Foster

Legal issues in foster care
Published by:
The Irish Foster Care Association (IFCA)
Dublin, 2016
Print edition: ISSN 2009-8790
Online edition: ISSN 2009-8804

Editor: Maeve Healy, Head of Learning and Development, IFCA

Aim and scope
‘Foster’ aims to inform IFCA members and a wider readership of those with an involvement in foster care of current issues in foster care and of developments in policy, practice and research. It aims to be accessible to a broad range of readers. Two issues of ‘Foster’ will be published per year.

If you are a member of IFCA you will receive a free print copy of ‘Foster’. You can also view or download it in the members’ area of our website. Additional copies of ‘Foster’ can be purchased by emailing info@ifca.ie with your details, price €8. You can find more information about the IFCA on www.ifca.ie

Registered office
Unit 23, Village Green, Tallaght, Dublin 24, D24 F6XA. Tel: +353 (1) 459 9474 www.ifca.ie
Registered no. 281419 Charity no. CHY 12498 Charities Regulatory Authority’s no. CRA 20036690

Copyright
Authors of articles published in ‘Foster’ retain the copyright of their articles. Permission to reproduce any article with relevant credits must be sought from the author.

Disclaimer
The views expressed in ‘Foster’ are not necessarily the views of IFCA. The authors and IFCA will not accept any legal responsibility for any errors or omissions that may be made in this publication. The publisher makes no warranty, express or implied, with respect to the material contained herein.
Contents

Foreword .................................................................................................................................................. 4
  Catherine Bond

The Children and Family Relationships Act 2015 .............................................................................. 7
  Beatrice Cronin

Permanence and long term foster care: what are the options? ......................................................... 27
  Dr Valerie O’Brien and Angela Palmer

How to manage a disclosure of abuse by a child in your care ......................................................... 46
  Sinéad Kearney

Sex abuse evidence in child care proceedings: the challenge for foster parents ............................. 51
  Dr Carol Coulter

The role of the Guardian ad Litem in proceedings under the Child Care Act 1991 .......................... 58
  Con Lynch and Miriam Lyne

The legal framework in relation to relative foster care and private foster care arrangements ........ 70
  Teresa Blake

Foster children and gifts and inheritances ......................................................................................... 83
  Eamonn Shannon

Enhanced rights for foster carers .......................................................................................................... 87
  John Bermingham and Terence O’Connor

A preliminary evaluation of the Triple-A Model of Therapeutic Care in Donegal ......................... 95
  Colby Pearce and John Gibson

Glossary ................................................................................................................................................ 105
The focus of issue two is primarily on legal issues in foster care in Ireland. It brings together articles from diverse areas of expertise and offers readers information, research, comment and debate. As with issue one of the journal, there is scope to include articles which are not related to the main theme, and in this issue we have included the very interesting outcomes of the preliminary evaluation of the Triple-A Model of Therapeutic Care which was recently piloted in Donegal.

A noteworthy development in Irish law is the commencement of certain provisions of the Children and Family Relationships Act 2015 following the insertion of Article 42A in the Irish Constitution. This groundbreaking piece of legislation extends the categories of persons who may apply to the courts to be appointed as a legal guardian of a child. Significantly, the appointment of a legal guardian may not affect the appointment of a previous guardian/s which makes it possible, if it is in the best interests of the child, to have more than two legal guardians. The new categories of guardianship together with other commenced key provisions are outlined in Beatrice Cronin’s informative article on the Children and Family Relationships Act 2015.

The central premise of Article 42A is the recognition of the state of the, “natural and imprescriptible rights of the children and shall, as far as practicable, by its laws protect and vindicate those rights” (Article 42A. 1). Article 42A ensures amongst other rights that the best interests of the child are upheld, the views of children are taken seriously, and, for the first time in Irish law, allows for married parents to place a child for adoption, and for children who have been placed in foster care for longer than three years or more to be adopted. It is also recognised and acknowledged in both Beatrice Cronin’s, and Dr Valerie O’Brien and Angela Palmer’s, articles that Article 42A will have implications for current state delivery and how the courts will interpret and implement the “best interests of the child” which for the first time are outlined in detail in the 2015 Act.

Valerie and Angela’s article focuses on the issue of permanency in foster care and issues of stability, and questions whether or not the primary focus of the Adoption Bill (2012), which was published as part of the children’s referendum campaign, is in the best
interests of the child. They suggest one option might be to find better ways to manage what works within the current foster care system to promote higher rates of permanency, and to use this in tandem with long-term foster care, guardianship and adoption. They recognise the importance of both long-term foster care and adoption for children and caution against the unintended consequences of such legislative change for children in the care system where adoption reform could destabilise long-term foster care placements and the inherent relationships existing within them.

Teresa Blake’s article examines the legal framework in relation to relative foster care and private foster care arrangements. This topic will be of great interest to both relative foster carers and social workers. Teresa highlights the complexity of relationships within relative care placements and the legal mechanisms which exist to assist in the providing for the care, protection and welfare of children. She distinguishes the difference between assessed and approved relatives who care for children within the family and those who care for children within the family in an informal (non-statutory) care scenario and who, in practice, are carrying out the obligations and duties to the children living with them in a similar manner.

The importance of hearing the voice of the child is outlined in Con Lynch and Miriam Lyne’s article of the role of the Guardian ad Litem in proceedings under the Child Care Act 1991. The article offers readers a comprehensive overview of the implementation of the role of the Guardian ad Litem and the lack of clarity within the role itself, resulting in a variation of the appointment of guardians across the district courts. This article will be of great interest to carers whose foster children have a Guardian ad Litem appointed to them.

John Bermingham and Terence O’Connor in their article on enhanced rights for foster carers offer a comprehensive oversight of the Child Care Amendment Act (2007). The Act affords foster carers “enhanced rights” in relation to the care of children placed in their care, where the foster carer will have ‘like control’ over the child as if he/she were the child’s parent. Enhanced rights grant long-term foster carers increased autonomy with respect to issues of consent for medical treatment, the issuing of passports, and day-to-day matters for children such as going on school tours. John and Terence highlight the distinction between enhanced rights for foster children in Ireland, England and Wales. Foster carers will find this article to be of great assistance in informing them of provision to obtain enhanced rights, thus normalising those everyday events for
children in foster care and, as the authors affirm, offering children certainty.

Certainty in life is crucial for children in care and Eamonn Shannon’s article examines the legal entitlements of foster children to inherit any share in the estate of a deceased foster carer. Eamonn’s article highlights the importance of the foster carer being aware of the legal processes involved should they decide to leave a bequest to a foster child.

The sensitive and upsetting nature of a child disclosing abuse is of grave concern to all those caring for and working with children. Sinéad Kearney’s article on the management of a disclosure of abuse by a child offers foster carers a comprehensive overview of how to handle disclosures of abuse made by children in care and of the legal framework within which they are managed. This informative article will reassure foster carers of how to receive a disclosure from a child, which, Sinéad affirms, may occur when the child becomes more settled with foster carers. Dr Carol Coulter refers to the findings of the Child Care Law Reporting Project and reports that there appears to be little consistency in the gathering and presentation of evidence and in how it is dealt with by the courts. The article will be of great interest to those working in this area. Dr Coulter highlights the variation in the availability of specialist sex abuse clinics in different parts of the country.

This issue offers readers a depth of information which we hope will promote debate, discussion and reflection amongst all those who have an interest in children in care and the legal structures which inform their statutory rights. We hope that its contents will continue to foster and nurture an open and learning culture amongst all of our readers which will ultimately contribute to positive developments for children in care.
The Children and Family Relationships Act 2015

Beatrice Cronin

Synopsis of article
The Children and Family Relationships Act (herein the 2015 Act) substantially reforms private family law to provide legal recognition to different types of modern families and to create new rights for parents, both biological and non-biological, and for children. This article is based on a review of certain provisions of the 2015 Act commenced by Ministerial Order on 18 January 2016. This paper analyses in particular the significance of the 2015 Act on proceedings related to guardianship, access, and custody of children.

Introduction
The Child Care Act 1991, the primary legislation regulating child care policy, does not provide a definition of ‘welfare of the child’ although it is the court’s first and paramount consideration in this type of proceedings (Child Care Act 1991, S.24). The court has defined it to include health and well-being, physical and emotional welfare, moral and religious welfare and being materially provided for. One of the key features of the 2015 Act is the introduction of a new definition of ‘best interests of the child’ in line with Article 42A.4.1° Thirty-first Amendment of the Irish Constitution 2012 which protects children’s rights. It is likely that the definition provided by the 2015 Act may be adopted in child care proceedings, given that it is often used in that context.

The best interests of the child principle
The best interests of the child principle is at the forefront of the 2015 Act rather than the relationship between the parents. The court must have regard to 11 factors and circumstances when determining what is in the best interests of the child in any proceedings related to guardianship, custody, or access to a child, or administration of any property or income belonging to, or held on trust for, a child. This new statutory guidance will enable the court to focus on tangible factors related to a child’s present and future wellbeing. It appears that the court must have regard to all the factors systematically otherwise the decision may be vulnerable to judicial review.

The list of factors and circumstances include the benefit to the child of having a
meaningful relationship and sufficient contact with both parents and with other relatives and persons who are involved in the child’s upbringing; the willingness and ability of each of the child’s parents to facilitate and encourage a close and continuing relationship between the child and the other parent and to maintain and foster relationships between the child and relatives; and the history of the child’s upbringing and care, including the nature of the relationship between the child and each of his or her parents and the other relatives and persons. The court must also take into consideration the capacity of each person in respect of whom an application is made to care for and meet the needs of the child; to communicate and co-operate on issues relating to the child; and to exercise the relevant rights and responsibilities.

Also included are factors related to the needs of the child such as the physical, psychological, and emotional needs of the child (taking into consideration the child’s age, stage of development, and the likely effect of a change of circumstances); the child’s religious, spiritual, cultural, and linguistic upbringing and needs; and the child’s social, intellectual, and educational upbringing and needs. The child’s age and any special characteristics as well as the views of the child concerned (when ascertainable) must also be considered.

One of the key factors the court must consider in determining the best interests of the child is any harm which the child suffered, or is at risk of suffering, including harm as a result of household violence, and the protection of the child’s safety and psychological wellbeing. Household violence may have occurred or is likely to occur in the child’s household, or a household in which the child has been or is likely to be present. Hence the provision encompasses circumstances from risk assessment to the aftermath of violence.

In particular, the court must have regard to the ‘impact of household violence’ or the impact of such violence on the safety of the child or other members of the household; the child’s personal wellbeing; the victim of such violence; and the capacity of the perpetrator of the violence to properly care for the child and the risk, or likely risk, that the perpetrator poses to the child. This provision is a sign of recognition that witnessing violence within the home or the family may impact on the child’s personal wellbeing, including the child’s psychological and emotional wellbeing. However, it does not include a reference to the ability of the victim of violence to protect the child/children although this may be a determinative factor in child care proceedings.
Voice of the child

In line with the recently enshrined children’s constitutional rights (Thirty-first Amendment to the Constitution 2012 (Art. 42A.4.2), in any proceedings related to guardianship, custody or access the court shall also have regard to the views of the child concerned that are ascertainable. A new provision of the 2015 Act permits the court to give directions to obtain from an expert a report in writing regarding any question affecting the welfare of the child or to appoint an expert to determine and convey the child’s views in private law proceedings. This provision is broadly analogous to section 47 of the Family Law Act 1995, which empowers the circuit court and the high court to procure a report on any question affecting the welfare of a party to the proceedings, including children. Effectively it means that the same type of report can now be procured at district court level.

In deciding whether to order an expert report under this new provision, the court shall have regard to the age and maturity of the child, the nature of the issues in dispute, the best interests of the child and, significantly, whether the report will assist the child in the expression of his or her views. The Minister for Justice and Equality, in consultation with the Minister for Children and Youth Affairs, may issue regulations to provide for any matters considered necessary to ensure that experts are capable of performing their functions, including the qualifications and experience of an expert, the minimum level of professional experience to be held, the minimum standards that shall apply, and the fees that may be charged.

A court-appointed expert, by virtue of this section, must ascertain the maturity of the child and, where requested by the court, ascertain whether or not the child is capable of forming his or her own views. Where the expert concludes that the child is capable of forming his or her own views on the matters that are the subject of the proceedings, he or she should ascertain the views of the child, either generally or on any specific questions as directed by the courts, and furnish to the court a report with any views expressed by the child concerned. The child concerned is entitled to a copy of the report, whether a party to the proceedings or not, although the court may decide that, in the best interests of the child, a parent, guardian, next friend of the child, or an appointed expert should be furnished with the report instead.

A fundamental flaw of this new provision is that the parties, regardless of their financial means, shall pay the fees and expenses of the expert report. The reality is that many
parents will not be in a position to afford this, therefore the right of the child to be heard will be compromised. This may lead to challenges considering that Article 42A of the Constitution puts an obligation on the State to secure, albeit as far as practicable, that in all proceedings concerning the adoption, guardianship or custody of, or access to, a child, the views of the child concerned shall be ascertained and given due weight having regard to the age and maturity of the child.

**Who is a guardian?**

The provisions on guardianship of the 2015 Act are likely to have the widest application as they have the potential to benefit children living in a wide range of family situations. The 2015 Act extends the categories of persons who may apply to court to be appointed a guardian of a child. This could result in a child having more than two guardians as the appointment of a guardian will not affect the previous appointment of existing guardians. Arguably this may have an impact on the demand for foster care as children would have a wider safety net. In addition, it expands the category of persons from whom consent may be sought or who may have a bona fide interest in the child and be entitled to access under Section 37 of the Child Care Act (1991).

Guardianship refers to the rights, duties, and responsibilities exercised by a parent and others in respect of a child. It includes both the duty to maintain and properly care for a child and the right to make decisions about a child’s overall welfare and upbringing. In practice, guardianship means having a say in the major decisions of a child’s life, such as consent to medical treatment, consent to the issuing of a passport, consent to adoption, choice of school and religion, and whether the child can be taken out of the country.

The concept of guardianship is distinct from the concept of custody which is the day-to-day care and control of the child. A guardian is entitled to be consulted and to have input into the important decisions of a child’s life even though the guardian may not have the day-to-day custody of the child. In the event of a dispute arising concerning the exercise of joint guardianship rights, the court may determine the matter on the application of either guardian (Guardianship of Infants Act, S. 11).

The 2015 Act amends the Guardianship of Infants Act 1964 (herein the 1964 Act) to develop the law relating to the guardianship and custody of, and access to, children. Following the commencement of certain provisions of the 2015 Act, there are seven types of guardianship:
1. Automatic guardianship

Parents who are married at the time of the birth of the child are automatically joint guardians (Guardianship of Infants Act, S. 6 (a)). When parents marry each other after the birth of the child, the father automatically becomes a joint guardian with the mother. Often unmarried parents, including those living together, mistakenly believe that if the father’s name is on the child’s birth certificate, this gives him guardianship rights to his child. In fact, where a child is born outside of marriage, the mother is automatically the sole guardian of her child at the time of birth. The 2015 Act for the first time provides that a non-marital father automatically becomes a guardian of his child if he has cohabited with the child’s mother for 12 consecutive months, including not less than three months after the child’s birth.

The cohabitation requirement is not retrospective, hence the 12 consecutive months must occur after 18 January 2016, the date the subsection came into operation. The three months period does not have to take place directly after the birth of the child. It can be fulfilled any time before the child turns 18 provided that it is part of the 12 consecutive months during which the parents have resided together.

The non-marital father who qualifies for automatic guardianship may apply to the court for a declaration of guardianship to demonstrate he has acquired joint guardianship rights. This is particularly important if the relationship breaks down. If there is a dispute, it is also possible to seek a declaration that a person is or is not a guardian by virtue of this section. Notice of the application must be served upon each guardian of the child(ren).

The judge shall make the declaration of guardianship if satisfied, having heard the evidence offered, that the required cohabitation occurred on the balance of probabilities.
2. Guardianship by statutory declaration

The Children Act 1997 amended the 1964 Act to introduce a procedure of appointing a non-marital father as guardian when parents are in agreement⁸ (S.I. No. 5 of 1998 – Statutory Declaration of Father and Mother in relation to Joint Guardianship of Child/Children). An unmarried father can obtain guardianship of his child at any time following the birth by signing a statutory declaration with the mother in the presence of a practicing solicitor, peace commissioner, commissioner for oaths, or notary public⁹. The parents declare that they are the mother and father of the child concerned, that they have not married each other, that they agree to the appointment of the father as guardian of the child jointly with the mother, and that they have entered into agreements as regards custody and access of the child as appropriate. If there is more than one child a separate statutory declaration must be made in respect of each child. It is important that the statutory declaration is kept in a safe place because there is no central register for guardianship agreements. Where a declaration is lost or destroyed there is no evidence of the fact that the father has guardianship rights to his child/children.

Treoir, the national federation of services for unmarried parents and their children, has advocated for many years for the initiation of a central register for guardianship agreements because of the hardship caused to unmarried fathers and their children when fathers are unable to prove guardianship. In addition, Treoir has advocated for the introduction of a registration process for fathers who meet the cohabitation requirements under the 2015 Act so that they can demonstrate that they have acquired guardianship rights without the involvement of the court. Treoir believes that these agreements could also be registered in the central register for guardianship agreements.

The failure of the State to establish a central register was held not to constitute a breach of the child’s rights pursuant to Articles 41 and 40.3 of the Constitution, and Article 8 of the European Convention on Human Rights. Nevertheless, following the introduction of Article 42A on children’s rights into the Irish Constitution, the State could potentially be found liable in a future challenge, O’B. (a minor) v MJELR & Ors (2009). The Minister for Justice and Equality has committed to developing a pilot project to establish a voluntary repository into which non-marital parents can deposit copies of statutory declarations. It is intended that the lessons from the pilot project will inform whether or not to proceed with the establishment of a national repository (www.justice.ie/en/JELR/Pages/SP15000079).
3. Guardianship by court

If the mother does not consent to allowing the father to become a legal guardian then the father can apply to the local district court to be appointed a guardian of his child\textsuperscript{10}. This is possible whether or not his name is on the child’s birth certificate. The appointment shall not affect the prior appointment of any other person as guardian of the child unless the court orders otherwise. A court-appointed guardian shall act jointly with any other guardian of the child concerned.

4. Non-parental guardianship

Children and those who care for them on an ongoing basis and play a significant role in their lives may now be able to enjoy a legal relationship. The 2015 Act\textsuperscript{11} enables the court to appoint the following persons, other than a parent, as a guardian where the person:

- is married to, is in a civil partnership with or has cohabited with the child’s parent for over three years and in each case has shared responsibility for the child’s day-to-day care for more than two years
- has provided for the child’s day-to-day care for more than 12 months and where there is no parent or guardian willing or able to exercise the rights and responsibilities of guardianship in respect of the child. In this case, the Child and Family Agency will be on notice of the application and will have the possibility of giving views.

An application to appoint a person other than a parent as a guardian shall be on notice to each person who is a parent or guardian of the child. A non-parental guardianship order shall not be made without the consent of each guardian of the child and the applicant concerned. Nevertheless, the court may make an order dispensing with the consent of a guardian of the child if it is satisfied that the consent is unreasonably withheld and that it is in the best interests of the child to make such an order.

The child should have the opportunity to make his or her views on the matter known to the extent possible, given his or her age and understanding. The court must have regard to these views as well as to the number of persons who are guardians of the child concerned and the degree to which those persons are involved in the upbringing of the child. The appointment under this section shall not affect the prior appointment of any other person as guardian of the child, unless the court directs otherwise. Hence, there could be an unlimited number of guardians if it is deemed to be in the best interests of
the child concerned. This could lead to challenging situations where several guardians with conflicting ideas or principles must act jointly. Nevertheless, it is important to note that the court may, on application by a guardian, or a proposed guardian, remove from office a guardian.\(^\text{12}\)

The 2015 Act does not explicitly provide a definition of guardianship but this particular section\(^\text{13}\) lists, for the first time in Irish law, the following rights and responsibilities of a guardian:

- to decide on the child’s place of residence
- to make decisions regarding the child’s religious, spiritual, cultural, and linguistic upbringing
- to decide with whom the child is to live
- to consent to medical, dental, and other health-related treatment for the child in respect of which a guardian’s consent is required
- to provide consent under specified enactments related to children such as child passport application, firearms training certificate application, employment of a child, and the taking of evidence in the context of criminal investigations
- to place the child for adoption and consent to the adoption of the child under the Adoption Act 2010.

The 2015 Act has amended the 2008 Act\(^\text{14}\) to provide that before issuing a passport to a child, the Minister for Foreign Affairs and Trade must be satisfied on reasonable grounds that where the child has two guardians, each guardian of the child should consent to the issuing of a passport. Where the child has more than two guardians, not fewer than two of those guardians should consent to the issuing of a passport to the child. This provision could potentially be a source of conflict as, for instance, it could undermine the rights of an unmarried father who is a guardian and available to give his consent.

