

ASPECTS OF CHILD CARE IN THE DISTRICT COURT

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INTRODUCTION

Childcare law is a hidden world in the sense that, like private family law proceedings generally, public law child care applications are also heard *in camera*. It is hidden in the sense that citizens are not aware of it. Its workings do not permeate the public consciousness as some of our other courts do. Much media attention is focussed on the terrible abuses that happened in the recent past in the various residential homes, and on the awful sexual abuse of children, but little attention is paid to the trials and tribulations of families in crisis today. With the arrival of the new Court Reporting System¹ some changes are now occurring. However, I feel that this issue of secrecy is one that will emerge again.

According to Professor Powell, of the Department of Applied Social Studies, UCC, Cork, in a letter to the *Irish Times*, the powers of social workers came about because of rampant child abuse in the late 19th century. Court provision and child protection followed the successful Mary Ellen case in New York

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¹ S.40 Civil Liability Act 2004.

in 1875, when an abused child was brought to the courts under animal welfare legislation as there were no child protection laws in force then. He said that a vigorous child-protection movement emerged, including organisations such as Barnardos, the ISPCC (then NSPCC) and many others, which sought to uphold children's rights and insist they be treated as citizens with a right to care and protection by the State.

The modern era of childcare in Ireland dawned quite recently with passage of the 1991 Child Care Act. This Act replaced the Act of 1908, which had provided, as Geoffrey Shannon observed, "a legal framework that was best described as 'skeletal'".² Under the 1991 Act the promotion of the welfare of a child, defined as any person under 18 years of age, became the focus of the courts. The concept of welfare, according to the judgment of Kennedy C.J. in the case *State (Kavanagh) v. Sullivan*,³ is to be taken in its widest sense rather than the narrow confines of physical comfort.

The District Court, in dealing with matters that affect children, bears a weighty responsibility. It has a power that is similar to a life sentence in effect, because the consequences of our decisions have lifelong impact on those whom we seek to protect and care for. This is of course a complex area, one where, as some decisions have shown, the courts have difficulty at times in avoiding the various legal and constitutional minefields that exist.⁴ The family law advocate Catherine Ghent has said that litigation under Article 42.5 of the Constitution falls into two distinct categories; namely, litigation in which parents and the State are at odds in terms of how best to protect the child's interest and litigation taken where children allege the State has failed in its duty to provide adequately for them.⁵ The work of the District Court generally falls into the first category.

The main aspects I will deal with are:

² Shannon, *Child Law* (Thomson Round Hall, 2005).

³ [1933] I.R. 618 at 630. See also Shannon, *Child Law* (Thomson Round Hall, 2005) p. 111.

⁴ *T.D. v. Minister for Education & Ors.* [2000] 2 I.L.R.M (S.C.).

⁵ Ghent, "Young People and the Courts", lecture delivered at the conference 'Working with Young People who will Not Engage', organised by the Special Residential Services Board (SRSB), 14 November 2006.

1. Statistical Information
2. Children on the edge
3. Giving children a voice
4. Case review procedure

I. STATISTICAL INFORMATION

The number of children in care in the Irish republic, according to Health Service Executive (hereinafter “HSE”) figures revealed in a recent report in the *Irish Times*, is currently over 5,000.⁶ It stated that there was a greater likelihood of children going into care in the east than the west of Ireland – twice as likely, in the case of children in the Greater Dublin area compared to the west. Ironically, they found that the west had higher investment in family support services than the east. In 1989, there were 2,700 children in care compared to the current figures. It is not my intention to extrapolate from these statistics, suffice to say they give a useful impression of the dimension of the problem. I contacted the HSE seeking information and Mr John Smith, from the Chief Executive’s office kindly obliged me in this regard.

The figures garnered from the Courts Service with respect to care orders reflect the urban/rural dimension shown in the HSE figures. I was surprised to learn that the court only deals with about 43% of children placed in care. This means that children are being placed in care on a voluntary basis *simpliciter* or under the section 4 procedure,⁷ without any court involvement at all. Unfortunately, some confusion surrounds the accuracy of certain statistics provided to me by the Courts Service, but this may be due to the fact that they were given little time to formulate the figures. My own cursory research indicates, or at least it is my hunch, that there were more applications in 2005 than that disclosed.

⁶ See “Number of children in care doubles since 1989”, Carol O’Brien, p.1, the *Irish Times*, 16th August 2006.

⁷ S.4 Child Care Act 1991.

Emergency Care Orders (ECOs)	45
Care Orders (COs)	52
Interim Care Orders (ICOs)	572

Table 1: Dublin Metropolitan District (DMD) Care Orders made 2002-2005

Year	Supervision Care Orders	Care Orders	Interim Care Orders
2005	78	35	212
2004	29	20	243
2003	22	28	205
2002	45	32	937

The reason why the interim care orders were drastically reduced from 2002 to 2003 was simply due to the amendment made to s.17(2)(b) of the Child Care Act by s.267(1)(a) of the Children Act 2001. This increased the maximum time for an ICO from eight days to 28 days. By consent of one of the parents that period may be extended but this is done rarely.

