... day of ..... 20.... [Details of a for mention date to be inserted if applicable] and may be received in evidence in the proceedings.

The report should not be released to the parties, their child(ren) or their legal representatives.

[insert contact details of the parties, their solicitors (if applicable), Court office for submission of the report]

Liberty to re-enter on notice to the other party at a time and date assigned by the Court Office (together with such further directions in this regard as the Court considers appropriate).

Dated this... day of ..... 20...

Signed .....  
Judge of the [insert] Court/ Registrar

*\*Delete inapplicable words*

**APPENDIX 3.2 – EXAMPLES OF ISSUES WHICH THE COURT MAY WISH TO HAVE ADDRESSED AND MAY WISH TO SPECIFY IN THE ORDER OF THE COURT**

1. The current custody and access arrangements;
2. The benefit to the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child's upbringing and, except where such contact is not in the child's best interests, of having sufficient contact with them to maintain such relationships;
3. The physical, psychological and emotional needs of the child concerned, taking into consideration the child's age and stage of development and the likely effect on him or her of any change of circumstances;
4. The history of the child's upbringing and care, including the nature of the relationship between the child and each of his or her parents and the other relatives and persons referred to in paragraph (a), and the desirability of preserving and strengthening such relationships;
5. The child's religious, spiritual, cultural and linguistic upbringing and needs;
6. The child's social, intellectual and educational upbringing and needs;
7. The child's age, maturity and any special characteristics to include:
  - (1) ascertaining the degree of maturity of the child (or each of the children),
  - (2) ascertaining whether or not the child (children are) is capable of forming his or her or their views and if so a general description of the type of matters on which he, she, they is, are capable of forming his, her, their own views;
  - (3) ascertaining whether any views so expressed by the child, children are not expressed as a result of undue influence;
  - (4) where the child, children is are capable of forming his, her, their own views on these questions, ascertain and report to the Court on those views;
8. Any harm which the child has suffered or is at risk of suffering, including harm as a result of household violence, including

(a) household violence that has occurred or is likely to occur in the household of the child, or a household in which the child has been or is likely to be present,

(b) the impact or likely impact of such violence on:

- i. the safety of the child and other members of the household concerned;
- ii. the child's personal well-being, including the child's psychological and emotional well-being;
- iii. the capacity of the perpetrator of the violence to properly care for the child and the risk, or likely risk, that the perpetrator poses to the child.

and the protection of the child's safety and psychological well-being;

9. The proposals made for the child's custody, care, development and upbringing and for access to and contact with the child;

10. The willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives;

11. The capacity of each parent

- (a) to care for and meet the needs of the child,
- (b) to communicate and co-operate on issues relating to the child, and
- (c) to exercise the relevant powers, responsibilities and entitlements to which the application relates.

## **APPENDIX 4 – REPORT TEMPLATE**

It is important that the Report is always focused upon the issues to be assessed per the Order of the Court always with regard to any other issues which the expert may deem necessary or appropriate to bring to the attention of the Court.

**1. Recommendations of the expert relating to release of the report should be included on the cover page of the report.**

**2. The Expert**

- a. Qualifications and experience
- b. Membership of professional bodies and regulatory regimes applicable
- c. Details of how to make a complaint to the expert's professional body
- b. Data protection compliance
- c. Details of domestic violence training and trauma informed training
- d. Understanding of role and obligations to the Court
- e. Professional Declaration (see paragraph 6.11 of the Guidelines)
- f. Conflicts of Interest

**3. The Assessment**

- a. The scope of the assessment as set out in the Order of the court
- b. Overview of process and methodology engaged with reasoning for approach taken
- c. List of materials considered
- d. List of documentation considered (including documentation received in soft or hard copy) together with source of same
- e. List of audio/video materials considered together with source of same
- f. Interviews with parents and child including dates and durations, and manner of interview (remote or in person)
- g. Third party sources
- h. Narrative/descriptive portion

- i. Expert testing utilised/explanation of same and why considered appropriate in the particular instance/results of same
- j. Section 31 factors grouped under

***Voice of Child***

- i. assess child's age and maturity
- ii. whether the child is expressing and is capable of expressing freely formed views which are not and have not been subject to influence
- iii. The child's expressed preferences regarding the issue(s) specified in the order
- iv. Observations of interaction between child and parents

***Welfare & protection of child from harm***

- i. Physical, emotional, and educational needs of the child
- ii. Effect of conflict on child
- iii. Any special needs or vulnerabilities of the child
- iv. The child's relationship with each parent and other significant individuals in their life
- v. Any history of abuse, neglect, or domestic violence involving the child or any family member
- vi. The ability of each parent to provide a safe and stable environment for the child.

***Parental Capacity***

- i. The physical and mental health of each parent
- ii. The ability of each parent to distinguish between their own needs and those of child and between their role as partner and parent
- iii. The ability of each parent to meet the child's needs and promote their well being

- iv. The willingness of each parent to facilitate a positive relationship between the child and the other parent
- v. History of previous conflict resolution & conflict management – an assessment of both parents’ personalities
- vi. Presence of major risk factors, such as substance abuse, alcohol use, major mental illness, access to firearms, or threats of homicide or suicide

#### **4. Expert analysis of the foregoing (3 above)**

#### **5. Disputed Facts**

Where the facts are in dispute, the expert should make clear which version of events forms the basis for their opinion and what the consequences for that opinion are if an alternative version is accepted/determined by the Court

#### **6. Other Issues Arising**

Any other issues arising which in the professional opinion of the expert require to be addressed which are not referenced in the Order of the court having regard to the welfare of the child

#### **7. Recommendations**

Clear time-lined recommendations including where appropriate:

- a. *Realistic Parenting Plans* which encompass what is already evident in the history of the relationship and the parenting of the children;
- b. *Identification of Specific Community Resources* including addictions services, parenting courses and services for ongoing therapeutic counselling and support
- d. Recommendations as to feedback and as to the manner in which the substantive Order of the court should be relayed to the child

#### **8. Appendices**

The Recommendations should be set out in an Appendix to the report for ease of attachment to court order, and should be furnished to the Court Clerk or Registrar in soft copy for ease of amendment (if applicable) and attachment to the Court Order.

**APPENDIX 5 – ACKNOWLEDGEMENT OF CONDITIONS OF RELEASE OF [S32/47] REPORT**

I confirm that I have been provided with the attached summary of the *in camera* (non-disclosure/privacy) rule and that I understand the contents of that document.

I understand that this is a summary of some of the main aspects of the *in camera* rule and is not a full legal explanation of that rule. I confirm that if I require a more detailed explanation of that rule that I must seek legal advice from a solicitor.

I understand that it is a criminal offence to breach the *in camera* rule and that a breach of the *in camera* rule could also be considered contempt of court by the Judge.

I understand that the [s32/47 report of xxxx dated xxxxx] is a private document and is subject to the *in camera* rule. I also understand that the document, or any part of it, must not be communicated or disclosed to any third party, including any child referred to in the report, without permission from the Judge.

I understand and agree that the [s32/47 report of xxxx dated xxxxx] is being released to me on the condition that I comply with the *in camera* rule and do not communicate or disclose the report, or any part of it, to a third party.

\_\_\_\_\_  
Signed

\_\_\_\_\_  
Print name

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Date