Where the court appoints an eligible person under this section as guardian of a child, and one or both of the parents of that child are still living, the non-parental guardian will generally have restricted powers limited to decisions on day-to-day matters, depending on the relationship with the child and the best interests of the child. The court must expressly order the specific listed rights and responsibilities the non-parental guardian shall enjoy, as well as the extent and the limitations.
Foster care and non-parental guardianship

Foster care in Ireland is governed by the Child Care Act (1991) and the Child Care (Placement of Children in Foster Care) Regulations (1995). The Child Care (Amendment) Act 2007 inserted Section 43A in the Child Care Act (1991). This section allows a foster carer who has a child in care for a continuous period of five years or more to apply for a court order to have enhanced rights. The purpose of the section is to allow long-term foster carers increased autonomy while the State continues to be the guardian of the child in care. Foster carers granted this type of order may be entitled in particular to give consent for medical or psychiatric examinations, treatment and assessment, consent to the issue of a passport for the child, and/or bring the child abroad for a limited period.

It appears that there is a shortage of information available regarding foster parents obtaining guardianship rights under these provisions, but studies suggest a very limited take up (O’Brien, 2014). It has been suggested that a time requirement shorter than five years would lead to more demand from foster carers. In return, increased guardianship rights for foster carers could assist in stabilising a higher number of placements (ibid). The fact that the Child and Family Agency must have consented in advance of the granting of the order may also be a deterrent for foster carers to apply for guardianship rights.

The non-parental guardianship introduced by the 2015 Act is a groundbreaking provision that will allow grandparents and other relatives and persons who are exercising the responsibilities of raising a child to acquire the significant decision-making rights associated with guardianship as recommended by the Law Reform Commission (2010, pp.42-44). It is uncertain whether by virtue of this section it may be possible for a foster parent, who has provided for a child’s day-to-day care for more than 12 months, to be appointed a non-parental guardian in the best interests of a child. A non-parental guardianship court order outlines the specific rights granted, tailored to each individual case, and allows for the inclusion of limitations, conditions, and periodical reviews when appropriate.

The Child and Family Agency will be on notice of this type of application and will have the possibility of giving views. In cases where the application is supported by the Child and Family Agency the prospect of a foster carer obtaining guardianship rights under this section may become more tangible.
The foster carer could be allowed certain guardianship rights that would not compete against the guardianship rights of the State, parents, or other legal guardians but rather would support the foster carer in the day-to-day upbringing of the child while in care. The interpretation of this provision of the 2015 Act will evolve in the courts and its boundaries are to be tested. The potential implications, such as the withdrawal of the foster care allowance and other supports, also remain unexplored.

In any case, it is apparent that the Child Care Act (1991) and the Child Care (Placement of Children in Foster Care) Regulations (1995) are due a review to ensure that they are aligned with the children’s constitutional rights introduced by the recent 31st amendment to the Constitution and the Children and Family Relationships Act 2015.

5. Temporary guardianship

The 2015 Act enables a qualifying guardian to nominate a person to act as a temporary guardian in the event of the qualifying guardian becoming incapable of exercising the rights and responsibilities of guardianship through illness or injury. A qualifying guardian in relation to the child means a person who is a guardian of that child and who:

- is a parent of the child and has custody of him or her or
- not being the parent of the child has custody of him or her to the exclusion of any living parent of the child.

The nomination form must be signed by the qualifying guardian, and the nominated temporary guardian, and witnessed by a third party. The qualifying guardian can specify limitations on the listed rights and responsibilities to be exercised by the temporary guardian. The nomination form does not need to be filed in the court but must be attached to the notice of application. The nominated person can apply to the court to act as a guardian if the qualifying guardian is subsequently incapacitated. The Child and Family Agency, any other parent or guardian, and the qualifying or the nominated person as applicable, must be put on notice. The appointment will be subject to the court’s approval.

The court will consider, in making the appointment, the views of the parties put on notice; whether the nominated person is capable of exercising the role and whether the appointee is a fit and proper person; and whether the appointment is in the best interests of the child. A person appointed to be temporary guardian may exercise the rights and responsibilities of guardianship in respect of the child concerned, shall take
custody of the child concerned, and shall act jointly with any other guardian of the child concerned, including the qualifying guardian concerned. The court can later continue or revoke the temporary guardianship or can order that the temporary guardian continue in the role to act jointly with the qualifying guardian. A temporary guardian is not deemed to be a guardian for the purpose of the Student Support Act 2011 (Student Universal Support Ireland grant income assessment). Children and Family Relationships Act 2015, (S 180).

This type of new guardianship could prove relevant in circumstances where for instance a qualifying guardian has been involved in a car accident or when a qualifying guardian is planning to undergo a serious medical treatment. It is uncertain whether it may be possible for an unmarried pregnant woman to appoint a temporary guardian by virtue of this provision in case she becomes incapacitated following the delivery of her child. Although the definition of ‘qualifying guardian’ relates to a born child, as it refers to having custody of the child at the time of making the nomination, arguably once the child is born these conditions materialise as the unmarried mother is automatically the sole guardian and custodian of the child. In any case, the appointment would be subject to the court’s approval.

6. Testamentary guardianship
A guardian who is the parent of a child, or not being the parent of the child has custody of him or her to the exclusion of any living parent, may appoint by deed or will a testamentary guardian to act on his/her behalf in the event of his/her death before the child is 18\textsuperscript{16}. The testamentary guardian must act jointly with any surviving guardian. The testamentary guardian may apply to the court to have the surviving guardian removed as guardian on the basis of being unfit to have such a role. The surviving guardian may also apply to court objecting to the appointment of the testamentary guardian. The court can make an order revoking the appointment of the testamentary guardian, order that the testamentary guardian act to the exclusion of the surviving guardian, or order that both guardians act jointly in respect of the child.

7. Guardianship acquired in other jurisdictions
The 2015 Act provides that a person should be a guardian of a child where the rights and responsibilities equivalent to guardianship were acquired in another State\textsuperscript{17}. In essence, this section allows for the recognition by the State of the rights and responsibilities equivalent to guardianship arising in another jurisdiction (under Council
Regulation (EC) No. 2201/2003, known as Brussels IIA or II bis, or under the Hague Convention) bringing this legislation into line with international best practice. Nevertheless, the court may remove, vary, or enforce the rights and responsibilities of a guardian in accordance with the 2015 Act and, where applicable, the Council Regulation and the Hague Convention.

**Statement of Arrangements**

The above sections highlight how the concept of guardianship has become increasingly complex in order to address the necessities of modern family types. The introduction of the Statement of Arrangements document is a positive development of the district court procedures that aims to assist the court in dealing with potentially complex family scenarios\(^\text{18}\). In any application concerning the guardianship of a child, the applicant and the respondent shall complete the Statement of Arrangements with factual information concerning each child to whom the application relates, the applicant’s proposals, and the respondent’s response. Where a respondent agrees to the applicant’s Statement of Arrangements and proposals, the respondent shall signify his or her agreement and the progression of the case may be speeded up. If the respondent intends to contest the application he/she shall set out the matters in dispute and the respondent’s proposals.

The Statement of Arrangements may facilitate the quick progression of a case when both applicant and respondent are in agreement regarding the living, care, and/or access arrangements of the child(ren). In addition, it will assist the court in understanding the child’s circumstances and determining the best interests of the child(ren). It could also be a very useful document for other professionals such as mediators and social workers. Although the Statement of Arrangements must be completed in any application concerning the guardianship of a child, it appears that it may also be used in custody and access cases as the document includes information regarding current as well as proposed living, care, and access arrangements of the child(ren) concerned.

**Custody and access**

Custody refers to the day-to-day care and control of the child. A guardian is entitled, as against non-guardians, to custody of a child unless the terms of the appointment provide otherwise. Guardianship of Infants Act 1964 (S.10 (2) (a)). Married parents are joint custodians of their child even after the dissolution of the marriage. An unmarried
mother is automatically the sole guardian of a child born outside of marriage and has sole custody. Where unmarried parents cannot agree on custody arrangements in respect of a child, the natural father can apply to the court for joint custody\textsuperscript{19}. Joint custody involves a child residing with each parent for a stipulated time that does not cause disruption to a child’s life. It is not necessary for the unmarried father to have guardianship before he applies for custody or access\textsuperscript{20}. An unmarried father may also apply for sole custody.

The 2015 Act allows relatives and certain persons to also apply for custody of a child\textsuperscript{21}. ‘Relative’ in relation to a child means a grandparent, brother, sister, uncle, or aunt of the child. ‘Certain persons’ means a person with whom the child concerned resides where the person:

- is or was married to or in a civil partnership with, or has been, for a period of over three years, the cohabitant of the parent of the child and has for a period of more than two years shared with that parent responsibilities for the child’s day-to-day care or
- is an adult who has for a continuous period of more than 12 months, provided for the child’s day-to-day care, and the child has no parent or guardian who is willing or able to exercise the rights and responsibilities of guardianship in respect of a child.

By virtue of this section the court may appoint such persons jointly with a child’s parent and make orders regarding the residential and contact arrangements for the child where these are not agreed.

Access, or the right to visit and spend time with a child, is fundamental in order for a child to maintain a meaningful relationship with a non-custodial parent, relatives, or other persons. The 2015 Act makes it easier for grandparents and other relatives and qualifying persons to have access to a child\textsuperscript{22}. It simplifies the former two-tier court procedure by removing the leave to apply requirement for applicants. In addition, the 2015 Act extends the category of persons who can apply for access to a child to include a person with whom the child resides or has formerly resided. The court, in considering the application, must have regard to: the applicant’s connection with the child; the risk if any of disrupting the child’s life to the extent that the child would be harmed by it; the wishes of the child’s guardians; the views of the child; and whether it is necessary to make an order to facilitate the access of the person to the child.
Additional powers of the court

Holding the passport of a child

The 2015 Act provides that the court may impose such conditions as it considers to be necessary in the best interests of the child. In particular Section 12A of the Act 2015, provides that the court can impose conditions regarding the holding of a passport of a child in order to protect the best interests of the child including his or her right to the care and custody of both parents. The conditions include directing that a passport may be retained by the court or held by a specified person and may be released subject to conditions determined by the court.

Adjourning proceedings pending investigation

In addition, in any proceedings pursuant to Part II of the Act (Guardianship) the court may adjourn the proceedings, where appropriate, of its own motion or on the application of another person, and make directions under Section 20 of the Child Care Act 1991 for the Child and Family Agency to undertake an investigation of the child’s circumstances. Upon so adjourning, the court may give directions as to the care and custody of the child or make a supervision order in respect of the child concerned pending the outcome of the investigation. It is unknown what influence the 2015 Act may have on child care proceedings but it appears possible that the court may adopt the 11 factors and circumstances to determine the best interests of the child outlined in the 2015 Act when making decisions regarding the welfare of children in care.

Other provisions

Custody and access enforcement orders

The 2015 Act creates new enforcement procedures in relation to custody and access to ensure that the child has a meaningful relationship with both parents even if the relationship breaks down. A parent or guardian who has been granted a court order for custody or access and has been unreasonably denied such custody or access by another guardian or parent may apply to the court for an enforcement order. An application should be on notice to each guardian or parent of the child. The court shall make an enforcement order only if satisfied that the custody or access was denied unreasonably and if it is in the best interests of the child to do so and if it is otherwise appropriate.

These measures may include allowing a court to require a parent who is persistently not complying with a court order for access or custody to reimburse the denied parent for
any necessary expenses incurred such as travel expenses or lost remuneration; to give
the other parent additional time with the child to help rebuild the relationship; to attend
a parenting programme or avail of family counselling (either individually or together);
and/or to receive information in such a manner and form as the court may determine
on the possibility of availing of mediation as a means of resolving disputes that adversely
affect their parenting capacities. Likewise, if a guardian or parent of a child with a
custody or access order fails to exercise these rights without reasonable notice, the other
guardian or parent may apply to the court for an order to reimburse necessary expenses
incurred as a result of this failure.

It is important to note that the implementation of an order under the Act shall not be
stayed pending the outcome of an appeal unless the court that made the order or the
court handling the appeal directs otherwise.

Maintenance liability of cohabitant guardian
The 2015 Act now allows the court to order payment of maintenance by the cohabitant
of a child’s parent for the support of the child. This potential liability can arise only when
the cohabiting partner is a guardian of the child. Where those parents are civil partners
of each other, the protections contained in the Civil Partnership and Certain Rights and
Obligations of Cohabitants Act 2010 are also extended to the dependent children of the
civil partners. In addition to maintenance, these protections relate primarily to the
family home.

What the future holds
The remaining provisions of the 2015 Act will introduce further significant changes if
and when commenced in the future. The parts not commenced relate mostly to donor-
assisted human reproduction and parentage in cases related to donor-assisted human
reproduction. Under the 2015 Act the birth mother will continue to be the mother of her
child but the situation of the non-biological parent of a donor-conceived child will
change. The married father of a donor-conceived child will continue to be presumed to
be the child’s father even if he is not biologically linked to the child. Parentage where a
child is born through assisted human reproduction will be subject to three conditions:

- The donor-assisted human reproduction must take place in a clinical setting
- The birth mother and her husband, civil partner, or cohabitant must both consent
in advance of the donor-assisted human reproduction treatment to become the parents of a child born as a result

- The donor must have donated gametes on the clear understanding that the donor knows that he or she will not legally be a parent of a child born as a result of that donation.

The 2015 Act will provide for the establishment of a National Donor-Conceived Person Register in which the identity of a donor-conceived child, his or her parents, and each relevant donor will be recorded. The child will have the right to access identifying information about a donor on attaining the age of 18. Also, it will enable civil partners and cohabitant partners (three years) to be eligible to apply to adopt children jointly. In addition, the 2015 Act will make certain reforms to the law on maintenance to ensure that same-sex parents whether through donor-assisted reproduction or adoption have the same maintenance responsibilities as any other parents in respect of their children.

Under the 2015 Act, there is provision for a new arrangement whereby unmarried parents could sign the statutory declaration for joint guardianship when registering or re-registering their child’s birth. Registrars will have the authority to witness statutory declarations for joint guardianship. Treoir was instrumental in ensuring that this provision was included in the 2015 Act. It is remarkable that it has not been commenced at this time considering that it is the only provision addressing the needs of unmarried fathers who are not cohabiting or who do not meet the cohabitation requirement.

Conclusion

The 2015 Act is a groundbreaking piece of legislation that brings much needed reform to many types of families in Ireland. Some of the main conclusions are:

- Following the commencement of certain provisions of the 2015 Act, the district court will be dealing for the first time with constitutional rights together with the complexities of modern families which may delay court procedures.

- It will be interesting to observe how the courts interpret and implement the best interests of the child, for the first time outlined in detail in the 2015 Act; whether the definition will be adopted in child care proceedings; and, whether the voice of the child will be adequately ascertained.

- The 2015 Act extends the categories of persons who may apply to court to be appointed a guardian of a child. This could result in a child having more than two
legal guardians as the appointment of a legal guardian will not affect the previous appointment of existing guardians.

- The non-parental guardianship introduced by the 2015 Act is a groundbreaking provision that will allow grandparents, other relatives, and persons who are exercising the responsibilities of raising a child to apply to the court to acquire the significant decision-making rights associated with guardianship. It is uncertain whether by virtue of this section it may be possible, in the best interests of a child, for a foster parent to be appointed a non-parental guardian with specific and limited rights tailored to each individual case.

- It is apparent that the Child Care Act (1991) and the Child Care (Placement of Children in Foster Care) Regulations (1995) are due a review to ensure that they are aligned with the children’s constitutional rights introduced by the recent 31st amendment to the Constitution and the Children and Family Relationships Act 2015.

- The 2015 Act provides significant rights to non-biological parents and persons acting in *loco parentis*, but it does not improve the rights of unmarried fathers unless they have cohabited with the mother for the requisite time.

- The unmarried father of a child will continue to have to resort to the courts if the mother does not agree to sign a statutory declaration for joint guardianship. In this regard, the 2015 Act fails to address the current discriminatory situation of unmarried fathers and children in non-marital families. It is significant that in Northern Ireland and Britain unmarried fathers acquire automatic guardianship rights when jointly registering the birth of the child with the mother (Law Reform Commission, 2009).

- A fully resourced and dedicated family law system will be fundamental to ensure that the purpose of the Children and Family Relationships Act 2015 is fully accomplished.

**About the author**

Beatrice is a qualified barrister and an information officer with Treoir, the National Federation of Services for Unmarried Parents and their Children.

This article is for general information purposes only and does not comprise legal advice on any particular matter. The author would like to highlight that while every care has
been taken in the preparation of the article, the Children and Family Relationships Act 2015 is a multi-layered and complex piece of legislation that significantly amends the already dissected Guardianship of Infants Act 1964 and various other enactments.

Acknowledgement
The author would like to acknowledge the valuable contribution made by the team at Treoir in completing this article.

Endnotes
1 Guardianship of Infants Act 1964, Section 3 as amended by Children and Family Relationships Act 2015, Section 45
2 Guardianship of Infants Act 1964, Part V, Section 31 as inserted by Children and Family Relationships Act 2015, Section 63
3 Guardianship of Infants Act 1964, Section 31(2)(h) as inserted by Children and Family Relationships Act 2015, Section 63
4 Guardianship of Infants Act 1964, Section 31(3) as inserted by Children and Family Relationships Act 2015, Section 63
5 Guardianship of Infants Act 1964, Section 32 as inserted by Children and Family Relationships Act 2015, Section 63
6 Guardianship of Infants Act 1964, Section 2 (4A) as inserted by Children and Family Relationships Act 2015, Section 43 (c)
7 Guardianship of Infants Act 1964, Section 6(F) as inserted by Children and Family Relationships Act 2015, Section 49 other than in so far as it relates to s.6B(3)
8 Guardianship of Infants Act 1964, Section 2 (4) as amended by the Children Act 1997, Section 4
10 Guardianship of Infants Act 1964, Section 6A as amended by the Children and Family Relationships Act 2015, Section 48
11 Guardianship of Infants Act 1964, Section 6C (11) and Section 6C (12) as inserted by Children and Family Relationships Act 2015, Section 49
12 Guardianship of Infants Act 1964, Section 8(6) as inserted by Children and Family Relationships Act 2015, Section 51(b) other than in so far as this section as amended relates to s.6B
13 Guardianship of Infants Act 1964, Section 6C as inserted by Children and Family Relationships Act 2015, Section 49
14 Section 14 of the Passports Act 2008 as amended by the Children and Family Relationships Act 2015, Section 100
15 Guardianship of Infants Act 1964, Section 6E as inserted by the Children and Family Relationships Act 2015, Section 49
16 Guardianship of Infants Act 1964, Section 7 as substituted by the Children and Family Relationships Act 2015, Section 50
17 Guardianship of Infants Act 1964, Section 6D as inserted by the Children and Family Relationships Act 2015, Section 49

18 Form 58.49 O. 58, r. 4(12) Schedule C. The Statement of Arrangements Form is available at www.courts.ie and www.treoir.ie

19 Guardianship of Infants Act, 1964 Section 11A as inserted by the Children Act 1997

20 Guardianship of Infants Act, 1964 Section 11 (4) as substituted by the Children and Family Relationships Act 2015, Section 53 (a) and (b)

21 Guardianship of Infants Act, 1964 Section 11E as inserted by the Children and Family Relationships Act 2015, Section 57

22 Guardianship of Infants Act, 1964 Section 11B as inserted by the Children and Family Relationships Act 2015, Section 55

23 Guardianship of Infants Act, 1964 Section 12A as inserted by the Children and Family Relationships Act 2015, Section 58

24 Guardianship of Infants Act 1964, Part V, Section 31 as inserted by Children and Family Relationships Act 2015, Section 63

25 Guardianship of Infants Act, 1964 Section 18A as inserted by the Children and Family Relationships Act 2015, Section 60

26 Guardianship of Infants Act, 1964 Section 18D as inserted by the Children and Family Relationships Act 2015, Section 60

27 Guardianship of Infants Act, 1964 Section 11C as inserted by the Children and Family Relationships Act 2015, Section 9

28 Family Law (Maintenance of Spouses and Children) Act, 1976 Section 5B as inserted by the Children and Family Relationships Act 2015, Section 73

29 Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010 Section 52A as inserted by the Children and Family Relationships Act 2015, Section 146

30 Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010 Section 30 and 34 as amended by the Children and Family Relationships Act 2015, Section 137 and 138

31 Civil Registration Act 2004, Section 27A as inserted by Children and Family Relationships Act 2015, Section 97

References


Child Care Act 1991

Child Care (Placement of Children in Foster Care) Regulations 1995

Child Care (Amendment) Act 2007

Children and Family Relationships Act 2015 (amendment of Guardianship of Infants Act 1964)

Children’s Act 1997

Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010
Civil Registration Act 2004
European Convention on Human Rights. (Art. 8)
Guardianship of Children (Statutory Declarations) Regulations 1998
Guardianship of Infants Act 1964, amended by Children and Family Relationships Act 2015
Irish Constitution (1937)
O’B. (a minor) v MJELR & Ors (2009) IEHC 423
Passports Act 2008
Thirty-first Amendment of the Irish Constitution 2012

Web resources
www.childlawproject.ie
www.courts.ie
www.justice.ie
www.irishstatutebook.ie
www.treoir.ie
Permanence and long-term foster care: what are the options?

