An Bord Um Chúnamh Dlíthiúil
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Legal Ease

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Note from your Editor

Special Focus: Child Care Cases

It's been 4 years since we took a deep dive into Child Care Cases in the Legal Aid Board. The last Report was completed in 2016. This report which provided a number of recommendations also analysed some of our statistics. We found that the number of Child Care cases in which Legal Aid Certificates were granted to provide representation to parents had been steadily increasing from 483 cases in 2012 to 799 cases in 2016. Since then, the number of child care cases where legal aid certificates were granted has hovered between 616 and 658 per annum. The number of certificates issued up to the end of 2020 has, not surprisingly dropped to 565. With an almost full shut down of services in March and April it is apparent that this affected the numbers of new cases during that time but not quite as significantly as popular reports in the media might have suggested. Dr Carol Coulter analyses some further effects of the pandemic on Child Care cases later in this edition.

No. of Legal Aid Certificates granted per annum – Childcare Cases

2012	2013	2014	2015	2016
483	575	629	661	694 +105PP

2017	2018	2019	2020
522+94PP	561+97PP	559+67PP	518+47PP

In our previous analysis a stark geographical dispersal of cases emerged with some parts of the country dealing with very few cases and others having a very significant demand in case numbers. In the intervening years this trend has continued.

Geographic Spread of Cases 2016 - 30 Nov, 2020

Dublin	937	Meath	73
Cork	509	Westmeath	60
Limerick	199	Sligo	54
Galway	157	Mayo	52
Tipperary	145	Longford	47
Kerry	145	Wicklow	44
Wexford	112	Cavan	44
Waterford	104	Laois	42
Donegal	101	Offaly	41
Kilkenny	89	Kildare	27
Louth	85	Carlow	18
Clare	80	Monaghan	15

It's no surprise to see Dublin with the vast majority of Child Care cases at 937 in this 5 year period followed by Cork at 509, Limerick at 199, Galway 157, followed closely by Tipperary and Kerry both at 145. What is surprising are the very few numbers in counties like Wicklow 44, Meath 73, and Kildare at just 27 cases in this 5 year period. These statistics do seem to continue to follow trends identified in our earlier study but again begs the question why there is a dearth of cases from certain parts of Ireland in comparison to others.

It's also clear to see that these cases occupy a central role in some law centres and not others. Likewise, additional court time is required to hear these cases in certain areas, primarily due to volume of cases. What is not so obvious is

whether the counties with these additional cases get additional court time or additional resources to deal with the demand. We have one dedicated Child Care Law Centre at Chancery St which deals exclusively with Child Care cases. Other Dublin Law Centres also deal with Child Care cases in Dublin Metropolitan District. There are two judges sitting everyday in The Richmond and one at Green St. for contested cases. There is a virtual call-over each Monday and cases are then allocated a judge and court venue. These specialised courts are not replicated elsewhere in the country, although both Limerick and Cork have childcare hearings each week. Other counties have usually only one dedicated Child Care sitting per month with additional days being offered for contested hearings. The inadequacies of this in comparison to Dublin are not difficult to comprehend but hard to tolerate for parents and practitioners often having hearing dates postponed or spread out over weeks/months. Despite the dedication of individual judges to facilitate hearings, there is clearly an urgent need to overhaul this system. The anticipated overhaul of the Family Courts as set out in the recently published Family Courts Bill is hoped may provide a solution.

The Child Care Act is also currently subject to review and the Department of Children and Youth Affairs has sought expressions of interest from all interested parties in 2018 which has recently been re-visited seeking further focussed comment on proposals which they have put forward. The Department has outlined:

"*Building on this research and consultation, the Department has concluded that the Child Care Act, 1991 continues to serve children well, and contains much that is worth retaining. However, Ireland has changed greatly in the quarter of a century since the Act's full commencement, and it is unsurprising that there are areas that require updating to reflect both these changes in society and our understanding of children's rights, and also to allow for positive practice developments to be enshrined in law where needed."*

The Legal Aid Board has made a submission to these proposals as have many other contributors but it is yet to be seen what any

new version of the Child Care Act will provide. However, the approach seems swayed primarily in one direction, which is the rights of the children. Whilst there is no argument that the welfare of children must be paramount it does appear that other interests could be side-lined as a result.

The rights of parents or the constitutional position of children being brought up by their parents unless extenuating circumstances arise does not feature as a main tenant of concern. Indeed one of the proposals sets out that" parental participation will be facilitated……as far as practicable". This whittling down of parents involvement is potentially detrimental for those we represent and is a move away from that balancing of rights that is envisaged by the Constitution. Moreover there is a proposal to remove the statement in Sec 3 of the Act that Tusla shall provide family support services in favour of a broader provision promoting the well-being of children. This proposal is concerning as it removes the family unit from the remit of the provision of services and rebalances that in favour of children and not their family unit. Likewise, there are detailed proposals relating to Voluntary Care which don't go as far as outlining that parents need to obtain legal advice before entering into such arrangements. (See below for further details of research carried out by UCC in this regard.) There is also provision to extend ECO's up to 14 days at the discretion of the court. There is no proposal to ensure parents are notified or any requirement to seek legal advice. Changes to Care Orders propose that parental rights can be applied for by a foster parent after 6 months. This really offers another blow to parents that might be dealing with addiction or mental health challenges that may require a longer period of recovery and could disincentivise them from continuing with progress for family re-unification. We will need to see what the future legal landscape will look like but it would seem that our role acting for parents is likely to become even more challenging in the future.

Happy reading!

Catherine Ryan (Editor)

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This Special Edition has some fantastic contributors, leaders in this field and it is with great thanks that they have taken the time and effort to contribute to this publication.

6. *Fair Procedures and the Statutory Duty of the Child & Family Agency*

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An interesting insight is also provided by Mimi Linehan B.L. in relation to investigations into child abuse. Mimi herself a former social worker is uniquely equipped to see both perspectives and she hones in on the wider issues surrounding fair procedures at each step of the process. The potential for unfairness is identified at a number of stages not least of which is the unbalanced investigation process itself which can leave parents on their own to face the magnitude of an entire team of investigators sometimes without full disclosure or information about the allegations made. She sets out useful pointers to seek to redress this balance in a pre-trial procedure which should be further codified to ensure consistency and fairness.

7. *Brief Overview of cases from the Child Law Reporting Project*

By Catherine Ryan, Managing Solicitor, Law Centre, Limerick ***Page 26***

The Child Law Reporting Project has and continues to offer a window into the heretofore shrouded confines of individual child care courts and really offers an excellent glimpse and indeed often a very extensive account of specific evidence and how same is dealt with. It is through this prism that we can evaluate the courts that we attend. This paper gives a brief overview of some of these cases.

8. *Representing the voice of the child in child care proceedings*

By Freda McKittrick, Head of Service and Monica Hynds Practice Manager Barnardos Guardian ad Litem service ***Page 28***

The authors both of who work in Barnardos Guardian ad Litem service, the state's largest and longest established Guardian ad Litem Service. Barnardos Guardian ad Litem service has been representing the voice of the child in public law proceedings since 1997, and its panel of thirty Guardians ad Litem worked with 774 children from January to September 2020.

9. *Representation for children in care proceedings – why the wrong question?*

By Catherine Ghent, Solicitor ***Page 33***

Catherine Ghent is a partner with Gallagher Shatter Solicitors. As one of the foremost Child Law practitioners in Ireland Catherine works extensively on behalf of children who are the subjects of care order applications and who are at risk. Catherine lectures on the Law Society's PPC II course, Criminal Law Certificate and Child Law Certificate courses and regularly contributes to public and media debate on all aspects of Child Law. In this paper Catherine outlines a strong case for refocusing the argument over the role of the GAL to the overriding concern about children being represented fully and adequately in all Care proceedings.

1. COVID-19 has sharp impact on vulnerable families

Carol Coulter, Director
Child Care Law Reporting Project

While the COVID-19 pandemic has had an impact on every aspect of life, this impact has been severe, and potentially life-changing, for families in the child protection system.

When the pandemic began and the courts scrambled to cope with the new situation arising from the necessary restrictions, the CCLRP decided to modify its practice of publishing two volumes of reports annually in order to bring the impact of the pandemic on families in the child protection system to public attention as quickly as possible. Therefore we added a new heading to our website where cases particularly affected by Covid-19 would be published as soon as practicable. Nine such reports have been published so far, and our next volume of case reports, due in January 2021, will contain a number of additional cases where Covid-19 has caused further difficulties for already challenged families.

The biggest issue to emerge from these cases is that of reduced or suspended direct access between parents and their children in care. The Child and Family Agency policy is that access should continue to take place provided it is safe, and this is decided on a case-by-case basis. However, there appear to be no clear guidelines as to what is considered safe, and this creates openings for apparently arbitrary decisions. It also appears that there can be a subjective element in deciding what is safe, depending on the perceptions of social workers and foster carers, rather than one based on the best scientific evidence.

For example, in a case recently attended by the CCLRP, a mother in direct provision, where reunification with her children was in prospect, was denied face-to-face access with her three children in care, because the foster carers said they would end the placement if it took place. She was happy for access to take place outside and socially-distanced. The foster parents had a child with a health condition, though there was no evidence brought forward as to the impact COVID-19 might have on the specific condition. Furthermore, in an initial report the social worker cited the mother's presence in direct provision as a specific concern (this was rowed back on in court), despite the fact that, unlike most parents of children in care, she was in receipt of regular COVID-19 testing.

In another case a mother who was in a residential treatment centre was told she could not hug her toddler at access or change her baby's nappy. Again, reunification was being planned, but one can only imagine the effect the lack of direct contact between the mother and her very young children was having on the bond between them.

Such problems are likely to be exacerbated when a parent suffers from a cognitive disability, as is the case in a significant number of cases. In yet another case access was reduced from what had been ordered by the court, justified by the CFA on the basis that the mother had consented. However, it emerged during the hearing that the mother was not clear that she was not obliged to consent to the departure from the court-ordered access.

Other additional vulnerabilities include those of migrant families, some of whom require an interpreter. In one case the interpreter was shielding due to a family member's medical condition, he was only interpreting over the phone and the mother found this

very difficult. Eventually another interpreter was found.

Remote access is usually offered as an alternative to direct contact. However, not all parents have access either to the relevant devices or possess the technical skills to use apps like Zoom. They are also totally unsuitable for very young children. One parent complained that the foster parents were present when she spoke to her child on Zoom. This parent also complained that, while direct access was suspended due to the health concerns of a foster father, other people were regularly visiting the house and the father was attending work.

The access problems are arising in a situation when cases are taking longer to process due to difficulties with assessments, and with interrupted treatments and therapies for both children and parents. Many alcohol and drug treatment programmes have halted due to the pandemic, which means that parents hoping for reunification with their children cannot access the supports they need. Decisions on care orders are being held up while children wait to be assessed in relation to attachment or to therapeutic needs or while risk assessments on parents are being delayed.

All of this is adding to a situation where the prospect of reunification of parents with their children in care, where the initial reason for the children going into care has been addressed, is damaged by delays and by the lack of meaningful contact between parents and children. It is all to easy for a dynamic to be created for children in care whereby their relationship with their birth family becomes attenuated and they settle into foster care. However, even in the midst of a pandemic sight cannot be lost of the imperative under both the Irish Constitution and the various international instruments to which we are signatories, that children should be brought up within their birth families, and State entities should strive to support this, except where there are compelling reasons to the contrary.