With respect to the Circuit Court involvement, in Dublin, the county registrar, Ms. Ryan's office informed me that the appeal figures are as follows:

Table 2: Appeal Figures

Year	Number of Appeals
2002	5
2003	8
2004	9
2005	8
2006	9 to date

With regard to funding, in answer to my series of questions⁸ to the HSE they state there has been a significant increase in funding and investment in childcare from €14m in 1989 to €375m

⁸ See Appendix 1, Questions sent to HSE. Available at www.jsijournal.ie.

in 2004 equating to a rise from 0.82% to 4% of overall health expenditure.⁹

The HSE figures show that there are 5,060 children in care. The largest number of children in care occurs in the eastern region. It is of note that the figures show that the court is involved in 43% of the cases. Of course, under the terms of the Child Care Act, the court has the ultimate responsibility for children in care but this is notional as there is no direct involvement. The court can become involved if directions are required.

Table 3: HSE Figures for number of children in care

Former Health Board Area	Care Order	Voluntarily	Total
Eastern Region (E)	832	1,248	2,080
Midland (M)	70	230	300
Mid-Western (MW)	282	156	438
North-Eastern (NE)	232	205	437
North-Western (NW)	133	71	204
South-Eastern (SE)	167	408	575
Southern (S)	301	403	704
Western (W)	163	159	322
National	2,180	2,880	5,060

Table 4: HSE Percentages for number of children in care

Former Health Board Area	Care Order	Voluntarily
Eastern Region	40%	60%
Midland	23%	77%
Mid-Western	64%	36%
North-Eastern	53%	47%
North-Western	65%	35%
South-Eastern	29%	71%
Southern	43%	57%
Western	51%	49%
National	43%	57%

My inquiries to the HSE sought further analysis of the figures.

⁹ See Appendix 2, Replies by John Smith of the HSE to Questions Sent, 13 November 2006. Available at www.jsijournal.ie.

Table 5: Reasons Children are in Care

Former Health Board Area	Abuse					Child Problems						
	Emotional Abuse	Neglect	Physical Abuse	Sexual Abuse	Drug/Alcohol Abuse	Involved in Crime	Pregnant	Emotional/Behavioral Problems	Mental Health Problem/Intellectual Disability	Other-Please Specify	Physical Illness/Disability	
E	13	618	120	59	0	0	2	35	1	98	0	
M	36	59	13	9	3	4	0	19	0	0	0	
MW	16	80	23	15	0	0	0	11	2	5	1	
NE	17	202	28	9	0	0	0	2	0	10	0	
NW	6	28	18	12	2	0	0	4	0	0	2	
SE	11	117	23	29	0	0	4	39	14	27	4	
S	40	206	53	12	3	0	1	14	1	1	1	
W	8	76	12	14	1	0	0	10	1	5	0	
National	147	1,386	290	159	9	4	7	134	19	146	8	

The figure here that stands out is that of neglect and the one that also intrigues me is the heading that denotes there are four children in care because of their involvement in crime.

Table 6: Breakdown of numbers in different type of care

Former Health Board Area	Foster Care			Pre-Adopt Placement	Resid.* General	Resid. Special Care	Resid. High Support	At Home Under Supervision	Other	Total
	General	Special	Relative							
E	988	0	603	5	221	12	12	10	229	2,080
M	199	0	74	2	18	4	2	0	1	300
MW	266	13	121	3	4	1	12	10	8	438
NE	274	10	97	2	14	0	2	0	38	437
NW	126	0	47	0	16	1	1	7	6	204
SE	367	2	121	9	48	5	16	2	5	575
S	446	0	197	9	30	1	4	3	14	704
W	203	0	89	8	14	3	1	0	4	322
National	2,869	25	1,349	38	365	27	50	32	305	5,060

* Residential

Table 7: 2003 Figures for costings and details of care

Service Area	Expenditure	% of Total	No of Recipients	Cost/Year per User
Foster Care	73.008m	19.538%	3,986	€18,316
Mainstream Residential Care	87.451m	23.451%	466	€187,663
High Support Special Care	25.421m	6.80%	66	€385,178
Special Arrangements	13.257m	3.54%	35	€378,799
Family Support Community Interventions	45.751m	12.24%	N/A	N/A
Legal	9.817m	2.62%	N/A	N/A

I notice that in England and Wales in 1998 the breakdown for the number of children in care was the following:¹⁰

Foster placements	37,340
Community homes	5,100
Others including voluntary children's homes	3,960

Lord Adonis, the Minister for Education in the House of Lords said the number of children in care has risen from 50,000 to 60,000 over the past 10 years.¹¹

II. CHILDREN ON THE EDGE

It is troubling at times to consider the children who come before Court 20. I describe these children as being on the edge; they are on the edge of society, on the edge of their families, on the edge of the care system and often on the edge of their lives. It just takes one little push to put them over the precipice. It is

¹⁰ 'Children looked after by local authorities, year ending March 1998', Department of Health, United Kingdom. See www.dh.gov.uk.

¹¹ H.L. *Hansard* (9 October 2006).

difficult to get the Irish statistics, but according to figures for children in care in the United Kingdom half of all children in care are failing to achieve a single qualification in school, with only six in 100 making it to university. They are five times more likely to have a diagnosable mental illness and almost one third will not have received their basic inoculations. Many children in care end up in prison or turning to drugs and prostitution.¹²

The most troubling cases are those where children are physically or sexually assaulted, those who suffer non-accidental injury (NAI) and the separated children who arrive here unaccompanied, destitute and often destined for a life of domestic slavery or worse, such as being absorbed into the sex industry.

We as judges have the ultimate responsibility. We are obliged to inquire about such matters and in particular to ensure that the children are being correctly cared for. It is appalling to hear of children who are supposed to be in care of the HSE availing of bed & breakfast accommodation, the out-of-hours emergency accommodation service despite the provisions of section 5 of the Child Care Act¹³ which could not be clearer with respect to the HSE responsibility for homeless children.