Dr Valerie O’Brien and Angela Palmer

Synopsis of article
Long-term foster care is the predominant permanent placement option for children who are likely to remain in out-of-home care in Ireland. The insertion of clauses into the Irish Constitution recognising children’s rights provides possibility for the expansion of options. The nature of care planning, foster and adoptive parent assessments, as well as social work involvement in judicial processes, may be on track therefore to undergo significant change in Ireland. This paper describes the recent insertion into the Irish Constitution and examines it against the backdrop of a profile of children currently in care. It explores the option of ‘special guardianship’, which was legislated for in Ireland in 2007, as one possibility within long-term foster care which is aimed at securing greater permanency for placements. The paper also explores the proposals for advancing adoption as another permanency option for children in long-term foster care. We identify a number of key issues of potential interest to the foster care community in relation to permanency and stability, as well as legislative and policy change.

Introduction
For over 30 years, carers and social workers in Ireland have achieved success in securing stable outcomes for many children in long-term foster homes. This is an achievement of which both carers and the profession can be very proud. There is, however, evidence that stable outcomes have not been achieved for all children. Questions remain as to how the system, and the situation for individual children, could be improved. The options in respect of permanency are examined with these in mind. Firstly, the new insertion into the Irish Constitution recognising children rights is presented, followed by a snapshot of trends in respect of children in care. Secondly, the legal options and proposed changes are examined.

Recognising children’s rights in the Irish Constitution
The constitutional amendment of 2012 changes the previous balance of legal rights between children and parents in Ireland. Prior to this insertion, the rights of parents were
the stronger undoubtedly. The newly-approved Article 42A in the Irish Constitution 2012 enables married parents to place their child for adoption for the first time; it facilitates children born to either married or unmarried parents to be adopted, as well as those residing for a specific time frame in long-term foster care. The Adoption Amendment Bill 2012, published as part of the children’s referendum campaign, contains legislative proposals which would permit children to be adopted if they are with foster carers for three years or more.

Article 42A of the Irish Constitution Amendment 2012 recognises that all children have rights, and pledges to protect those rights through the laws of the State. This is its central premise. The Article makes provision for children to have their views established and permits the courts to identify rights for children on a case-by-case basis.

**Article 42A**
The new article inserted into the Constitution states:

1. The State recognises and affirms the natural and imprescriptible rights of children and shall, as far as practicable, by its laws protect and vindicate those rights (Art.42A.1).

2. In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child (Art.42A.2.1°).

3. Provision shall be made by law for the voluntary placement for adoption and the adoption of any child (Art.42A.3).

Article 42A.4.1° outlines that provision shall be made in law that in the resolution of all proceedings:

i) brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or;

ii) concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.

The Amendment further states that provision shall be made by law for securing, as far as
practicable, that in all proceedings referred to in Article 42A.4.1° in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

One of the effects of recognising children’s rights in the Constitution is to position adoption more centrally in the care system. It also expands the basis on which the State can make decisions about children, going against the wishes of their parents. It is, as yet, unclear how the provisions under Article 42A will become manifest in practice in relation to children’s rights. However, it is clear that these changes will have implications for current service delivery and particularly for professional practice. It is likely to change the nature of care planning, as well as foster and adoptive parent assessment, and social work involvement in judicial processes (O’Brien and Palmer, 2015).

**Children in care**

The information systems available in respect of children in care are extremely limited in Ireland. This impacts seriously on the ability to obtain a detailed profile of different cohorts of children in the care system and, with particular importance for this article, children in long-term foster care. The shortfall of data creates challenges for service managers, professionals, advocates and policy makers who are planning and delivering services aimed at optimising opportunities for children in the system.

Table 1 overleaf provides an indication of the circumstance of the total numbers of children in care between the years 2006 and 2012. It breaks down the numbers of children admitted into and discharged out of care each year, the total number in foster care in relation to total care population and, finally, the total length of time children have spent in foster care over this seven-year period.

While this type of snapshot is helpful, it is clear that it is not yet possible to track the pathway of each individual child through the care system. The data available for analysing trends in the Irish foster care system is limited to overview. While there are plans to improve data collection, there is a need to balance resource usage for data collection in relation to frontline service delivery. The pressures on frontline social workers are already well documented, and social workers have to negotiate their way through an under-resourced child protection system. Rarely do they have the opportunity to look at a range of options for a child, but must settle frequently for what is second best or available (O’Brien and Cregan, 2015; O’Brien and Palmer, 2016).
Table 1. Profile of all children in care between 2006 and 2012

<table>
<thead>
<tr>
<th>Amount of Time in Care</th>
<th>&lt; 1 year</th>
<th>1-5 years</th>
<th>More than 5 years</th>
<th>Total no. of children in foster care (FC and relatives)</th>
<th>Total no. of children in care system</th>
<th>Total no. admitted to care per year</th>
<th>Total no. discharged from care per year*</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>27%</td>
<td>39.4%</td>
<td>33.6%</td>
<td>4,519</td>
<td>5,247</td>
<td>1,845</td>
<td>-</td>
</tr>
<tr>
<td>2007</td>
<td>25.2%</td>
<td>37.4%</td>
<td>37.4%</td>
<td>4,693</td>
<td>5,307</td>
<td>2,134</td>
<td>-</td>
</tr>
<tr>
<td>2008</td>
<td>23.1%</td>
<td>40.1%</td>
<td>36.2%</td>
<td>4,715</td>
<td>5,345</td>
<td>2,013</td>
<td>1,973</td>
</tr>
<tr>
<td>2009</td>
<td>27.5%</td>
<td>39.4%</td>
<td>33.1%</td>
<td>5,058</td>
<td>5,674</td>
<td>2,372</td>
<td>2,045</td>
</tr>
<tr>
<td>2010</td>
<td>25.3%</td>
<td>39%</td>
<td>35.7%</td>
<td>5,343</td>
<td>5,965</td>
<td>2,291</td>
<td>2,000</td>
</tr>
<tr>
<td>2011</td>
<td>23.1%</td>
<td>43.3%</td>
<td>33.5%</td>
<td>5,564</td>
<td>6,160</td>
<td>2,218</td>
<td>2,053</td>
</tr>
<tr>
<td>2012</td>
<td>18.2%</td>
<td>44.9%</td>
<td>36.9%</td>
<td>5,816</td>
<td>6,332</td>
<td>2,070</td>
<td>1,898</td>
</tr>
</tbody>
</table>

Sources: Data from HSE, 2012; TUSLA, 2014; Department of Children and Youth Affairs, 2013b; * It is not possible to de-aggregate the numbers of children leaving care, that is: if care order expired and/or was overturned; if reunification occurred as part of care plan; if children reached 18 year, etc.

Table 1 provides information on the level of activity in the system and a number of trends are evident. There are, on average, approximately 2,000 children entering the care system each year and almost 2,000 leaving it. However, the cumulative numbers of children in care are increasing each year. Referencing the Department of Children, O’Brien and Cregan (2015, p.89), report that:

“According to a report (DCYA 2013a) submitted to the UN on the Rights of the Child, a rise in the population and a growing awareness of the impact of both long-term neglect, as well as the impact on vulnerable parents of the economic downturn contributed to the increase in the care population.”

Internationally, Ireland still resides in the mid-range category in terms of the number of children in care and average admission rates, when compared to countries such as Japan and America (O’Brien and Cregan, 2015, p.89).

Creating a detailed analysis of trends, especially as it relates to children in need of permanency, requires knowledge of the individual journeys through care. Who are the children residing in care for longer than five years? What family situations brought them into care? Why are they still in care? Do they have siblings, or not? Are these siblings in care? And if so, are they placed together? What was the initial care plan? How has this changed over time? Was reunification planned for initially? What did this outcome
change? And, finally, what cohort of children represented in other time periods (such as those represented in Table 1) are likely to remain in care? Such information is usually known at a case level, and is usually captured within the care plan. However, templates for care plans might not always capture all this information. Information is essential to obtain a full picture of the care experience and pathways.

**Carers for children in care**

O’Brien and Cregan (2015, p.89), report that:

“The majority of children in state care (91 per cent) were living with foster families and the remaining 9 per cent were living in residential care units or other types of placements. Of the 91 per cent children, 31 per cent were living with relatives, (formal kinship placements) and 60 per cent were living with non-related foster carers.”

‘Snapshots’ of the carer profile are provided by Meyler (2002), Daly and Gilligan (2005) and Irwin (2009). Clearer analysis of the demographic features of the 3,783 foster and kinship carers (DCYA 2013b) is, however, largely unknown. The age, personal family set-up and income level are among the questions that come to mind if one is deciding on a permanent living arrangement for a child in care. Additionally, information such as the number of foster children in their care, how long they have been foster carers and how long individual children have remained in their care, would provide a more rounded overall picture of carers. Within this information void, the precise profiles, challenges and opportunities faced by carers in respect of providing permanent homes to children are hard to describe.

It is suggested that implementation of domestic adoption reform, while welcome in some respects, may have an impact, as yet undetermined, on the group of long-term foster carers whose retention is essential for the maintenance and stability of multiple care options for children in care. Stability in foster care is crucial and it is well recognised that the foster carer role is complex (Horgan, 2002).

If alternative options for children in long-term care are being considered at a political level, information and data are needed urgently in respect of the children, the carers, and the birth and foster families within the current system. This is crucial and basic information and should be an important pre-requisite to any future legislative change.
Otherwise, planned legislative amendments may be developed and implemented, largely with a knowledge vacuum on the general state of the care system.

**What do we already know?**

The goal of the care system is to provide for children who cannot live with their parents. The system is built on the premise that admission to care is a last resort and is only pursued when all efforts to keep children and their birth parents together are exhausted. If care is needed, the preference is for family-based care.

There are no generally-agreed definitions as to what constitutes short- or long-term foster care. However, in practice, six months or under is considered short term, while over six months is considered long term. However, if any foster carers are asked what short-term care is, their answer will tell a different story. Long-term foster care - the focus of this paper - is usually understood to apply to circumstances where the professionals involved are of the view that “it is unlikely the child/young person will return to live with their own family” (IFCA, 2011). But what is known of this cohort of children, and their carers, within the care system? And how is this knowledge pertinent to discussions surrounding permanency options in Ireland?

There has been a number of small studies in respect of long-term foster care (Daly and Gilligan, 2005; Daly, 2012), but the limited data available on the profile of children in care, and their care plans, means that very limited inferences only can be drawn.

Daly and Gilligan’s study highlighted that nearly two thirds (61 per cent) had more than one foster child within the household (2005). It was also found that 76 per cent (Meyler, 2002) and 70 per cent (Daly and Gilligan, 2005) had at least two other children in the household, so children were fostered alongside birth children.

In terms of family structure, 11.2 per cent in Daly and Gilligan’s (2005) study, and 12 per cent in Meyler’s (2002) had just one adult carer in the household. Daly and Gilligan’s (2005) report showed that 85.4 per cent (170) of foster carers stated they had a very close or fairly close relationship with the fostered child, while 14.6 per cent (29) stated there was a reasonably close or a not close relationship. The nature of the relationship is a crucial factor in determining stability and permanence in care. McEvoy and Smith (2011) noted in their study that young people felt that being treated differently from the foster carer’s own children was one of the greatest barriers to feeling a sense of real belonging to that family.
At an anecdotal level, a number of trends are indicated. Children in long-term foster care are predominantly in their teenage years. In 2012, 32.8 per cent of children in long-term care were aged nine to 13, and 30.3 per cent were aged 14 to 17 (Tusla, 2014, p.52). This is seen as a result of a combination of factors, including long-term foster care being the predominant form of out-of-home-care, many children entering care at an older age, and adoption from care being a rare occurrence. Other anecdotal evidence suggests that some children in long-term foster care lose contact with their birth families over time, while some long-established, long-term, foster-care placements are at heightened risk of breakdown as the children enter teenage years.

More informed analysis could provide useful information in respect of children already in long-term foster care and their carers. This could help also to assist planning for children who may enter long-term foster care at a future date, with particular reference to issues of stability and permanency, and those that might avail of those options. It is likely that, if permanence is to become more central within the care system, there may be different actions for short- and long-term foster children. There is evidence that, when permanence is more central in the system, there is a greater focus on time as a variable in planning for young children entering the system (Parkinson, 2003).

**Permanence and outcomes**

A great deal of confusion exists as to the definition of permanence within the care system. The literature is full of examples in which commentators are not explicit in their definition when discussing this term. Deciding on a definition is important when one considers the legal, emotional, and social parameters of permanence. This paper is mainly concerned with the legal definition in order to secure permanence. However, at a more general perspective, a good working definition of permanence is the one used by the UK Performance and Innovation Unit (2000) where it is defined as the security and well-being that comes from being accepted as members of new families. This definition captures the combined aspects of stability, good developmental outcomes and family membership which remain at the heart of the various definitions of permanence (Schofield 2009).

It is widely accepted also that stability and permanence are key to health development. Multiple placements, and lengthy periods in care, are intrinsically linked to trauma and negative outcomes later in life (Daly, 2012; Biehal, 2009). It is known that in 2012, 172 of
the 6,332 children experienced three or more placements, but we don’t know how many of the 172 were children in long-term foster care (Tusla, 2014). Daly’s research reiterates the high levels of adversity facing children in the care system, especially when they reach 18 years and age out of the system. When this is combined with the issues identified by the Child Death Review (Shannon and Gibbons, 2012), the challenges for young people in care are seen to be enormous. McEvoy and Smith (2011) have found in their research that children in the care of the Irish State carry with them an “immense fear” of turning 18 and that some children who had left their foster family at this age did so with a sense that they were “a transaction in a business arrangement” (McEvoy and Smith, 2011, p.85). The assumption is that a legal provision for adoption would increase the chances of foster children staying with their foster families into adulthood. Once adopted, they would be full members of the new family and would transition to live away from home just like other young people in their community.

The relationship between outcome and experience in the care system is hugely difficult to explain. The reason is because it is not always possible to compare like with like; every individual care experience may be very different in any number of ways. It is extremely important therefore to place caution at the forefront when assertions are made in this regard. Variables such as permanence, stability and identity formation are widely recognised as key to optimising outcomes for children in state care. It is hard to argue against this premise. What presents difficulty, however, is the ability to obtain agreement on the level of relational or hierarchical importance each of these variables represents within the whole picture. Debates rage on questions including, “How are each of these terms defined? What would we see if they were all in place? Are there different perspectives depending on who is speaking?”

While outcomes for children in care are, and should be, held as core measures, the actual experiences of the system of children and young persons are also seen as key indicators (McEvoy and Smith, 2011). To this end, we will now consider the legal options, available or proposed, in respect of enhancing permanency.

**Guardianship as a permanence option?**

‘Special guardianship’ was introduced in 2007 to enhance the stability of placements by creating legal ties between children and foster carers, while not completely severing the child’s links with the birth family. The change was inserted into Section 43 of the Irish
Legal issues in foster care

Child Care Act, 1991. It authorises foster carers:

“To have, on behalf of the Health Service Executive (HSE), the like control over the child as if the foster parent or relative were the child’s parent” (Child Care (Amendment) Act 2007, s.4(a)).

Implementation in Ireland

‘Special guardianship’ was first recommended for implementation in Ireland in 1984 by the Review Committee on Adoption Services. The absence of alternatives created a fear that adoption orders might be applied for in inappropriate circumstances and that adoption might not be a suitable option for all children. These circumstances relate to children in long-term care with relatives, where in-family adoptions could create “distorted relationships” and, for older children, where cutting all links with their birth family would not be appropriate (Review Committee on Adoption Services, 1984, p.83). The Review Committee (1984, p.82) recommended that a “less radical” option should be introduced for children in long-term care.

The 2007 ‘Special guardianship’ order that subsequently came into force creates circumstances where increased responsibility and autonomy can be provided to foster carers or relatives in the practical day-to-day care of children in their long-term care (Nestor, 2007). It represented a change in practice as, for the first time, foster carers were recognised as persons who could apply for legal rights and have responsibilities in respect of children in their care. ‘Special guardianship’ gives foster carers the authority to consent to medical and psychiatric examination, treatment or assessment. It also enables carers to consent to the issuing of a passport to “enable the child to travel abroad for a limited period” (Child Care (Amendment) Act 2007, Section 4 (5)(ii)). This authority is similar to that given to the HSE (now Child and Family Agency) when a child enters care on a care order (Child Care Act 1991, Section18 (3) (a) & (b)). However, it does not remove birth parents’ guardianship rights. Importantly, neither does it “supplant the HSE’s (now Child and Family Agency’s) statutory role” regarding the child, (Child Care (Amendment) Act 2007, Section.43A) as the Child Care Act 1991 and Child Care (Placement of Children in Foster Care) Regulations 1995 remain in place (Shannon, 2010, p.302). Under the legal arrangement, the child remains in the care of the state and can be removed from the foster placement at any time (Shannon & Power, 2007).

Certain criteria must be complied with prior to any application for guardianship. The
most significant of these is the requirement of foster carers to have been caring for the child for a “continuous period of five years” (Child Care (Amendment) Act 2007, Section 4 (2) (a)), without disruption of a period longer than 30 days (Section 4 (3)). Other criteria include that:

- The order is in the best interests of the child
- The HSE (now Child and Family Agency) has consented
- If in voluntary care, the birth parents have consented
- If on a full care order, the birth parents have been informed, unless they are determined to be missing or the court, having regard to the child’s welfare, so directs
- The child’s wishes have been considered, in so far as practicable (Child Care (Amendment) Act 2007, Section 4, subsection 4(2) - 4(4)).

The order also stipulates that further conditions can be imposed (Child Care (Amendment) Act 2007, Section 4 (6)). These conditions were set out first in a brief policy guidance document for HSE staff in 2009. The policy also recommended that, when eligibility to apply is met, the provisions in Sections 43A and 43B be “automatically discussed at child-in-care reviews” (HSE, 2009, p.5).

Why did it happen?
The reason for the introduction of this provision was to address basic issues which were causing difficulties for foster children and their carers at the time. These, according to Mulligan (2012, pp.22-23), included:

- The “regime of intensive supervision of foster carers” by social workers, regardless of length of placements (Dáil Éireann, 2007, p.636(3)). It was thought that special guardianship could free up social work time (Seanad Éireann, 2006).
- The stigma of being in care and how this impacted on the quality of life for children in care when compared to that of their peers. The example of school trips was cited and how children in care can be singled out among peers, as they wait for written permission from their social worker to partake in the excursion (Dáil Éireann, 2007).
- Practical problems around consent for medical attention where delay might put children at risk (Dáil Éireann, 2007). Prior to the introduction of section 43 into the 1991 Act, foster parents, despite acting in a primary-carer role, could only consent
to “urgent medical treatment” and only if a medical practitioner found it to be necessary and “in the interest of the child’s welfare” (Department of Health and Children, 2003: Standard 11; Shannon, 2010, p283).

While the introduction of special guardianship addressed a number of these issues, challenges remain today for many children and their long-term foster families in respect of being able to live more like their peers and others living in their community.

**Guardianship as a route to permanency?**

There is no data available in respect of how many special guardianships have been granted since the introduction of the provision in 2007. The extent to which guardianship is routinely addressed in care reviews is not known. This data gap is a major concern. How can guardianship be evaluated as an option if base data, such as the numbers involved, cannot be ascertained. In the first instance, the collation of base data is necessary along with an evaluation of how guardianship has been experienced by carers and young people.

Anecdotally, a number of difficulties have been identified with how the legal framework for guardianship has been set up. One difficulty is the five-year time frame which needs to be in place prior to an application. This time criteria is longer in Ireland than in many other jurisdictions. An application for legal guardianship in Sweden, for example, can be made after three years. A further criticism is the stated provision of guardianship to provide a ‘family for life’. Ireland, together with other jurisdictions providing this measure, offers ‘special guardianship’ only until a young person reaches the age of maturity (18 years). It should be noted that foster care and guardianship ends for all children in the care of the State at this age.

