



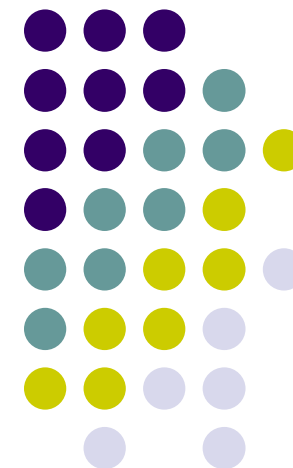
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Family Law Conference 2011



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**The role of a solicitor
representing Parent's in Child Care
Proceedings under Part IV of the
1991 Act as amended
– does the parent have any real
say?**



A Presentation By Colm Roberts



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- **In deciding whether it is good enough the Court must enquire as to the veracity of the actions alleged by the HSE, the needs of the child and the capacity of the parent(s).**



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- **Children do not exist on their own and that the legislation and the Constitution all point to the view that as far as practicable that it is generally in the best interest of a child to be brought up in it's own family.**



The Child Care Act 1991

- Section 3 of the Child Care Act 1991 as amended states that the HSE shall:
- (a) *Take such steps as it considers requisite to identify children who are not receiving adequate care and protection and coordinate information from all relevant sources in relation to children in its area;*
- (b) *having regard to the rights and duties of parents whether under the constitution or otherwise, regard the welfare of the child as the first and paramount consideration and insofar as it is applicable, give due consideration, having regard to the child's age and understanding, to the wishes of the child;*
- (c) *Have regard to the principal that it is generally in the best interest of a child to be brought up in its own family.*
- It confirmed that the Court's paramount consideration is the child's welfare and further confirmed that due consideration must be given to the wishes of the child.



The Constitution of Ireland – BUNREACHT NA hÉIREANN

“the rights of a child who is a member of a family are not confined to those identified in article 41 and 42 but are also rights referred to in article 40, 43 and 44.”

Re Article 26 and the Adoption Bill 1987 [1989] IR 656

the child has the right to be fed and to live and to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being.”

G. -v –An Bord Uachtala [1980]IR 32 at 56, Chief Justice O’Higgins

“that the Courts have a constitutional jurisdiction to intervene to protect the constitutional rights of a child. The Courts will protect such rights whether legislation exists or not.”

Denham J. in North Western Health Board v H.W. and C.W. [2001] 3 IR 622



The European Convention of Human Rights

- ***Eriksson v Sweden 1989 12 EHRR 200***
- ***Olsson v Sweden 1988 11 EHRR 259***
- **It should be for the shortest possible period,**
- **That the parents should be kept informed and consulted in relation to all major decisions in relation to their children,**
- **That the parents should be facilitated with all reasonable access,**
- **That regular reviews by the HSE should occur to see whether the circumstances that lead to the children being placed in care continue to justify the ongoing order.**



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Various Orders under the 1991 Act

- **emergency care orders, S.13.**
- **interim care orders, S17.**
- **full care orders, S18.**
- **supervision orders, S19.**