2. Research Update: Voluntary Care in Ireland Study

Kenneth Burns*,
Conor O'Mahony
and Rebekah Brennan
University College Cork

Introduction

Legal Aid Board (LAB) practitioners are aware of the myriad of voluntary care and private kinship care arrangements that are in existence in the families that they represent. While solicitors are likely to be more involved with care and supervision orders,[1] what may not be known is how prevalent voluntary care agreements are in the Irish care system. Most European countries,[2] New Zealand,[3] Victoria,[4] South Australia,[5] Western Australia[6] and Ontario[7] have a voluntary care decision-making pathway for children to come into state care. In 2019, 54% of all admissions to care in Ireland were through voluntary care arrangements (down from a high of 70% in 2014); however, overall, 74% of children are in state care in Ireland are there under an order of the court.[8]

This independent research study at University College Cork (UCC), building on

[1] Sections 13, 17, 18 and 19 of the Child Care Act 1991 (as amended).
[2] Burns, K., Pösö, T and Skivenes, M. (Eds.) (2017). *Child Welfare Removals by the State: A Cross-Country Analysis of Decision-Making Systems*. New York: Oxford University Press.
[3] Children and Young People's Wellbeing Act 1989, ss 139-149.
[4] Children, Youth and Families Act 2005, ss 133-156.
[5] Children and Young People (Safety) Act 2017, s 96.
[6] Children and Community Services Act 2004, Division 4, ss 74-77.
[7] Child, Youth and Family Services Act 2017, ss 21-23.
[8] Tusla, Child and Family Agency (2020) *Annual Review of Child Care and Family Support Services Available*, available at: https://www.tusla.ie/publications/review-of-adequacy-reports/ [accessed 08/12/20].

the work of the UCC *Child Care Proceedings in the District Court Study*[9] and the *Child Care Law Reporting Project,*[10] undertook a national survey of social workers and managers in Tusla, the Child and Family Agency (n=243), interviews with 20 solicitors (10 in the Legal Aid Board, and 10 in private firms representing Tulsa and/or parents and GALs), focus groups with 26 social workers and managers, and interviews with 6 EPIC advocacy officers, covering practice in seven counties in Ireland. This short summary article presents some of the key findings of this study. Readers interested in finding out more about the study's findings will be able to access current and forthcoming publications and outputs on the website for this study. [11]

In summary, the study found high levels of support amongst front-line solicitors and social workers for the voluntary care pathway; however, study participants also expressed significant concerns about aspects of the current regulation of these arrangements.

Overall, most participants felt that voluntary care arrangement have an important place in our care and child protection system, and that this care pathway should be retained. They argued that there are clear advantages; for example, voluntary care can be less adversarial than court proceedings; parents retain many key decision-making powers; it is less costly than court proceedings; it can reduce delay in decision-making; and these agreements have the potential to facilitate social workers and families to work collaboratively for the best interests of the children concerned. In particular, it is a useful family support mechanism for some families (short-term care when a parent is unwell or to facilitate a parent to attending residential addiction treatment). Furthermore, conscious of issues that have been documented in respect of child care court proceedings, participants did not wish to see a significant number of voluntary care cases being diverted to court.[12] Nonetheless, there was strong consensus amongst participants that the law and practices in this area were in need of modernisation and reform. The sparse nature of Section 4 is a particular case in point.

Section 4 of the Child Care Act

The 1991 Child Care Act provides in Section 4 that the Child and Family Agency may receive a child into care with parental consent:

> (1) Where it appears to the Child and Family Agency that a child requires care or protection that he is unlikely to receive unless he is taken into its care, it shall be the duty of the Agency to take him into its care under this section.

[9] Summary of the *UCC Child Care Proceedings in the District Court* research outputs: https://www.ucc.ie/en/appsoc/resconf/res/childcareproceedingsinthedistrictcourt2012-2019/

[10] See https://www.childlawproject.ie/ and Corbett, M. (2018). 'Children in voluntary care: an essential provision, but one in need of reform' in *Irish Journal of Family Law*, Vol 21 No 1 (9-16).

[11] Visit the study's webpage for access to research outputs, including podcasts, videos and links to peer-reviewed papers: https://www.ucc.ie/en/appsoc/resconf/res/voluntarycareinirelandstudy2018-2020/

[12] Child Care Law Reporting Project reports at https://www.childlawproject.ie/interim-reports/; Burns, K., O'Mahony, C., Shore, C. and Parkes, A. (2018) 'What social workers talk about when they talk about child care proceedings in the District Court in Ireland'. *Child and Family Social Work*, 23 (1): 113-121; O'Mahony, C., Parkes, A., Shore, C. and Burns, K. (2016) 'Child Care Proceedings and Family-Friendly Justice: The Problem with Court Facilities'. *Irish Journal of Family Law*, 19 (4): 75-81; O'Mahony, C., Burns, K., Parkes, A. and Shore, C. (2016) 'Representation and participation in child care proceedings: what about the voice of the parents?'. *Journal of Social Welfare and Family Law*, 38 (3): 302-322; O'Mahony, C., Shore, C., Burns, K. and Parkes, A. (2016) 'Child Care Proceedings in Non-Specialist Courts: The Experience in Ireland'. *International Journal Of Law Policy And The Family*, 30: 131-157.

> (2) … nothing in this section shall authorise the Child and Family Agency to take a child into its care against the wishes of a parent having custody of him or of any person acting *in loco parentis* or to maintain him in its care under this section if that parent or any such person wishes to resume care of him.
>
> (3) Where the Child and Family Agency has taken a child into its care under this section, it shall be the duty of the Agency—
>
> > (a) subject to the provisions of this section, to maintain the child in its care so long as his welfare appears to the Agency to require it and while he remains a child, and
> >
> > (b) to have regard to the wishes of a parent having custody of him or of any person acting *in loco parentis* in the provision of such care.

Compared to other countries, Section 4 is quite threadbare with no or little detail on issues such as time limits on agreements; how consent should be obtained from parents; independent reviews; children and young person's assent and participation in decision-making; the process for cancelling voluntary agreements; or whether a parent has to sign a physical agreement. The section is predicated on the assumption that because the parents have consented, there are no further safeguards necessary to ensure that parents' and children's rights are protected. [13] Participants in the study questioned whether parents' consent was always free and fully informed. One key recommendation of the study is that the Child and Family Agency's policy on voluntary care needs to be updated to support social work teams when assessing parental capacity and informed consent in voluntary care cases. Of particular interest to Legal Aid Board solicitors is that there is no requirement for a parent to have access to legal advice or to consult an advocate prior to providing their consent in voluntary care agreements.

Independent Legal Advice

When a parent is making a crucial life decision to place their child into state care by signing a voluntary care agreement (whatever the duration), most professional participants in the study felt that parents ought to have either independent legal advice or access to an advocate. In our national survey of Tusla social workers (n=243), 69% either agreed or strongly agreed with the statement: "when I am discussing voluntary care with a parent I always recommend that they seek independent legal advice before they sign". However, when asked whether these social workers believed that parents actually accessed such independent advice before they signed the voluntary agreement, 78% felt that parents did not. In the qualitative interviews, LAB solicitors confirmed that it was rare for them to be approached for advice on voluntary agreements by parents. If they were approached, it was usually about the transition of a voluntary care agreement to a care order. This is in contrast to care order applications where most parents benefit from independent advice, and courts are slow to proceed with making a decision until parents secure advice and representation. It is possible that some parents may benefit more from access to an advocate, but there is a clear need to invest resources into both systems.

Private Family Arrangements

An unexpected finding of this study examined what participants called "private family arrangements". In these informal kinship care arrangements which are setup and facilitated by the Child and Family

[13] See O'Mahony, C., Brennan, R. and Burns, K. (in press) 'Informed consent and parental rights in voluntary care agreements'. *Child and Family Law Quarterly*, Volume 4.

Agency, the child is 'placed' with kinship carers, but the child is not in the *formal* care of the state under either Sections 4, 13, 17 or 18 of the Child Care Act 1991. There is no data on the frequency of these arrangements in Tusla's national data sets, but participants in most of the counties in this study indicated that there was a growth in these arrangements instead of entering into a voluntary care agreement or applying for a care order. At a minimum, there is a lack of a legal framework for kinship carers (mostly grandparents) providing informal care through a private family placement. There is no payment to support the care of the child (although carers can apply for a Guardian's Payment[14] from Social Welfare which is significantly less than the formal fostering payment); the carers have no decision making-power in respect of the children; and there is no oversight or care plan reviews for children placed with relatives in "private family arrangements".

Such issues were ventilated in the PG v. Child and Family Agency (High Court, 2018), where a grandparent who was caring for her grandchildren was successful in her application seeking an order compelling the Child and Family Agency to apply to the District Court for care orders in respect of the children to regularise their care. The case was closed to the Child and Family Agency and they were refusing to reopen the case despite the concerns expressed by the grandparent.[15] The judgment by Meenan J, who granted the order sought, highlighted the precarious nature of such arrangements when they are not working well. A dedicated study is required to examine the strengths and weaknesses of such care arrangements.

Conclusions and Recommendations

While voluntary care agreements have an important role to play in the Irish child protection system, compared to other jurisdictions, the law does not provide sufficient directions or safeguards. The findings of this study suggest that Ireland's model may not be compliant with international law on parental and children's rights. For example, more robust safeguards are required to address the length of such arrangements, informed parental consent, and to introduce time limits and independent reviews. A further finding was that study participants felt that there are differences in resources available to children in voluntary care as opposed to children subject to a formal care order (where a child's care plan may be under the close scrutiny of the court). Such a disparity in the allocation of resources is further accentuated for children 'placed' in 'private family arrangements' who are not in state care and have less access to resources (for example, the young person would have no right to access aftercare).[16]

Key reforms to the Child Care Act 1991, policies and professional practices, should consider:

1. A maximum of 3 months duration (renewable once only) for a voluntary care arrangement where parents have not received legal advice, and 12 months (renewable more than once) where such advice is provided.
2. The provision of sufficient resourcing for an advocate service and/or legal advice for parents through the Legal Aid Board.
3. A formal review 2-4 weeks prior to the ending of a voluntary care agreement;
4. A formal review process with an independent chair should be established for child in state care on voluntary care agreements;
5. Children in state care on a voluntary care agreement should have access to an

[14] https://www.gov.ie/en/service/709bab-guardians-payment/

[15] *PG v Child and Family Agency* [2018] IEHC 812, available at: https://www.bailii.org/cgi-bin/format.cgi?doc=/ie/cases/IEHC/2018/H812.html&query=(IEHC)+AND+(812)

[16] Child Care (Amendment Act) 2015.

advocate or a guardian *ad litem* when a review is underway;

6. Cancellation of voluntary care agreements by parents should be subject to a statutory 72-hour notice period, which Tusla may waive if it is in the best interests of the child to do so;
7. The Child Care Act 1991 should stipulate that parental consent to voluntary care agreements must be supplemented by the assent of the child where the child is 12 years or older;
8. The Child and Family Agency's voluntary care policy should be updated to reflect the findings of this study; specifically, the adoption of a model to support social work teams to assess parents' informed consent. Where there is any doubt regarding a parent's ability to provide informed consent, an application should be brought to the District Court for a care order.[17]

Further information and an in-depth analysis of the findings of this study (free to access video, webinar and podcast), are now available through the website for this study.[18]

Acknowledgements

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[17] For further information, see: O'Mahony, C. (2020) *Annual Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas* (Chapter 3) https://www.gov.ie/en/collection/51fc67-special-rapporteur-on-child-protection-reports/

[18] https://www.ucc.ie/en/appsoc/resconf/res/voluntarycareinirelandstudy2018-2020/

3. TUSLA's investigations into Allegations of Abuse; A brief overview.

Aisling Mulligan B.L.*

Introduction

By now many of you will have come across an investigation into an allegation of abuse undertaken by the Child and Family Agency (the Agency). These investigations run separate to and apart from child protection investigations under the Childcare Act 1991. Unfortunately, most people seem to seek advice after initial engagements with the Agency so your client is likely to arrive with a letter which confirms an investigation took place and, on foot of same, the allegation has been deemed **founded**. In more recent times, these findings have been raised by the Agency in childcare proceedings. It is therefore important, irrespective of whether you are providing advice or grappling with a finding in care proceedings, to know where the right to undertake such an investigation comes from and how to deal with it.