Anecdotally again, it seems the numbers of foster carers availing of this option is low. There is a need for research into why so few carers have availed of this 2007 legislative provision. As the psychological processes and the effects of claiming children are gaining greater emphasis in the literature, questions remain about the issue of guardianship. We have identified some issues that need attention:

1. Would a shorter time period, rather than the five-year rule currently required for special guardianship, increase its use?
2. Does the use of guardianship stabilise placements and are there any other effects?
3. What are the processes that surround decision-making in applying for guardianship?

4. How do the knowledge, skills and values of child welfare professionals impact on its use?

5. What role do financial supports play?

Research shows that access to allowances and services should be available for carers, irrespective of legal relationship with the child (O’Brien and Palmer, 2015). Foster carers actively seeking and taking on additional responsibilities may be of symbolic importance to young people in care and, in doing so, address fears faced by children about ageing out of care. It may also indicate that children are more likely to remain in these families after 18 years of age. Research would provide a better picture and the viability of this option in securing permanence for children can be better evidenced.

**Adoption and the care system**

The Adoption Amendment Bill 2012, which accompanied the constitutional referendum on Children’s Rights, offers a new potential route to a permanent living arrangement for children in the care system. The proposals in the Bill lower the threshold of parental abandonment outlined in the 1988 Act. It contains proposals to permit children to be adopted if they are with foster carers for three years or more. Proportionality is also key to the proposals.

**Legislative changes**

The Adoption Act 1988 made provisions concerning the issue of parental consent by providing for the adoption of children, against the wishes of their natural parents, regardless of their marital status. However, a high threshold was set for abandonment, which was termed as the complete failure of parental duty until the child reached 18 years of age. For decision-making, this meant the right of the family unit was privileged over the right of the child to be adopted. Adoption remains predominantly consensual in nature but the proposals contained in the Adoption Amendment Bill 2012, serve to fundamentally shift this basis (O’Brien and Palmer, 2016).

**Changing landscape of adoption**

The profile of adoption in Ireland is changing. A snapshot of the 146 adoptions that
occurred in 2014 (see Table 2) shows the variation occurring across the different adoption categories. Parents relinquishing their newborn children (by consent) to adoptive families continue to represent a very small percentage of the overall cohort (15 cases). A total of 23 adoptions related to children adopted out of long-term foster care (LTFC). (A significant number of these would have been contested by birth parents). Step-parent adoptions accounted for 74 family adoptions, while 34 intercountry adoptions (ICA) were registered.

Table 2. Different strands of ICA and domestic adoptions in Ireland in 2014

Note: There is no breakdown separating family and stranger adoptions in the 2014 official statistics. It is likely that the majority of adoptions in this category are stranger, as the bulk of family adoptions are contained in the step-parent category. The intercountry adoptions (ICA) figure represents adoptions that were registered by people habitually resident in Ireland. (Source: O’Brien and Palmer, 2016)

The numbers of children adopted from the care system remains low. Out of a total of 116 adoptions in 2013, 17 were adopted from long-term foster care. (Adoption Authority of Ireland (AAI), 2015a). This figure rose to 23 in 2014 (AAI, 2014). Many children are adopted in the period prior to their ageing out of the care system. In 2014, for example, 65 per cent of adoptions from long-term foster care occurred when the foster child was 17 years of age (AAI, 2015b). The reasons for adoption at this age have not been researched fully, but anecdotal evidence shows that it is driven in many cases by the foster child’s and foster parents’ desire for legal permanence.

Adoption is a legal instrument designed to terminate the rights and responsibilities between children and their birth parents and, in so doing, it transfers the rights and responsibilities to another set of parents (Shannon, 2010). Post-adoption supports may be provided and, in some countries (Neil 2007), there is provision for ongoing contact, although provision for legal enforcements concerning same is limited. However, adoption means that parents and the adopted child are then able to live their lives free of child-welfare agency and regulatory involvement. For some children and families in
the Irish care system, this would be a welcome development. It is, however, more complicated than that as many carers, birth families, and young people are aware.

Cregan’s (2016) research, based on interviews with foster carers in respect of adoption out of care under the 1988 Act, paints an interesting picture. She reports that carers found a lack of information regarding adoption. Carers who were aware of it were generally cautious about bringing it up in reviews for fear of ‘rocking the boat’, in terms of their relationship with both birth families and with the agency. They were also somewhat cautious of breaking the legal bond between children and their family members, despite the strong relationship between them and the children. Carers’ fear that the child would regret the decision in later life emerged as a factor, as did the fact that carers themselves had a less-than-positive general view of adoption.

On the other hand many positive aspects were seen as connected with adoption such as greater stability, the end of forced access, and that as parents they would have a greater voice.

“Many of the carers interviewed recommended that, even if they had adopted or were interested in doing so, they would need support and financial help into the future.”

Cregan’s seminal work in an Irish context adds an important dimension to the picture that is evolving.

Outcomes for adoption

Adoption may be a good choice for some children, for some birth parents and some prospective adoptive parents (Conway 2000). The research shows that adoption is successful for the majority of late-placed children and that children show remarkable developmental recovery and catch up in many areas. It could be said that adopters “represent the most potent of therapeutic environments” (Wrobel & Neil 2009, p.9). It is also evident that adoption may not be open to or suitable for all children and families in the long-term foster care system. Disruption can also occur in adoption. It is not necessarily a ‘panacea’ for all situations and, while there is a body of evidence that shows outcomes can be stronger for children who have been adopted compared to those in care, there are many in the research and professional community who question this
assertion and evidence base. Research is identifying useful measurements of outcomes that go beyond disruption or continuation, but there is still a long way to go in terms of the methodological advancements required to capture differences across the populations and different child welfare systems.

“Suffice it to say that, in a situation of a contested adoption, it is likely that expert witnesses could be found to provide strong and compelling argument to support pro- and anti-adoption positions based on the available evidence.”

There are a number of children in care who have lost meaningful relationships with their birth family and, although they are an integral part of their foster family, they have no legal status and are largely adrift in care (Gilligan, 1998). There are no easy answers for these children, often referred to as living in the twilight zone (Shannon, 2002). However, this should not distract us from seeking a truly child-centered and ethical path for each individual child. The legacy of the past continues to evoke a level of societal unease and shame, especially in relation to forced adoptions. While there is an obvious need to safeguard children’s placements and to offer them stability and security, adoption should only be seen as one option (O’Brien and Palmer, 2015).

Conclusion

The options open to provide greater legal security for children in long-term care have been limited to ‘special guardianship’ until recently. There is a data gap in respect of how this facility has been used, by whom and with what outcomes. There is an urgent need to address this information deficit.

The Government’s adoption proposals will need to be handled with transparency and honesty, allowing opportunities to the different stakeholders to deliberate, discuss and debate the key issues. This debate needs to include all those individuals affected by and responsible for legislative change, policy formation and best practice, and its implementation (O’Brien and Palmer, 2015).

If the primary focus of the Adoption Bill 2012 is on the best interests of the child, one option should be to find better ways to manage what works within the current foster care system in order to create higher rates of permanency (Palmer, 2015). This should be
used in tandem with long-term foster care, guardianship, and adoption. The complete severance of all legal relationships between the child and their birth family has major implications, not only for the child and family involved but also for future generations. While openness and contact provides for people to know their kinship ties, and this is of enormous benefit, carers are acutely aware that the reality of managing such dynamics is not always easy.

There is also a need to examine different options within long-term foster care and to see how innovations such as ‘Home for Life’, as developed in New Zealand, might have a role to play in Ireland. Undoubtedly, there is a place for both long-term foster care and adoption in the care system, but a major challenge is to ensure that change does not have unintended consequences. It is imperative that adoption reform does not destabilise the long-term foster care placement option and the existing relationships within it. This is an important consideration, given that foster care is the backbone of the Irish child welfare system. The manner in which the individual child’s need and best interests are balanced with the common good will continue to be a fine balancing act. The agency, the social worker, carers, the courts and other professionals need to ensure that sound decisions are made and that both sets of parents (birth and adoptive) and the children involved are offered long-term help with whatever decisions are reached. To this end, a number of pertinent issues facing carers have been outlined in this paper. It is hoped that this deliberation will enable carers and those in the foster care community to take a lead position in this debate.

**About the authors**

Valerie is lecturer at the School of Social Policy, Social Work and Social Justice, University College Dublin (UCD). She was a member of the Irish Adoption Board from 1998 to 2010 and board member of IFCA from 2012 to 2014. She is currently researching the adoption of children from the Irish care system with Angela Palmer; comparative India/Ireland adoption practices with Sahana Mitra; and the adoption of children to and from the USA with Dr Joyce Maguire Pavao, Cambridge MA, USA.

Angela is a doctoral scholar at UCD in the area of young people’s experience of adoption from the care system and the policy making process. She previously worked as a policy analyst, journalist and social policy advocate. Angela is an adoptive mother of two children from foster care.
References


Adoption Authority of Ireland. (AAI), (2015a), Personal e-mail communication with authors.

Adoption Authority of Ireland. (AAI), (2015b), Personal telephone communication with authors.


Child Care (Amendment) Bill 2006: Seanad Éireann Second Stage. 26 October. 184(23).

Child Care (Amendment) Bill 2007: Dáil Éireann Report and Final Stages. 26 April. 636(3).


Daly, F. (2012) My Voice Has to be Heard: Research on Outcomes for Young People Leaving Care in North Dublin, Dublin: EPIC.


Department of Children and Youth Affairs (DCYA), (2013a) Ireland’s Consolidated 3rd and 4th Report to the UN Convention on the Rights of Children, Dublin, DCYA Publications.


Health Service Executive (HSE), (2012), Review of Adequacy of Services for Children and Families 2011, Dublin, HSE.


Mulligan, A. (2012) A Comparative Analysis of the Use of ‘Special Guardianship’ as a Placement Option for Children in Long-Term Care in Ireland, Sweden and the US. Dissertation submitted as part of Master of Social Science, Unpublished: Dublin, UCD.


How to manage a disclosure of abuse by a child in your care

Sinéad Kearney

Synopsis of article

Children may come into care as a result of a court order in circumstances where there may be immediate or serious risk of abuse. When children become more settled with foster parents, they may open up to the carer. Disclosures children make may become part of the evidence for the child’s care order, so carers need to be prepared and careful when recording this information. The article offers guidance on how to keep accurate, contemporaneous, and balanced notes of these disclosures.

Introduction

There are two ways in which children can be placed in foster care. There are circumstances where a parent accepts that they need assistance and that the care they are in a position to give to their child is less than adequate at that time. This is called voluntary care and is done under section 4 of the Child Care Act 1991. Alternatively children come into care on foot of court orders granted pursuant to the Child Care Act of 1991. These children can be the subject of Emergency Care Orders, Interim Care Orders, or Care Orders. The manner in which these cases are run before the courts has changed and developed over the years since the introduction of the Child Care Act 1991. In general, we now have a much more comprehensive examination of what is in the child’s best interests and a much more robust interrogation of the evidence so that ‘findings of fact’ can be made by a court.

When a child goes into care on foot of a court order, it is the beginning of a lengthy process. Very often an application is made in urgent emergency circumstances where there is immediate or serious risk to the child, or where there is a concern that the health, development, and welfare of the child is being avoidably impaired or neglected. Very often, the initial application will be contested and can run over a number of days before the court will make its decision to grant the order.

There are different standards of proof for each of the above-mentioned orders, from the Emergency Care Order, where the judge must be of the opinion that there is reasonable
cause to believe that a certain set of facts exist, to the Interim Care Order, where the judge must be satisfied that there is reasonable cause to believe that a certain set of facts exist, to the Care Order, where the judge must be satisfied that a certain set of facts has existed or is likely to exist. The standard of proof is incremental, based on the seriousness of the impact of the order being sought on the child or children and the family.

The set of facts or criteria that the court has to adjudicate upon are as follows:

(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.

What this means is that if a child in your care is the subject of a court order then certain facts in regard to the above threshold will have been proven and so you can take it as a given that the child has suffered abuse of some kind.

“It is my understanding that when children become more settled they become more inclined to trust; they begin to open up to consistent people in their lives such as foster carers, teachers, and social workers. It is in this context that a foster carer needs to be prepared and to be confident as to how to manage a situation where the child begins to talk about their experiences of abuse.”

The Care Order Application will usually be heard within approximately 12 months of the child coming into care. The reason for this delay is that often parenting capacity assessment reports need to be done. Guardians ad Litem are appointed for children and need to have time to prepare reports, and sometimes independent reports are sought.

It is often during the time period between the granting of the Interim Care Order and the hearing of the Care Order that children make very serious disclosures that have to become part of the evidence for the Care Order. It is critical that you are prepared for when a child begins to speak about their experiences while in the care of their parents. The reason for this is because, as a general rule, hearsay evidence is not allowed to be admitted before the court and the evidence must be given by the owner of the information.
For instance, the social worker in the case cannot give evidence that he or she is informed by a public health nurse that children were left home alone. If the parents deny the allegation, then the solicitor running the case for the Child and Family Agency will need to call the public health nurse to give the evidence which he or she knows from his or her own direct knowledge.

The one exception to this rule in this regard is evidence of children. The evidence of children is governed by Section 23 of the Children Act, 1997 and what it says in summary is that, the evidence of children can be admitted before the court if the court is satisfied that it would not be in the interests of the welfare of the child to bring the child to court and secondly, that the child is too young to go to court. If a child says something to a social worker, a foster carer, or a teacher in regard to something that happened to them when they were in the care of their parents, and it is considered necessary to rely on the statement for the purposes of reaching the threshold, then the Child and Family Agency will usually submit to the court that it is not in the welfare interests of the child that they come to court and/or that the child is too young to come to court. A social worker or a psychologist will have to give evidence in regard to this proposition and must be able to persuade the court that this is indeed the position. If the court is satisfied as to the evidence then the social worker, the foster carer, or the teacher will be permitted to give evidence as to what the child told them and will have to come to court to recite what the child told them.

In order for you to be best prepared in the event that you are required to come to court and recite what a child has told you, it is imperative that the disclosure of the child is handled very carefully.

“The first thing is that if a child begins to speak about negative experiences that he or she has had, you clearly need to be sensitive, supportive, and you need to listen carefully. It is very important that you do not directly question the child but simply allow them to speak. There should be no commentary, no editorialising; you should remain supportive and calm even though often these disclosures can be most upsetting and traumatic to hear.”

You should, as soon as possible after the conversation, write down exactly what the child has said and set out the context for it. For instance, it may be that you were reading them a bedtime story, or they had just finished their evening meal, or you were sitting
watching television, or driving somewhere, when the child began to speak. The context in which it was said is important because it is one of the factors the court will consider when assessing the credibility of the statement made by the child. The court will, for instance, place considerable weight on the statement if it was made in an unsolicited way, so recording how the disclosure was made is very important.

As soon as possible thereafter, you should communicate with your social worker to let them know what the child has said. It is likely that you will be asked for a copy of the notes that you have taken, so that the lawyer running the case can assess whether or not the information is necessary to go to the threshold criteria which must be met before the court will be satisfied to make a Care Order. The social worker may want to visit with the child also, to speak about the disclosure and assess whether the child needs further assistance or therapy. If the disclosure relates to child sexual abuse it may be that a referral to one of the two specialist units in Our Lady’s Hospital or Temple Street Hospital will be indicated.

If it is the case that a decision is made that the disclosure does need to be part of the evidence put before the court, then the verbatim disclosures of the child will form the basis of an application pursuant to Section 23 of the Children Act, 1997. Usually the statements of the child are appended to the application and again this demonstrates why it is so important that accurate, contemporaneous, balanced notes are kept.

Once that application is made, a number of things can happen. The optimum result is where the respondent parents will agree to admit the information contained in the statements made by the child and they form part of the evidence before the court. The second likely scenario is that the respondent parents will not admit the evidence, and the court will have to hear submissions from the Child and Family Agency, in accordance with section 23, to the effect that it is not in the interests of the welfare of the child to come into court and give his or her evidence, and/or that the child is too young to come to court. The court accepts the evidence and the person to whom the disclosure was made will then be allowed to come to court and repeat what the child has told them. When you give this evidence, it is open to the respondent parents’ solicitors to question you on your evidence and, again, if you have managed the disclosure carefully, and written down what the child told you as soon as possible after the disclosure, and if you remain balanced and unbiased, you should not be in any difficulty in the witness box.
Both of these scenarios are a good result from the child’s point of view as the child will not be put through the trauma of having to recount their experiences in court. “What?” you might say. “That would never happen.” But it has happened and the judge of the district court has, on one occasion last year, ruled that two children had to come to court and give evidence regarding the disclosures they had made about one of their parents. The judge indicated dissatisfaction with the professional evidence given and was not convinced that it would not be in the interests of the welfare of the child to come to court and recount their stories. Needless to say that decision was appealed and happily the circuit court took the opposite view and allowed the evidence to be admitted.

To conclude, as anyone who has ever given evidence in a court case will say, it can be a difficult experience and so the better prepared you are in terms of managing a disclosure from the very beginning, the easier your experience will be.

**About the author**

Sinéad is a partner at Byrne Wallace, one of Ireland’s largest law firms. She has been the legal advisor to the Child and Family Agency and its predecessors in the seminal child protection cases of the last 25 years. Sinéad represents and advises the agency in complex and sensitive litigation before the district court pursuant to the agency’s statutory obligation as set out in the Child Care Act. She represented the Health Service Executive (HSE) in the development of the Special Care Jurisdiction for Children. In addition to child protection, Sinéad specialises in adoption law, children’s mental health and constitutional rights. She provides expert advice and representation in complex domestic and intercountry adoption cases.

**References**

*Cite references here.*

Child Care Act 1991

Children Act, 1997 (section 23)
Sex abuse evidence in child care proceedings: the challenge for foster parents

Carol Coulter

Synopsis of article

In the child protection proceedings attended by the Child Care Law Reporting Project those involving allegations of sex abuse have, along with the rarer cases involving allegations of non-accidental injury, been the most contested we’ve seen. They have also been those raising the most difficult questions about evidence. There appears to be little consistency in the gathering and presentation of evidence and on how it is dealt with by the courts, compounded by great variation in the availability of specialist sex abuse clinics in different parts of the country. In a few cases, foster carers have found themselves faced with giving evidence in these circumstances. The article explores these issues and makes recommendations to address current systemic gaps and inconsistencies in order to reduce risks both of miscarriages of justice and of leaving children in danger.

Introduction

Child sexual abuse is rightly considered a serious crime, subject to the sanctions of the criminal law. It is also hugely condemned by society, and perpetrators are understandably very reluctant to admit to it. Proving it to either the standard of proof required for child protection measures, including care orders, or to the criminal standard of proof when prosecutions occur, poses many problems around the gathering and presentation of evidence, especially evidence from children. Foster parents are often engaged in this process as the people to whom children make disclosures about abuse.

It is not surprising child protection proceedings where sex abuse is alleged are contentious: parents will always strenuously deny such allegations, which attract the greatest public odium and which also expose them to prosecution for serious criminal offences. In addition, the stakes are very high. A finding of fact that children were sexually abused while in the care of their parents will almost inevitably mean they will be taken into care until adulthood. On the other hand, leaving children who have been abused with their families can expose them to further abuse, either at the hands of their
Sex abuse evidence in child care proceedings: Carol Coulter

parents, or others from whom their parents have failed to protect them, with potentially catastrophic consequences for the children involved. The need for exceptional care in decision-making cannot be over-emphasised.

“However, from our observation of such proceedings there appears to be little consistency in the gathering and presentation of evidence of sexual abuse on the one hand, and on how it is dealt with by the courts on the other, compounded by great variation in the availability of specialist sex abuse clinics in different parts of the country.”

There have been a number of cases where this issue has been the subject of days of legal argument, leading ultimately to a measured decision by the district court judge. However, such a decision is not binding and the reasoning may not be followed in subsequent proceedings before a different judge.

**Disclosure of suspected sexual abuse and the role of foster carers**

Often the issue of the sexual abuse of a child is raised first by a foster carer, either because the child makes disclosures to the carer, or exhibits sexualised behaviour giving rise to the suspicion the child has been abused. The foster carer will generally report this to the social worker, who will bring it into on-going child protection proceedings, as the child will generally be in care under an Interim Care Order while assessments are carried out.

Disclosures of abuse from children to third parties are hearsay, and fall under the general prohibition on the admissibility of hearsay evidence in both criminal and civil proceedings. When allegations or indications of abuse are made by children to others, it is possible for this to pass through a number of people – foster parents, fostering link workers, social workers, before it reaches court, thereby falling under the heading of hearsay, sometimes multiple hearsay.

Despite the general prohibition on hearsay evidence, Section 23 of the Children Act 1997 permits an exception in the case of evidence from children. It states, “A statement made by a child shall be admissible as evidence of any fact therein of which direct oral evidence would be admissible in any proceeding to which this Part applies, notwithstanding any rule of law relating to hearsay, where the court considers that –
(a) the child is unable to give evidence by reason of age, or (b) the giving of oral
evidence by the child, either in person or under section 21 [referring to audio-visual link] would not be in the interest of the welfare of the child.”