Various Orders under the 1991 Act

- **Emergency care order.13.**—(1) If a justice of the District Court is of opinion on the application of a health board that there is reasonable cause to believe that—(a) there is an immediate and serious risk to the health or welfare of a child which necessitates his being placed in the care of a health board, or (b) there is likely to be such a risk if the child is removed from the place where he is for the time being, the justice may make an order to be known and in this Act referred to as an “*emergency care order*”. (2) An emergency care order shall place the child under the care of the health board for the area in which the child is for the time being for a period of eight days or such shorter period as may be specified in the order. (3) Where a justice makes an emergency care order, he may for the purpose of executing that order issue a warrant authorising a member of the Garda Síochána, accompanied by such other members of the Garda Síochána or such other persons as may be necessary, to enter (if need be by force) any house or other place specified in the warrant (including any building or part of a building, tent, caravan or other temporary or moveable structure, vehicle, vessel, aircraft or hovercraft) where the child is or where there are reasonable grounds for believing that he is and to deliver the child into the custody of the health board. (4) The following provisions shall have effect in relation to the making of emergency care orders—(a) any such order shall, subject to *paragraph (b)*, be made by the justice for the district in which the child resides or is for the time being; (b) where a justice for the district in which the child resides or is for the time being is not immediately available, an order may be made by any justice of the District Court; (c) an application for any such order may, if the justice is satisfied that the urgency of the matter so requires, be made *ex parte*; (d) an application for any such order may, if the justice is satisfied that the urgency of the matter so requires, be heard and an order made thereon elsewhere than at a public sitting of the District Court. (5) An appeal from an emergency care order shall not stay the operation of the order. (6) It shall not be necessary in any application or order under this section to name the child if such name is unknown. (7) (a) Where a justice makes an emergency care order, he may, of his own motion or on the application of any person, give such directions (if any) as he thinks proper with respect to—(i) whether the address or location of the place at which the child is being kept is to be withheld from the parents of the child, or either of them, a person acting *in loco parentis* or any other person; (ii) the access, if any, which is to be permitted between the child and any named person and the conditions under which the access is to take place; (iii) the medical or psychiatric examination, treatment or assessment of the child. (b) A direction under this subsection may be given at any time during the currency of the order and may be varied or discharged on the application of any person.



Various Orders under the 1991 Act

- **Interim care order.17.**—(1) Where a justice of the District Court is satisfied on the application of a health board that—(a) an application for a care order in respect of the child has been or is about to be made (whether or not an emergency care order is in force), and (b) there is reasonable cause to believe that any of the circumstances mentioned at *paragraph (a), (b) or (c) of section 18 (1)* exists or has existed with respect to the child and that it is necessary for the protection of the child's health or welfare that he be placed or maintained in the care of the health board pending the determination of the application for the care order, the justice may make an order to be known and in this Act referred to as an “*interim care order*”. (2) An interim care order shall require that the child named in the order be placed or maintained in the care of the health board—(a) for a period not exceeding eight days, or (b) where the health board and the parent having custody of the child or person acting *in loco parentis* consent, for a period exceeding eight days, and an extension or extensions of any such period may be granted (with the consent, where an extension is to exceed eight days, of the persons specified in *paragraph (b)*) on the application of any of the parties if the justice is satisfied that grounds for the making of an interim care order continue to exist with respect to the child. (3) An application for an interim care order or for an extension of such an order shall be made on notice to a parent having custody of the child or to a person acting *in loco parentis* except where, having regard to the interests of justice or the welfare of the child, the justice otherwise directs. (4) Where an interim care order is made, the justice may order that any directions given under *subsection (7) of section 13* may remain in force subject to such variations, if any, as he may see fit to make or the justice may give directions in relation to any of the matters mentioned in the said subsection and the provisions of that section shall apply with any necessary modifications.