Origins of the investigative process

In *MQ v Eastern Heath Board*,[19]the High Court found that the Health Board (as it then was) had a proactive duty to protect children. The Court found that the duty to protect extended beyond known risks but rather included a duty to investigate allegations to prevent prospective harm. The Court, in making this finding, relied on section 3 of the Childcare Act 1991, which sets out the core functions of the Agency, that is to say, to take such steps as it considers requisite to identify children who are not receiving adequate care and protection[20]. In particular the court determined:

[19] [1998] 4 I.R. 85.

[20] Section 3(2) of the Childcare Act 1991

> *The specific statutory obligation placed on every health board "to promote the welfare of children in its area who are not receiving adequate care and protection" is, inter alia, directed towards identifying the categories of children to which a health board owes a duty of care under the Act. That duty is not owed to all children in its area but only to those who are not receiving adequate care and protection. The categories thus identified include children who by reason of a potential situation in the future are liable to require protection at that time from a prospective danger the nature of which is presently known to or reasonably suspected by a health board. It is present knowledge or reasonable suspicion of potential harm which is the essence of the health board's obligation to children*[21].

The Court also found that the Health Board had a duty to the alleged abuser. This included the right to be informed of the allegations, the right to raise a defence and a duty of overall fairness to the application in disclosing its findings to third parties. This dicta was endorsed by the 2010 judgement of Hedigan J. *in M.I. v. the Health Service Executive*[22]. In considering the relevant principles for investigations, the learned judge summarised the relevant principles as follows:-

As applicable here it seems to me that those principles are as follows:-

> *(1) The respondent herein has a duty to investigate in the circumstances … There may be a risk and that risk must be assessed.*
>
> *(2) The respondent must afford the applicant fair procedures.*
>
> *(3) If the respondent comes to the conclusion that there is a risk, it is under a duty to communicate that to an appropriate party.*
>
> *(4) The respondent's role in conducting this investigation is not an administration of justice. It does not make any determination of guilt or innocence. Its role is quite distinct from that of the Director of Public Prosecutions. Its role is the protection of vulnerable children. The Director of Public Prosecution's role is the detection and conviction of criminals, including child abusers."*

Since *MQ,* there have been successive attempts to create a policy to elucidate the parameters of these investigations. The most up to date of which is *Policy and Procedure for Responding to Allegations of Abuse and Neglect (2014)*[23]. This policy forms the process that any alleged accused is likely to undergo once an accusation has been made. Many investigations have resulted in Judicial Review proceedings with adherence to policy, credibility assessments and weight of witness testimony among the issues that continue to trouble the Courts. Below is a short snapshot of the caselaw that may be relevant when giving advice:

- ***P. (DP) v Board of Management of A Secondary School and Health Services Executive*** **[2010] IEHC 189**

The applicant was a secondary school teacher against whom a written complaint was made that a former pupil was been sexually abused by him. The issue arose as to whether the respondents had properly

[21] At para 70 ibid
[22] [2010] IEHC 159
[23] This document has yet to be published publicly.

carried out an independent inquiry and whether fair procedures had been accorded to him. The Applicant had been forced to attend meetings without knowledge of the allegations and the Court considered this to be in breach of fair procedures. This should include a complete and comprehensive understanding of the allegations being made. The Court also determined that, given the age of the alleged victim, he was old enough to be cross examined. These two principles are very important when advising about procedural rights.

II ***W.M. v Child and Family Agency*** **[2017] IEHC 587**

The applicant sought an order of *certiorari* for quashing the determinations made by the respondent to the effect that the applicant was at risk of causing harm to children and vulnerable adults. The applicant also sought an order for restriction on the publication of the identity of the applicant. The applicant alleged that the respondent had failed to have due regard to the applicant's right to prior notice of allegations made against him, the disclosure of all relevant material, an oral hearing and acquaintance with the procedures that were applied to him.

Mr. Justice McDermott granted an order of *certiorari* to the applicant. The Court, however, held that the respondent was not precluded from carrying out a fresh investigation against the applicant. The Court found that the procedure that the respondent had adopted for investigating the complaints was fundamentally flawed as the true nature of the allegations against the applicant had not been explained to him. The Court held that there was breach of the applicant's right of fair procedures as the respondent erroneously made findings in relation to the vulnerable adults because it was outside its role and ambit.

III ***EE v Child and Family Agency*** **[2016] IEHC 777**

These review proceedings had been initiated by the applicant against the respondent for its refusal to permit the applicant to cross-examine the complainant. The applicant, being the biological father of the complainant, contended that the degree of allegation, namely non-contact sexual abuse made by the complainant against him, had a profound impact on his relationship with his other child.

Mr. Justice Richard Humphreys held that the applicant was entitled to cross-examine the complainant. The Court directed the respondent to set aside the First Instance Examination. The Court varied the terms of the stay previously granted, thereby stopping the respondent from further investigating the present case until the right to cross-examine had been afforded to the applicant. The Court noted that the right to cross-examine was a constitutional right, and where the reputation and life of the applicant was at stake, it became mandatory to afford him that right, notwithstanding the intent of the respondent to bring justice to the complainant.

IV ***TR v child & Family Agency [2017] IEHC 595***

The applicant sought an order to prohibit further investigation of allegations of sexual abuse made by the complainant against the respondent. The applicant argued that since the outcome of the investigation carried out by the respondent would have a devastating effect on the family life of the applicant, the respondent must apply fair procedures while conducting that investigation.

Mr. Justice McDermott refused to grant the desired relief to the applicant. The Court held that there were enough safeguards mentioned under the 2014 Procedure and the Children Act 1997 which ensured that the persons accused of child abuse were afforded fair procedures in conformity with the Constitution. The Court appears to have endorsed the 2014 Procedure as being compliant with the Agency’s obligations for

fair procedures. This is an important decision, as breaches of the policy are likely to result in the need for Judicial Review.

Conclusion

Investigations into allegations of abuse or neglect must be compliant with the 2014 Procedure in order for the investigation to be compliant with fair procedures. Issues of credibility assessments and reliability of evidence are also likely to feature in any assessment as to whether an investigation is compliant with fair procedures. Finally, the 2014 Procedure places no emphasis on how risk is to be assessed if an allegation is deemed founded at the end of the investigative process. Therefore, as it is not clear whether an assessment of risk is a matter of fact or law one should presume that the Agency's discretion for assessment of risk is not unlimited. While not a complete list of all the issues that might arise, the above examples should give you a useful insight into the Superior Courts views on these investigations and inform advice for clients.

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4. Outline observations - recent childcare cases

Elaine Houlihan B.L.

The need to contest Emergency Care Orders/Interim Care Orders at the earliest opportunity

In some instances the writer's experience has been that parents can be too willing to consent to the making of an Emergency Care Order and possibly the first Interim Care Order (ICO), especially when faced with the armoury of sudden State involvement in their private and family lives and also perhaps due to the difficulties they may be experiencing trying to cope with and manage their child's behaviour which can also be influenced by their own socio-economic circumstances.

However, with the passage of time, the longer children remain in care, the more difficult it can become to contest the making of a Care Order. In the writer's view it is necessary that parents are made aware from the outset the difficulties that can arise when trying to contest a Care Order and that such Orders if they are to be contested should be done so at the earliest possible opportunity.

In one case children from a poorer economic background were placed into more comfortable surroundings and a question arose as to whether this of itself could give rise to criticism on their part of their parents' care. Sometimes this perception might perhaps be subconsciously reinforced for children by their foster carers' surprise at their inability for example, to use a knife and fork, or dress themselves, or their parents' inability to provide an orderly and well managed home, none of which examples of themselves are evidence of neglect.[24] This can lead to reluctance on the part of the child to desire a return home, a factor which will be given weight by a childcare court, appropriate to the age and level of maturity of the child.

[24] The Children First: National Guidelines for the Protection and Welfare of Children indicate that neglect occurs when a child does not receive adequate care or supervision to the extent that the child is harmed physically or developmentally. It is generally defined in terms of an omission of care, where a child's health, development or welfare is impaired by being deprived of food, clothing, warmth, hygiene, medical care, intellectual stimulation or supervision and safety. Emotional neglect may also lead to the child having attachment difficulties.

Delays in care proceedings and in particular delays that are inherent in the court process can also lead to frustration on the part of parents,[25] which can impact on their working relationship with social workers and exacerbate the difficulty of contesting childcare proceedings.

In another case the CFA indicated that at the outset that the case would take a single day and involve four CFA witnesses. The case ended up being adjourned on a number of occasions and eventually took in excess of twenty days over two years to complete. The fact that the list of witnesses was continuously and fluidly supplemented by the CFA meant that a full five consecutive weeks were not specially fixed at the outset of the case for hearing. If this had occurred, it is reasonable to assume that the case may have finished within at least a year on the assumption that such dates were specially assigned by the President of the District Court. It is submitted that tighter case management of childcare cases could reduce the delay considerably.

Parents faced with delays in the fixing of a date for hearing of an application for a Care Order can find themselves sometimes met with the report of an attachment expert which indicates that their young child has now developed an attachment to the foster carers. Notwithstanding the caselaw, [26] the reality is that it can sometimes be an uphill and struggle for parents, particularly when viewed through the lens of the artificial environment of supervised or 'supported' access, to demonstrate 'attachment' or their natural bonds with their children.

There is a need for all involved, but most especially children, to have childcare proceedings resolved with reasonable expedition, particularly in light of the rights engaged by Articles 6 and 8 of the European Convention on Human Rights, given the difficulties poised by a fragmented and disjointed approach.

Difficulties where a criminal investigation is taking place during the currency of care proceedings

A number of difficulties can arise here. In a recent case, the District Judge recommended at the outset that An Garda Síochána (AGS) be represented at all stages of the proceedings and this led to a situation where the Garda leading the criminal investigation attended almost all of the ICO hearings and confusion reigned amongst lawyers as to whether AGS were a party or a witness to the proceedings. This raises the issue as to whether there is a legal basis for AGS to attend childcare hearings when they are not a party to the proceedings.

Quite apart from the unintended but subtle pressure which the presence of the Gardaí can put on Respondent parents in a childcare case, the presence of AGS at childcare hearings, or even the background of a criminal investigation can lead to constraints in contesting the CFA application.