Cases such as *P.S. v. Eastern Health Board*¹⁴ set the position out in clear terms. Geoghegan J., then of the High Court, made clear the position and obligation of the HSE in this regard where a child was staying in unfit accommodation. I accept that social workers and the HSE do a difficult job and people do not become social workers in order to make money, they are caring people. At times though, there is little or no communication between the duty social workers and the assigned teams in different areas. You even get cases occasionally where a Garda will have activated the section 12 emergency procedures but due to communication breakdowns, children at risk will have been

¹² Baroness Morris of Bolton, HL *Hansard* (9 October 2006).

¹³ “Where it appears to a health board that a child in its area is homeless, the board shall inquire into the child's circumstances, and if the board is satisfied that there is no accommodation available to him which he can reasonably occupy, then, unless the child is received into the care of the board under the provisions of this Act, the board shall take such steps as are reasonable to make available suitable accommodation for him.”

¹⁴ High Court, unreported, 27 July 1994.

returned to a parent in crisis without discussion or consultation between the social work teams, or the original garda, who initiated the process. It brings to mind a recommendation of the Laming Report into the Victoria Climbié case:

Managers of duty teams must devise and operate a system which enables them immediately to establish how many children have been referred to their team, what action is required to be taken for each child, who is responsible for taking that action, and when that action must be completed.¹⁵

A case as tragic as Victoria Climbié does not appear to have happened here as far as I am aware, but we have a system not unlike that in the UK, where social workers are dealing with impossibly large case-loads, in a climate of scarce resources and crisis management. They do not have the necessary technology and systems that any modern agency would require. Sometimes files are unfortunately shut for the wrong reason. Too often children move from one care area to another without proper reference onwards or communication to those who should be responsible. At times, proper assessments of the children are not made, and the different agencies and personnel do not have the means or systems to deal properly or appropriately with files in a systematic way. Of course, in the majority of cases, proper procedures work, but we have to ensure that they work in all cases that come before us.

The appalling circumstances or the terrible reality for many children worldwide has been well documented at every level, most recently at the International Association of Youth and Family Judges and Magistrates XVII World Congress in Belfast, held in September 2006, which set out some of the horrors that children face. The congress delegates heard, among other issues, of human rights violations of children including execution by death squads, torture, unfair detention, forced genital mutilation, slavery, trafficking in human organs, the murder and abuse of street children, forced marriage, and forced conscription. Is it any

¹⁵ *Laming Report* HMSO 2003, p. 41 para. 4.14. Available at www.victoria-climbié-inquiry.org.uk.

wonder that some children are washed up on our shore, alone, unaccompanied and separated? It is said that at any one time, there are approximately 200 separated children in State care¹⁶.

The legal framework used by the HSE for unaccompanied or separated children is usually that of section 4 of the Child Care Act 1991,¹⁷ which is a deemed voluntary care in circumstances where parents are not contactable. Section 8 of the Refugee Act 1996 and sections 3, 4 and 5 of the Child Care Act 1991 are also utilised in these cases.

The National Children's Strategy commits the Government to treating separated children in accordance with international best practice. The Strategy includes a commitment to undertake research into the needs of refugee children and to provide an independent *guardian ad litem* to look after their best interests.

¹⁶ Rosenstock-Armie, "Separated Children in Ireland, losers in a two-tier system", Irish Refugee Council, 23 June 2006. Available at www.irishrefugeecouncil.ie.

¹⁷ 4. — (1) Where it appears to a health board that a child who resides or is found in its area requires care or protection that he is unlikely to receive unless he is taken into its care, it shall be the duty of the health board to take him into its care under this section.

(2) Without prejudice to the provisions of Parts III, IV and V, nothing in this section shall authorise a health board 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 a health board has taken a child into its care under this section, it shall be the duty of the board—

(a) subject to the provisions of this section, to maintain the child in its care so long as his welfare appears to the board 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.

(4) Without prejudice to the provisions of Parts III, IV and VI, where a health board takes a child into its care because it appears that he is lost or that a parent having custody of him is missing or that he has been deserted or abandoned, the board shall endeavour to reunite him with that parent where this appears to the board to be in his best interests.

The hostels which accommodate the children have posed difficulties in the past and often have appear to have minimal levels of staffing which is a likely contributor to the fact that some of these children go missing.

In any case that comes before Court 20 now with respect to these children, or any child who is being placed in a residential institution, I believe that it is appropriate that the court should make the following minimal inquiries of the HSE to ensure that these institutions are proper places for these children:

1. Who owns the institution;
2. Whether it is owned by limited liability company, unincorporated association, charity, a private provider, or the HSE;
3. Depending on details supplied, if a company or private agency confirmation that it is registered, compliant and up to date;
4. Details of Directors or persons in charge or accountable;
5. Copy of the most recent Social Services Inspectorate Report or HSE inspection report if it is not covered by the Social Services Inspectorate;
6. Details of staffing and confirmation that they are appropriately qualified and numbers sufficient in accordance with best practice;
7. In view of young people going missing, I ask what controls and management systems are in place to deal with this risk.

In response to the questionnaire that I forwarded to the HSE with respect to type of care institutions, Mr. John Smith replied:

In October 2005 there were 141 Children's Residential Centres in all categories, a decrease of 7 from 148 in 2004. Statutory and non-statutory Children's Residential Centres by former Health Board area as at 24th October 2005 were Statutory Centres 86 and non-statutory centres 55.