In certain parts of the country applications for Care Orders from the Child and Family Agency contain the following, “Pursuant of S. 23 of the Children Act 1997 the Child and Family Agency intends to rely on all hearsay statements, together with particulars of same, contained herein, for the purpose of all applications made and the context of the on-going child care proceedings in this case.” In some courts judges are more willing to admit such hearsay evidence than in others.

Section 23 does not give a blanket licence to admit hearsay evidence. The section goes on to state, “In considering whether the statement or any part of the statement ought to be admitted, the court shall have regard to all the circumstances, including any risk that the admission will result in unfairness to any of the parties to the proceedings.” This clearly envisages that the admission of hearsay evidence from children must first be fully considered by the court in the light of “all the circumstances”.

Inevitably this has given rise to a number of lengthy legal debates prior to the hearing of the substantive care proceedings. One of the issues raised in such hearings has been whether foster carers, to whom children made disclosures of sexual abuse, should be called to give evidence directly of the disclosures made by the children or of their sexualised behaviour. Some courts have acceded to a request for foster parents to give evidence, while others have refused it. When they do, if the parents have robust legal representation, the foster parents are likely to face rigorous cross-examination.

Sexualised behaviour alone can be open to different interpretations, and the interpretations can be hotly contested. Increasingly experts point out that sexualised behaviour is not in itself a reliable indicator of child sexual abuse, especially where children suffer from an intellectual disability and may have less social inhibition as a result. In some instances masturbation, for example, can be self-soothing behaviour. In a lecture to Trinity College Dublin’s Master of Science in Child Protection students in 2013, attended by the present author, Dr Rosaleen McElvaney, clinical psychology lecturer in Dublin City University, said that, while such behaviour had previously been considered a strong indicator of abuse it no longer was, and could be attributed to a number of other causes, including a child seeing sexual behaviour on television or the general social
Sex abuse evidence in child care proceedings: Carol Coulter

atmosphere. Therefore expert advice is needed on the assessment of such behaviour within its full context.

We observed that in those areas of the country where specialist sex abuse clinics were available and the children were interviewed there, DVDs of the interviews might be shown to the court along with the assessment from the unit. Where criminal prosecutions were in prospect, Garda interviews might also be available. But in a number of cases we attended, neither specialist sex abuse assessments nor DVDs of Garda interviews were available to the court, and the initial evidence about suspected child sex abuse was given by social workers who were not experts in the area. Such evidence could be vulnerable to challenge by legal representatives of the parents.

Even less than social workers, foster parents are not trained in the diagnosis of sexual abuse. It is natural that they may be disturbed by sexualised behaviour on the part of a child, but, as stated above, this may have a number of different explanations. It is vital that experts are available to interview the children and assess their disclosures, but such experts are not available in many parts of the country.

In two of the cases we attended, where the children had made disclosures to foster parents, who duly reported them to social workers, an expert from the UK was called to give evidence on the credibility of the disclosures. In one case the children’s disclosures were described as credible, based on the detailed sensory descriptions they contained. In the other the expert’s conclusion was less definitive, but other evidence of serious risk of sexual abuse by the child’s father was compelling, so a full care order was granted. In neither case were the foster carers called to give evidence.

However, in another case lawyers for the parents argued that the foster parents, who had reported observing sexualised behaviour on the part of young children, one of whom was cognitively impaired, should be called to give evidence. Following a day’s legal argument, they were called, gave evidence and were cross-examined by counsel for the parents. That case is still on-going.

In this case the children were also interviewed in St Clare’s specialist sexual abuse unit, albeit many months after the allegations had first surfaced as the children fell outside its catchment area. This meant that by the time the children were brought to St Clare’s the social workers were already convinced that the children had been abused. Lawyers for the parents obtained the approval of the court to call an expert forensic psychologist
from the UK to examine the DVDs of these interviews and assess them for the court. One of the unusual aspects of this case is that the parents had an expert to question the evidence from one of the very few specialist sex abuse units in the country, on which many cases involving allegations of child sex abuse rely. Neither parents nor the Legal Aid Board usually have the resources to commission an independent expert in cases where sex abuse is alleged.

However, even when experts do give evidence, caution needs to be exercised in accepting it. There has been a number of examples of serious miscarriages of justice in other jurisdictions when child abuse, leading to serious injury or death, has been the subject of proceedings. These have led to major inquiries which have many lessons for the justice system in all cases where the abuse of children, both physical and sexual, is alleged.

A major study of the law and policy on child abuse in common law jurisdictions, which won the first Inner Temple Book Prize in 2010, warned of the need to evaluate carefully sexualised behaviour and in particular the way in which evidence around it is presented. The authors warned that phrases like “consistent with“ abuse are problematic, unless accompanied by evidence of the frequency of the behaviour among abused, as against non-abused, children. They added, “Recent studies are beginning to lay the empirical foundation that the presence of sexual behaviours that are seldom observed in non-abused children provide evidence of sexual abuse... the rapidly evolving research in this field means that caution is warranted in analysing judicial pronouncements on the probative value of such evidence“ (Hoyano and Keenan, 2010, pp 883-885).

“It would be very useful if a uniform template was drawn up for use in all district courts for the admission of various types of evidence in child sex abuse cases, including whether foster parents should be called to give evidence, expert and DVD evidence, and also including guidance as to who may see such evidence and under what conditions.”

This was the subject of a helpful ruling in the case Child and Family Agency and R. In his seventh report as Government Rapporteur on Child Protection, Dr Geoffrey Shannon states, “Section 23 of the 1997 Act needs to be reviewed in the context of care proceedings whereby the evidence of the child should be admissible, but with
safeguards built in as to the weight to be attributed to it and an assessment of the particular circumstances of the disclosure” (Shannon, 2014, p74).

This recommendation should be implemented, and the rulings made by the district court in such cases would be a good place to start. But that is not enough.

“All children in the country who have disclosed or indicated sex abuse should be able to access expert assessment and therapy in a timely way, rather than be subject to a geographical lottery.”

The protocol on joint Garda and expert or social worker interviews should be implemented consistently. The courts should be sure that the methodology and interview techniques in use in all sex abuse units represents best practice and do not tend towards bias. Resources for the Legal Aid Board should include provision for the calling of experts to challenge the Child and Family Agency evidence of child sex abuse, where necessary.

Foster parents should be prepared to give evidence of disclosures from children, and to describe their behaviour, if required. But they should not have to carry the burden of interpreting such disclosures or behaviour, thereby giving evidence of likely sexual abuse. The assessment of the disclosures or behaviour should rest with appropriately trained experts.

Children have a right to be safe from abuse and to be reared in a nurturing environment. They also have a right to be reared by their own families, other than in the most exceptional circumstances. Their welfare and rights have to be the paramount consideration in all proceedings concerning them. Parents also have the right to rear their own children, and the right to fair procedures in all legal proceedings. Upholding and balancing all these rights is not easy. But a failure to do so could lead both to miscarriages of justice and to the risk of leaving children in danger.

About the author

Carol is Director of the Child Care Law Reporting Project. Its Final Report is available on www.childlawproject.ie
References

Children Act 1997 (S.23)


The role of the Guardian ad Litem in proceedings under the Child Care Act 1991

Con Lynch and Miriam Lyne

Synopsis of article
This article examines the national and international legal context in which Guardians ad Litem are appointed and the role that they carry out. We discuss the lack of clarity in respect of the role and highlight the variation in the appointment of Guardians ad Litem across the district courts. We outline current activity and the service providers. Finally we make the case for legislative and organisational reform.

Introduction
The Child Care Act 1991, as amended, provides the legal framework for the state to intervene in the lives of children not receiving adequate care and protection. The Act obliges the Child and Family Agency (CFA) “to promote the welfare of children in its area who are not receiving adequate care and protection” and where necessary to take such children into its care either with the consent of the child’s parents or by applying to the district court for a care order. Section 36 of the Act outlines the circumstances in which the Child and Family Agency may provide care, and the ministerial regulations of 1995 establish further obligations in respect of the monitoring and review of placements. Section 47 of the Act 1991 provides that “where the child is in the care of the Child and Family Agency, the District Court, may of its own motion or on the application of any person, give such directions and make such order on any question affecting the welfare of the child as it thinks proper”.

The 1991 Act requires that the Child and Family Agency should “regard the welfare of the child as the first and paramount consideration” and “in so far as is practicable, give due consideration, having regard to its age and understanding, to the wishes of the child”. These principles reflect articles 3 and 12 of the United Nations Convention on the Rights of the Child (UNCRC) 1989. Article 3(1) states:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
Article 12 requires that:

1. State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The principles espoused in articles 3 and 12 have been given very significant additional weight as a result of the enactment of the Thirty First Amendment of the Constitution of Ireland 2015 which includes in the final part of Article 42A:

4. 1° Provision shall be made by law that in the resolution of all proceedings—
   i. brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
   ii. concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

**The appointment of Guardians ad Litem**

Section 26 of the Child Care Act 1991 makes provision for the appointment of a Guardian ad Litem under the Act:

26.—(1) If in any proceedings under Part IV or VI the child to whom the proceedings relate is not a party, the court may, if it is satisfied that it is necessary in the interests of the child and in the interests of justice to do so, appoint a Guardian ad Litem for the child.
The role of the Guardian ad Litem in proceedings... Con Lynch and Miriam Lyne

The Act is silent on the circumstances in which a Guardian ad Litem should be appointed or the functions of the Guardian ad Litem. Moreover, the Act does not stipulate which persons may perform the role. A Guardian ad Litem cannot be appointed if the child to whom the proceedings relate has been made party to the proceedings pursuant to section 25 of the Act. The decision to appoint a Guardian ad Litem is at the discretion of the district court judge and significant variation occurs in the rate of appointment across the 23 court districts.

In 2013, according to the latest figures, there were 8,977 applications under the 1991 Act to the district courts (Courts Service, 2013). 1,896 children were received into the care of Health Service Executive during the same period. Sixty-four per cent of admissions resulted from a voluntary agreement with parents and 36 per cent (n=677) were a result of court orders (ibid). It is important to note that any one child is likely to have been the subject of numerous applications during the period.

Between December 2012 and July 2015, researchers of the Child Care Law Reporting Project (CCLRP) attended hearings in respect of 1,194 cases across 37 District Courts (Coulter 2015). Coulter reports that Guardians ad Litem were appointed in 53 per cent of cases although significant regional variation is identified - the highest rate of appointment of 79.8 per cent being in the Louth district and the lowest of 13.3 per cent in Galway (ibid). Although the CCLRP attended only a sample of the total hearings, Coulter states that they were careful to ensure “that the information we collected was as representative as possible” (ibid, p.10).

In 2009, the Children’s Act Advisory Board (CAAB), following extensive consultation, published a set of guidelines entitled ‘Giving a voice to children’s wishes, feelings and interests - Guidance on the Role, Criteria for Appointment, Qualifications and Training of Guardians ad Litem appointed for Children in Proceedings under the Child Care Act, 1991’. Within the guidelines a wide range of considerations are outlined to assist the court in exercising its discretion in regard to the appointment of a Guardian ad Litem in the context of the requirement in section 26 of the Child Care Act 1991 that the court “is satisfied that it is necessary in the interests of the child and in the interests of justice” to appoint a Guardian ad Litem.

The interpretation of the criteria for appointment has been subject to considerable variation with some courts appointing Guardians ad Litem in the majority of cases while others do so rarely (Corrigan, 2014). The question of complexity is commonly cited but
the legitimacy of using complexity as criterion for appointment is challenged by Carr (2009, pp. 60-72) who argues that “if one considers that proceedings under this Act relate to children in care or who are involved in care proceedings, in relative terms it is fair to categorise all such cases as ‘complex’”. The Bar of Ireland (2015) in its submission to the Department of Children and Youth Affairs (see below) argues strongly that, from the perspective of children’s rights, the exercise of discretion by the courts in the appointment of Guardians ad Litem is not compatible with the Article 42A of the constitution and international human rights law and that “each child in care, and certainly those in respect of whom proceedings have been instituted, must have a Guardian ad Litem appointed to them in order to give effect to their right to participate in proceedings affecting them” (The Bar of Ireland, 2015, p.7).

At the conclusion of care proceedings, that is when a full care order has been granted or the application has been refused, the Guardian ad Litem is generally discharged and has no further involvement with the child. However in some cases the Guardian ad Litem is retained, sometimes for a number of years, where the care order continues to be reviewed by the district court. This usually occurs when contested issues remain in respect of access or where the child has complex needs requiring ongoing specialist services. However there is considerable regional variation in this regard. A Guardian ad Litem may also be appointed or re-appointed in respect of a section 47 application.

In the majority of cases Guardians ad Litem appoint solicitors, and occasionally counsel, to represent them in the course of proceedings although this practice is also subject to variation. It is also the case that the appointment of solicitors to represent Guardians ad Litem has been legally challenged and judicial reviews have been granted in this regard in two recent cases.

It is important to note that while applications for care orders are made in the district court, the outcome can be appealed to the circuit court where Guardians ad Litem will play a role if they have been appointed.

**The role and functions of the Guardian ad Litem**

A report by the Law Society Child Law Committee in 2006 suggests that “a Guardian ad Litem is, effectively, an independent representative appointed by the court to represent the child’s personal and legal interests in legal proceedings” (Law Society Child Law Committee, 2006, p73). While the 1991 Act does not define the role or functions of the
The role of the Guardian ad Litem in proceedings... Con Lynch and Miriam Lyne

Guardian ad Litem, there is a wide range of national and international custom and practice to inform any consideration of what the Oireachtas may have intended in introducing the provision into the Act notwithstanding that “internationally, the term Guardian ad Litem has no agreed definition” (National Children’s Office 2004, p.11). Furthermore, judgements in the district and superior courts have facilitated an incremental refinement of the Guardian ad Litem’s role by means of continual purposive interpretation of section 26 in the light of the overall provisions of the Act, the Constitution and international law. However “there is no superior court case-law on the status of the Guardian ad Litem in child care proceedings in the District Court” (The Bar of Ireland, 2015) and much remains contested.

The Child Care (Amendment) Act 2011 provides some elaboration in respect of the role with the following insertion into section 26 of the 1991 Act:

(2B) A Guardian ad Litem shall for the purpose of the proceedings for which he or she is appointed promote the best interests of the child concerned and convey the views of that child to the court, in so far as is practicable, having regard to the age and understanding of the child.

(2C) Where the court makes an appointment under subsection (1) (as amended by the Child Care (Amendment) Act 2011)—

(a) the Guardian ad Litem concerned may instruct a solicitor to represent him or her in respect of those proceedings and, if necessary, having regard to the circumstances of the case, may instruct counsel in respect of those proceedings, and

(b) where a Guardian ad Litem instructs a solicitor or counsel or both pursuant to paragraph (a), the costs and expenses reasonably incurred for that purpose shall be paid by the Health Service Executive and the Health Service Executive may apply to the court to have the amount of any such costs or expenses measured or taxed.

While the Child Care (Amendment) Act 2011 has been passed by the Oireachtas, this section has not been commenced and, for the present, section 26 of the 1991 Act stands, without amendment.

The National Children’s Office commissioned the “Review of the Guardian ad Litem Service” in January 2003. The authors of the review, in their final report, note that “the
The central problem with the GAL service at present is derived from the absence of a tight legal framework which defines clearly and unambiguously the role and duties of the GAL” (National Children’s Office 2004, p.62). This view has been amplified by a number of commentators (Shannon, 2007; Shannon, 2014; Carr, 2009; McWilliams and Hamilton, 2010; Law Society, 2006).

The Children’s Act Advisory Board (CAAB) guidelines (2009) state that the role of the Guardian ad Litem is to “independently establish the wishes, feelings and interests of the child and present them to the court with recommendations”.

The guidelines offer the following summary of standards for good practice:

a) Independence: the Guardian ad Litem is independent of all other professionals and agency staff involved with the child and family.

b) Inclusiveness: the Guardian ad Litem shall ensure that the views of all parties and others of significance are taken into account.

c) Inquiry into the child’s circumstances: the Guardian ad Litem’s approach to the task shall be planned, focused, and flexible. Avoiding delay, other than planned and purposeful, will be a priority. The inquiry shall comply with the provisions of the Freedom of Information Acts, 1997 and 2003, and the Data Protection Acts, 1998 and 2003.

d) Interests of the child: the Guardian ad Litem shall meet the child as often as necessary to be satisfied that his/her wishes, feelings and interests are ascertained and adequately represented to the court.

e) Evaluation and report: the Guardian ad Litem shall complete a written report for the court, unless the exceptional nature of the case requires otherwise.

f) Attendance at court: the Guardian ad Litem shall attend on all court dates unless excused by the court.

g) Closing the case: when proceedings have concluded, the Guardian ad Litem’s involvement in the case ceases. However, if the case is scheduled for further review, s/he shall seek clarification from the court regarding its expectations of his/her further involvement.

The guidelines go on to outline the tasks that the Guardian ad Litem should carry out in providing a service to the child and to the court. These tasks are outlined as follows:
a) Meet the child who is the subject of the proceedings.

b) Identify the nature of the proceedings and the parties involved.

c) Conduct a thorough inquiry into the child’s circumstances and provide independent recommendations to the court. Some cases may require more extensive inquiry than others. Whatever the level of difficulty, a Guardian ad Litem shall be familiar with the family and child’s history during proceedings.

d) Understand the judicial, legal, social, political and governmental systems affecting the child.

e) Try to achieve the most appropriate outcome for the child.

f) Consult with the child’s family.

g) Assess the impact of the proceedings on the child and, if necessary, act promptly to help protect the child from further stress or distress. A Guardian ad Litem shall be aware of the options available to him/her in any situation.

h) Decide on the necessity or otherwise of expert evidence bearing in mind the possible negative implications of delay.

i) Assess the level, timing and the manner of State intervention in the life of the child.

j) Provide a written report to the court which takes account of all information gathered during the inquiry. The contents of this report shall not be revealed to anyone who is not a party to proceedings.

The CAAB guidelines have no legal standing and the extent of their authority is limited. They have, however, been developed by a state agency and are a benchmark for good practice.

It important to stress that the Guardian ad Litem does not have responsibility for the day-to-day management of a case. However, in carrying out an assessment of a child’s best interests, the Guardian ad Litem will meet, on an ongoing basis, with foster carers or residential care workers to ascertain their views. This is particularly the case where issues in regard to care planning and review are being considered by the court or where applications pursuant to section 47 of the 1991 Act have been made. Moreover the Guardian ad Litem will often meet the child in their foster home or residential centre and have regular contact with their carers.
Providers of Guardian ad Litem services

In addition to the above guidance, the Children’s Act Advisory Board guidelines (2009) also outline the qualifications, skills and the criteria that must be met for a person to be considered for appointment as a Guardian ad Litem. A Guardian ad Litem must have a third level qualification in social work, psychology or other third level qualification relevant to the role and have a minimum of five years’ post-graduate direct experience in child welfare and/or protection work, knowledge and experience of the court system, and relevant experience of the child welfare and protection systems. Furthermore, they outline a range of required skills including: the ability to communicate with children in stressful situations and with parents; assessment of parental functioning, family dynamics and attachment; understanding of the professional systems, the legal system, and the interaction between the family and professional services; the ability to negotiate, and report writing skills. The guidelines also include an approach to training.

As stated above, the Children’s Act Advisory Board guidelines (2009) do not have statutory authority and in principle any person can act as a Guardian ad Litem. However our experience across a range of courts is that all Guardians ad Litem working in proceedings under the Child Care Act 1991 are professionally qualified and that almost all have a social work qualification.

While some Guardians ad Litem are not aligned to any organisation, the majority are associated with one of two service providers. Barnardos have been providing a Guardian ad Litem service since 1997 and have 32 Guardians ad Litem on their panel. Barnardos’ Guardians ad Litem are selected, referenced, and vetted in accordance with the CAAB guidelines and meet their standard for independence. They work to a set of professional standards and receive regular supervision, structured appraisal and participate in a continuous professional development (CPD) programme. Barnardos’ Guardians ad Litem who are social workers are required to be registered with the Health and Social Care Professionals Council, CORU. All Barnardos’ Guardians ad Litem are required to comply with Data Protection and Freedom of Information Acts.

The Independent Guardian ad Litem Agency, TIGALA, was established in 2014 and has 12 Guardians ad Litem on its panel. The agency ensures that Guardians ad Litem on its panel have been properly vetted, have an adequate level of skills and knowledge, an appropriate academic qualification, clinical support and are registered with the appropriate professional body. Each of the Guardians ad Litem work to a set of
professional standards and are required to comply with the Data Protection and Freedom of Information Acts.

