Anna Airsmann.

Giving children a voice

The case for the independent representation of children

The Guardian **Ad Litem** *Group*

May 2001

BACKGROUND TO THE REPORT

This report is the culmination of work undertaken by a committee set up following a Law Society seminar in October 1998 entitled *Giving children a voice*. We are beginning to understand the importance of childhood in the formation of an individual. We see that we must encompass the entitlement of children to be heard as children, in our legal system. The report looks at the difficulties encountered in undoing the legal obstacles to a child-centred framework. This calls for a philosophical shift in our approach and for legislative change and perhaps a change to the constitution.

MISSION STATEMENT

We recognise that all children have rights. We want to find ways to facilitate children who are caught up in legal proceedings, private or public, to speak for themselves. Ireland's international obligations commit us to providing the opportunity for our children to be heard in any judicial or administrative proceedings affecting them. Every child should have an advocate. That person may be a lawyer or a guardian *ad litem* (GAL).

We believe that the best protection for children is to empower them to express their thoughts and feelings.

MEMBERS OF THE GUARDIAN *AD LITEM* GROUP

- Dr Gerard Byrne, consultant child and adolescent psychiatrist, Lucena Clinic, Tallaght, Dublin 24 and Charlemont Clinic, Dublin 3.
- Barbara Hussey, solicitor, specialising in family law with experience in representing children before the courts.
- Sinéad Kearney, solicitor with extensive experience in the area of child welfare law.
- Geoffrey Shannon, solicitor and author, deputy director of education at the Law Society of Ireland.
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SUMMARY OF RECOMMENDATIONS

1

Article 41 of the constitution protects the family based on marriage only. The rights guaranteed by this article do not belong to individual members of the family but rather to the family unit as a whole. Article 41 fails to recognise the child as a juristic person with individual rights to which separate representation must be given.

The constitution should be amended to ensure that the right of children to have their welfare protected is given the paramountcy it deserves.

2

A guardian ad litem *(GAL) is someone who is appointed 'a guardian for a law suit'. This is a temporary appointment which ends when the court proceedings are finished. There are no parameters to guide the courts or individuals appointed as guardians* ad litem, *and no supervision or accountability.*

The government should establish and fund an independent guardian ad litem *service.*

3

The management of this service should encompass the supervision, training, monitoring and accountability of GALs employed.

4

A GAL should be an officer of the court and independent of all other parties.

5

Specially-trained solicitors should provide legal representation for children, working with or without a GAL.

6

The GAL service should consist of a panel of available professionals who have significant experience in child care and who understand the child welfare and family law systems.

7

There should be dual representation in public law cases for children. A GAL and a solicitor for the child should both be appointed.

8

The Child Care Act, 1991 *should be reformed to give children the automatic right to be made parties to legal proceedings.*

9

In certain circumstances, it may be necessary for guardians ad litem *to have their own legal representation.*

10

Sections 25 and 26 of the Child Care Act, 1991 *should be repealed. A new part should be drafted, headed* Representation for children.

11

Section 28 of the Guardianship of Infants Act, 1964, *as inserted by section 11 of the* Children Act, 1997, *should be similarly amended. There should be a separate part of the Act dealing with representation of children.*

12

The new legislation should detail the rights, duties, obligations, qualifications and experience of both the GAL and the legal representatives.

CHAPTER 1: GOALS

- To devise a system for guardians *ad litem* (GALs) that will mean children have access to legal and welfare advocacy and representation for themselves that will be independent of the other parties to the proceedings, properly resourced from central funds and with authority to present the views of the child and to make recommendations regarding the best interests of the child.
- To put an end to the confusion about the role and responsibilities of GALs, so that judges, practitioners, health board personnel and most importantly children can readily understand and access the service.
- To put in place a set of guidelines which would in due course become accepted as the protocol for all professionals in the field.
- To ensure that training is made available for all personnel, lawyers, GALs and judges, so that there is a professional standard in place.
- To incorporate a complaints system to which children will have easy access.
- To suggest reform of the legislation.

FREQUENTLY-ASKED QUESTIONS

1) Who should be appointed a guardian *ad litem*?