A detailed breakdown of the Children's Residential Centres, No., Category and occupancy levels are outlined in the Social Services Inspectorate Annual Report (2005) which is available on the S.S.I. Website.¹⁸

III. DEVELOPMENTS IN THE DUBLIN METROPOLITAN DISTRICT COURT

A. Current Developments

Court 20 deals exclusively with child care issues under the Child Care Act 1991, as amended, and the District Court (Child Care) rules 1995 on a daily basis and its business consists of the following applications:

1. Emergency care orders (ECOs), returnable for 8 days;
2. Interim care orders (ICOs), returnable for 28 days if not on consent, unlimited time if on consent;
3. Extension of interim care orders, returnable for 28 days if not on consent, unlimited time if on consent;
4. Matters for review if care order in place, (usually a day or half day to hear);
5. Full Care Order hearing (anything from 1 day to 30 days may be required);
6. For mention matters which are heard each morning;
7. Any emergency care *ex parte* application which the court may not be on notice of at the commencement of the court.

The number of cases heard daily at present range from 5 to 12 ICOs and then from 11.30 am to 4.00 pm we list the full hearings for care orders. Until recently, the system was differently handled. Each Tuesday and Thursday, ICOs, ECOs and

¹⁸ See Appendix 2, Replies by John Smith of the HSE to Questions Sent, 13 November 2006. Available at www.jsijournal.ie.

Supervision orders (SOs) applications were heard from 2.00 pm to 4.00 pm.

This system became unwieldy and caused problems for the court and its users. At times it was impossible to fit in the number of cases in the hours allocated and Judges often found that they were sitting until 5.00 pm, 6.00 pm or 7.00 pm, or even later. There was an obligation on the judge to read relevant reports, hear evidence and then submissions in many of the cases. At many hearings, applications were consented to or they were uncontested. If uncontested, the judge had to hear the evidence and read relevant material. The only difference between the uncontested and contested hearing in this context is that there is no cross examination. These hearings deserve time and attention; more importantly the children and the parents are entitled to it.

ICO applications often determine how the case will proceed. The vast majority of such cases that come before the court at ICO stage end with care orders. Thus it is crucial that they are given a proper listing and parents are given time to deal with the matters arising. Unfortunately, at this crucial stage most are not represented. This is simply because the civil legal aid system cannot react quickly enough to represent these clients and have a backlog of appointments. I do not have a statistical analysis to illustrate this point but I believe it has a major impact on the quality of justice in the court.

It is important that I acknowledge the work of my colleagues who have created the system that has worked so well to date. It would be invidious if I mentioned names, but I believe their work is well recognised as indeed has been the work of judges in other courts, who have ploughed a furrow in the apparent barren soil of children's rights. For example, it was agreed that the HSE would produce reports at each application and that at the hearing of the care order application they would produce a Book of Reports, not unlike a Book of Evidence and furnish this to the respondent's solicitors in advance of the time for the hearing. Judges of the District Court applied the provisions of the Child Care Act intelligently and when challenged their decisions have been confirmed by the superior courts, thus developing this jurisprudence. An example of this is the

fundamental case of *E.H.B. v. District Judge McDonnell*.¹⁹ Each day produces new issues and challenges but I believe that we in the District Court take our responsibilities seriously in this very important area of our work.

Some changes have occurred in the practice of Court 20 and made it better able to deal with the applications:

- ICOs are heard daily up to 11.30/11.45 am instead of between 2.00 pm and 4.00 pm each Tuesday and Thursday. There were objections from some practitioners but the new scheduling arrangement is working better.
- The court recording system is being computerised. This is an essential step. As Mr. Justice John Gillen, Head of the Family Court system in Northern Ireland, recently noted, new technology is the key to ensuring relevant information flows continuously, quickly and reliably to and from the relevant judges, for case management and tracking. He further mentioned that very good systems were in operation and should be emulated.²⁰
- We in Court 20 encourage the use of technology in the Court by arranging for the electronic transmission of reports and care plans so that they may be considered by the Court in a timely manner, particularly where they are agreed.
- The procedure in relation to allocation of dates involves the parties applying to the Court and requesting the dates and amount of days required. No certification to Court is sought or required. The Court up to now had no input into this process other than to rubber stamp dates and confirm judge availability. Lengthy cases frequently fell out of the list on very short notice, sometimes on the day of the

¹⁹ [1999] 1 I.R. 174 (H.C.).

²⁰ See “New Approaches to Children’s Interests in Legal Proceedings”, lecture delivered at the conference ‘Achieving Rights Based Child Law’, Dublin, 14 October 2006, sponsored by the Human Rights Commission and the Law Society of Ireland.

hearing. Thus court time is then lost and increases the waiting time for that case to be allocated new dates. Hearing days are lost as a consequence. It is proposed that a list to fix dates be listed on a weekly basis to allocate For Hearing dates. Listed cases would then be certified within four weeks as set down in the recent practice direction. A substitute list of cases ready to go on could also be compiled to allow these cases to go in to any vacated hearing dates. At the moment, we are planning on an interim basis that cases fixed for hearing are put in for mention three to four weeks before hearing date in order to confirm that they are proceeding.

- Applications in future are no longer simply sent into court, they will be forwarded to the Registrar of Court 20, who will allocate them a date and they will proceed on that date. The applications for dates may be done electronically and it is my view that this court is very suitable for developments in this regard. At the moment, some of the Child Care teams forward Care Plans, Court Reports and other documents electronically to the Court registrar.

