
*September 22nd 2016: Wayne Dignam, Care Leavers' Network.*

*Speech to the Annual Conference of the Legal Aid Board*

## The child the subject of a family law action – how best to hear his or her voice.

I'd like to thank the Legal Aid Board for the opportunity to speak about this topic and to participate in a panel discussion with Dr. Kyle Pruett and Freda McKittrick.

I speak as someone who, as a child, was the subject of a care order. From the age of ten, I was placed into long term foster care as a result of this order. This was in my best interests, but it happened after many traumatic events that could have been prevented if the right people had acted in my best interests and listened to my voice, and the voices of others, over a longer period of time.

It was in this context, on Monday 15th October 2012, that I delivered a speech at the launch of Fine Gael's campaign for a 'Yes' vote in the Children's Referendum. I was accompanies by the Taoiseach, Minister for Justice, Minister for Children and Fine Gael's Campaign Director. I was speaking on behalf of children who were in need of protection from the courts, and my personal experience was an example of why we should enshrine the rights of children into the Irish Constitution. From that day to voting day of the 12th November, I campaigned, with many others, throughout Ireland, and argued the case for a 'Yes' vote across various media. I fought the good fight, and I am here today to reflect on whether it has made much of a difference, particularly in the context of the voice of the child in family law proceedings.

As a direct result of the inclusion of Article 42A into the Irish Constitution in April 2015, together with the Children and Family Relationships Act 2015, in family law matters, concerning the adoption, guardianship, or custody of, or access to, any child, the best interests of the child is of paramount consideration. In addition, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

Have we succeeded in making this a reality throughout the courts? How can we improve this? Firstly, let's review what independent experts concluded as recently as 4th February 2016.

The United Nations Committee on the Rights of the Child published its concluding observations on Ireland, covering a range of crucial recommendations to the Irish State on its compliance to the UN Convention of the Rights of the Child, which we ratified in 1992.

As a party to the UN Convention on the Rights of the Child, Ireland has an obligation, under Article 4, to take all measures to implement the Convention. The Committee's 2016 concluding observations present an opportunity and a roadmap for the successful implementation of the Convention in Ireland in the next five years, in time for our next report in October 2021.

Before focusing on the recommendations on the voice of the child, I would like to highlight the recommendations in relation to the best interests of the child principle. That is, Sections 45 and 63 of the Children and Family Relationships Act 2015. It is important that this principle is taken within context of the voice of the child principle. The Committee raised the following practical concerns:

*'The Committee is concerned that the right of the child to have his or her best interests taken as a primary consideration has yet to be fully implemented as a positive obligation in all relevant legislation and administrative procedures and decision-making processes.*

*In the light of its general comment on the right of the child to have his or her best interests taken as a primary consideration, the Committee recommends that the State strengthen its efforts to ensure that this right is appropriately integrated and consistently interpreted and applied in all legislative, administrative and judicial proceedings and decisions as well as in all policies, programmes and projects that are relevant to and have an impact on children. In this regard, the State is encouraged to develop procedures and criteria to provide guidance to all relevant persons in authority in determining the best interests of the child in every area and in giving due weight to their interests as a primary consideration'.*

The central problem of how to safeguard children's best interests, while representing children's views, as raised by the Committee, needs to be addressed.

In relation to the **voice of the child**, the Committee had the following observation:

*The Committee also notes that the State has legislative provisions recognizing the right of a child to have his or her views heard. However, the Committee is concerned that:*

*(a) The said legislative provisions have not been effectively implemented;*

*(b) Under the Children and Family Relationships Act 2015, parents must bear the cost of an expert to hear the views of the child in family law proceedings;*

*In the light of its general comment on the right of the child to be heard, the Committee recommends that the State:*

*(a) Take measures to ensure the effective implementation of legislation recognizing the right of the child to be heard in relevant legal proceedings, in particular family law proceedings, including by establishing systems and/or procedures for social workers and courts to comply with the principle;*

*(b) Ensure that there are provisions under the Children and Family Relationships Act 2015 with regard to covering the cost of an expert to hear the child's views in family law proceedings, to guarantee that the views of the child are taken into account in all child care proceedings;*

The issue of covering costs and the inconsistency in implementation has been raised by other experts. While the Children and Family Relationships Act 2015 provides entitlement for the child's voice to be heard, there is no provision for how this works and how it is paid for. Ms Justice Mary Finlay Geoghegan, at the Walsh Lecture in UCD earlier this year, raised the question as to whether there is an obligation on the courts to meet their new mandate to hear the voice of the child if additional resources have not been made available.

Similarly, on 8th September 2016, at the inaugural child summit, the Ombudsman for Children Dr. Niall Muldoon, stated that:

*'Article 42A of our Constitution makes provision for the best interests of the child to be determined and the views of the child to be ascertained in the context of proceedings around adoption, guardianship or custody of or access to any child. However, the resources and ancillary services are not in place to support the courts to provide an enabling, inclusive, equitable and meaningful amenity for children and young people. Quite apart from the significant positive effect it will have on children and the decisions made in these cases, I would suggest that the constitutional imperative derived from Article 42A makes for a compelling reason to allocate the resources required to translate this essential piece of legislation into reality.'*

What type of resources do we need to hear the voice of the child, and why? And how could this be managed better?

For the purpose of today's talk, I am focusing on two imperatives: To act in the child's best interests and to ensure the child's views are heard and duly considered. These may, of course, be perfectly compatible but may also, at times, conflict. The relative weight attached to one or the other of these imperatives very much affects the ways in which children's needs for representation are met. Children need representation, particularly in public law proceedings affecting their care, welfare or liberty.

For solicitors to provide this service, this requires specialist training, smaller caseloads, and a more comprehensive role where the children have the capacity to instruct a legal representative and are capable to cope with adopting a more adversarial position in relation to their parents, the Child and Family Agency, or both.