At the hearing of the section 18 application by the CFA for a Care Order in the aforesaid case, the District Judge acceded to an application on behalf of the Respondents for members of the criminal investigation team of AGS (other than witnesses which the CFA intended calling) to remove themselves from the courtroom during the hearing. AGS indicated their intention to apply for the Digital Audio Recording if the Respondents gave evidence.

In probably most instances, criminal lawyers will advise clients accused of criminal charges to remain silent to avoid self-

[25] See for example, https://www.childlawproject.ie/publications/judge-frustrated-at-assessment-delays/

[26] *N v Health Service Executive [2006] IESC 60*

incrimination.[27] For the most part, childcare lawyers in this jurisdiction, where there is a background of a live criminal investigation, will advise similarly. In the United Kingdom, section 98 of the Children Act 1989 provides that "no person" is excused from giving evidence or answering questions on any matter put to him in childcare proceedings on the ground that doing so might incriminate him, his spouse or civil partner of an offence. Such statement or admission made in the proceedings is not admissible in evidence against the maker of the statement (his spouse/civil partner) in criminal proceedings, except in the case of a charge of perjury. However, it seems that this self-incrimination privilege in care proceedings in the United Kingdom has been eroded by subsequent legislative developments which permit the use for example of prior inconsistent statements as evidence in criminal proceedings, such that the protection afforded by s.98 has been described as "*largely illusory*."[28]

Perhaps therefore it is submitted, that the situation in this jurisdiction, where parents are not compellable in child care proceedings and can refuse to answer questions which incriminate them, is a preferable approach. However, this then raises the issue as to whether this advances the provisions of either Article 42A.4.1 of the Constitution or s.24 of the Childcare Act 1991 where the best interests or welfare of the child is paramount.

In ***EO'C v Tusla & Ors***[29] a secondary student facing criminal proceedings in the District Court refused to engage with a Tusla assessment into an allegation of inappropriate behaviour towards a female student, on the basis that a parallel process could possibly prejudice his defence to the criminal proceedings. This approach is increasingly advocated by criminal lawyers to parents and the question arises as to whether and if so, how a parent is to respond to allegations put to them by social workers in such circumstances.

Applications by AGS for access to social work reports completed in care proceedings are becoming commonplace and can inform subsequent questioning of accused parents by interviewing Gardaí.

In practice, such applications are occurring after the s.18 Care Order has been granted, but is there anything to preclude a court from granting access to such material at the ICO stage? In ***M (Children)***[30] the UK Court of Appeal upheld the trial judge's decision to disclose to police the parents' initial statement and position statement following an ICO hearing. The leading judgment in ***Re C (a minor) (care proceedings) (disclosure)***[31] was followed where Thomas LJ enunciated ten factors to be considered in determining an application for disclosure to the police.

There is an obvious tension between the very nature of childcare proceedings and criminal proceedings, not just in terms of the burden of proof which applies but where the focus of the court lies.

The failure of parents to engage with the CFA, to answer questions put to them by either a social worker, a Guardian ad Litem or a court appointed expert is generally seen by a court in child care proceedings as an unwillingness on the part of parents to have 'insight' into the impact of their alleged

[27] Albeit advices will be given in relation to s.19A of the Criminal Justice Act 1984 as inserted by s.30 of the Criminal Justice Act 2007 and indeed other criminal provisions regarding inferences which can be drawn from the failure of an accused to mention certain facts
[28] Roderick L Denyer QC, 'Section 98(2) of the Children Act 1989: A somewhat illusory shield' [2007] Fam Law 151
[29] EO'C v Tusla, CFA, Paul Harrison and Liz Oakes, [2019] IEHC 843
[30] M (Children) [2019] EWCA Civ 1364
[31] Re C (a minor) (care proceedings) (disclosure) [1997] Fam 76

behaviours on their children, yet it can be most difficult for parents to engage when their criminal lawyers are advising them of the implications of not exercising their right to silence.

In the UK there is a Protocol and Good Practice Model for the disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings.[32] There is an urgent need for similar guidance to be considered in this jurisdiction.

It is this writer's view that the interplay between care proceedings and criminal proceedings needs to be more fully considered on this side of the Irish Sea.

The importance of discovery in challenging Care Orders

In a recent case on Circuit, disclosure of social work case notes revealed a detailed note from a social worker illustrating the leading and suggestive questioning of a young child. No factual finding was made against the Respondent parent arising from the resulting 'disclosure' from the child, having regard to the manner in which that 'disclosure' was elicited. Interestingly, the District Court Judge in that case raised a query around the use by the CFA of the word 'disclosure' in relation to children. The word 'disclosure' is defined in the Collins Dictionary as *"the act of giving people new or secret information*." Since the word connotes that there is truth in the information, perhaps it is submitted that it would be fairer to use the word 'allegation' as opposed to "disclosure".

5. Compelling reasons to rebut the Constitutional presumption a child's best interest lies within the family

Elizabeth Mullins B.L.

A child's best interest lying within the family is so self-evident to practitioners that very little time is sometimes spent emphasizing it to the Court in child-care hearings. However, I think it is important to highlight it; the fact is that every time a care order is granted it is necessary for the Court make a finding that rebuts a Constitutional presumption.

This well-established and Constitutional presumption that a child's best interest lies within the family pertains in child-care cases. O'Malley J. indicated in ***KA v HSE 2012***[33] that there was no contention in that case that the principle did not apply to the Child Care Act.

It is also important to note that this constitutional presumption relates to the children of unmarried parents as well. The case ***PH and LHT (a minor suing through her mother and next friend PH) v CFA***[34] 2016 specifically deals with this aspect of the constitutional presumption relating to the children of unmarried parents.

Humphreys J discusses the impact of Article 42A of the Constitution on this presumption where he states

> *"Article 42A of the Constitution, with its emphasis on the rights of the child and the paramountcy of best interests, does not take away from (indeed it enhances) the right of the child to the society of both its parents, and the presumption that the best interests of the child lie in the child's enjoying such society. To that extent N v*

[32] https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/protocol-good-practice-model-2013.pdf

[33] KA v HSE 2012 1 IR 794

[34] PH and LHT (a minor suing through her mother and next friend PH) v CFA 2016 IEHC 106

HSE[35], a case that dealt with married parents, remains the position post – Article 42A."

Humphreys J goes on to say

"As concerns unmarried parents, the striking emphasis on non-discrimination introduced by the 31st Amendment (Article 42A.1 applies to 'all' children and Article 42A.2 acknowledges the rights of children in the context of proportionate state action having regard to parental failures ' regardless of their marriage status') supports the position such a presumption should apply in favour of the child's best interests lying with the society of its parents, regardless of their marital status. Such a presumption may be displaced where there are compelling reasons that the welfare of the child cannot possibly be upheld in the society of its parents, or where proportionate state action becomes necessary in the exceptional case of parental failure of sufficient gravity as to trigger Article 42A.2."

Test to rebut the presumption

In **re J.H. an infant[36] 1985** sets out the test which continues to be applied to cases involving the welfare of children, Finlay C.J. stated as follows:

' …s 3 of the Act of 1964 must be construed as involving a constitutional presumption that the welfare of the child, which is defined in section 2 of the Act in terms identical to those contained in Article 42, section 1 is to be found within the family, unless the court is satisfied on the evidence that there are compelling reasons why this cannot be achieved, or unless the Court is satisfied that the evidence establishes an exceptional case where the parents have failed to provide education for the child and to continue to fail to provide education for the child for moral or physical reasons'.

In the same case McCarthy J. stated *the key issue is whether the court is satisfied on the evidence that there are compelling reasons why the welfare of the child, as defined, cannot be achieved within the family, in other words that there are compelling reasons why the child should be in the custody other than that of her parents ….. the compelling reason or reasons must, in my view be clearly established.*

The Constitutional presumption is clear that a child's best interest lies in the society of their parents unless there are compelling reasons that their welfare cannot possibly be upheld in the society of their parents, or where proportionate State action becomes necessary in the exceptional case of parental failure of sufficient gravity as to trigger Article 42A.2.

Compelling reasons and attachment to foster parents

In the baby Ann case, **N v HSE[37]** Hardiman J sets out what constitutes a compelling reason:-

"The phrase ' compelling reasons' why the child's welfare cannot be secured in the family, plainly connotes that, to meet the test, there must be found coercive reasons to believe that the proper nurturing of the child in the natural family is not possible. The phrase therefore has a natural and inescapable significance for the type of evidence required and the standard it must meet."

In the Baby Ann case there was an argument before the Court that the impact on Ann of leaving her adoptive parents with whom she lived with and whom she considered her parents to return to her

[35] N v HSE 2006 4 IR 374
[36] In re J.H. an infant 1985 ILRM 302
[37] N v Health Service Executive 2006 4 IR 374 at 513

natural parents was so compelling that it was a compelling reason within the **In re JH** test.

Hardiman J. specifically rejects counsel's argument in that case when counsel stated that 'it is the nature of what may happen that must be 'compelling' and not the evidence or the burden of proof. The test is met if what may happen is so compelling as to interfere with the welfare of the child' (Hardiman J's emphasis)

Hardiman J. states; *In my view, there is no support whatever for this construction of the phrase. The word 'compelling' is an adjective and the noun it qualifies is 'reason'. Unless the basic norms of the English language are to be ignored for the purposes of making an argument, it follows that it is the reasons which must be compelling. The reasons in question are reasons why the welfare of the child cannot be secured or achieved in the natural family…'*

Further on he states of the relevant passage of [In re JH] quoted above

> *"If read as I have found it should be, it requires the Court to be satisfied, on evidence, that there are compelling reasons why the welfare of the child 'cannot' be achieved in the constitutional family."*

Mr. Justice Geoghegan in the ***N v HSE*** addresses the child's bonding with the adoptive parents and states:

> *"It cannot be the correct understanding of the law that the presumption that the child's welfare is better served with the natural parents in a marriage can be rebutted by the effect of procedural delays and still less by a refusal, whether excusable or not to cooperate in a hand over of the child to the natural parents."*

Kelly in 'The Irish Constitution' 5th ed.[38] states with reference to **In re JH an infant** *By implication, an appreciable but uncertain risk of long term psychological harm to the child would not appear to be a 'compelling reason' for rebutting the presumption that the child's welfare is best served within the marital family.*

There is a constant argument made in child-care cases that because the child's welfare is paramount, the child's attachment to their foster parents should be considered when determining their best interest and welfare. The implication being that returning a child to their natural parents when the child has an attachment to their foster parents puts the natural parent's rights ahead of the child's rights which go against the precept that the child's welfare is paramount.

In **N v HSE**, both Hardiman and Geoghegan JJ., with both of whom Fennelly J agreed, strongly defended the merits of the constitutional presumption with Hardiman J[39] saying;

> *"It would be quite untrue to say that the Constitution puts the rights of the parents first and those of the children second. It fully acknowledges the 'natural and imprescriptible rights' and the human dignity, of children, but equally recognizes the inescapable fact that a young child cannot exercise his or own rights. The Constitution does not prefer parents to children.* ***The preference the Constitution gives is this: it prefers parents to third parties, official or private, priest or social worker, as the enablers and guardians of the child's rights.*** *This preference has its limitations: parents cannot, for example, ignore the responsibility of educating their child. More fundamentally, the Constitution provides for the wholly exceptional situation where, for physical or moral reasons, parents fail in their duty towards their child. Then, indeed, the State must intervene and endeavour to supply the place of the parents,*

[38] Kelly in 'The Irish Constitution' 5th ed. at page 2293

[39] N v HSE Hardiman J. at paragraph 103 page 504

always with due regard to the rights of the child." (my emphasis).