We are attempting to properly manage the lists, the court dates and maintain proper and fair procedures. As well as numerous other proposals, the President of the District Court, Her Honour Judge Miriam Malone, is continuing this process of renewal in shortly establishing an informal committee, representing the stakeholders in the system to formulate rules for practice and procedure in child care application. This is being done with a view, in the first instance to have them operate on a pilot basis as a practice direction in the DMD and later, if possible, to have them circulated to all judges in order to consider having them submitted to the District Court Rules committee for their consideration and to possibly have them incorporated into the District Court (Child Care) Rules.

At any time if there is a hiatus or hearing time available in Court 20, it then becomes a back up court for the two private Family Law Courts in Dolphin House.

B. Future Developments

The most important change that is imminent to the Child Care Court is that Court 20 will be hearing those applications which are presently heard by The Hon. Mr. Justice McMenamin in the High Court for what are known as ‘out of control young people’, with civil detention and special care orders being made in the District Court.

Judge McMenamin, in his paper to today’s conference,²¹ reminds us that Part IV A and B inserted into the Child Care Act 1991 by s.16 of the Children Act 2001 relates to this, and a new s.23 in the Child Care Act 1991 which imposes a duty on the HSE to seek a special care order in the District Court where the behaviour of the child or young person was such that it imposed a real or substantial risk to his or her health, safety, development and welfare and where it was necessary in the child’s interest that such a course be adopted. This has been commenced.²²

These Special Care Orders will increase the workload of the District Court. As Judge MacMenamin has stated, these new cases will not only result in an increased workload for us, but that some of these cases are complex and necessarily time consuming. Given the subject matter, it is to be expected that many of them will be of an emergency nature. These orders are of a rolling nature and may result in multiple applications. Counsel will usually present in these cases, and with no disrespect to them, this might mean there will be an added impact on court time.

Who knows where the future lies? In the United Kingdom, they are planning a unique approach to these problem children. As reported in *The Times* newspaper²³ recently, such children will be placed in boarding schools in order to prevent them being taken into care by the Child Care authority and a new homeless children scheme is being launched using properly vetted private homes. One of the motivating factors is that boarding schools with fees of £12,000 to £24,000 per annum would be more cost effective than special care arrangements which can cost around

²¹ “The High Court Minors List”, paper delivered at the Judicial Studies Institute National Courts Conference, 17 November 2006.

²² Children Act, 2001(Commencement)(No.2) Order 2004 (S.I. 548 of 2004).

²³ *The Times*, 7 November 2006.

£3,000 per week. The idea is to target children before they come formally into the care system.

Maybe at some future date, we in this jurisdiction ought to consider preparing documents for our own assistance as have been in operation in Northern Ireland such as the Children Order Advisory Committee (COAC) *Best Practice Guidance and Case Management in Private and Public Law Cases*.²⁴ I have found it instructive to sit in on child care cases in Northern Ireland and compare their system to ours.

Of course, it would be impossible in this treatment to cover comprehensively the whole spectrum of the children's rights issue, an ever changing area which encompasses many other matters, such as: the impact of constitutional law; the European Convention of Human Rights; the need to carefully examine *in camera* procedure in light of developments elsewhere; the need for timely legal representation of parents in all cases; sections 77, 91 and 96 of the Children Act 2001;²⁵ the training of judges; and the training of lawyers who practice in this specialised area.

IV. GIVING CHILDREN A VOICE:

ASPECTS OF THE ROLE OF THE GUARDIAN *AD LITEM*

Section 26 of the Child Care Act 1991 provides for the appointment by the court of a guardian *ad litem* (GAL) in public law proceedings, where a child "to whom the care proceedings relate is not a party" to the proceedings and "if it is satisfied that it is necessary in the interests of the child and in the interests of justice to do so."

Section 11 of the Children Act 1997 further acknowledges the legal rights that children should be entitled in respect of the appointment of a GAL in private law proceedings. Under the Children Act 2001, in respect of special care orders there is provision for GALs.

²⁴ Launched in December 2003, the guide was subjected to a practitioner review in December 2006. Both the guide and the review are available at <http://www.courtsni.gov.uk/en-GB/Publications>.

²⁵ See Catherine Ghent, "Young People and the Courts", lecture delivered at the conference 'Working with Young People who will Not Engage', organised by the Special Residential Services Board (SRSB), 14 November 2006.

The appointment of a GAL is a matter for the discretion of the court. The key point is that they are appointed where the child is not a party to the proceedings as such; a common occurrence given that it is very rare for children to be made a direct party to proceedings under the Child Care Act. The Law Reform Commission *Report on Family Courts* in 1996²⁶ suggested that social workers were suitable for appointment as GALs and indeed the people usually appointed are qualified social workers, psychologists and sometimes solicitors. There is a cogent case to be made that it should be mandatory to appoint a GAL in all child care court proceedings. This is so in order that there would be no doubt about the child's voice being represented. By so doing, the UN Convention on the Rights of a Child²⁷ would be complied with and due consideration would be given to the wishes of the child as required by the Child Care Act.

Many would disagree with this proposition on the basis that it is not necessary in every case, that it would not be a good use of resources and that it might delay proceedings unnecessarily. I do not see these arguments having any real validity. In many cases the GAL would not have much input, the issues may be clear thus the GAL's role would simply be to ensure that not only is justice being done in this context but being seen to be done and more importantly, the child, the subject matter of the process would have a voice. In private law proceedings the parties themselves have to bear the cost of hiring a GAL, where such an appointment is made. We in this jurisdiction lack a Court Welfare Officer which exists in the United Kingdom and where GALs are appointed in all care proceedings. The Child Care Act is silent on the criteria the court should take into account when appointing a GAL. The GAL's fees and costs are paid by the HSE.