A person who has not only qualifications and training in child welfare but skills and experience from working in this area. It would be the view of this group that a lawyer would not adequately fulfil the function of a guardian *ad litem*.

2) What experience should a guardian *ad litem* have?

A guardian *ad litem* should have the expertise and knowledge derived from working in the field of child protection and child welfare.

3) What precise role is to be played by the guardian *ad litem*?

The guardian *ad litem's* role is two-fold: first, to establish and report on a child's wishes and feelings and, second, to assess, report on and act in the best interest of the child who is the subject of court proceedings.

4) What qualifications should a guardian *ad litem* have?

No specific recommendations are being made in relation to qualification criteria although this issue was considered at great length by the group. The experience and skill bases of potential guardians are viewed as being of primary importance, and these should be within the field of child welfare.

5) What powers does a guardian *ad litem* have?

At present the powers, if any, of a guardian *ad litem* are not defined. The view of the group is that in any proceedings concerning the welfare of the child, whether it is public or private proceedings, the child should be joined as a party to the proceedings and the guardian *ad litem* should therefore have equal powers with any of the other participants in the proceedings. This should enable the GAL to have an input into the timetabling of the case. The GAL should be an officer of the court.

6) **What duties should a guardian *ad litem* fulfil?**

The duty of the guardian *ad litem* is to establish and report on a child's wishes and feelings and to assess, report on and act in the best interests of the child, who is the subject of the court proceedings.

7) **Should a guardian *ad litem* have legal representation?**

Yes.

8) **What access to files should a guardian *ad litem* have to health board, hospital, medical or school records?**

The guardian *ad litem* should have access to any information which he considers necessary to fulfil the role.

9) **Should this be decided on a case by case basis?**

No. In principle, the guardian *ad litem* should be able to have access to whatever files he or she considers necessary in the fulfilment of their duties. Obviously, the particular file that they need to have access to can be decided in each case.

10) **Does this conflict with privilege attaching to social work files?**

No. The guardian *ad litem's* report is for the court and it will be dealt with in the context of in camera proceedings.

EXTRACT FROM THE CONSTITUTION

ARTICLE 41

'1) The state recognises the family as the natural primary and fundamental unit group of society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

2) The state, therefore, guarantees to protect the family in its constitution and as the necessary basis of social order and as indispensable to the welfare of the nation and the state.'

ARTICLE 42

'1) The state acknowledges that the primary and natural educator of the child is the family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

2) Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the state.

3) The state shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the state, or to any particular type of school designated by the state.

4) The state shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.

5) In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the state, as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.'

CHAPTER 2: THE CONSTITUTION

SYNOPSIS OF CHAPTER 2

- Article 41 of the constitution protects the family based on marriage only. The rights guaranteed by this article do not belong to individual members of the family but rather to the family unit as a whole. Article 41 lacks a child focus. It fails to recognise the child as a juristic person with individual rights to which separate representation must be given. This is largely due to the principle of parental autonomy created by that article.

- Article 42 places significant restrictions on the state in its dealings with the children of marital families.

- Section 3 of the *Guardianship of Infants Act, 1964* provides that in deciding any question in regard to the upbringing of the child, the court shall regard the welfare of the child as the first and paramount consideration.

- An uneasy compromise exists between the provisions of articles 41 and 42 of the constitution and the welfare principle outlined in section 3 of the 1964 Act.

- The *UN convention on the rights of the child 1989*, the *European convention on the exercise of children's rights* and the *European convention on human rights* are all soundly based on a defensible concept of children's rights. The law in Ireland, however, falls far short of such a concept.

- The constitution should be amended to ensure that the right to children to have their welfare protected is given the paramountcy it deserves.

The constitutional position of marriage

The institution of marriage enjoys a privileged position in the Irish constitutional order. By virtue of article 41.3.1 of the constitution of 1937, the state 'pledges to guard with special care the institution of marriage, on which the family is founded and to protect it against attack'. Article 41 as a whole concerns the family and is in the following terms:

'1.1 The state recognises the family as the natural and primary unit group of society, and as a moral institution possessing inalienable and imprescriptible rights antecedent and superior to all positive law.

1.2 The state, therefore, guarantees to protect the family in its constitution and authority as the necessary basis of social order and as indispensable to the welfare of the nation and the state.