We understand that the Child and Family Agency are currently discharging costs in respect of 61 Guardians ad Litem and this would indicate that there are approximately 16 additional Guardians ad Litem working autonomously.

**Department of Children and Youth Affairs consultation**

In October 2015 the Department of Children and Youth Affairs issued a consultation paper with the title, “Preparing a Policy Approach to the Reform of the Guardian ad Litem Arrangements in Proceedings under the Child Care Act 1991” (DCYA 2015). This paper sought submissions from stakeholders in respect of the following areas:

- principles and policies
- amendment of existing legislation
- establishing a nationally organised, managed and delivered service
- children who are made party to proceedings
- appointment of Guardian ad Litem
- role of Guardian ad Litem
- provision of Guardian ad Litem report to child
- qualifications and eligibility for appointment
- access to records, records management and information provision
- role of the Child and Family Agency and payment for Guardian ad Litem services
- engagement of legal representation
- transitional provision
- regulations by the Minister.

We understand that the Department has received a range of submissions from individuals, professional bodies and agencies and that they are preparing a policy paper for the Minister.

**Conclusion**

In the period since 1996, when the full provisions of the Child Care Act 1991 were implemented, the involvement of Guardians ad Litem in proceedings under the Act has
become firmly established, notwithstanding that there is significant variation in the rate of appointment. This period has coincided with a growing understanding of the importance of the participation of children in decisions that affect them and the need for their ‘voice’ to be heard. The importance of this participation is both a children’s rights and a developmental imperative. The appointment of a Guardian ad Litem in child care proceedings is a critical instrument in this regard.

While the involvement of Guardians ad Litem has been, in part, unregulated and subject to wide variation in terms of appointments and understanding of the role, we would argue that a generally uniform approach to practice has been adopted by practitioners in the absence of reform. Our experience in courts and our contact with other Guardians ad Litem would suggest that a core understanding of the role has emerged that reflects the parameters of the Guardian ad Litem’s functions in other jurisdictions. Essentially this involves meeting the child, parents and key stakeholders including foster parents; reviewing the involvement of the Child and Family Agency; assessing the child’s needs and informing the court about the child’s views; and making recommendations about how their best interests should be met.

> While each Guardian ad Litem is accountable to the court to which they are appointed, given the profound significance of child care proceedings in the lives of children and given that the appointment of Guardians ad Litem is a statutory provision, it is not acceptable that the professional context in which Guardians ad Litem practice continues to be unregulated.

The recent consultation paper from the Department of Children and Youth Affairs is a welcome development and we hope that it will lead to a rigorous reorganisation of Guardian ad Litem provision. In our view the optimal outcome would be:

- a national unitary service
- founded on clear principles
- accessible to all children
- with a clear statement of function in regard to the role
- consistent application ensuring equality of service
- rigorous service and financial management
- public accountability and transparency in its operations.
Achieving the above will require further public debate, political will and legislative change. However, it is difficult to have confidence that the matter will be given the necessary priority in light of the fact that over 10 years has elapsed since the report of the National Children’s Office made a robust case for substantial change. The recent enactment of the Thirty-first Amendment of the Constitution will bring increased scrutiny in the area of children’s rights and any debate in relation to the reform of the Guardian ad Litem service will need to take place in the light of this.

Finally, it should be noted that, in addition to proceedings under the Child Care Act 1991, Guardians ad Litem are also appointed in respect of High Court applications for Special Care and in private family-law cases across all courts. It is beyond the scope of this article to address the role of the Guardian ad Litem in these important proceedings.

**About the authors**

Con has been a Guardian ad Litem with Barnardos since 2013. He also holds the role of Development Specialist with Barnardos Guardian ad Litem Service for the purpose of supporting practice. Con previously worked for 22 years as a social worker, principal social worker and national project specialist in HSE Children and Family Services. He is registered with CORU.

Miriam has been a Guardian ad Litem with Barnardos since 2000. She is Head of Service (South) for the Barnardos Guardian ad Litem Service. Miriam qualified as a social worker in 1988 and prior to her work with Barnardos, practiced as a social worker for over 13 years, mainly in the areas of child protection and fostering. She is registered with CORU.

**References**

The Bar of Ireland. (2015) *Submission to the Department of Children and Youth Affairs regarding the Guardian ad Litem (“GAL”) system in Ireland.* www.lawlibrary.ie

Barnardos Guardian ad Litem Service. www.barnardos.ie


*Child Care Act* (1991)

*Child Care Amendment Act* (2011)


The Independent Guardian ad Litem Agency. www.tigala.ie


Tusla, Child and Family Agency. Review of adequacy in respect of child care and family support services provided by the Health Service Executive 2013. www.tusla.ie

The legal framework in relation to relative foster care and private foster care arrangements

Teresa Blake

Synopsis of article
This paper examines the legal framework in relation to relative foster care and private foster care arrangements. It is the statutory responsibility of the Child and Family Agency under the provisions of the Child Care Act 1991 to provide family support services to promote the welfare of children. Children placed in care with a relative under Section 41 of the 1991 Act are under regulation similar to the regulation governing placement with foster carers. Relatives caring for children in informal (non-statutory) care will be carrying out their obligations and duties to the children living with them in a similar manner as if the children were in care but without the security of formal recognition and all it entails. This type of care is significant in the care system and needs, according to the author, to be more fully recognised.

Introduction
The support provided to the poorest and most vulnerable children and their families in the State is a reflection of the core value of ‘respect for the family’ in our society. When parents experience difficulties and need support in caring for their children, it is natural that they would turn to family members or trusted friends for help. Such help could and does include taking care of children either for a short time or over a longer period. How such care is acknowledged formally by the child care system and if it is adequately supported are relevant issues in the lives of vulnerable children, for service providers and social support systems. The care, protection, and welfare of children in the State is a legal imperative founded in the Constitution of Ireland 1937, now reflected specifically in the Amendment to the Constitution Article 42A 2015. The State and its agencies have positive obligations to support the right to respect for family life and cannot interfere in family life except in exceptional circumstances, in accordance with law, on specific grounds and when necessary. The best interests of the child must be the paramount consideration in any intervention to remove children from their family.
Various legal mechanisms exist to assist in providing for the care, protection, and welfare of children. These include financial support through social-welfare payments legislation including guardian’s payment (see www.welfare.ie), family support for several care scenarios on a continuum from service provision to alternative care, placement with foster carers or relatives, and residential or other suitable care arrangements under the Child Care Act 1991. Enhanced rights for relative carers and foster carers, as well as provision for private foster care arrangements, are provided for under the Child Care Act 1991 (as amended).

This paper examines the legal framework in relation to relative foster care - or kinship foster care as it is often referred to - and private foster care arrangements.

The legal context for state involvement

The law provides different ways in which the State can become involved in support of children and their families when coping with difficulties:

- family support services, financial assistance, and other service provision
- in exceptional circumstances, the removal of children from family care into state care
- how the State should care for such children and what placement options serve the best interests of the children concerned
- the supervision and regulation of such care to ensure best outcomes for children and their families.

This is a highly regulated area of law and includes rights guaranteed and protected under constitutional law, European law, and standards set in international human rights law. The legislative framework is further supplemented and extended by National Standards, Guidelines, and National Policies and Procedures which continue to be developed through extensive interagency collaboration (Kilkelly, 2008).

The constitutional rights engaged are the rights of children and parents as individuals and as family units. The duty on the State through its agencies is to intervene to defend, protect, and vindicate the rights of children where necessary as guardian of the common good.

European Union law applies, through EC Regulation 2201/2003 [Brussels 11A], to
the placement of children abroad or to other situations where children from EU member states are in Ireland and require care.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) is part of Irish law under the European Convention on Human Rights Act 2003. The right to respect for family life has been held by the European Court of Human Rights to mean that taking children into care is to be regarded as a temporary measure. Family re-unification is to be supported and any interference by the State in family life must be necessary and proportionate.

International human rights law - The United Nations Convention on the Rights of the Child (1990) (UNCRC) is particularly significant. Under its provisions, the State has committed to providing for, promoting, and protecting the rights of children and preventing the abuse, neglect, and exploitation of children. The best interests of the child are the guiding principle. The UNCRC acknowledges the family as the fundamental unit of society. When children are in care, it supports care in the extended family. Where children are cared for in an alternative setting, the right to contact with their parents must be vindicated. In relation to representation of the child in proceedings, a child must be given an opportunity to express his or her views. This provision is reflected in the role of the Guardian ad Litem in child care proceedings under the Child Care Act 1991.

Specific constitutional rights of the child

The Constitution of Ireland 1937 imposes a duty on the State to protect, and as far as practicable by its laws, to defend and vindicate the personal rights of the citizen. This obligation applies to children as citizens, as can be seen from the statements as to the rights of children made by the courts in G. v. An Bord Uchtála (1980).

O’Higgins CJ (ibid, p.56) stated

“Having been born, the child has the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being. These rights of the child (and others which I have not enumerated) must equally be protected and vindicated by the State.”

Walsh (ibid, p.69) stated

“The child’s natural rights spring primarily from the natural right of every individual to
life, to be reared and educated, to liberty, to work, to rest and recreation, to the practice of religion, and to follow his or her conscience. The right to life necessarily implies the right to be born, the right to preserve and defend (and to have preserved and defended) that life, and the right to maintain that life at a proper human standard in matters of food, clothing and habitation. It lies not in the power of the parent who has the primary natural rights and duties in respect of the child to exercise them in such a way as intentionally or by neglect to endanger the health or life of the child or to terminate its existence. The child’s natural right to life and all that flows from that right are independent of any right of the parent as such.”

The insertion of Article 42A into the Constitution, following the referendum on the rights of children, gives even more explicit recognition to the specific rights enjoyed by children. The new constitutional provision will be of significance into the future in terms of the lives of all children in Ireland and their families but most particularly in respect of children who are in care. It is to be hoped that this constitutional provision will protect children in their families in the first instance and, in the exceptional circumstances when the State must intervene to protect a child, such action will be proportionate and proceed in the best interests of the child, while protecting the rights and duties of parents.

**The statutory duty to provide support and protection**

The Child and Family Agency Act 2013 and the Child Care Act 1991 (as amended) provide the main legal basis for the provision of support services to families by the State through its agencies, the Child and Family Agency (CFA) and the Health Service Executive (HSE). Section 8 of the Child and Family Agency Act details the functions of the Agency. Of particular importance is the specific mandatory obligation in Sec 8(3) of the Child and Family Agency Act in respect of the provision of preventative family support services aimed at promoting the welfare of children. Where the care and welfare needs of children are being met by relative carers and when children are not in care under the Child Care Act 1991, this provision could be relied on to seek support and services for any children concerned and the relative carer. Section 3 of the Child Care Act, 1991 places a statutory duty on the Child and Family Agency, as a service provider, to identify children at risk and provide child care and family support services and places on it an obligation to promote the welfare of children who are not receiving adequate care and protection. Section 3(2)(c) of the Child Care Act 1991 provides that the Child and Family
Agency, in taking action in respect of a child in need of protection, “ought to have regard to the principle that it is generally in the best interests of a child to be brought up in his own family”.

The Child Care Act 1991 provides four ways in which children can be removed from the custody of their parents or guardians or a person acting in loco parentis. These are (1) voluntary care arranged on consent (2) an emergency care order (3) an interim care order and (4) a care order Section 18 of the Act. The Act also provides for making a supervision order where a child can be visited periodically by the Child and Family Agency and advice be given as to the child’s welfare to the parent or carer.

**Regulations in relation to placement with a relative (1995)**

When a child is in care under the Child Care Act 1991, immediately a host of regulations fall to be implemented. Section 36 of the Act provides for the accommodation and maintenance of children in care. Children in care are subject to the control and supervision of the Child and Family Agency and it has a broad discretion in respect of placement, but is always guided by the child’s best interests.

Under section 41 of the 1991 Act, the Minister made regulations in respect of the placement of children with relatives. ‘Relative’ is defined as including the spouse of a relative of that child and a person who has acted in loco parentis. This could include someone who has an existing relationship with a child through co-habitation, adoption or friendship. The regulation specifies the conditions under which children can be placed with relatives; prescribes the form of contract to be entered into with relatives and provides for the supervision and visiting of children placed with relatives. The detail of these regulations in respect of placement with relatives is very similar to the regulation governing placement with foster carers.

All relative carers, as well as foster carers, must be assessed. The assessment is carried out by a social worker. The applicant being assessed must do the following:

- provide the Child and Family Agency with written medical references
- name two referees who can be contacted
- give authorisation to the Child and Family Agency to contact the Gardaí in relation to the applicants and all members of their household regarding any recorded convictions
● permit an assessment of the suitability of the applicants and their home.

A written report is then provided to the local foster care committee. It is that committee that decides if the applicant(s) are suitable to become carers.

The regulations also deal with monitoring of placements, care reviews, care planning, request for a special review, removal from placement, and termination of placement.

Article 6 of the regulations provides for an emergency placement with relatives when a child is in care, provided the Child and Family Agency, following an interview of the relatives and a visit to their home and having made such enquiries as are practicable, is of the opinion that the relatives are suitable persons to take care of the child. Relative carers, when approved, are paid the Foster Carer’s Allowance. The child concerned should have an assigned social worker and a fostering link worker and the supports necessary to support the placement as would be made available to a non-relative foster carer placement.

The duties of the relatives who are taking care of the child are set out in Article 16. These include the obligation to take all reasonable measures to promote the child’s health, development and welfare and in particular:

a. permit a Child and Family Agency professional to see the child and visit their home
b. co-operate with and furnish information as may be required to that person
c. ensure information given to them about the child is treated confidentially
d. seek appropriate medical assistance for the child
e. inform the Child and Family Agency as soon as practicable of any significant event affecting the child
f. inform the Child and Family Agency of any change in the relative carer’s circumstances that might affect the child
g. co-operate in providing access to the child by a parent or other person allowed access to the child
h. give 28 days’ notice of any intended change of residence
i. make proper arrangements for the care of the child in case of absence of the child or relative carer from the home
j. give notice of any absence that is likely to exceed 72 hours.
A review of the above shows that relatives caring for children in an informal (non-statutory) care scenario will in practice be carrying out their obligations and duties to the children living with them in a similar manner, apart from the reporting obligations to the Child and Family Agency. So is there a difference in treatment of such arrangements and is it justified on policy grounds? See Megan O’Leary MSc & Shane Butler PhD (2015).

“To this writer the importance of support to both formal and informal care arrangements should not fall foul of policy, as the object and purpose of the system is to protect children and support family functioning. The care status of a child should not limit support in any way. Difficulties when encountered have to be overcome for the benefit of the child.”

The Child Care Act 1991: informal care of children by relatives

This occurs when children are cared for by relatives, generally grandparents, owing to breakdown in the parenting of the child by his/her own parents as a result of relationship breakdown, addiction issues, mental health issues, imprisonment of parent and so on. The response of the child protection system will vary according to the reality of each set of circumstances. The following is illustrative:

1. No welfare issues - if there are no issues of concern regarding a child’s health, development, or welfare, then there is no need for specific Child and Family Agency involvement.

2. Welfare concerns that can be managed by the provision of advice and support to the relative carer and without recourse to an order under the Child Care Act 1991.

3. Protection Concerns – if such exist it will require relative carers to be involved with Child and Family Agency social workers, and the child concerned will most likely be the subject of a child protection plan which generally identifies risks that would trigger action to protect the child (for example, a parent with addiction issues returning to the grandparent’s home and seeking to remove the child).

A feature of a ‘protection concerns’ scenario could be that the Child and Family Agency have informed the relative that, if any attempt is made to remove the child from the relative’s care, the Child and Family Agency and the Gardaí must be informed. An application would probably be made to court to take the child into formal care if this
happened. There may or may not be a willingness on the part of the Child and Family Agency to state, if that course of action was followed, whether the child would remain placed with the relative. The matter would also be complicated as the parent is the respondent in court proceedings and a relative carer would have to apply to court to be joined in the proceedings and engage legal representation.

In all of the circumstances set out above, the relative is caring for the child in the same manner as if the child were in care under the Child Care Act, but without the security of formal recognition and all it entails for the child concerned, the relative carer and the child’s natural parents (O’Brien, 2013). It is such circumstances that require collaborative work between all involved to ensure the best interests of the child concerned are advanced and all actions are taken with this as the central focus.

Internationally, practice points to the success of relative/kinship placements:

> “The outcomes for children in kinship care, however, are generally seen as positive in terms of child protection, identity formation, maintaining contact with family, stability of placement, enabling siblings to live together; and there is evidence that relatives show greater tolerance towards behavioural and mental health challenges. However, there has been a lag in identifying and appraising the particular inputs and processes that are connected with achieving these positive outcomes in kinship care” (Winokur et al, 2009 in O’Brien, 2013, p.3).

<table>
<thead>
<tr>
<th>Placement of Children in Care – May 2015</th>
<th>Total Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Children in Care</td>
<td>6,411</td>
<td>-</td>
</tr>
<tr>
<td>Foster Care (General)</td>
<td>4,110</td>
<td>64%</td>
</tr>
<tr>
<td><strong>Foster Care (Relative)</strong></td>
<td><strong>1,833</strong></td>
<td><strong>29%</strong></td>
</tr>
</tbody>
</table>

The data above shows that just 29 per cent of children in the care of the State are placed within their extended family. Given the acknowledged benefits of such a placement, any review of the Child Care Act 1991 should consider the inclusion of a specific provision requiring the presentation before a court, on application for orders under the Child Care Act, of a report detailing options in the extended family which can be explored and the extent to which care is available for the children by members of the extended family. In the experience of the writer, grandparents have been rejected as relative carers all too frequently for vague reasons.
Private foster care

Private foster care is not care by a relative. The law in relation to private foster care is contained in Part 1VB of the Child Care Act 1991 sections 23(O) to 23(W). The law contemplates that an arrangement for private foster care is something planned in the first instance:

A private foster care arrangement is defined as “any arrangement or undertaking whereby a child is for more than 14 days in the full time care for reward or otherwise of a person other than his or her parent or guardian, a person cohabiting with a parent or guardian or a relative”.

The provision contains exceptions such as attendance at a boarding school, care in an institution for illness or disability, care or adoption placement, and others.

As can be seen, a private foster care arrangement is a very specific arrangement between a person described as an arranger and a person undertaking a private foster care arrangement. It is unlikely that there are many such arrangements.

<table>
<thead>
<tr>
<th>Residential Care (incl. Special Care, General &amp; Out of State Secure)</th>
<th>363</th>
<th>5%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Other Care Placements</td>
<td>105</td>
<td>2%</td>
</tr>
</tbody>
</table>

A person arranging or undertaking a private foster care arrangement must satisfy the detailed notice requirements under the Act and give notice to the Child and Family Agency in a specified manner not less than 30 days before the placement (Section 23(P)) (up to 14 days after the arrangement if there are unforeseen circumstances).

The legislation provides for authorised officers of the Child and Family Agency to be appointed under section 23(S). Their powers include right of entry at all reasonable times to any premises where the child concerned is residing; to investigate the care the child is receiving; and to assess the living conditions of the child.

Section 23(R) of the Act sets out the duties in respect of children in private foster care. Any person arranging or undertaking a private foster care arrangement shall regard the child’s welfare as the first and paramount consideration and shall take all reasonable measures to safeguard the health, safety, and welfare of a child concerned. Any person making an arrangement shall make all reasonable inquiries to ensure that the person undertaking the arrangement complies with the requirement to take all reasonable
measures to safeguard the child’s health, safety and welfare. Where the Child and Family Agency believes that the person who is arranging or undertaking a private foster care arrangement has not notified it under section 23(P) or that such a person is not taking all reasonable measures to safeguard the health, safety, and welfare of the child concerned it may apply to the District Court for any one of the orders under the Child Care Act 1991, seek to have the arrangement terminated and seek to have the child returned to its parents.

A person guilty of an offence under Section 23W is liable on summary conviction to a fine not exceeding €1,500. On conviction such a person can be the subject of an order prohibiting them from undertaking a private foster care arrangement for such a period as may be specified in the order.

In the course of Dáil debates on the adoption of these provisions, the then Minister, John O’Donoghue (2001) stated:

“The amendment has been inserted in the Child Care Act 1991 and is therefore governed by the principles set out in section 3 of that Act. It would therefore always be an obligation on the Health Board to act in a manner that regards the welfare of the child as the first and paramount consideration having regards of the rights and duties of parents whether under the constitution or otherwise. If a Health Board considers it appropriate to monitor and supervise the situation voluntarily, in cooperation with the private foster carers it is open to it to make that arrangement without recourse to the Courts. This is the situation in relation to many vulnerable children where the Health Board works with the families to ensure their protection without taking the child into care.”

**Conclusion**

This paper has looked at two very different ways of providing support to children contained in the provisions of the Child Care Act 1991. It seems private foster care arrangements remain ‘private’ and it is fair to say that, since there is so little data on the use of these provisions, their purpose is to provide for an issue that may arise but which in reality it seems rarely occurs.