While the CFA might not specifically rely on the impact of a child moving from their foster family to return to live with their parent as a ground for granting the care order sought, they can and do put forward evidence setting out the attachment a child has with their foster parents and the potential impact on a child of leaving their foster family as evidence to be taken into account regarding the child's welfare.

It is very clear ***from In re JH*** an infant and ***N v HSE*** that a potential impact on a child of moving from a foster family to reunite with a parent is not a compelling reason such that it rebuts the presumption that it is in child's best welfare that they should be with their parent or parents. It is my belief that any such asserted likely reaction should not and must not be considered by Courts. It is the duty of Courts to set aside any such submissions or arguments from the agency and protect and enforce the child's Constitutional rights. I think it is worthwhile in this context to refer to ***Western Health Board v M*** [40] where the Court makes clear that it was ultimately for the Courts, not the Health Board (now the CFA) to protect and enforce these Constitutional rights in respect of children who are in care.

6. Fair Procedures and the Statutory Duty of the Child & Family Agency

Mimi Linehan B.L.

Introduction

The purpose of this paper is threefold. The first being to set out the nature and extent of the statutory duty of the Child and Family Agency pursuant to s.3 of the Child Care Act of 1991, in investigating allegations of abuse and neglect. Secondly, to examine the entitlement of the alleged wrongdoer to fair procedures in responding to such allegations of child abuse, and finally, to consider when decisions are required at various stages of assessment concerning child protection issues.

Prior to setting out the writer's findings and observations, it is useful to firstly set out the relevant law and to consider the leading judgment in this area.

The Law

Section 3 of the Child Care Act 1991 [hereinafter the 1991 Act] states "*that it shall be a function of every health board to promote the welfare of children in its area who are not receiving adequate care and protections*".

The statutory function under section 3 initially was the responsibility of each regional health board but now resides with the Child and Family Agency, following a series of legislative amendments. An established line of case law has given a broad interpretation to the statutory function to promote the welfare of children who are not receiving care and protection.

Leading Judgment

The leading judgment is that of the High Court, Barr J, in *M.Q. v Gleeson*.[41] In that judgment Barr J. identified the procedures to be followed in ensuring compliance with natural and constitutional justice. The Applicant was a participant in a course that lead to a qualification that would allow him to work in the childcare area or proceed to a further qualification in this field. He had come to the attention of the Eastern Health Board on number of previous occasions and it concluded that he was not a suitable

[40] Western Health Board v M (21st December 2001) SC

[41] *M. Q. v. Gleeson* [1998] 4 I.R. 85

person to engage in childcare work. The Eastern Health Board received a, number of, complaints concerning the applicant over a, number of, years including allegations of physical and sexual abuse against his partner and children. The applicant was never informed of those complaints. Mr. Justice Barr held that the statutory duty underpinning s.3 of the 1991 Act is not confined to protecting specifically identified or identifiable children who are already at risk of abuse, but the duty extends to those that are not yet identifiable and who may be at risk in the future. The Court noted the requirement of fair procedures.

> "*Subject to the proper exercise of its functions in the matter of complaints about child abuse and its duty to afford the application the benefit of fair procedures. I have no doubt that in the instant case, on the premise that it had taken appropriate steps to inform itself , the board would have been entitled to form an opinion that the applicant was unfit for child care work and would have had an obligation under s3(1) of the Act of 1991 to communicate its opinion to the vocational college with a view to having the applicant removed from the social studies course on which he was engaged* "[42]

The Court noted the inherent risk in a false complaint of child abuse and that complaints unfounded have the potential for great injustice and harm. To negate against this risk the judgment outlines the procedures to be followed, which have become known as the "Barr principles". The Court stated as follows:

> "*In the ordinary course in serious cases the complaint should be put to the alleged abuser in course of the investigation and he/she should be given an opportunity of responding to it. However, an exception in that regard may arise where the board official concerned has a reasonable concern that to do so might put the child in question in further jeopardy as, for example, where the abused child is the complainant. An obligation to offer an alleged abuser an opportunity to answer complaints made against him/her would arise in circumstances where the board contemplates making active use of the particular information against the interest of the alleged wrongdoer – such as publication to a third party as in the present case or embarking on proceedings to have the child or children taken into care* " [43]

The Court noted that the board had a duty to take all reasonable steps to interview the applicant, to furnish him before interview with notice of the allegations against him in short form, to give him a reasonable opportunity to make his defence, carry out such further investigations as might appear appropriate in light of the information furnished by him in response to the allegation and no opinion as to the weight to be attached to the allegation should be formed until the investigation has occurred and the information derived from the investigation was carefully assessed.

The Judgment highlighted the duty owed to the alleged abuser and emphasised the two cardinal rules of natural justice. The first being that a person charged with wrongdoing should be informed of what is being alleged against him and secondly, he should be given a reasonable opportunity to make his defence.

Not necessary to identify specific children at risk

[42] *M.Q. v Gleeson*, [1998] 4 I.R. 85

[43] *M.Q. v Gleeson* [1998] 4 I.R. 85 at 22

In the case of *P.(D.P.) v. Board of Management of a Secondary School*[44], the judgment refers to a litany of failures on the part of the Health Board to adhere to the requirements of fair procedures in its conduct of its investigation into the allegations made against the applicant. The relevant health board erred in permitting the complainant's counsellor to act as the validator of the allegation of abuse and in not affording the applicant an opportunity to confront his now adult accuser in cross examination**.** The court noted that without such an opportunity the investigation could not progress in any meaningful way respecting the norms of natural justice. Justice O' Neill elaborated on the principle that it is not necessary to identify specific children at risk.

> "*It would be contrary to the obvious purpose and objective of s.3(1) of the Act of 1991 to confine the power given in s.3(1) of the Act of 1991 to those situations in which the person suspected had already an established access to a child or children"*[45]

Criminal investigation and statutory duty under s. 3(1) of 1991 Act

The conclusion of a criminal investigation into allegations of sexual abuse does not estopp the Health Service Executive from carrying out its statutory duty under s.3(1) of 1991 Act. Mr Justice Hedigan in *I v the Health Service Executive*[46] refused an application for relief in circumstances where the applicant sought an injunction restraining the executive from proceeding with the investigation of an allegation of child sexual abuse, pending the conclusion of criminal proceedings against the applicant. Instead of engaging with the investigation process in line with the principles set out in *M.Q. v Gleeson*, the applicant issued judicial review proceedings. The judgment concluded that the Health Service Executive ought to be able to conduct these vital investigations without having to constantly look over their shoulder for possible intervention by the courts.

Findings of founded or unfounded

Humphries J, in a recent judgment in *CD v The Child and Family Agency*[47] concluded that the statutory duty to promote the welfare of children in need of protection and the duty to investigate and make findings of child abuse is perhaps an area that requires explicit statutory underpinning. He further noted that the same social worker being in effect investigator, interviewer, liaison point for the complainant, prosecutor, judge and jury right from the earliest stages and goes on to make a final decision, albeit under supervision, does not appear to comply with fair procedures.

On the facts of the case before him, the learned Judge concluded that a finding of whether a complaint of child abuse or neglect is founded or unfounded is not *ultra vires* and that s.3 of the 1991 Act, did provide a sufficient statutory basis for such findings.

Cross examination of a now adult complainant

The principle of cross examination has received judicial attention. In *P.(D.P.) v. Board of Management of a Secondary School*, the court concluded that the health board had not afforded the applicant an opportunity to confront his now adult accuser in cross examination which prevented the investigation progressing in any meaningful way respecting the norms of natural justice.

[44] *P. (D.P.) v. Board of Management of a Secondary School* [2010] IEHC 189
[45] *P.(D.P.) v. Board of Management of a Secondary School* [2010] IEH C 189 at 15
[46] *I. v. The Health Service Executive* [2010] IEHC 159
[47] *C.D. v. The Child and Family Agency* [2020] IEHC 452

The matter of cross examination of an adult complainant's was reaffirmed by Mr Justice Humphries in *E.E. v The Child and Family Agency*[48]. The learned Judge confirmed that the issue had already been determined by O' Neill J. in *P.(D.P.)*. The learned Judge stated that it was directly on point and should be followed in accordance with the normal rule of *stare decisis* and there was no good reason to depart from it and there was substantial reason to follow it.

In both cases, the right to cross examination of the complainant is limited to retrospective allegations of abuse whereby the child that made the complaint is now an adult.

Commencement of a fresh investigation

As concluded in *J v The Child and Family Agency*[49], s.3 of the 1991 Act has always been given a wide interpretation and the protection of children is the paramount consideration. Simons J, held that given the breadth of the discretion afforded to the Child and Family Agency under section 3 that it was matter of law that the agency can commence a fresh investigation of a complaint and it was not estopped in circumstances where initially it was decided to close a file.

A fresh investigation may be warranted in circumstances where new information comes to light or where a process has already been procedurally flawed.

Policy and procedure for investigating complaints of child abuse and neglect

In September 2014, the Child and Family Agency developed a policy document for investigating allegations of child abuse. A number, of, Judges have considered the policy regarding fair procedures.

O' Malley J,[50] concluded that the Child and Family Agency's policy document "*Policy & Procedures for responding to allegations of Child Abuse and Neglect 2014",* as an investigation template appeared to be a model of proper procedure.

The 2014 procedure was examined in detail in *T.R. v The Child and Family Agency*[51]*.* Mac Dermot J. noted that the 2014 procedure reflects the principles set out in *M.Q*. The Court concluded that the first stage of the investigation was a preliminary stage of a fact-finding exercise and at that stage the suspected abuser had no right to participate in the interviewing of a complainant. The preliminary stage could lead to the discontinuance of the process or a decision to proceed to the second stage. In this case, the second stage of the assessment had not been completed. Mac Dermot J. further concluded that any findings must be based on the balance of probabilities.

Mr Justice Humphries in *E.E. v The Child and Family Agency*[52], was critical of the appeal procedure under the 2014 policy.

> *"What is unacceptable about this submission is that it is the agency itself that has created the appeal mechanism. A public body must act in good faith; and must act at all times to vindicate the human, constitutional and ECHR rights of person affected by its action. It simply not open to a public body to create an appeal mechanism, and then rely on any ineffectiveness of that mechanism (e.g. 'merely a review') as a basis for contenting that*

[48] *E.E. v. The Child and Family* Agency [2016] IEHC 777
[49] *J. v. The Child and Family Agency* [2020] IEHC 464
[50] J.G. v The Child and Family Agency [2015] IEHC 172
[51] *T.R v. The Child and Family Agency* [2017] IEHC 59
[52] *E.E. v. The Child and Family Agency* [2016] IEHC 777

> *the first instance decision cannot now be challenged"*[53]

In *F.A. v Child and Family Agency*[54], MacGrath J. noted that the appeal panel in the appeal stage of the 2014 policy took an unnecessarily restrictive view of its terms of reference. He further concluded that the appeal panel acted unlawfully and contrary to its own policy and procedures in failing to interview the complainant and ascertaining her response to the alleged abuser denials of the allegations. In doing so, it failed to comply with its own procedures and thus exceeded its powers. The learned Judge concluded that this was one, but not the only means, by which the allegation might have been stress tested.