Various Orders under the 1991 Act

- **Care order.18.**—(1) Where, on the application of a health board with respect to a child who resides or is found in its area, the court is satisfied that—(a) the child has been or is being assaulted, ill-treated, neglected or sexually abused, or(b) the child's health, development or welfare has been or is being avoidably impaired or neglected, or(c) the child's health, development or welfare is likely to be avoidably impaired or neglected, and that the child requires care or protection which he is unlikely to receive unless the court makes an order under this section, the court may make an order (in this Act referred to as a “care order”) in respect of the child.(2) A care order shall commit the child to the care of the health board for so long as he remains a child or for such shorter period as the court may determine and, in such case, the court may, of its own motion or on the application of any person, extend the operation of the order if the court is satisfied that grounds for the making of a care order continue to exist with respect to the child.(3) Where a care order is in force, the health board shall—(a) have the like control over the child as if it were his parent; and(b) do what is reasonable (subject to the provisions of this Act) in all the circumstances of the case for the purpose of safeguarding or promoting the child's health, development or welfare; and shall have, in particular, the authority to—(i) decide the type of care to be provided for the child under [section 36](#); (ii) give consent to any necessary medical or psychiatric examination, treatment or assessment with respect to the child; and(iii) give consent to the issue of a passport to the child, or to the provision of passport facilities for him, to enable him to travel abroad for a limited period.(4) Any consent given by a health board in accordance with this section shall be sufficient authority for the carrying out of a medical or psychiatric examination or assessment, the provision of medical or psychiatric treatment, the issue of a passport or the provision of passport facilities, as the case may be.(5) Where, on an application for a care order, the court is satisfied that—(a) it is not necessary or appropriate that a care order be made, and(b) it is desirable that the child be visited periodically in his home by or on behalf of the health board, the court may make a supervision order under [section 19](#) .(6) Between the making of an application for a care order and its determination, the court, of its own motion or on the application of any person, may give such directions as it sees fit as to the care and custody of, or may make a supervision order in respect of, the child who is the subject of the application pending such determination, and any such direction or supervision order shall cease to have effect on the determination of the application.(7) Where a court makes a care order, it may in addition make an order requiring the parents of the child or either of them to contribute to the health board such weekly or other periodic sum towards the cost of maintaining the child as the court, having regard to the means of the parents or either of them, thinks fit.(8) An order under *subsection (7)* may be varied or discharged on application to the court by the parent required to contribute or by the health board.



Various Orders under the 1991 Act

- **Supervision order.19.**—(1) Where, on the application of a health board, with respect to a child who resides in its area, the court is satisfied that there are reasonable grounds for believing that—(a) the child has been or is being assaulted, ill-treated, neglected or sexually abused, or(b) the child's health, development or welfare has been or is being avoidably impaired or neglected, or(c) the child's health, development or welfare is likely to be avoidably impaired or neglected,and it is desirable that the child be visited periodically by or on behalf of the health board, the court may make an order (in this Act referred to as a “*supervision order*”) in respect of the child.(2) A supervision order shall authorise the health board to have the child visited on such periodic occasions as the board may consider necessary in order to satisfy itself as to the welfare of the child and to give to his parents or to a person acting *in loco parentis* any necessary advice as to the care of the child.(3) Any parent or person acting *in loco parentis* who is dissatisfied with the manner in which a health board is exercising its authority to have a child visited in accordance with this section may apply to the court and the court may give such directions as it sees fit as to the manner in which the child is to be visited and the health board shall comply with any such direction.(4) Where a court makes a supervision order in respect of a child, it may, on the application of the health board, either at the time of the making of the order or at any time during the currency of the order, give such directions as it sees fit as to the care of the child, which may require the parents of the child or a person acting *in loco parentis* to cause him to attend for medical or psychiatric examination, treatment or assessment at a hospital, clinic or other place specified by the court.(5) Any person who fails to comply with the terms of a supervision order or any directions given by a court under *subsection (4)* or who prevents a person from visiting a child on behalf of the health board or who obstructs or impedes any such person visiting a child in pursuance of such an order shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £500 or, at the discretion of the court, to imprisonment for a term not exceeding 6 months or both such fine and such imprisonment.(6) A supervision order shall remain in force for a period of 12 months or such shorter period as may be specified in the order and, in any event, shall cease to have effect when the person in respect of whom the order is made ceases to be a child.(7) On or before the expiration of a supervision order, a further supervision order may be made on the application of the health board with effect from the expiration of the first mentioned order.



Pre-Trial

Full and Proper Disclosure

- ***The State (D) v G and Others [1990] ILRM 19***
- ***The State (F) v Superintendent B Garda Station and Others [1990] ILRM 243).***
- ***‘copy statements and reports, if any, or summary of all evidence being relied upon, including case conference notes and results’. See Southern Health Board – v – Judge David Riordan and KS & MS, Quirke J 16 January 1998.***



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Issues at Trial

- the jurisdiction of the Court,
- the role of the Court,
- the applicability of the rules of evidence and in particular the hearsay rule,
- the admissibility of reports and the right of representation in court.