Relative foster care, on the other hand, is very significant in the care system, be it formal or informal. It remains this writer’s view that it needs to be more fully acknowledged in
the care system and its benefits fully explored so that the care system does ensure the best outcomes it can for children and their families.

**About the author**

Teresa is a senior counsel and has been practising at the Bar of Ireland since 1995 in the following areas of law: child protection and welfare law; asylum and immigration law; education, disability, and related areas. She has been involved in many key cases in the above areas before the higher courts. Her first qualification was in social work which has led to her life-long interest in children in care and family rights in the public law system. She has lectured on subjects of relevance to child protection and welfare law, and family law, in University College, Cork and Trinity College, Dublin. She has been involved with a wide variety of civic society groups and has represented various non-governmental organisations at the United Nations (UN) under the reporting process applicable to the UN Conventions. Teresa is a chairperson of the Mental Health Tribunal, appointed under the Mental Health Act 2001. She is a commissioner on the Irish Human Rights and Equality Commission.

**Endnotes**

1 The Thirty-first Amendment of the Constitution (Children) Act 2012 was signed into law on 28 April 2015. It inserted Article 42A into the Constitution which provides:

1 The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

2 1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.

3 Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.

4 1° Provision shall be made by law that in the resolution of all proceedings -

   i  brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or

   ii  concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views,
the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

2 8. (1) The functions of the Agency shall be to—

(a) perform the functions transferred to it by sections 72 and 82, [refers to Child Care Act 1991 and previous HSE functions]

(b) support and promote the development, welfare and protection of children,

(c) support and encourage the effective functioning of families,

(d) maintain and develop support services, including support services in local communities, relating to the functions specified in paragraph (a), (b) or (c),

(2) The functions specified in subsection (1)(b) include providing for the protection and care of children in circumstances where their parents have not given, or are unlikely to be able to give, adequate protection and care.

(3) Without prejudice to the generality of subsection (1), in supporting and encouraging the effective functioning of families pursuant to subsection (1)(c), the Agency shall provide—

(a) preventative family support services aimed at promoting the welfare of children,

(b) care and protection for victims of domestic, sexual or gender-based violence, whether in the context of the family or otherwise, and

(c) services relating to the psychological welfare of children and their families.

3 Section 3 of the Child Care Act, 1991 outlines the functions of the CFA as follows:

3. (1) It shall be a function of the Child and Family Agency to promote the welfare of children in its area who are not receiving adequate care and protection.

(2) In the performance of this function, the CFA shall—

(a) take such steps as it considers requisite to identify children who are not receiving adequate care and protection and co-ordinate information from all relevant sources relating to children in its area;

(b) having regard to the rights and duties of parents, whether under the Constitution or otherwise—

(i) regard the welfare of the child as the first and paramount consideration, and

(ii) in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child; and

(c) have regard to the principle that it is generally in the best interests of a child to be brought up in his own family.

(3) The CFA shall, in addition to any other function assigned to it under this Act or any other enactment, provide child care and family support services, and may provide and maintain premises and make such other provision as it considers necessary or desirable for such purposes, subject to any general directions given by the Minister under section 69.

4 At the end of May 2015 there were 6,411 children in care. Source: State Report to UNCRC

5 A relative is defined in section 23(O) as meaning a grandparent, brother, sister, uncle or aunt whether of whole blood, half blood or by affinity and includes the spouse of any such person and any person cohabiting with any such person.

6 A reply to a request for data from the Child and Family Agency suggests such data may not be available.
References

Amendment of the Constitution (Children) Act 2015. (No 31) (Article 42A)


European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)


Regulations in Relation to placement with a Relative (1995)


UN Convention on the Rights of the Child (1990)

Foster children and gifts or inheritances

Eamonn Shannon

Synopsis of article

This article examines the issue of the legal entitlement of foster children to inherit any share of the estate of a deceased foster parent and highlights the importance of leaving a bequest to a foster child in a valid will if a foster parent intends for his/her foster child to benefit on his/her death.

The article sets out the relevant tax information that foster parents and foster children should be cognisant of when it comes to estate planning and provides helpful examples to illustrate how gifts and inheritances are taxed in Ireland.

Entitlement under succession law

At present, foster children do not have a legal entitlement to inherit any share of the estate of a deceased foster parent.

This means that if a foster parent dies without leaving a bequest to a foster child in a valid will, the foster child will not be legally entitled to benefit from the deceased foster parent’s estate.

If a foster parent intends for his/her foster child to benefit on his/her death, then he/she should consult a solicitor to make a last will and testament.

Taxation of a gift or inheritance

General

Capital acquisitions tax (CAT) is a tax charged on taxable gifts and taxable inheritances. The standard rate of tax is 33 per cent in respect of gifts and inheritances taken on or after 6 December 2012.

A gift or inheritance is taxed if its value is over a certain tax-free amount or group threshold. The relationship between the person who provided the gift or inheritance (‘the disponer’) and the person entitled to benefit from the gift or inheritance (‘the beneficiary’) at the date of the gift/inheritance determines the maximum tax-free amount or group threshold.
A beneficiary is entitled during their lifetime to benefit tax-free from gifts or inheritances, equal in value, to the tax free amount set out for each group threshold. The maximum tax-free amount includes any prior gifts or inheritances taken by the beneficiary from any source, within the same group threshold, on or after 5 December 1991.

There are three group thresholds as set out below.

<table>
<thead>
<tr>
<th>Group</th>
<th>Relationship to the disponer</th>
<th>2016 from 14.10.15</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Child/foster child/minor child of a deceased child</td>
<td>€280,000</td>
</tr>
<tr>
<td>B*</td>
<td>Lineal ancestor or lineal descendant: brother, sister, child of brother or sister</td>
<td>€30,150</td>
</tr>
<tr>
<td>C</td>
<td>Others</td>
<td>€15,075</td>
</tr>
</tbody>
</table>

*In the case of an absolute inheritance, a parent falls into Group A*

The Group A threshold applies to a child of a disponer and he/she is entitled, during their lifetime, to benefit tax free from gifts and inheritances valued up to €280,000 from any source within the Group A threshold.

A foster child will only qualify for the Group A threshold, in respect of a benefit taken on or after 6 December 2000, if he/she was cared for and maintained at the disponer’s expense, from a young age up to the age of 18 years, for period(s) amounting to at least five years, and also resided with the disponer. The five-year requirement will not apply in the case of a formal fostering under the relevant child care regulations where the foster child inherits on the death of a foster parent. Claims for tax relief by a foster child will have to be supported by the testimony of two witnesses. Acceptable witnesses include individuals such as a garda, a doctor, school principal or someone of similar status who has knowledge of the circumstances involved.

Where a foster child qualifies for the Group A threshold (subject to the criteria referred to above) and the disponer was their foster parent, any prior gifts or inheritances taken by the foster child from any source within the Group A threshold (including from a birth parent) on or after 5 December 1991 will be taken into account.
Example

In 2009, Mary inherited €60,000 under Séan’s will (her deceased foster parent). Séan fostered Mary for more than five years prior to Mary’s 18th birthday and Mary resided with Séan. This was not a formal fostering under the relevant child care regulations.

Mary satisfied the Group A threshold criteria in 2009 and did not pay any CAT on her inheritance from Séan.

In January 2016, Mary inherited €250,000 from Susan (her birth mother).

Mary is entitled to claim the Group A threshold in respect of her inheritance from Susan. The CAT payable by Mary takes into account her inheritance from Séan in 2009.

Mary’s tax liability on her inheritance in 2016 is calculated as follows:

<table>
<thead>
<tr>
<th>Group A</th>
<th>€280,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deduct inheritance received from Séan in 2009</td>
<td>€(-60,000)</td>
</tr>
<tr>
<td>Balance threshold</td>
<td>€220,000</td>
</tr>
<tr>
<td>Inheritance from Susan</td>
<td>€250,000</td>
</tr>
<tr>
<td>Less Balance Threshold</td>
<td>€(-220,000)</td>
</tr>
<tr>
<td>Taxable Amount</td>
<td>€30,000</td>
</tr>
<tr>
<td>CAT@33%</td>
<td>€9,900</td>
</tr>
</tbody>
</table>

Mary will pay CAT in the amount of €9,900 on her inheritance from Susan.**

**The above analysis is confined to an interpretation of current legislation and Revenue practice and cannot take into account individual circumstances or any future changes in legislation or practice.

Where a foster child does not qualify for the Group A threshold (subject to the criteria referred to above) and the disponer was their foster parent, then the Group C threshold applies. Any prior gifts or inheritances taken by the foster child from any source within the Group C threshold on or after 5 December 1991 will be taken into account.

Example

In January 2016, John inherited €80,000 under Thomas’s will (his deceased foster parent). Thomas fostered John for two years prior to John’s 18th birthday and John resided with Thomas. This was not a formal fostering under the relevant child care regulations.

John does not satisfy the Group A threshold criteria and will pay CAT on his
inheritance from Thomas. John is entitled to claim the Group C threshold in respect of his inheritance from Thomas. John did not take any prior gifts or inheritances from any source, within the Group C threshold, on or after 5 December 1991. John’s tax liability on his inheritance from Thomas in 2016 is calculated as follows:

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Group C</td>
<td>€15,075</td>
</tr>
<tr>
<td>Inheritance from Thomas</td>
<td>€80,000</td>
</tr>
<tr>
<td>Less Threshold</td>
<td>€(15,075)</td>
</tr>
<tr>
<td>Taxable Amount</td>
<td>€64,925</td>
</tr>
<tr>
<td>CAT @33%</td>
<td>€21,425.25</td>
</tr>
</tbody>
</table>

*John will pay CAT in the amount of €21,425.25 on his inheritance from Thomas.*

**The above analysis is confined to an interpretation of current legislation and Revenue practice and cannot take into account individual circumstances or any future changes in legislation or practice.

**About the author**

Eamonn is a founding partner of Shannon & O’Connor Solicitors, a multi-disciplinary law firm with offices in Dublin and Galway. He has extensive experience in many areas of law including probate and family. Eamonn is the President of the Dublin Solicitors’ Bar Association and has served on the Council of the Law Society of Ireland.

**References**

*Capital Acquisitions Tax Consolidation Act 2003* (as amended by subsequent Acts up to and including the Finance Act 2015)
Enhanced rights for foster carers

John Bermingham and Terence O'Connor

Synopsis of article

It is generally accepted that a child needs stability in his/her life and this is particularly true of children who are in foster care. Both England and Ireland have provisions in law that allow for foster parents to be granted certain rights with a view to ensuring further stability in the foster child's life. This article will set out the tests that need to be applied in both countries prior to a foster parent being granted these rights. However, it will be shown that the Irish position allows for more autonomy to be granted to the foster family as a unit.

Introduction

The Child Care (Amendment) Act 2007 introduced into Irish law the concept of enhanced rights for foster carers over their foster children. Prior to the introduction of this legislation there were very limited steps that could be taken to ensure some sort of permanence for foster children. Enhanced rights grant long-term foster carers increased autonomy in relation to issues such as consent to medical treatment, the issuing of passports, and day-to-day matters such as consent for school tours. It will be seen that the introduction of this provision into Irish law is a further child-centred step but it also highlights a major distinction between the treatment of foster children in Ireland and the treatment of foster children in England and Wales.

The Act states that, if the order is granted, the foster parent will have 'like control' over the child as if he/she were the child's parent. The foster parent will be empowered to do, on behalf of the Child and Family Agency, what is reasonable in all the circumstances of the case for the purpose of promoting the health, development or welfare of the foster child (Child Care (Amendment Act) Section (43A)(5)). Without the benefit of this order, foster parents have to continually contact the Child and Family Agency for routine consents. However, if the court is satisfied that the granting of the order is in the child's best interests, it brings a lot more normality to the lives of children. It should be noted, however, that the Child and Family Agency still retains the ability to give consent, in the event that the foster parent, who has been given enhanced rights, refuses to consent.
Enhanced rights for foster carers: John Bermingham and Terence O’Connor

(Child Care (Amendment) Act Section (43A)(8)). However, the granting of the order ensures that it is the foster parent who is the first port of call when consent needs to be given, a position which is certainly more child-centred than that which pertains in England and Wales.

Conditions

There are a number of conditions that must be satisfied before a foster carer can apply for enhanced rights. The first condition is that the foster child in question must be living with the foster carer for a period of five years or more (Child Care (Amendment) Act Section (43A)(2)). This period of five years begins on the date the placement began and ends on the date of the court application. Any interruption in the placement of less than 30 days is discounted when calculating the five-year period (Child Care (Amendment) Act Section (43A)(3)). Whilst a five-year period may seem like a long time, it has been used to ensure that placements that have the potential to be permanent placements could qualify for enhanced rights. The five-year period also ensured that the Child and Family Agency can be confident that the granting of enhanced rights to the foster parents is in the foster child’s best interests.

The Child and Family Agency must consent in advance to the granting of the order. This condition is absolute and cannot be dispensed with by the court. Furthermore, if the child is in voluntary care, the consent of the birth parent or person who was acting in loco parentis to the child is required. If the child is subject to a care order under section 18 of the Child Care Act, 1991, there is a requirement that the parent of the child or person acting in loco parentis is notified of the application (Child Care (Amendment) Act Section (43A)(2)).

Both of these obligations rest with the Child and Family Agency, as the Act states it is the Agency that has to secure the consent of the parent or ensure that the parent is given notice of the application. The court is empowered to dispense with the requirement of the birth parent consenting or being notified of the application if the court is satisfied that the birth parent is missing or cannot be found, or the court having regard to the child’s welfare so directs.

The requirement that the birth parents are aware of the application for enhanced rights, or must consent to it, is an acknowledgment of their parental rights which, similar to the position in England and Wales, they continue to retain. However, the fact that the court
can dispense with these provisions, if it is in the child’s best interests, is a further acknowledgment that whilst the legislation grants rights to the foster parent, the sole factor to be considered is the best interests of the child.

**Court test**

Before the court grants the order it must be satisfied that the granting of the order is in the child’s best interests and the child’s wishes have been given due consideration, having regard to the age and level of understanding of the child (Child Care (Amendment) Act Section (43A)(2)).

The court can impose conditions to the granting of the order and generally certain standard conditions are sought by the Child and Family Agency and these can include:

1. The foster carer notifies the Child and Family Agency of the provision of passport facilities
2. The foster carer notifies the Child and Family Agency of any elective or emergency treatments
3. The foster carer notifies the Child and Family Agency of any immunisations of the child.

**Child and Family Agency procedure**

When it is made known by the foster carer that there is to be an application for enhanced rights, a special child in care review will be held unless a statutory review is due in the near future. A report will be presented to the review by the fostering social worker which will outline why the granting of the order is in the child’s best interests, what the view of the child or young person is to the granting of the application having due regard to their age and level of maturity, and what conditions should be imposed on the order. The pre-condition of a five-year placement is a matter of fact which is objectively proven. However, the best interests of the child requirement is a matter which focuses people’s minds on the child when deciding on whether or not to consent to the order.

**Research findings**

The granting of the order is not absolute and can be discharged or varied by the court. The following people can apply to court to have the order discharged or set aside:
1. The Child and Family Agency
2. The foster parent to whom the order was granted
3. A parent having custody of the child at the relevant time
4. A person (other than a foster parent or relative) acting in loco parentis to the child concerned or
5. A person who, in the opinion of the court, has a bona fide interest in the child concerned.

Finally, the order ceases to have any legal effect if the child in question was in voluntary care and is returned to his birth parent, the child is under a care order and this order is discharged, the child is removed from the custody of the foster carer concerned, the foster carer concerned requests the removal of the child, or, the child reaches 18 years of age (Child Care (Amendment) Act Section (43B)). The fact that an order is not absolute acknowledges that children’s lives change and what is in the best interests of the child at a certain point in his/her childhood may not always be in his/her best interests.

**Position in the United Kingdom**

By contrast, the position in the United Kingdom in relation to autonomy for foster carers to make decisions is somewhat different and, it can be argued, not as progressive as the system here in Ireland. Both systems place the welfare of the child as the paramount consideration but come at this primacy in different ways. It is necessary here to provide a short exposition of the law and terminology. The terms to be aware of that govern child protection in the United Kingdom are provided below.

**Parental responsibility**

Parents do not lose their parental responsibility (Children Act 1989 (United Kingdom)) unless an Adoption Order is made. Where a child is placed with prospective adopters, the prospective adopters acquire parental responsibility as soon as the placement is made. This will be shared with the birth parents and with the adoption agency making the placement. It should be noted that under voluntary care arrangements, under the Children Act 1989 (United Kingdom) (S.20), local authorities do not acquire parental responsibility for any child who is being accommodated by voluntary agreement; parents must specifically delegate authority for matters such as consent to medical treatment, as part of the agreement to accommodate and this is a considerable restraint on the autonomy of foster carers when looking after a child.
**Looked after child**

A looked after child\(^1\) is one who is in the care of a local authority by virtue of a care order; or a child who is provided with accommodation by a local authority in the exercise of their social services functions.

**Differing points of view between jurisdictions**

The power that the courts in England and Wales have to dispense with the consent of parents and order that a child be placed for adoption should be noted at this juncture. To that end, it is not unusual for a child to be placed with potentially long-term foster carers who end up adopting the child at the end of the process. The Public Law Outline\(^2\), which governs child care proceedings in England and Wales, envisages that cases will be concluded in any event within 26 weeks, beginning with the day on which the application for the care order was issued. This timetable will include in its calculation any review of local authority plans for the child, including any plans for permanence through adoption, special guardianship or placement with parents or relatives.

Parallel planning for adoption starts as soon as the level of concern reaches the stage when care proceedings are being considered. Parallel planning is anathema viewed from an Irish constitutional law perspective. However it is these twin concepts of parental responsibility and parallel planning that drive the appointment of foster carers in the United Kingdom and their powers or lack thereof to make decisions.

There is an abundance of legislation governing this matter, the overarching legislation being the Children Act 1989, from which we here in Ireland took some guidance when drafting the Child Care Act 1990.

The Care Planning, Placement and Case Review (England) Regulations 2010, which came into effect on 1 April 2011, bring together all the provisions in previous regulations relating to the placement of children by local authorities, and include provisions for the placement of looked after children with foster carers. For the purposes of this article, all the powers/duties of foster carers derive from the placement plan drawn up by social services.

**The placement plan and its impact on foster care**

A placement plan\(^3\) is required to be provided for all looked after children. This forms part of the care plan and sets out how, on a day-to-day basis, the child will be cared for and
his/her welfare safeguarded and promoted, and the arrangements for matters such as ‘contact’ (‘access’ in Ireland), medical care (at the level of vaccinations, routine general practitioner visits and emergency hospital visits), education/training, as well as details of the responsible social worker. The foster carer is given a copy of the child’s placement plan by the responsible authority.

In the United Kingdom almost anyone can foster a child: persons who are married, cohabiting, single, or divorced, as long as the potential foster carer or their partner is available full-time (or flexible part-time if the applicant is alone), owns or rents a home and has a bedroom exclusively for the foster child.

In all legal advice and articles there is a ‘however’. We have said that the situation here in Ireland is progressive, especially in light of the enhanced rights available to foster carers and providing certainty for children. Viewed from the remove of this jurisdiction this is not the situation across the water.

In the UK, the system is one whereby foster carers have no powers to determine any decisions made in respect of a child’s health and education to name but two matters. This has been the subject of comment in the Supreme Court of England and Wales. In Re V (Children) [2013] the court made observations on the differences between long-term fostering and adoption in terms of security for the future of the child.

With an eye to Article 8 of the European Convention on Human Rights4 (1953) which provides a right to respect for private and family life, the supreme court held that a care order with a view to adoption represented an interference with the exercise by the family unit (namely the child, the child’s mother and the child’s father) of their rights to respect for their family life. The Supreme Court further held that this intrusion could only be justified if it was in accordance with law and ‘necessary’ in a democratic society for the protection of the right of the child to grow up free from harm. However the interference must be proportionate to identified risks. To clarify this, the court went on to say, “Parental consent can be dispensed with for adoption but only if the child’s welfare requires this, and the court must be satisfied that there is no practical way of the authorities (or others) providing the requisite assistance and support to help the parents discharge their responsibility to the child” (Re V Children (2013) Paragraph 96 of Judgement). Having seen all the supports available in the United Kingdom, there are problems for foster carers, more particularly as the issue of parental responsibility dictates the approach that must be
taken by local authority and other decision makers such as judges. In day-to-day life, children in foster care are often marked out as different from their peers because decision-making for their care is more complicated, with carers often having to seek permission from social workers for ordinary activities like school trips. On occasion, this can lead to children missing out on activities because permission cannot be sought in time.