The Child and Family Agency has since revised its 2014 policy. However, the introduction of the revised version *"The Child Abuse Substantiation Procedure (CASP)* has been delayed until 2021. This revised policy aims to address inconsistency in practices across the Agency and incorporate new legal judgments in what the Agency regard as a complex area of law and practice.

Child Protection Conferences

The level of fair procedures applicable to parents in Child Protection Conferences in which significant decisions are taken concerning their children was considered by O' Malley J., in *J.G. v. Child and Family Agency*[55]. The Court noted that a meeting, the purpose of which is to exchange information, could rarely, if ever be a proper subject for judicial review proceedings. The learned Judge held that a meeting that could result in a child being listed on a Child Protection Notification System without a court order cannot be said to be without legal effect since it gives access to private information about the family to persons who would not otherwise be entitled to that information. O' Malley J., sated that in such circumstances it must follow that parents must be afforded proper fair procedures in relation to the holding of such conferences. The Court stated:

> *"I do not regard the letter and information leaflet given to the parents in advance of the June conference as remotely adequate in this respect. Both are generic documents with no indication given to the parents as to what factual matters are to be discussed. The furnishing of the social worker's report in advance of the November conference was a considerable improvement. However, both the extent of the disclosure and the timing of it were, I believe insufficient to vindicate the applicant's rights. The suggestion that they already had all the relevant documents is surprising in a situation where a fresh application for court orders would have to be based on some evidence other than that which had already been rejected. The offer to meet with the social worker shortly before the conference was scheduled to begin was also not adequate in terms of allowing the applicants to prepare themselves."*[56]

The judgment concluded that the "*Policy & procedures for responding to allegations of child abuse & neglect published in September 2014"* document appeared to be a model of proper procedure and an appropriate template. O' Malley J. held that he did not believe that a parent is automatically entitled to full disclosure of the

[53] *E.E. v Child and Family Agency* [2016] IEHC 777 at para 99
[54] *F.A. v. Child and Family Agency* [2018] IEHC 806
[55] *J.G. v. Child and Family Agency* [2015] IEHC 172
[56] *J.G. v Child and Family Agency* [2015] IEHC 172 at para. 104 and 105

entire file of material held by the Child and Family Agency but the document provides for sufficient disclosure for the parents to make their case.

In *MS A v Child and Family Agency*[57], Barrett J, did not agree with the findings of the court in *J.G.* and held that a decision made at a case conference was amenable to judicial review. The judgment also considered the principle of a parent having representation at a child protection conference and stated as follows:

> *"In general, there is no absolute legal right under Irish Law to have a legal advisor, here acting through attend at an administrative meeting. This is clear from cases as diverse as Corcoran v. Minister for Social Welfare [1991] 2 I.R. 175 and Barry v Review Group [2001] 4 I.R. 167. As there is no right to have a legal advisor attend, it follows that there is no obligation on the State, here acting through the medium of the CFA, to provide and/or pay for such legal representation. However, one has to recognise the peculiar vulnerability of parents coming to CFA Child Protection Conferences, as well as the sheer emotion (and the accompanying lack of detachment) that most parents naturally bring to discussion of private family matters with strangers, however professional or[2015 well-intentioned the latter may be. This emotional engagement is generally likely to be even more pronounced when it comes to a discussion with a parent about the welfare of her child or children. All of this suggests to this Court that in the particular context of CFA Child Protection Conferences – and this judgement does not speak to any wider reality – fairness of procedures requires that if a party wishes to bring her own solicitor, for whose services she is herself paying, to a CFA Child Protection Conference, she should be neither stopped or dissuaded from doing so."*[58]

Observations

This paper now sets out hereunder some observations by the author.

Fair Procedures

The fundamental requirements of fair procedures, which may result in adverse findings and consequences for the person, include the person being given:

(1) Adequate notice of the allegation

(2) Full details of the allegation and disclosure of the materials upon which they are based

(3) An opportunity to respond to the allegation

(4) No opinion to be attached to the allegations until the investigation has occurred.

It is only in exceptional circumstance where the child might be put at further risk can fair procedures be departed from.

The caselaw cited in this paper highlights other important fair procedure factors including:

(a) the stress testing of the allegations,

(b) restrictive appeal processes,

(c) the delegation of a statutory investigation to other professionals

(d) and the right to representation at child protection conferences.

Whilst the case law confirms the necessity to have investigations of child abuse and neglect undertaken in accordance with fair

[57] *MS A v Child and Family Agency* [2015] IEHC 679

[58] *MSA v Child and Family Agency* [2015] IEHC 679 at para 29

procedure and natural justice, it is contended that the implementation of this in practice is not always apparent.

It is settled law that a criminal investigation does not estopp the Child and Family Agency from investigating an allegation of abuse and neglect. It is submitted that in practice, this is not consistently applied across the Agency. In this regard when an allegation is referred to an Gardaí, on occasions the approach of the Child and Family Agency is to await the outcome of the criminal investigation. Whilst awaiting the outcome of the criminal investigation actions can and have been taken against the person subject to the allegation of abuse. Prior to referring the allegation of abuse to the Gardaí the credibility of the allegation is not always stress tested nor is an investigation pursuant to the 2014 procedure actioned.
The Children's First Guidelines issued under section 6 of the Children's First Act 2015 identifies the four main types of abuse sexual abuse, physical abuse, emotional abuse, and neglect. Pursuant to section 14 of the Act of 2015, a mandated person must legally report concerns that meet the threshold of reasonable grounds for concerns that a child is being, or is at risk of being abused and that the health, development and welfare of the child is seriously affected or is likely to be seriously affected. Once a referral is received by the Child and Family Agency, it decides if an assessment is required. If the assessment is deemed not to be required, the family is not contacted. If an assessment is required, it will contact the family to seek their co-operation in carrying out an examination of the child and family needs.

This raises the question as to whether the stress testing of the credibility of the referral meets the standard required of the mandated person occur?

Furthermore, it also raises the questions that in seeking the co-operation of the family in carrying out an examination of the child and family needs, is in accordance with the full benefit of the 2014 policy?

Judicial comment is noted regarding the inadequacies in a parent meeting a social worker prior to a scheduled child protection conference and the view that an attending parent is entitled to have representation present at such conferences. The purpose of a child protection conference is to determine whether a child is at on-going risk of significant harm and to list any children of significant harm on the Child Protection Notification System (CPNS). The process requires the attendance of multiple professionals whereby each qualified professional has a responsibility to contribute to the decision about concerning risk of harm. The professionals are requested to confirm if they believe that the child is at risk of on-going significant harm. Prior to attending the meeting, the professional does not have sight of the report of other professionals, at the commencement of the meeting they are given 15 to 20 minutes to read all reports.

This raises the question as to the obligation placed on the multiple professions that attend child protection conferences devolving the statutory obligation placed on the Child Family Agency under s.3 (1) of the 1991 Act.

Furthermore, is having all complainant's presenting their allegations against a parent at a single meeting a fair process?

Disclosure

Disclosure is necessary in ensuring that there is adherence to fair procedure and natural justice. Practitioners working in this area can be disadvantaged when pertinent information prior to applications before the court is not known. Vulnerable parents,

particularly in complex cases, may not always have important knowledge of the case.

Electronic case management recording is now operational in the Child and Family Agency. It is contended that applications for disclosure should consider seeking:

- Case notes of duty social worker
- Supervision case notes of duty social worker and social worker
- Risk assessments completed.
- Notifications from mandated persons
- Notifications from the Gardaí
- Professionals meetings
- Child protection conference minutes
- Child protection conference review minutes
- Child protection plans
- Reports completed for the child protection conference

Conclusion

The author concludes that the statutory duty to investigate allegations of abuse and neglect applies equally to all allegations of abuse and neglect save in exceptional circumstances whereby the gravity of the matter requires the immediate protection of a child. Whether the source of the allegation is a third party, a mandated person or a direct allegation by an individual, the far-reaching powers of s.3 of the Act of 1991 do not discriminate. It is the author's view that the requirement of fair procedures in investigating allegations of abuse and neglect is in the best interest of the child. A flawed investigation conflicts with Article 42A of the constitution and the unique position of the child in society.

7. Brief overview of some of the cases reported in the Child Law Reporting Project 2020

Catherine Ryan,
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The cases reported by the Child Law Reporting project this year are varied and it is clear that the same issues arise but can be handled differently depending on the Social Work Department, the CFA solicitor and the individual judges. Hereunder is a small synopsis of some of the reported cases.

a) This case details a mother with mental health issues and allegations of sexual abuse. It provided very extensive detail as to the situation of the mother, although she was not present and her solicitor had no instructions from her. The non-appearance of parents or a dearth of instructions from some parents is unfortunately an all too common reality. It places the court and Legal Aid Board solicitors in an invidious position. A court liaison person could assist to bridge that gap and promote parental participation. Their participation in the court process is essential and every support should be given to enable that engagement.

b) This case related to an order granted under section 25 of the Mental Health Act to detain a child in psychiatric care. Again it is of note that the application was made ex-parte with the CFA solr conveying the parents views to the court as "The "child" is a terrible trouble maker. She has been huge trouble in the inpatient unit. She needs to be in hospital" The court faced a further

conundrum when the matter came back to court after an 11 day order was made where the child potentially no longer satisfied the threshold under Sec 25 of the Mental Health Act but a further placement had not been fully identified.

c) This case concerned a refusal by CAMHS to forward their report to the court in relation to children who were subject to a Care Orders, The Judge directed that CAMHS would provide an explanation as to their refusal which was a "huge worry for the court" .

d) A case where neither parent were represented but their daughter had been in and out of voluntary care on numerous occasions. The judge expressed dissatisfaction about the case and how it was being run by the CFA and although ultimately made a full care order, expressed the view that the child here had been let down by the CFA and the courts and wanted a full review of all the delays in the case as the child here is lost.

e) In this case a teenager refused to return home. Issues of culture were discussed although the court did not accept that the cultural differences were so much to impact the care of the child. This case raises interesting issues. Where does the state role commence in such a circumstance? A corollary is where a parent does not want to parent the child and looks for the state to step in. Where is the line that must be crossed so that the state must step in? Sec 3 of the Act sets out the function of the CFA which has been expanded on in caselaw but must there be some "failure" on the part of the parent? In either or both of these circumstances it may be difficult to establish "fault" or "failure" by the parent.

f) This was a very detailed case concerning sexual abuse allegations which were fully contested by the parents. This illuminates the complexity of the evidence and the assessment methods used by psychologists. The case which was not concluded was afforded significant court time as ever y aspect was contested. The case is very interesting in addressing some of the technical aspects of risk assessments and the conduct of interviews concerning sexual abuse.

g) In another reported case the hearing days/dates had to be fragmented over several days spanning months at a time. The impact this has on the end result could be significant and the lack of certainty for the child or parents during these protracted staggered hearings are problematic for everyone concerned. While time should be of essence in deciding Child Care cases there must be a balance in resources throughout the country. Practitioners in rural towns and provincial cities have become accustomed to having to wait for judges to hear contested cases but the delays can be detrimental and damaging.

h) The in-camera rule and its necessity to protect the anonymity of complainants and alleged offenders was discussed in an application to release reports to An Garda Síochána where the District Court held that a balance must be struck between the duty of the DPP to prosecute and the right of an individual to a fair trial. These applications are often made in the District Court and by and large seem to be always made in favour of the release of the documents. It may not be within the realm of Child Care practitioners to know whether these are later challenged in a subsequent criminal trial but it does raise questions about the prejudice that might arise

given the different evidentiary standards and whether certain safeguards need to be put in place for the release of such reports rather than individual cases and individual judges making the decisions on a case by case basis.

i) A further case explored a reduction in access to a mother where evidence was given as to the possibility of her being on the Autistic Spectrum which the court was not prepared to accept as a reason to reduce access. The thorny issue of access being reduced is often a source of great disappointment and frustration by parents. The reasons for such a reduction is often due to evidence of the child becoming unsettled after access or the parent not participating in the access to a full extent with the child. The reasons given are usually subjective and arguably parents with the correct supports can significantly improve their contact in this stifled artificial environment where their every move is scrutinised.

j) This case highlighted the unavailability of a secure placement for a teenager who had to be returned to her mother's care having been previously removed from there. The judge described it as particularly worrying that no placement was available. Unfortunately this is replicated in many childcare courts and is a worrying gap in our care system.