2.1 In particular, the state recognises that by her life within the home woman gives to the state a support without which the common good cannot be achieved.

2.2 The state shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

3.1 The state pledges itself to guard with special care the institution of marriage, on which the family is founded, and to protect it against attack.

3.2 A court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that:

- **i)** at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,
- **ii)** there is no reasonable prospect of a reconciliation between the spouses,
- **iii)** such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and
- **iv)** any further conditions prescribed by law are complied with.

3.3 No person whose marriage has been dissolved under the civil law of any other state but is

> a subsisting valid marriage under the law for the time being in force within the jurisdiction of the government and parliament established by this constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved'.

This article 'recognises the family as the natural primary and fundamental unit group of society' and further guarantees 'to protect the family in its constitution and authority'.

It is, however, immediately evident from the terms of article 41.3.1 itself that the family which the constitution contemplates as deserving such protection is that based on marriage alone.[1] The latter-mentioned section speaks, with a somewhat misguided air of self-evidence, of 'the institution of marriage, on which the family is founded ...'. The pre-eminence of the family based on marriage, in other words, is not so much asserted as assumed. However true such an assumption may have been in 1937, recent social trends show that while marriage remains for the moment the preferred option, an increasing proportion of the populace have adopted less conventional household arrangements. Underlying trends expose a gradual move away from marriage with increasing numbers of children being born outside wedlock.

Nevertheless, the Irish courts have remained steadfast in asserting the exclusivity of the constitutional 'family'. In *State (Nicolaou) v An Bord Úchtála*,[2] the Supreme Court definitively affirmed that the family referred to in article 41 did not include an unmarried couple and their child. In *Nicolaou*, the applicant's daughter had been placed for adoption with the respondent board. The mother of the child and the applicant, though not married to each other, had lived together as a couple for some number of years and at the time had looked after the child together. Some months afterwards, the couple became estranged and the mother put their child up for adoption.

Under adoption legislation as it then stood, the father was not entitled to object to the adoption unless he was either guardian of the child or had at the relevant time charge of or control over the child.[3] This placed him in a situation that, he argued, was a breach of the rights enjoyed by his family under article 41 and of his personal rights under the constitution. The Supreme Court, however, ruled that the family of which the applicant claimed he was a part did not enjoy

Footnotes:

1 It is assumed that this refers only to marriages deemed legally valid and subsisting according to Irish law.

2 [1966] IR 567

3 See s14(1) of the *Adoption Act, 1952* (no 25 of 1952).

constitutional rights under article 41. Those rights, the court pointed out, were reserved to the family based on marriage.[4] The court, moreover, ruled that the applicant, as unmarried father of the child, had no constitutional rights whatsoever in respect of the latter.

The courts cannot be accused of inconsistency in this regard. In the early 1990s, the Supreme Court reiterated this position in *In Re SW, K v W.*[5] The plaintiff in this case and his partner, although unmarried, had enjoyed a stable relationship for approximately two years. The couple had decided to have a child together but some time before the child's birth they became estranged from each other. The plaintiff's partner placed the child for adoption without the consent, or even the knowledge, of the plaintiff. At the time, he had no right under Irish law to challenge a decision to place for adoption either before the Adoption Board or before the courts. The plaintiff argued that this was a breach of his constitutional rights. The Supreme Court, however, concluded that the failure to consult the father of a child as of right was not a breach of any constitutional right, whether of the family or otherwise, again noting that the plaintiff was not and had not been a member of a family in the sense understood by the constitution.[6]

Within these confines, however, the courts have acknowledged that to be a family enjoying rights under articles 41 and 42, a household need not necessarily conform to the stereotype of 'father, mother and 2.4 kids'. It would appear, for instance, that a married couple without children still constitutes a family for the purposes of article 41.[7] Similar considerations apply to widowed persons and their children[8] and even, presumably, to orphaned siblings (whose parents had been married prior to their deaths). All of these families, despite their bereavements, continue to enjoy the family rights guaranteed by the constitution. In a similar vein, a family headed by persons who, though married, have separated due to irreconcilable differences, nonetheless retains its privileged constitutional status.[9] It is no small irony that such a family even in the throes of marital breakdown will be accorded full family rights under article 41, while its non-marital but happy and stable contemporaries do not.