The GAL is an independent court appointed person who acts in the best interests and welfare of the child, becomes his (or her) voice in the court, representing his wishes and what ought to be his or her wishes and needs. Ms. Freda McKittrick, Head of the Beacon GAL service of Barnardos in a recent lecture cites what Judith Timms says of the guardian's role:

²⁶ (LRC 52-1996) Available at www.lawreform.ie/publications/reports.htm.

²⁷ U.N. Doc. A/44/49 (1989), entered into force 2 September 1990. Available at <http://www.unhchr.ch/html/menu3/b/k2crc.htm>.

The crucial importance of the Guardian's role is that it stands at the interface between the conflicting rights and powers of courts, local authorities, the natural and substitute parents in relation to the child. The Guardian has to safeguard the child's interest, to ensure the most positive outcome possible for the child. The Guardian also has to make a judgement between the potentially conflicting demands of child's rights, children's rescue, the autonomy of the family and the duty of the state.²⁸

In the UK the concept of the GAL arose from the concerns expressed in 1974 by the Field Fisher Report for the representation of children in care and related proceedings, following the tragic case of Maria Colwell. I read some of the debates in the Oireachtas, which revealed that there was no provision in the original Bill that became the Child Care Act, even though it had an incredibly long gestation. It was proposed by two Senators (Ryan and Norris) during Committee Stage in the Seanad.²⁹ It was accepted by the Government and to my mind was a most important contribution to the legislation. Without it, the work of the District Court in Child Care would be much more difficult and children's interests would not have been as well served as they should. They have been simply invaluable in this context. In her excellent book, Judith Timms³⁰ also describes the GAL as the key element to the successful implementation of the UK Children Act 1989.

²⁸ Department of Health, *Manual of Practice Guidance for Guardians ad Litem and Reporting Officers* (HMSO, 1992). See also Timms, *Children's Representation: a Practitioners Guide*, (London: Sweet & Maxwell, 1995).

²⁹ Senator David Norris during the Second Stage: "Guardians *ad litem* are court appointed professionals who have a very specific and independent role in relation to children who are the subject of court hearings. The main job of the guardian *ad litem* is to focus very specifically on the interests of the child and report to the court for the purposes of the court hearings. It is not intended that the relationship is an ongoing or therapeutic one. It is contemplated solely with regard to the court and comes into play where the parent is absent through illness, death or incompetence of various kinds or is a party to contentious proceedings." 127 *Seanad Debates* 2088–2089 (Second Stage, 7 March 1991).

³⁰ *Children's Representation: a Practitioners Guide*, (London: Sweet & Maxwell, 1995).

Article 12 of the United Nations Convention on the Rights of the Child sets out the principle of child representation. In other jurisdictions – such as the United Kingdom, the USA and Europe – the role of the GAL is much more developed and recognised. The guardian system in Northern Ireland consists of a mixture of private and state GALs with the existence of Cafcas in the United Kingdom which has independent trained panels available to the Courts.

Given that GALs have no right of audience before the Court as such, they are required to appoint a solicitor and or counsel to represent them in Court,. In the case *R. v. Cornwall Co. Council*³¹ the court said that with respect to the GAL no restriction could be placed on him carrying out his function or duties. It was important, the Court said, that the public have confidence in the independence of the GALs, and that they themselves should be confident of their status. In the Irish case *Re M.H. and J.H., Oxfordshire Co. Council v. J.H. & V.H.*,³² Costello J. stated that a GAL was independent in his role advising the court as to a child's needs and as to what is appropriate for the child.

The absence of established procedures or regulations with respect to GALs and how they should act can give rise to problems at times. Prior to the HSE being established, different policies existed in each Health Board area, with the result that disputes often arose with respect to payment of GALs. These conflicts are unfortunate as they could take up valuable Court time. The District Court has to measure the costs in the absence of agreement between the parties. Now that the HSE is in existence it is hoped that they will establish national criteria and panels for GALs. I understand that the integration of child care policy is ongoing in the HSE at the moment and naturally this will take some time. A very interesting report was prepared in 2004 for the National Children's Office (NCO) on GALs in Ireland by three UK academics on behalf of Capita, the public service consultants, and is referred to by John Smith of the HSE in his response to my

³¹ [1992] 1 W.L.R. 427.

³² High Court, unreported, 19 May 1988. Quoted by Geoffrey Shannon in *Child Law* (Thompson Round Hall, Dublin, 2005) p. 251.

queries.³³ It has a comprehensive review of the guardian's work, function and office together with a perceptive analysis of financing the office. They found that guardians were more expensive in Ireland than Northern Ireland, or the rest of the United Kingdom.

As I have mentioned I made contact with the HSE with certain inquiries. Mr Smith was kind enough to set out particulars with respect to GALs, stating that:

Historically Health Boards were not allocated specific funding for GAL Services with payments coming out of general budgets for child care allocated by the Department of Health & Children (...) [with] de facto no limit on the financial liability faced and no scope or mechanism for additional resources.

A review of the Guardian Ad Litem Service (2003) found that there was no clear policy regarding payment and that the nature of current arrangements, largely unstructured and unregulated, meant that inevitably disputes in respect of costs arose. During the period from 2001-June 2003 126 cases the average cost per case was €8,524.00 however, there were extensive variations with the former ERHA paying on average €11,311.00 per case as opposed to figures between €3,425 & €7,145 for other Boards.