This is a flavour of some of the cases reported but I would encourage practitioners to read these reports which offer an invaluable insight into the conduct of these cases and could really enhance our representation of parents and how to deal with complex and technical psychological or other expert evidence.

Please refer to childlawproject.ie

8. *Representing the voice of the child in child care proceedings*

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and Monica Hynds
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Guardian ad Litem service

Barnardos Guardian ad Litem service has been representing the voice of the child in public law proceedings since 1997, and its panel of thirty Guardians ad Litem worked with 774 children from January to September 2020.

In Ireland at the end of September 2020, Tusla records that:

- 5,913 children were in care, down 70 children from September 2019
- 388 children were placed in care by Tusla's emergency Out of Hours Service
- 91% were in foster care
- 94% of children in care had an allocated social worker
- 96% had an up to date care plan
- 95% of children aged 6-15 were in full time education[59]

Of the 2,900 young people in after care services in September 2020:

- 91% had an aftercare worker
- 83% had an aftercare plan
- 75% of young care leavers between the ages of 18-22 were in education or accredited training and hence eligible for an aftercare allowance [60]

Some children and young people came into care this year in a planned manner, while

[59] This figure doesn't include children in care under the social work team for *Separated Children Seeking Asylum*

[60] https://www.tusla.ie/uploads/content/Q3_2020_Service_Performance_and_Activity_Report_V1.0.pdf

some including the 388 who were placed in care in an emergency, experienced it as difficult if not traumatic.

Examining these figures, it seems that the vast majority of children in care have the opportunity to live within families in the community, attend school and achieve some level of stability and security, while most young care leavers are in some form of education or training and have supports as they transition into adulthood. Our direct work with children allows us to fully understand their lived experiences.

The Guardian ad Litem works with children in care and related proceedings: children coming in to care, or where a supervision order is sought, or where there is a review by the court of a child's circumstances under Section 47 of the Child Care Act. This can include children in voluntary care.

The UK's national Guardian ad Litem service evolved some years after the death of a child called Maria Colwell. She was starved and beaten by her stepfather, having been returned home at her mother's request from her placement in care with relatives. The application to discharge the care order was made on consent without any independent view. As a result, the enquiry into her care recommended that the Guardian ad Litem's role, to give an independent view of the child's welfare, was established in certain proceedings and it grew from there, until it became the norm for all children in care proceedings to have a Guardian ad Litem who then would arrange legal representation for the child, who themselves was a party to the proceedings.

In Ireland, the provision came late in the consideration of the 1991 Child Care Act. In a written judgement in 2009 one District Court Judge noted that *"There was no provision for the appointment of either a solicitor or a guardian ad litem for the obtaining of reports by the court in the original draft of the Bill.... it was suggested there should be a person assigned by the court to argue specifically for the child's welfare and who would be capable of contradicting a Health Board proposal with regard to a Care Order.*

The Judge went on to comment *"the eventual outcome may well be the result of a rushed compromise between desirable objectives and ...financial prudence." "This would be in contrast to a policy driven choice regarding the appropriate services to be made available to the child and the court."*

In the absence of a clear legislative basis, the current role and parameters of the Guardian ad Litem was established through evolving case law including the Baker Judgement in 2016 which set out that while the Guardian ad Litem was not a party to proceedings in the normal sense, they were more than a witness and that the role of the Guardian ad Litem was intended to secure many of the same benefits for the child as party status. Additionally the Baker Judgement also confirmed that the Guardian ad Litem was entitled to legal representation.

Researchers from the Child Care Law Reporting Project previously reported that Guardians ad Litem were appointed in 53% of cases with significant regional variation - the highest rate of appointment of 79.8% was in the Louth district and the lowest of 13.3% in Galway (CCLRP 2015, p.80). Court could appoint solicitors directly for young people but they found this was rarely used – around 2%.[61]

The Guardian ad Litem is appointed by the court, either of its own motion, or on the application of any party to the proceedings. The means by which the specific Guardian ad Litem is chosen continues to be somewhat *ad hoc* in some courts. While names are provided to the courts of suitable

[61] Coulter C. (2015) The Child Care Law Reporting Project Final Report

persons to act, at other times suggestions are put forward by the parties or judges appoint according to their own individual preferences.

Guardians' ad Litem advise the Courts about the wishes and needs of young people, and they seek to represent the interests of young people in the highly stressful atmosphere of a court.

Carmel Corrigan[62] conducted a study published in 2015 which revealed that there was an emphasis on appointment of Guardians in 'complex' cases and in particular, those that were seen to present challenges to judges. By contrast, children and young people had little or no control over how their voices were represented in court, if at all: they were not aware that a Guardian ad Litem could be appointed until one was, and there is no mechanism for the child to apply for a Guardian ad Litem.

An important benefit of Guardian ad Litem work is that an experienced professional can navigate the court process on behalf of the child and identify inadequacies or the absence of a care plan, and provide a mechanism by which the wishes and feelings of the child can be incorporated into proceedings.

The Judges in the Corrigan study considered that having an advocate to articulate their wishes and feelings and having a relationship with someone that they trust are the two primary advantages of having a Guardian ad Litem. Other advantages perceived by the Judges include allowing children to voice their views without adult interference, building the child's confidence and promoting better outcomes for the child. Corrigan found that for children, the value is in being heard, listened to and supported.

The core of the Guardian's work is their relationship with children, it's a task centred rather than a therapeutic relationship. It needs to sufficiently close to build trust to allow the child to openly discuss their wishes and feelings, while not fostering dependency. It does not and cannot replace the child's relationship with their social worker, who is the most significant person in their care journey, and who will remain after all court proceedings have gone. The Guardian ad Litem's relationship with the child has to be measured and proportionate. The Guardian ad Litem needs to have a thorough knowledge of child development and welfare, and the impact of trauma on children and their capacity to form and maintain healthy relationships.

Some Guardians ad Litem and many social workers view the short term, targeted nature of the Guardian ad Litem appointment as attractive. What many find is the opposite, that in many cases courts retain their input for on-going reviews under Section 47 of the Child Care Act in order to continue to advise them on issues such as access to family members and the progress of therapeutic support following the making of a section 18 Care Order. This has exposed a gap in provision, of an independent oversight of on-going post care order arrangements.

While this was an unintended consequence, many young people seem to appreciate on-going role of the Guardian ad Litem, telling us *"At least you're still here".*

Tusla continue to experience high staff turnover in many social work areas and the Guardian ad Litem often ends up holding the history of the case, for example informing the new social worker *why access arrangements were changed from unsupervised to supervised* or *why a particular therapeutic approach was unsuccessful.*

How is the Guardian ad Litem different from Social Work with vulnerable children?

[62] Corrigan C (2015) Children's Voices Adult Choices: the voice of the child through the Guardian ad Litem in child care proceedings in the Irish District Courts

The Guardian ad Litem not only works directly with the child, but with the professional network and the child's carers to try to achieve outcomes that are in the best interests of the child. While collaboration is key to the work it must not be confused with collusion.

There are many challenges to the role and the work – many view the Guardian as too powerful, too critical of social workers. They take up resources that would be better spent on services, such as speech and language therapy.

Barnardos Guardian ad Litem service argues that there is value to a child of having a means to participate in proceedings. We know that for children, the benefit to them is to be heard, supported and to know that they have had their say.

There is value to the courts of having an independent voice to advise of the options. There is value to the institutions charged with caring for the children who cannot live with their parents, of having an independent and external view, asking the awkward questions.

The Guardian ad Litem works in our adversarial, often conflictual courts system. We have developed a body of expertise and strive to add a unique perspective to this work.

So what have we achieved?

Despite the lack of formal regulation in this ad hoc space, a shared understanding of the Guardian ad Litem's skill and role has developed: that they have a professional background in child care, usually social work and will provide an independent assessment based on the child's needs unconstrained by agency restrictions.

We believe this independent view of the child's rights and needs contributes positively to the decision making for children.

In the early days of the work, it was necessary to advocate that children remaining in care required up to date care plans and after care plans as part of the consideration of the care arrangements for children. As seen in the statistics at the start of this article, this is now routine.

It is now accepted practice that in all cases, Guardians ad Litem are appointed for children who go into Special Care Placements, and for the Guardian and the court to oversee their care for a period of time following their discharge.

> *Aoife experienced huge trauma as a young child prior to coming into care, was drug using and involved in sexually coercive relationships. Aoife finds it very difficult to trust others, to build and maintain relationships with peers or professionals. These are factors that had to be considered whilst identifying an appropriate onward placement from Special Care. The GAL took an active role in ensuring Aoife's needs were documented and evaluating whether proposed placements would meet her needs.*

Children have told us "*You're on my side*" and "*You go by what I say*". One wrote to her Guardian to say:

> *"I am turning 18 soon and I wanted to let you know that I appreciate all the work you have put in to me and my brothers case… Coming in to care I feel saved me from myself and the road I was on…I have goals now, I never thought I would ever go to college because I wasn't smart enough. I never believed I'd make it this far but (my foster carers) did. They pushed me to do well in school and I thrived in school as a result….*
>
> *Thank you for standing by me and for being there every time we went to*

court. Your presence in the room was reassuring, just knowing you were there made it easier to speak up to the Judge."

There is a need to fundamentally reform how we hear children and make decisions about them within the courts to ensure that good, sound decisions are made in a timely manner.

The system as it currently exists is seriously flawed. Courts don't have enough time, social workers are hard pressed, and experience the court process and cross examination as stressful. Too much energy is being put into a system that is based on a culture of defend, deny and counterattack. This is toxic for children, their families and those who care for them and work with them. Change is difficult to achieve and needs to bring all elements of the system on board. In practice, while we know that the majority of children do well in care, many of them have needs and circumstances that mean that at times, the 'system' struggles to cope.

Our service deals with a small but persistent number of cases each year where highly vulnerable children with multiple complex needs are due to age out of the care system and where the key players, TUSLA and HSE seem to struggle to agree on who is responsible for providing care for them.