The rights guaranteed by article 41 are recognised as belonging not to individual members of the family but rather to the family unit as a whole. They may be invoked by an individual on

Footnotes:

4 See, for instance, *per* Walsh J at 643-644.
5 [1990] 2 IR 437.
6 See also *W O'R v EH*, unreported, Supreme Court, 23 July 1996 and O'Driscoll, 'The rights of unmarried fathers' in [1999] 2 IJFL 18.
7 *Murray v Ireland* (1985), ILRM 542 *per* Costello J at 546.
8 *Per* Sullivan CJ in *In re Frost, Infants* (1947), IR 3 at 28.
9 *TF v Ireland* (1995), 1 IR 321.

> behalf of the family but, as Costello J notes in *Murray v Ireland*,[10] they 'belong to the institution in itself as distinct from the personal rights which each individual member might enjoy by virtue of membership of the family'.

Article 41 lacks a child focus. It fails to recognise the child as a juristic person with individual rights to which separate representation must be given. This is in no small measure attributable to the principle of parental autonomy created by article 41 of the Irish constitution.

This article establishes a private realm of family life which the state can enter only in the exceptional circumstances mentioned in article 42.5 of the constitution. Article 42.5 provides as follows:

> '**1)** The state acknowledges that the primary and natural educator of the child is the family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children ...
>
> **5)** In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the state, as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child'.

Clearly, this article provides that only in *exceptional cases*, where parents, for *physical* or *moral* reasons, fail in their duty towards their children, can the state as guardian of the common good endeavour to supply the place of the parents.

The Irish constitution is unique in that whereas most other western constitutions have a public/private divide, the family unit itself in this jurisdiction has autonomy over and above that of the individual members of the family. In fact, the individual rights of the constituent members of the family are both directed and determined by the family as an entity in itself. Consequently, membership of the constitutional family in this country subordinates the rights of the individual members. This is true specifically of the rights of children and manifests itself glaringly in Supreme Court judgments on the issue.

Footnotes:
10 [1985] ILRM 542 at 547.

Focusing on article 42, it is true to say that this in fact has more to do with the family than it does with the substantive right to education and, in many respects, is an addendum and subordinate to article 41. It deals with education in a wider sense than scholastic education. When it refers to education, it is alluding to the upbringing of the child, which it holds not only to be a right but a duty of parents. This article reinforces the decision-making autonomy of the family. This can be observed on examining the intellectual structure of article 42, which assigns a strong sense of priority to parental autonomy.

Article 42.5 is of particular importance in that it addresses the complete inability of parents to provide for their children's education. This provision, however, has been interpreted as not being confined to a failure by the parents of a child to provide education for them, but extends in exceptional circumstances, to failure in other duties necessary to satisfy the personal rights of the child. This supports the assertion made previously that the right to education in article 42 is a mere extension of the concept of 'the family' in article 41.

Looking at articles 41 and 42 of the constitution in unison, it is clear that they render the rights of married parents in relation to their children 'inalienable'. Article 41 of the constitution alludes to the inalienable and imprescriptible rights of the family. Article 42 alludes to the rights and duties of married parents. Only if the circumstances allow the constitutional *caveat* on inalienability, contained in article 42.5, to be satisfied is there then scope for the legal supplanting of the rights of the married parents. Articles 41 and 42 of the constitution thus have had a negative influence on any legislative intent or act of judicial discretion aimed at giving effect to the welfare of the child.

Extra-territoriality and the rights of non-national families

It would appear that the rights afforded by articles 41 and 42 are not confined to families made up, either wholly or partly, of Irish citizens or residents. In *Northampton CC v ABF*,[11] Hamilton J pointed out the 'universal application' of article 41 with the effect that the English father of a child born and resident outside the jurisdiction could legitimately plead the provisions of the constitution in his aid. In *Re ANM; Eastern Health Board v TM*,[12] O'Flaherty J endorsed this conclusion, stating that '[t]he reference to "parents" and "children" in article 42.5 [of the constitution] is not confined to citizens of this state'.

Footnotes:

11 [1982] ILRM 164 at 166.

12 [1993] ILRM 577 at 589.