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Post Trial

- The Court can direct regular reviews
- Applications under s.47 of the Child Care Act
- *Eastern Health Board v District Judge James Paul McDonnell and others [1999] 1 IR 74*
- *Western Health Board v K.M. 14th March 2001, High Court unreported and 21st December 2001 Supreme Court.*
- *It held that the Court is empowered to do whatever is appropriate in the circumstances to achieve the objectives of the 1991 Act in relation to the welfare and wishes of a child*



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Child Care Regulations

- **Child Care (placement of children in foster care) regulations 1995 (SI 260 of 1995).**



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Post Trial



- Applications under s.37 of the Child Care Act

- *Eriksson v Sweden 1989 12 EHRR 200*



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Applications under S43A of the Childcare Act 1991.

- The Child Care (Amendment) Act 2007 brought in Section 43a .
- It authorises foster parents to do on behalf of the Health Service Executive what is reasonable, subject to the provision of the Act and the Regulations for the time being enforced under the Act, in all circumstance of the case for the purpose of safeguarding and promoting the child's welfare, development of the child and in particular give consent to:
 1. Any necessary medical or psychiatric examination, treatment or assessment,
 2. With respect of the child to the issue of a passport to or the provision of passport facilities for the child to enable the child to travel abroad for a limited period.



Areas which need to be clarified:

- **Greater clarity on the role of the Court in Childcare proceedings. The Court has to balance the role of independent arbitrator in relation to the evidence versus having a role of an inquirer.**
- **Greater clarity on the role of all parties in the proceedings in particular the right of a Guardian Ad Litem to be legally represented and how this fits within the adversarial system that exists.**
- **Greater clarity on the Rules of Evidence and the applicability of same. The need to standardise practices in relation to running of Child Care proceeding in the country i.e. admissions of reports, appointments of Guardian Ad Litem, appointment of Solicitors etc.**
- **Greater clarity on the standard of what is good enough parenting.**
- **Greater clarity on what rights remain with parents as guardian after a Care Order is made, travel, medical care, contraception.**
- **Greater clarity on the benefit of placing children in care where they are of a certain age and are opposed to the placement.**
- **Greater clarity on the benefit of placing children in care where they are separated from their siblings.**
- **Greater clarity on the benefit of placing children in care where they will not receive the appropriate care.**



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Special Care

- ***HSE-v-SS and Ors delivered on the 15th June 2007.***
- **These Orders should only be made in exceptional circumstances, for the shortest possible period and for the purpose of providing treatment and /or education.**



Areas which need to be improved:

- **The need to improve the expectations for and the outcomes of children in care.**
- **The need for foster homes to be properly and regularly reviewed.**
- **The increasing case load of Child Care social workers and it's impact on the service.**
- **The need for Peer review and Stress testing of professional opinions.**
- **The need for greater up-to-date training on social work practices, psychological, psychiatric and behavioural practices.**
- **The need to provide greater Court time in order to allow child care proceedings to be properly heard.**
- **The need to improve the support services available to families to avoid children being placed in care unnecessarily.**
- **The need to ensure that a holistic view as to what is in the interest and welfare of a child is maintained. Thus obliging the Courts to ensure that Orders placing children in care should be as short as possible a period, that they should be constantly reviewed, that the relationship of the parents should be encouraged and maintained where possible and when the child leaves care that proper supports are put in place.**



Areas which need to be changed:

- **The need to have an aftercare programme put on a statutory footing.**
- **The need for early intervention, proper family support and the front loading of services**
- **Section 28(2) to be amended to allow District Court the jurisdiction to make further Orders after children have been placed with foster parents outside the Court's area by extending the jurisdiction to where the parents and guardians continue to reside.**
- **Therapeutic foster parents to be identified trained and provided.**
- **A national procedure to be implemented to allow parents know when and how they can seek a change of social worker.**
- **The need to review the Adoption laws to consider making adoption more available including open adoption.**