The average rates charged by GAL's varied from €3.57 per hour in the NEHB to €8.00 per hour in the ECAHB. These are average charges with some GAL's having reportedly charged €150.00 per hour. It is interesting to note that in the same period GAL's in Northern Ireland charged €2.94 per hour for professional time and €19.61 per hour for non productive time. Total cost for the period Jan 2001 – June 2003 was €1074,068.³⁴

³³ *Review of the Guardian Ad Litem Service*, Final Report from Capita Consulting Ltd., in association with the Nuffield Institute for Health, 2 March 2004. Available at www.nco.ie. See also Appendix 2, Replies by John Smith of the HSE to Questions Sent, 13 November 2006. Available at www.jsijournal.ie.

³⁴ See Appendix 2. Available at www.jsijournal.ie.

I asked Mr Smith if the HSE maintained a register of suitable GALs. He responded that there was no mandatory regulated process for the selection of persons to act as GALs. I do not agree with some of his views but they are worth reading.³⁵

V. CASE REVIEWS

Difficulties of understanding between the HSE and the Court often arise where the case directs by virtue of s.47, after making a care order, that case should be reviewed at some point in the future. This is so despite the fact that the law is clear in respect of this issue. I recall once when I made a care order and decided on a review date, I was greeted by an anguished cry from one of the Social Workers: “Do you not trust us?” “Indeed” was my response.

I can well understand the frustration of social workers who feel put upon at times. Their job is unenviable and I am still impressed by the commitment of the majority of social workers whom I encounter. They are one of the few groups of people who have to undergo frequent cross examination as part of their daily work.

There is an essential difference between the UK and Ireland in this regard as has been pointed out by McCracken J.³⁶ The pivotal case in England and Wales is *A. v. Liverpool City Council*³⁷ which was statutorily enshrined in the Children’s Act 1989 and the Children Order 1995. There, the court’s role concludes on the making of the care order, except in judicial review.

In Ireland, the District Court may review cases after the making of the care order pursuant to the very important Irish decision of *Eastern Health Board v. Judge McDonnell*³⁸ where McCracken J. decided that District Judge James McDonnell’s directions in relation to the Health Board’s care regime for the child were correct. This case has had the most important impact

³⁵ See Appendix 2. Available at www.jsijournal.ie.

³⁶ *Eastern Health Board v. District Judge McDonnell* [1999] 1 I.R. 174 (H.C.).

³⁷ [1982] A.C. 363.

³⁸ [1999] 1 I.R. 174 (H.C.).

on the District Court's role in child care. McCracken J went on to say that even though the Health Board had day to day care of the child, as set out in s.18, the District Court retained overall control of children in care. Directions are made by the Court under sections 23 and 47 of the Child Care Act, 1991.

Paul Ward, in his excellent book on the Child Care Act, notes that this position was reaffirmed by McGuinness J., in the case of *North Western Health Board v. K.M.*³⁹ Mr. Ward comments that s.47 was interpreted in these cases as obliging the Court to retain overall control of a child where a care order is made. These decisions change the whole concept of child care, as understood up to that time, and clearly distinguish our system from that of the UK with respect of the role of the Court. It requires the Courts to be vigilant but at the same time they must not trespass on the statutory role of the HSE in their day-to-day care of the child. It is a fine line that the court has to walk, but it must do so if it is carrying out its function correctly in this regard.

Section 36 of the 1991 Act requires a health board to determine the type of care afforded to a child on the basis of its consideration of the "best interests" of the child. A Health Board when deciding to place a child in care must always have regard to the rights and duties of parents. Both the decision in *P.S. v. The Eastern Health Board*,⁴⁰ to which I have already referred, and *F.N. v. The Minister for Education*⁴¹ provide examples of the reality of courts reviewing care, though each decision was made in a different context.

In many ways developments in the area of children's rights in our jurisprudence have always to be looked on within the context of the provisions of the Constitution with regard to the family and indeed the right of the State to interfere in family life.⁴² There have been many cases on these issues that are not within the purview of this analysis but this constitutional context should not be forgotten. Cases such as *North Western Health*

³⁹ [2002] 2 I.R. 493 (S.C.).

⁴⁰ High Court, unreported, 27 July 1994.

⁴¹ [1995] 1 I.R. 409 (H.C.).

⁴² See Catherine Ghent, "Young People and the Courts", lecture delivered at the conference 'Working with Young People who will Not Engage', organised by the Special Residential Services Board (SRSB), 14 November 2006.

Board v. H.W. and C.W.,⁴³ *D.T. v. Eastern Health Board*,⁴⁴ *D.G. v. Eastern Health Board*,⁴⁵ *D.B. v. Minister for Justice*,⁴⁶ *T.D. v. Minister for Education*⁴⁷ and *Sinnott v. Minister for Education*⁴⁸ give us a clear perspective of the constitutional framework within which child law has to operate. We have seen the complexities that arise in what should be a straightforward legal process in what is referred to as the “Baby A” case and some of the fantastic outpourings in the media regarding cases of this nature. The Supreme Court has deliberated carefully on issues in a context as to what are enforceable or justiciable perogatives in a constitutional framework, with the contradistinction between civil and political and socio-economic rights that the constitution envelopes being clearly stated in each case by the Supreme Court.

In recent times in Court 20, there have been skirmishes between the Court and the HSE about care plans. In the United Kingdom, a recent case suggests that before the court makes a care order, the judge ought to scrutinize the care plan and ascertain the suitability of the care plan. The court said that the judge was an expert in this role but had to bring his experience and knowledge to the task. In Cork District Court, Judge Riordan has directed that if the care plan produced at the care order hearing has in any way being altered in a substantial way, the matter should come back before the Court for its attention.