Because of the split in decision-making between parents, foster carers and social workers it is not always clear who is responsible for what decision. This can lead to conflict between the parties and can have a negative effect on the care of the child.

In contrast to the situation now in Ireland, in the UK, foster carers can feel that either they are being left to cope alone or that they are excessively restrained by the need to constantly seek permission to carry out basic caring responsibilities. In short, the placement plan as mentioned above will dictate the autonomy that the foster carers have to make decisions. This is very different to the system here in Ireland now and is arguably a shortcoming in the UK. Parents of children in care, while maintaining parental responsibility or sharing it with the local authority, will always have to be consulted about decisions that may be viewed as out-of-the-ordinary with regard to their child. Therefore, aside from essentials like medical treatment or schooling, questions arising from other matters may be litigated in the courts, and indeed frequently are, which means that, in an oft-repeated example of a question raised, a family holiday can necessitate a court appearance for the child’s guardian, the guardian’s legal adviser, the foster carers, the social worker, the local authority legal representative, and the legal representative(s) for the parents with whom parental responsibility is shared. This in and of itself leads to uncertainty for the child.

**Conclusion**

The Child Care (Amendment) Act 2007 in introducing enhanced rights for foster carers in decision making relating to foster children in Ireland is a major step forward. The Act states the foster parent will have “like control” over the child as if s/he were the child’s parent. The autonomy granted in day-to-day matters such as consent to medical treatment, attending at off-site school activities, the issuing of passports, and so on, makes them simpler, and has the knock-on effect of certainty for the child in care which is in the child’s best interests and is an approach Tusla would endorse.
About the authors

John is a solicitor employed by Tusla, the Child and Family Agency. Prior to joining Tusla, John worked in the area of criminal litigation for a long number of years. He has published a number of articles on the subject of youth justice and has also delivered several lectures on this and related topics. He holds an Honour’s Degree and Master’s in Law and also an Advanced Diploma in Juvenile Justice.

Terence is a solicitor for Tusla, the Child and Family Agency and is a former member of the Children’s Panel for England and Wales, and an accredited specialist in child law matters. He did his postgraduate work in human rights and foreign policy in the University of Leiden in the Netherlands. He is a member of the International Association of Prosecutors and is licensed to practice as a solicitor in Northern Ireland and in the Supreme Court of England and Wales. He has published articles in the *Law Society of Ireland Gazette*, the *Law Society Gazette* in England and Wales, and the *International Family Law Journal*. In his spare time he has completed a Certificate in Intellectual Property Law and a Diploma in Corporate Law and Governance with the Law Society.

Endnotes

1 A child who is looked after by a responsible authority – in the United Kingdom this means local authority.

2 Public Law Outline - The Children and Families Act 2014 (United Kingdom legislation) makes changes to Part 12 of the Family Procedure Rules 2010 and requires that all care, supervision and other Part 4 proceedings must be completed within a maximum of 26 weeks.

3 Placement plan under the definition given under Regulation 9 of the Care Planning, Placement and Case Review (England) Regulations 2010 which came into force on 1 April 2011.

4 Signed at Rome 1950 and came into force in 1953 – “Everyone has the right to respect for his private and family life, his home and his correspondence”.

References

*Care Planning, Placement and Case Review (England) Regulations 2010*

*Child Care Act 1991* – (Section 43)

*Child Care (Amendment) Act 2007* (section 4) (43A 2, 3, 5, 8), (43B)

*Children Act 1989* (United Kingdom) (5.20)

*Children and Families Act 2014* (United Kingdom)

*European Convention on Human Rights* (1953)

Re: V (Children) [2013] EWCA Civ 913 – Court of Appeal (Civil Division) (United Kingdom)
A preliminary evaluation of the Triple-A Model of Therapeutic Care in Donegal

Colby Pearce and John Gibson

Synopsis of article

This paper represents a brief description of the Triple-A Model of Therapeutic Care, an implementation programme that occurred in Donegal between December 2015 and March 2016, and some preliminary outcomes and discussion of these.

Introduction

Upon arriving home from his full-time job as an insurance salesman, Bill quietly enters the home and immediately looks for each of his children. As he approaches them, he observes what they are doing and their experience of the activity, as reflected in their verbal and non-verbal gestures. As well as greeting each child, he makes a comment about the child’s experience of the activity, saying it with congruent feeling, then moderating his tone and projecting calm as he advises each child that he is off to change before dinner. Bill changes out of his work clothes and joins the family for the evening meal. During the meal Bill suggests to the children that they choose a card game to play with him and reminds them of the roster of the order for this evening. After the meal Bill spends at least five minutes with each child in turn, playing a card game of their choice. At bedtime, Bill prepares their toothbrushes and pulls back their covers. He reads a book to the younger ones and engages in a best-of-five thumb wrestle and rock-paper-scissors with each child before making sure that they are covered and tucked in. He puts on some quiet, classical music in their bedrooms. Bill reminds each child that he will check in on them after he has put the kettle on to make himself a hot drink. He advises them that they can stay awake until he returns. He returns to the bedroom of each child approximately five minutes after leaving them and wishes them goodnight. The children who are still awake are advised that he will check in on them again after he has had his drink and they can stay awake if they like. He returns again 10 minutes later. In the morning, he places their preferred cereal in their bowl on the kitchen counter before leaving for work.

Melissa is a busy mother of two children. She rises before her children and enters their
bedrooms, whereupon she lays out their clothes for the day. She gently rouses each child, commenting that they look as though they were appreciating their sleep. She acknowledges with congruent emotion that it is not fair that they have to get out of their warm bed, before gently and calmly encouraging them to do so. She directs them to the clothes she has laid out and advises them that she will get their breakfast ready. As she leaves the room, she turns off the CD player that has been playing soothing classical music during the night. During breakfast, Melissa advises the children of where she will collect them from at the end of the school day. At school pick-up Melissa offers a small snack and a juice box, as she always does. Upon arriving home with the children, Melissa suggests they unwind a little, including changing out of their school clothes, before they do their homework. At homework time, Melissa regularly checks in with each child, observing their manner, making comments about their experience, and offering help where it is observed to be needed.

Rachel and Craig are parents to two teenage boys. On weeknights at 9:30pm they prepare a hot drink and snack for the boys in anticipation of their habit of dropping into the kitchen around that time in search of food. They remain in the kitchen and, as always happens, the boys duly arrive. The boys are generally chatty and Rachel and Craig listen and make comments about this or that aspect of each boy’s story and associated experience. They understand that there is an informal “three question rule”, so they are judicious about what questions they ask. The tone of the interaction is generally happy and relaxed.

Bill, Melissa, Rachel and Craig are all Triple-A caregivers. By Triple-A we mean that their approach to parenting, as encapsulated in these scenarios, is reflective of the conventional approaches to the care and management of children and teens that form the Triple-A model (Pearce, 2010). Having been utilised to facilitate understanding of the presentation and care requirements of children who have experienced intrafamilial trauma (Pearce, 2009) and care that promotes resilience in children (Pearce, 2011), the Triple-A model has itself evolved into an organised model of therapeutic care. Now known as the Triple-A Model of Therapeutic Care, Triple-A (as it is most commonly referred to) was recently delivered to 29 foster caregivers in Donegal as part of an implementation programme commissioned and supported by local Tusla authorities.

The three “A’s” in Triple-A stand for Attachment, Arousal, and Accessibility to needs provision. As the name implies, Triple-A is drawn from knowledge and endeavours in
attachment theory and neurobiology (of trauma). The origin of the third aspect is not as obvious. The construct of accessibility to needs provision is drawn from what learning theory tells us about the effects of different learning environments. This especially relates to what children learn about the reliability and predictability with which their needs will be met in the context of their first dependency relationship(s). This is an obvious point of difference from other approaches to understanding children who have experienced abuse and neglect, which tend to focus on attachment theory or neurobiology alone, or a combination of the two. Incorporating this construct into the Triple-A model arose in response to the need to better understand one of the most salient and difficult-to-shift aspects of the presentation of children recovering from abuse and neglect: the fact that they are inordinately preoccupied with their needs and wishes and seemingly driven to compulsively satisfy them. In short, they are difficult to satisfy through conventional caregiving. But, in order to be happy and satisfied on a day-by-day basis, these children need to learn to be satisfied with conventional caregiving as that is what the world will offer them in most, if not all, interpersonal transactions they enter into. Triple-A incorporates conventional caregiving and relational practices which, delivered in a way that enriches the child’s experiences of them, is expected to promote their satisfaction with conventional care and needs provision.

The landscape in which Triple-A operates is relationships. In Triple-A, meaningful human connection with others is viewed as optimal for psychological wellbeing and adherence to conventional standards of behaviour (Pearce, 2009). The primary task (Kahn, 2005) for a Triple-A caregiver is to achieve and maintain a healthy connection with children who are recovering from abuse and neglect. This is achieved through conscious adherence to a way of thinking about children that, in turn, promotes a way of interacting with them and associated responses in the children that allow connection. In turn, a self-perpetuating therapeutic care system is established.
The goals of this self-perpetuating therapeutic care system are the promotion of secure attachment, optimal arousal for performance and wellbeing, and acceptance of conventional caregiving for the satisfaction of needs and wishes.

These goals are achieved in the context of a therapeutic care environment and dependency relationships. Participant caregivers are instructed in how aspects of conventional caregiving and relating behaviours can be enriched for greatest therapeutic effect. There is a focus on what caregivers already do that helps!

In Triple-A, we also know and accept that without looking after the caregivers themselves all endeavours on behalf of the children are doomed. In confining ourselves to (and enriching) what caregivers already do that is therapeutic, Triple-A promotes positive self-awareness and a sense of competence in the role. We maintain a core belief that a validated caregiver is one who is freed to best consider the needs and interests of those who depend on them, and to be responsive to those needs (Pearce, 2012). In addition, validation promotes experiences of worth that are critical, creating a psychological buffer against vicarious trauma (also known as secondary traumatisation and compassion fatigue) and burnout. Furthermore, Triple-A incorporates training in the development of a mindset and self-care behaviours that are expected to support caregiver wellbeing.

Triple-A follows a step-by-step implementation protocol, with five modules that address different aspects of caregiving and relating. There are modules for adults in a direct care role and professionals who work with and support them in this role. Alternate modules exist for adults who interact with children in the classroom environment and for the care of children overcoming other forms of adversity, such as a disability. Each module is inclusive of training in therapeutic care and relating practices and approaches to self-care. There is a monitoring and evaluation protocol that consists of pre- and post-questionnaires and daily monitoring during the formal training and implementation period.

Methodology

An implementation programme for the Triple-A Model of Therapeutic Care was piloted in Donegal, Ireland across the period December 2015 to March 2016. The pilot
implementation programme was funded by Tusla (the Child and Family Agency) and delivered by Mr John Gibson of Secure Attachment Matters Ireland, with content and materials provided by the programme’s author, Mr Colby Pearce (Secure Start®, Adelaide, Australia). Mr Gibson met with key personnel of Donegal Tusla in December 2015 in order to establish an implementation timetable, at which time two Tusla staff members were nominated to act as liaisons for the programme.

Formal implementation began with a full-day training session for professional staff of Donegal Tusla on 20 January 2016 in Letterkenny. Staff who participated in the training day included those whose primary work role is the support of Tusla foster caregivers in the Donegal region. Thereafter, two groups of Tusla-registered foster caregivers participated in five, weekly, half-day workshops scheduled across the period, 1 February 2016 to 1 March 2016. Workshops were delivered in two locations: Buncrana and Stranorlar.

Caregivers who participated in the programme received formal training in the Triple-A Model of Therapeutic Care, inclusive of:

- an orientation to establishing a self-perpetuating, therapeutic, care environment
- therapeutic caregiving and relating practices targeting the promotion of secure attachment, optimal arousal, and acceptance of conventional caregiving for needs provision, and,
- self-care strategies targeting caregiver wellbeing.

Caregivers were invited to complete an evaluation protocol in two parts:

- A questionnaire completed at the end of each workshop addressing satisfaction with the training; and
- A series of online questionnaires to be completed before, during and after the delivery of the programme to gather information about progress towards achieving the joint goals of (1) improved adjustment in the children of the participant caregivers and (2) improved wellbeing of the caregivers themselves.

Results

Satisfaction with the training

We who are associated with the Triple-A Model of Therapeutic Care consider that foster
caregivers must be offered training that they see as valuable. Offering training that foster caregivers experience as valuable promotes feelings that they are valuable. Experiences of being valued are central to good mental health and wellbeing and optimal performance in the role of foster caregiver.

In each week of the delivery of the programme, participant foster caregivers were asked to complete a questionnaire seeking their views about the content, delivery, usefulness, ease of implementation, appropriateness to experience, overall perception, and whether they would recommend the training to others. Ratings were consistently very positive across both groups and for every session; 100 per cent of participant caregivers across both locations reported in each of the five weeks of implementation that the programme was communicated effectively to them and that they would recommend the training to others. All but one participant in one session reported that the programme was appropriate to their level of experience. Representative written comments sought from participants in the fourth and fifth sessions, in response to the invitation to provide general comments about the programme, include the following:

- I think it helps to identify, clarify and to implement strategies in a focused manner – with an expectation of an outcome. I think one of the most positive aspects is galvanising actions and ideas and practices that we are already doing but in a manner which held us to be more mindful of the manner in which we are doing them – with a greater understanding or appreciation of the need to do so – and benefit of doing so.

- I really enjoyed this training, I find it very user friendly, practical and most important effective. I feel the training should be done prior to any placements in any foster home, part of the entire training. Also social workers should be doing this training as well and any other professionals to ensure everyone is gelling together for the benefit of the child involved. It would be great if this training spread out to the community, schools, public health nurses, preschools, and schools, especially to all the children in the community.

**Progress questionnaires**

Critical to any programme of delivery of a therapeutic intervention is ongoing monitoring and evaluation of progress towards a desired goal and outcomes. Triple-A incorporates pre- and post-questionnaires and daily ‘Keeping Track’ questionnaires. This pre, post and daily monitoring methodology allows for both group and single-case evaluation, the latter reflected in the case that follows.
BG is a nursery-school-aged child of a foster caregiver who participated in the programme. On the pre-questionnaire, the foster caregiver recorded that BG typically had 10 emotional outbursts (tantrums/meltdowns) per day, each lasting an average of 15 minutes. The foster caregiver also recorded that BG was, typically, physically aggressive towards persons and objects on average five and four times per day respectively. BG was recorded as ignoring or refusing directions up to 30 times on a typical day and was inordinately demanding, making up to 40 requests in a typical day and otherwise seeking the caregiver’s attention 20 times in a typical day. BG was recorded as engaging in independent play only three times per day. In short, BG was inordinately demanding!

“In contrast, on the post-questionnaire, the responses of BG’s foster caregiver were indicative of a 50 per cent reduction in the incidence of emotional outbursts in a typical day, and a 67 per cent reduction in the duration of emotional outbursts. Similarly, there was an 80 per cent reduction in physical aggression towards persons and BG was no longer hitting objects in a typical day.”

BG’s foster caregiver’s responses on the post-questionnaire were indicative of an 80 per cent reduction in ignoring and/or refusing directions, an 85 per cent reduction in requests of the caregiver, and a 60 per cent reduction in attention-seeking behaviour. Independent play was up 200 per cent.

In terms of the Triple-A model, BG was less prone to emotional outbursts and they were of shorter duration, potentially reflecting lower arousal levels by the end of the formal implementation period. BG was less aggressive and defiant which might also reflect lower arousal levels. BG was less demanding, perhaps reflecting greater acceptance of his carer’s accessibility and responsiveness. BG was showing an increase in independent (exploratory) play, a possible precursor of a secure base and attachment security.

Triple-A’s monitoring and evaluation methodology allows one to take a closer look at BG’s progress across the period of formal implementation. For example, in the graph overleaf we can see the incidence of BGs’ emotional outbursts across 20 days of formal implementation of Triple-A.
Discussion

The Triple-A Model of Therapeutic Care was implemented with the support of Tusla across two locations in Donegal, Ireland. Implementation included a full day, training workshop for professional staff who support foster caregivers registered with Tusla in Donegal, and five, weekly, half-day workshops for almost 30 foster caregivers. Participant foster caregivers were trained in the theoretical basis of Triple-A and in therapeutic caregiving, as well as in a mindset and practices that make a therapeutic care environment. In addition, foster caregivers were trained in practical self-care strategies and were asked to complete monitoring and evaluation protocols at various intervals. The programme of implementation received practical support from delegated Tusla liaisons.

Overall feedback from the foster caregivers about the Triple-A programme was extremely positive. It is of particular note that 100 per cent of participant foster caregivers consistently advised that they would recommend the programme to others, with related written feedback recommending the programme, not only for foster caregivers, but for all adults with a caring concern or in a caring role with children. There was very little negative feedback, though such as there was, this related to:

- the duration of the programme of implementation
- the homework requirements, and,
- the request that participants complete online questionnaires.

It was originally anticipated that the timetable for foster caregiver training would occur over eight weeks. In reflecting on comments that relate to the intensity of the
programme, particularly the implementation components of therapeutic caregiving and relating, self-care, and the monitoring and evaluation protocol, a longer implementation period for future projects may be warranted.

Completion of the full package of online monitoring and evaluation questionnaires was low, with only six protocols (which include pre- and post-questionnaires and a proportion of ‘Keeping Track’ questionnaires) completed at the time of writing. Notwithstanding arguments around convenience and the safeguards afforded by an online data-collection protocol, future implementation programmes could clearly benefit from a revised monitoring and evaluation methodology and/or a longer implementation timetable which involves fewer daily requirements of participant foster caregivers.

Nevertheless, data received thus far is indicative of the potential of the Triple-A programme to achieve meaningful change in the emotional and behavioural functioning of children recovering from abuse and neglect, thus reducing caregiver stress and promoting their sense of competence in the role. Extensive caregiver feedback clearly demonstrates that the Donegal implementation of Triple-A was worthwhile to them, thus reinforcing their experience of their own worth to those who make decisions regarding the funding and implementation of such programmes.

Acknowledgements

The authors wish to acknowledge the support of the Donegal branch of Tusla and, in particular, Caroline Byrne and Siobhan Duffy, who assisted us in liaison roles. The authors also wish to acknowledge and thank all foster caregivers who participated in the programme and contributed to its success. Finally, the authors wish to thank Rebecca Pearce and Inke Jones of Secure Start® for assistance in the collation of monitoring and evaluation data.

Please note: An expanded evaluation document, with extensive data tables and written caregiver feedback, has been provided to Tusla authorities in Donegal.

About the authors

Colby is an Australian clinical psychologist and author. Colby’s interest in the relationship between psychological health and connection with others spans more than 25 years as an applied researcher (1991-1995) and clinician (1995-2016). Colby’s published works
span the fields of teen suicide and mental health, attachment and childhood trauma, and the promotion of resilience in children. Colby owns and operates Secure Start®, an independent psychology practice in Adelaide, South Australia.

John (Johnnie) is an Irish independent social worker and trainer based in Donegal, Ireland. He has almost 40 years’ experience of working with children and carers in residential and foster care. He is a faculty member of the Residential Child Care Project at Cornell University, New York. He has published journal articles and book chapters. He trained in the Child Attachment Interview at Anna Freud Centre, London.

References


Glossary

analogous  Similar or corresponding in some respect
anathema  Someone or something that is very strongly disliked
bono fide  Real or genuine; law made in a secure and honest way
congruent  In agreement or harmony
construct  Idea or theory considered to be subjective rather than based on evidence
contemporaneous  Existing or happening in the same time period
de-aggregate  To separate something into its component parts
disponer  One who legally transfers his or her own property to another
editorialising  Offering personal opinion in an objective report
hearsay  Evidence of a statement that was made other than by a witness while testifying at the hearing in question and that is offered to prove the truth of the matter stated
incremental  Increasing in number, size, quantity, or extent
in loco parentis  Acting in place of a parent, assuming parental rights, duties and responsibilities
liaison  A person who liaises between two organisations to communicate and coordinate their activities
lineal  Having a direct family relationship
optimal/optimum  Best or most effective
proportionality  Properly related in size, degree, or other measurable characteristics
precursor  Something that comes before something else and influences its development
protocol  Rules that explain correct conduct and procedures to be followed in a formal situation
purposive  Serving a useful function though not as a result of planning or design
salient  Very important or noticeable
self-perpetuating  Having the power to continually renew itself
verbatim  Using the same words, word for word
vicarious trauma  Emotional residue endured by carers in empathy with another’s
Glossary

experience of trauma

**retrospective**  Dealing with past events or situations

**secondary traumatisation**  Stress resulting from helping a traumatised person

**secure base**  A secure base is provided through a relationship with one or more sensitive and responsive attachment figures who meet the child’s needs and to whom the child can turn as a safe haven, when upset or anxious

**stayed**  temporarily stopped a judicial proceeding through the order of a court