Sean[63] aged 17 years while functioning at the level of a four year old came into care five years ago when his mother said she could no longer cope with his violent outbursts. From an early age Sean was exposed to extreme domestic violence and was physically and emotionally abused by his father. Sean's mother has poor mental health and his home life was very chaotic, he missed a lot of school and has recently been diagnosed with speech and language difficulties. The plan for his future when he turns 18 includes a safe residential facility where he will be properly cared for and supported as well as ongoing therapeutic support to help Sean deal with his past experiences. Sean had a Guardian ad Litem appointed by the Court when he came into care aged 12. The Guardian ad Litem worked with Sean, his mother and his social workers to ensure that the court was fully aware of the harm that Sean had experienced and that it was important that he continue to have therapeutic support to process his early violent and abusive experiences.

The Guardian ad Litem was brought back in to the case when Sean reached his 17th birthday as the court wanted to be satisfied as to the aftercare arrangements for him, given his vulnerability. The Guardian ad Litem fought to ensure that he had a detailed aftercare plan which provided for proper care and provision into his adulthood.

In recent years Guardians ad Litem have represented the views of vulnerable young people leaving care in Wardship applications where there are concerns about their ability to make decisions for themselves based on the nature of their disability or mental illness. Frequently the Guardian ad Litem has had to argue the need for a coherent approach to service provision as the young person moves from Tusla to HSE services. Barnardos Guardian ad Litem service are planning a seminar to examine the use of wardship in such transitions in early 2021, which we anticipate will be of interest to colleagues in the legal profession.

While the majority of young care leavers received aftercare services and had an aftercare worker, one quarter were not in any form of education/training. The payment of the aftercare allowance is tied to

[63] Names and identifying circumstances have been changed in all examples

participation in education/training and our experience is that this cohort who don't progress onto education/training are frequently the most vulnerable. For many young people leaving care, they still experience rushed aftercare plans being agreed on the doorstep of the court in the days before they turn 18.

What now for the establishment of a national service?

In August 2019 the then Minister Zappone published the Child Care (Amendment) Bill 2019 which sought to establish the provision of a national service regulating the existing system of Guardian ad Litem appointments and extending the system so that Guardians ad Litem could be made available to any child who would benefit from one within the public law system.

It was planned that the national service would be established in 2021 as an Executive Office of the Department of Children and Youth Affairs. While there was broad support for the Bill, key stakeholders raised concerns about some aspects of the Bill including that it didn't go far enough in ensuring that all children in care proceedings would have a Guardian ad Litem appointed to them, the child's status within proceedings and legal representation for the Guardian ad Litem during those proceedings.

That Bill fell with the dissolution of the 32nd *Dáil in January* 2020.

Roderic O'Gorman Minister for Children, Equality, Disability, Integration and Youth states that "*I am determined to progress this legislation as quickly as possible. However, I also intend to take this opportunity to examine some issues raised by stakeholders and to ensure that I am fully satisfied with the proposed Bill before introducing it. My officials are currently seeking legal advice on matters that have been raised as part of this process. I intend to wait until this legal advice has been received and fully examined before making any final decisions on proposals."*

Barnardos Guardian ad Litem service has long called for the establishment of a national, regulated service and welcomes Minister O'Gorman's interest in and commitment to the establishment of such a service that represents effectively the views, wishes and feelings of children in public law cases.

The authors are Freda McKittrick, Head of Service and Monica Hynds Practice Manager, both of whom work in Barnardos Guardian ad Litem service, the state's largest and longest established Guardian ad Litem Service.

9. Representing the voice of the child in child care proceedings

Catherine Ghent, Solicitor
Partner
Gallagher Shatter Solicitors

I am tired of the discussion about the role of the 'guardian *ad litem'* (hereafter the guardian) and in particular whether or not they are a party to proceedings. I am also tired of hearing the phrase 'guardian *ad litem'* and want to start hearing instead about a child advocate/child representative. In my view we have been asking the wrong question over the past few years and while the ideological basis for this has been obvious, the legal basis has been baffling. On the 28th April 2015, Article 42A of the Constitution was finally enacted by the Thirty-first Amendment of the Constitution (Children) Act 2012. I am not sure if it was the delay in resolution of the high court

challenge to the referendum which meant there was no firm date on which there was a change in the conduct of proceedings in line with the changed legal context. My sense is that the enactment slipped under the radar somewhat in circumstances where there was an ongoing debate about the role of the guardian and as a result there was wholly inadequate - or even at times any – consideration given as to what the changed constitutional context meant for children. Two instances in care proceedings which demonstrate this, stand out for me. The first is where a District Judge in 2016 in response to submissions made about the threshold in the context of Article 42A, stated; "*I don't have to have regard to the Constitution - I'm a creature of statute*". The second was in 2018, receiving counsel's written replying submissions on behalf of a mother, which contained the line, "*Ms. Ghent has referred to Article 42A which clearly doesn't apply in this case*."

The at times, hysteria surrounding the debate about the role of the guardian *ad litem*, in my view obscured the real question which should have been asked, namely how were children to be represented in proceedings and how would that be done in a manner where their rights under Articles 42A and 40.3 in particular, would be protected and vindicated. Article 42A.2.1. expressly refers to decisions in care proceedings being conducted, '*always with due regard for the natural and imprescriptible rights of the child'.* Article 42A.4.1. gives constitutional force to the principle that the '*best interests of the child shall be the paramount consideration'* and 42A.4.2. provides that, '*as far as practicable…the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.*'

The rightful questioning of what some Guardians were doing/not doing and earning, seemed to quickly escalate in to an ideologically entrenched position where it sometimes felt (perhaps somewhat facetiously) that we were in danger of the maxim *"Four legs good, two legs bad"* being applied to two parents and one guardian. The debate became the rights of parents versus the powers and status of guardians *ad litem*, with the former seeking to temper a perceived imbalance of power. In the first instance, the debate should not have been parents versus anyone as care proceedings have been long established as being inquisitorial in nature and Article 42A specifically and consciously removed the blameworthiness test set out by Hardiman in the P.K.U. judgment[64]. In addition, in my view the guardian is not part of proceedings in their own right, but participates on behalf of a child. I believe the legitimacy of the guardian as an entity is dependent on their being the representative of the child – otherwise they should merely be an expert witness or assistant to the court, which interestingly is contrary to the function envisaged by Baker J.'s decision in AO'D v Judge O'Leary[65]. In drafting the 2019 Bill, it appeared to me the role envisaged was misconceived and most importantly in focusing on whether or not the 'guardian' was a party, and seeking to limit the role accordingly, the focus, which should have been on the child's rights to representation was lost. I have always been of the view that the correct position is that the child is represented through their guardian rather than the guardian appearing as a random entity. If that position is accepted then the question shifts from what is the status of a guardian to how to vindicate the child's participation and other rights. Baker J.'s decision in AO'D dealing as it did with interpretation of the statute, refers to this on numerous occasions. "*A duty of a guardian ad litem is to ensure compliance with the constitutional rights of a minor…a child who is represented by a guardian ad litem is to be treated as having full procedural rights to engage in the proceedings…the guardian in*

[64] North Western Health Board v H.W. and C.W. [2001] 3 I.R.
[65] [2016] IEHC 757

whom is entrusted the role of representing the child…the approach identified in the case law with regard to the entitlement of a child to procedural fairness…"

The question as to whether the guardian is a party or not, in my view since April 2015 and particularly after the AO'D judgment, has an odd standing in the face of the stated obligation to vindicate the child's constitutional rights. The child is clearly not only entitled to the full panoply of constitutional rights which their parents are equally entitled to, in addition and by virtue of their special status as an identified rights holder they are entitled to specific consideration of the extra protections in Article 42A. Vindication requires the State to make provision for representation of the child with access both to a suitably qualified and accountable professional who can carry out an independent assessment of the child's best interests and to a suitably qualified legal professional.

It is remarkable to me that in circumstances where there is an express constitutional recognition and affirmation of the '*natural and imprescriptible rights of all children'* and an express obligation on the State in '*as far as practicable, by its laws [to] protect and vindicate those rights*', the debate which is at its heart should be about the constitutional rights of the child and how they bring the child in to the proceedings, has instead been about the functions and powers of a professional. The question most frequently asked, particularly within the Department of Children and Youth Affairs under the previous Minister, has been how can the expense of guardians be reduced. There is what has almost been an obsession with the status of guardians in proceedings and in particular to the issue of legal representation which I believe is badly misconceived.

I have been involved in numerous discussions where attempts to get officials to explain why children in care proceedings would have lesser rights than their parents and how this is constitutionally compatible, have been unsuccessful. At times these discussions have resulted in a level of hostility that is odd given what is at stake. I am unclear as to the reason for what appears to be a determined failure by the Department to ask the straightforward question, how does the State fulfil the express and enhanced constitutional obligations towards the child in proceedings. I am also unclear as to why the Department has equally determinedly instead stuck to the position of asking in the alternative how do they curtail the role of the guardian. The latter has pushed the former aside with no-one able to answer satisfactorily why this is the case.

The failure to ask that basic question about children's representation is particularly strange when we are all aware that the Child Care Act of 1991 has been creaking along for far too long and it was obvious to all involved that urgent reform was required – and mandated certainly from the 28th April, 2015. There are limits to the extent to which a purposive interpretation can cover up the parts of the Act which are now constitutionally dubious or incompatible and this particular issue was one for which the State had two and a half years to prepare.

It is instructive – and correct - that no-one would dream of asking the question how do we curtail the rights of parents in proceedings, particularly in terms of fair procedures. Costs arguments rightly would not be accepted as a reason to pare back fundamental rights. We need to explore why then when that question is being asked regarding children who are recognised as legally more vulnerable, has there not been more of an outcry. In my view the argument whether or not, *'to remove the discretionary access and legal advice currently enjoyed by*

GALs[66]', is a red herring and the real argument to be had is whether or not to remove the discretionary access and legal advice currently enjoyed *by children* through their guardian. The seriousness of the removal or curtailment of a child's fair procedure rights such as to cross-examine, is much more obvious when asked from the child's point of view. In that context, the breach of their *In Re Haughey* rights becomes more self-evidently untenable. That children in the most serious cases which concern them would be denied rights granted to adults whose good name was at risk before a tribunal, is on any level very clearly wrong. It adds insult to constitutional injury, that the proposals in the Child Care (Amendment) Act of 2019 which have not been replaced by positive obligations in the proposed amendments to the Child Care Act itself, leave children who have been physically, sexually, emotionally abused and neglected by their parents, with less rights than those parents in proceedings.

Fair Procedure rights accrue to the child as an individual rights' holder both under Article 40.3 and 42A[67]. As a corollary, there is a clear argument that where legislation deprives children of an effective mechanism to have those rights vindicated, that legislation is not constitutionally compliant.

I believe that if it is explained to parents, they will accept that their children are entitled to representation in proceedings to allow them vindicate their legal rights in the same way as theirs will be. I also believe that parents will accept that their children's representation will be different to theirs because of their age and the extra obligation to give paramountcy to their best interests. It is time to remove all reference to the term 'guardian *ad litem*' and replace it with what should be – namely a child advocate/representative. It is also time to stop asking the wrong question and properly and openly answer the right one, namely how are children to be best represented in proceedings and how will that be done in a manner where their rights under Articles 42A and 40.3 in particular, will be protected and vindicated.

[66] Conor O'Mahony Special Rapporteur Annual Report 2020

[67] This has specifically been stated by Baker J. in AO'D v O'Leary.