The acknowledgement of the universal application of family rights is subject to an important caveat. Where a case is brought involving a family or a child thereof that ordinarily reside(s) outside the state, the courts should have regard to the 'comity between courts' in different jurisdictions. In other words, where a court of another jurisdiction has made a determination in relation to a citizen or resident of that other state, the Irish courts must respect as best they can the authority of the foreign court.[13] In *Kent CC v CS*,[14] Finlay P made an order returning a child to the custody of the applicant, an English local authority in whose care the child was before he had been abducted by his father. The judge noted that the child and its family being ordinarily resident in England, the question of custody and care would be more appropriately determined by an English court. A similar conclusion prevailed in *Oxfordshire CC v JH*.[14a]

The *Guardianship of Infants Act, 1964*

Section 3 of the *Guardianship of Infants Act*, 1964 provides that in deciding any question in regard to the upbringing of the child, the court shall regard the welfare of the child as the first and paramount consideration. The problem of resolving the apparent contradiction between the provisions manifest in articles 41 and 42 of the constitution with the principle of the welfare of the child in section 3 of the *Guardianship of Infants Act, 1964* has been correctly reconciled by the judiciary by holding that the welfare of the child was to be found within the confines of the constitution. This is, however, a negative definition of welfare in so far as it impacts on the child. The focus is not on actively promoting the welfare interests of the child, but merely with ensuring that these are not seriously impaired. This approach is attributable to the wording of articles 41 and 42 of the constitution.

Child care policy should support the philosophy that any decision about a child's future should ensure that the welfare of the child is the most important consideration and, if this involves the legal termination of parental rights in carefully prescribed circumstances, that should be an option. This recommendation would require a constitutional referendum, the wording of which might mirror the child right provisions detailed in the *UN convention on the rights of the child 1989*. In particular, a clearly-stated child care provision in the constitution, similar to article 3 of the *UN convention on the rights of the child 1989*, regarding the welfare of the child as a paramount consideration, must be a starting point for reform in this area.

Footnotes:

13 *Per* Finlay PJ in *Re SS; Kent CC v CS* (1984),ILRM 292 at 297.

14 Ibid.

14a Unreported, High Court, Costello J, 19 May 1988.

International obligations

Internationally, the traditional ideal-typical nuclear family is becoming an endangered species. Notwithstanding this, the designation of the family in article 41 as a private realm which is virtually impenetrable still obtains today as can be seen from Supreme Court pronouncements on the matter. Ireland ratified the *UN convention on the rights of the child 1989* without reservation on 21 September 1992. This convention gives recognition to children's rights in its widest sense. In fact, article 3 of the convention states, *inter alia*:

> '**1)** 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.
>
> **2)** State parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures'.

While this article demands only that the children's interests be *a* primary consideration, not *the* primary consideration, it must also be read alongside the series of explicit rights which the convention protects. These include: 'the inherent right to life;[15] 'the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents;[16] 'the right of the child to preserve his or her identity, including nationality;[17] 'the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests;[18] 'the right (of a child who has the capacity to form his or her own views) 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;[19] 'the right to freedom of expression;[20] 'the right of the child to freedom of thought, conscience and religion;[21] 'the right of the child to freedom of association and to freedom of peaceful assembly;[22] 'the right to the protection of the law against arbitrary or unlawful interference with the child's privacy, family home or correspondence and unlawful attacks on the child's honour and reputation;[23] 'the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development;[24] 'the right of the child to education';[25] and 'the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent

Footnotes:

15 Article 6.
16 Article 7.
17 Article 8.
18 Article 9(3).
19 Article 12.
20 Article 13.
21 Article 14(1).
22 Article 15.
23 Article 16.
24 Article 27.
25 Article 28.

with the promotion of the child's sense of dignity and worth'.[26] Taking cognisance of these rights, and in particular article 12, it can be seen that the *UN convention on the rights of the child 1989* is soundly based on a defensible concept of children's rights. The law in this jurisdiction, however, falls far short of such a concept.