It was common for the HSE to say that they could not produce a care plan until a care order is in place. This does not make sense, it is important that, when the HSE are preparing their books of documents for the court, they should include a draft care plan among them. The Court needs to have the details of the proposed Care Plan for the child, for obvious reasons.

The essence of a care order application is:

1. Has the applicant reached the threshold required for the making of a care order, also called the threshold criteria?

⁴³ [2001] 3 I.R. 622 (H.C. and S.C.).

⁴⁴ High Court, unreported, 24 March 1995.

⁴⁵ [1997] 3 I.R. 511 (S.C.).

⁴⁶ [1999] 1 I.R. 29 (H.C.), [2001] 4 I.R. 259 (S.C.).

⁴⁷ [2000] 3 I.R. 62 (H.C.).

⁴⁸ [2001] 2 I.R. 545 (S.C.).

The four components are set out in s.18(1) of the Child Care Act 1991.⁴⁹ Cases such as *Re M., S. and W. (infants)*⁵⁰ and *Southern Health Board v. C.H.*⁵¹ are of assistance in understanding these matters. Both jurisdictions, the UK and Ireland, support the inquisitorial approach of the court. The key issue is that the District Court must be satisfied that the child requires care and protection which he is unlikely to receive unless the court makes a care order.⁵²

2. The second aspect relates to the type of care the HSE is going to provide, in what context, on what principles, and how the parents are to be catered for in the new arrangement. This usually takes up most of the hearing time in contested cases.

Specific issues arise in cases, each has its own dynamic. The court feels obliged to review the care of the child, to revisit the matter due to some issue emerging during the hearing that may require the court looking at it again. This is not a review of the care order as such, although often, parents look upon it in that way. The procedure is not used lightly and when utilized the

⁴⁹ 18. — (1) Where, on the application of a health board with respect to a child who resides or is found in its area, the court is satisfied that—

(a) the child has been or is being assaulted, ill-treated, neglected or sexually abused, or

(b) the child's health, development or welfare has been or is being avoidably impaired or neglected, or

(c) the child's health, development or welfare is likely to be avoidably impaired or neglected,

and that the child requires care or protection which he is unlikely to receive unless the court makes an order under this section, the court may make an order (in this Act referred to as a “care order”) in respect of the child.

⁵⁰ [1996] 1 I.L.R.M. 370 (H.C.).

⁵¹ [1996] 2 I.L.R.M. 142 (S.C.).

⁵² See Ward, *The Child Care Acts* (2nd ed., Thomson Round Hall, 2005) p. 66.

Court ought to flag the reasons why it wants a review lest there be a misunderstanding. The review may require the reappointment of the GAL.

Due to the provisions of s.45, another dilemma arises for the court. This relates to after care for the child. Where a court makes a care order, the court should provide for the HSE exercising its discretion under s.45 of the Child Care Act, with respect to the provision of aftercare for the child. In the United Kingdom there is specific legislation obliging care authorities to provide aftercare. However I am delighted to note that Mr John Smith of the HSE, who is integrating the Child Care policy nationally within the HSE has confirmed that aftercare planning for children in care will happen when the child reaches 16. He says that this is required by the HSE regulations.⁵³

The proper way to accommodate this is to set it out at the beginning. I set a review date when the child reaches the age of 16 or 17 for the purpose of s.47. It will allow the child to have a means through which they can articulate their views by way of a GAL or otherwise on this most important matter. After all, would we ourselves stop caring for our children at the age of 18 and cast them out into the world without careful preparation for independent living?

The HSE agree and now accept that care plans must be produced before the care order is made, that reviews are necessary in some cases, and they have not objected to the procedure for having a review to consider the aftercare provision. In Cork District Court, Judge Riordan has set out a procedure which I believe is equally important in that on every care order, there is an endorsement to the effect that if the care plan is to be materially altered in some way then the matter must be referred back to court as the care order was made on a care plan filed in court.⁵⁴

⁵³ See Appendix 2, Replies by John Smith of the HSE to Questions Sent, 13 November 2006. Available at www.jsijournal.ie.

⁵⁴ See Appendix 3, General endorsement of Care Order under Section 18, Judge David Riordan, Cork District Court. Available at www.jsijournal.ie.

CONCLUSION

It is important that I echo what Judge MacMenamin has said today with regard to the expertise of those who work and practice in this area.⁵⁵ Having very limited experience of this jurisprudence before I sat in Court 20, it is my view that generally, with a few exceptions, the social workers, GALs and people who care for our children are dedicated and selfless. Again from my experience, the legal practitioners, both solicitors and counsel, are equally determined, knowledgeable and helpful and will greatly assist the court in its deliberations, even though I might not agree with them all or even most of the time. We are also fortunate in Court 20 in having registrars and clerks who really do go the extra mile.

I believe the advice given to me by Her Honour Judge Philpott, the Recorder of Derry, is good in that she said judges should be careful not to assume the mantle of social workers and ensure that the social workers do not assume the mantle of advocates or lawyers.

The essential assumption or presumption that should underline all our actions in respect of these vulnerable children, is that our aspirations for them should match and equal those which each individual parent has for their own children, in many ways, I remember the words of Wordsworth: “the child is the father of the man.”

⁵⁵ “The High Court Minors List”, paper delivered at the Judicial Studies Institute National Courts Conference, 17 November 2006.