A guardian Ad litem should be a person who can interview various parties, represent the child's best interests, while also attending to their views. Such a person should have specialist knowledge in a range of areas including child development, family dynamics, trauma and so forth.

As well as the issue of resourcing these services, we have the issue of implementation of the legal and guardian ad litem services, ancillary services and the increased use by the courts of the family mediation services.

The manner in which these services are used by the courts varies greatly throughout the country. According to the Final Report of the Child Care Law Reporting Project of November 2015, some courts routinely use guardian ad litem to inform them as to the views and wishes of the child as well as the best interests of the child at the centre of the proceedings. In others, this is much rarer. There is no consistency in which the child care courts hear the voice of the child. There needs to be consideration of how and when guardian ad litem are appointed, a definition of their role, consideration of the point and circumstances in which it may be appropriate to hear the child directly, and whether that should always mean the child is legally represented; and whether psychologists should be engaged by the courts to assess the level of maturity of the child.

In addition we need to address the ancillary services to support the voice of the child in proceedings. I agree with Mr. Justice White's paper of 2013 'Challenges of Family Law Proceedings' which states that 'ancillary services be required by family courts to enable reports to be procured on any aspect of the welfare of the child, if necessary, should be without costs to the proceedings.'

Greater consideration, and examination, needs to be undertaken in relation to the suitability, experience and expertise of professionals providing such reports, including the standardisation of such reports.

Also, greater consideration needs to be given to the child's welfare throughout the process of report gathering. For children who have experience trauma, this process has the potential to re-traumatise the child, causing regression of symptoms. Post traumatic stress disorder, if not treated, can last a lifetime. Appropriate therapeutic support needs to be provided in these circumstances.

What model of representation for the child works best? In my opinion, the tandem model of a solicitor and guardian ad litem has a commonsense moral appeal together with its apparent ability to deal with both the child's best interests and feelings. It has a lot of benefits, but with high costs. This dual approach also relies on a degree of professional distance, which is potentially placed under threat if the choice of guardian or solicitor is made on an ad-hoc or discretionary basis. Dual representation of the child should, in theory, offer the possibility for the solicitor and guardian to part company if the solicitor

judges that the child is capable of giving his or her own instructions and if the child disagrees with the guardian's assessment of his or her best interests.

In complex and contentious cases legal representation may be required to guarantee the child's right to a fair trial and fair procedures under Article 40.3 of the Constitution, as confirmed by Article 6 of the European Convention on Human Rights. This is common practice under the UK model. A child should be entitled to have both his/her own legal representation and a GAL at the same time. This approach is in line with the UN Committee on the Rights of the Child General Comment No. 14.

Supreme Court *OA* judgment delivered in June 2015 – after the passage into law of Article 42A of the Constitution – is also important to note:

*Prior to considering the legal question, it is necessary to emphasise that in child care cases a number of constitutional rights are at stake. The practical protection of these rights necessitates access to an appropriate level of legal representation. But, as a corollary of these rights, there are constitutional and legal duties, including the State's statutory duty to protect and vindicate the welfare of children where questions arise in relation to their welfare and care. The child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies. In particular, in cases where a child is referred to an administrative or judicial procedure involving the determination of his or her best interests, he or she should be provided with a legal representative, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision*.

We support the position of the Children's Rights Alliance 2016 submission to the Department of Children and Youth Affairs on the reform of the Guardian Ad Litem Services. This proposal would be a nationally organised, managed and delivered service, a National Court Welfare Service, which would maintain a panel of guardian ad litems (GALs) for appointment in public law (care proceedings and adoption) and private law (family law) proceedings. The service would carry out assessments of the child's welfare and best interest, ascertain his or her views, and carry out family and risk assessments, as required. It is proposed by the Children's Rights Alliance that the new national Court Welfare Service would be governed under the structure of the Courts Service with its budget line provided through the Courts Service. This structure would allow for independence from the Department of Children and Youth Affairs, and Tusla, removing any real or perceived potential conflicts of interest.

The new service should maintain a panel of accredited GALs with detailed information on the individuals' qualifications, special areas of expertise, geographical location and Garda vetting. This information should be available to a judge to allow him or her to select a GAL appropriate to the case under consideration.

All GALs should be required to engage in continuing professional development and to be compliant with a professional code of conduct and national standard. The new service should also be empowered to consider and determine complaints against an individual GAL.

In summary, the State needs to step up to its new responsibility since the inclusion of Article 42A in the Constitution and it's legal responsibility to its children. This includes:

- Practical guidance on the matters raised in this speech;
- National standards;
- A programme by which to operate;
- The necessary resources to ensure the best interests of the child and the voice of the child have been heard in family and law matters;
- Effective implementation of the legislation throughout the country.

We have a Constitutional Imperative to do this. We have an imperative, under Article 4 of the UN Convention of the Rights of the Child, to do this by 2021. We have a duty to manage both the best interests of the child, and the voice of the child, through appropriate structures and resources.

When I reflect on my own personal history, I cannot stress enough the importance of family support and early intervention. We need to front-load services and support vulnerable families as early as possible, providing on-going engagement and communicating children's wishes and feelings to the courts. I believe that the Family Mediation Service has a critical role to play in this process also.

My history is the same as many others who are beginning to speak about their past. My story needed to be told to persuade people as to why this was important, and I am glad to have that opportunity again today to assess our progress. The journey continues. I am reminded of the words of the late Christopher Hitchens, 'One should strive to combine the maximum of impatience with the maximum of scepticism, the maximum of hatred of injustice and irrationality, with the maximum of ironic self-criticism. This would mean really deciding to learn from history rather than invoking or sloganising it.'

Ends.