Ireland has signed the *European convention on the exercise of children's rights 1996*. In some respects, it is of more limited application than its 1989 counterpart. It focuses predominantly on procedural rather than substantive rights, the emphasis being on such matters as the right of children to participation in, and information about, cases that concern their welfare. For example, article 5 of the 1996 convention provides that:

> 'Parties shall consider granting children additional procedural rights in relation to proceedings before a judicial authority offering them, in particular:
>
> **a)** the right to apply to be assisted by an appropriate person of their choice in order to help them express their views
>
> **b)** the right to apply themselves, or through other persons or bodies, for the appointment of a separate representative, in appropriate cases a lawyer
>
> **c)** the right to appoint their own representative
>
> **d)** the right to exercise some or all of the rights of parties to such proceedings'.

Clearly, the foregoing provisions are aimed primarily at children of sufficient age and maturity to understand the matters under scrutiny. That said, in appropriate cases a child should have a person to help the expression of his or her views. The absence of a facility for children to articulate their views, where a case is settled in advance of the hearing, was highlighted in the group discussion culminating in this report. It is a serious problem, particularly where the legal representative believes that the child is at risk.

Of special significance in discussing our international obligations are the relevant provisions of the *European convention on human rights and fundamental freedoms*, the incorporation of which into Irish law is to be by way of statute. It will now be possible to take proceedings in the Irish courts alleging a breach of the convention. There is little doubt that inconsistencies will arise between, on the one hand, Irish child law and practice and, on the other, the standards required by the convention. That said, the significance of this development has been overstated in the arena of Irish child law. The indirect or interpretative mode of incorporation preserves the

Footnotes:

26 Article 40.

domestic primacy of the constitution. Consequently, article 41 of the constitution will continue to act as an impediment to the effective implementation of children's legal entitlements under the convention. In summary, incorporation of the convention at sub-constitutional level will ensure that child rights remain subordinate to parental rights.[27]

One cannot avoid noting the enormous potential of the convention to protect and promote children's rights. Article 8 of the convention, for example, guarantees as a basic right, the right to respect for private and family life, home and correspondence. For these purposes, the convention (unlike the Irish constitution) makes no distinction between the family life of a marital and non-marital family.[28] In the previously-mentioned *Keegan* case, involving primarily the question of a non-marital father's right to be consulted in relation to the adoption of his child, the European Court of Human Rights held that the father's rights under articles 6 and 8 had been violated.[29] The court in particular noted that: '[t]he fact that Irish law permitted the secret placement of the child for adoption without the applicant's knowledge or consent, leading to the bonding of the child with the proposed adopters and to the subsequent making of an adoption order, amounted to an interference with his right to respect for family life'.[30]

Article 8 was applicable, the court emphasised, despite the fact that the natural parents of the child were never married to each other. For two years prior to the making of the adoption order, the mother and father had been living in a stable relationship and thus, essentially, formed a family for these purposes. Alluding to article 6 of the convention, the court further held that the father's right to 'a fair and public hearing by an independent and impartial tribunal' had also been violated. Effectively, the father had 'no rights under Irish law' to challenge the decision to place his child for adoption, either before An Bord Uchtála or before the courts. Effectively, he had 'no standing in the adoption procedure generally'.[31]

Articles 6 and 8 of the convention also afford certain procedural safeguards applicable in court proceedings in a contracting state. The child's right to participate in legal proceedings is one of those procedural safeguards, a conclusion underlined by the recent decision of the European Court of Human Rights in *T v UK* and *V v UK*.[32] The provision of separate and impartial representation to children was, in those cases, deemed to be essential to the conduct of certain

Footnotes:

27 If there is a conflict between a provision of the constitution and the convention, the constitution will prevail.

28 See *Marckx v Belgium* (1979), 9 Fam Law 228, *Johnston v Ireland* (1986), 9 EHRR 203, *Keegan v Ireland* (1994), 18 EHRR 341 and, most recently, *Elsholz v Germany*, 13 July 2000, (application no 25735/94).

29 *Keegan v Ireland* (1994), 18 EHRR 342.

30 Ibid at 362, para 51.

31 Ibid at 364.

32 16 December 1999 (application no 24888/94).

criminal proceedings in respect of children. Considering the far-reaching nature of many public law proceedings in respect of children, a similar approach is likely in relation to applications by a health board for orders for care or supervision of a child and perhaps even in civil proceedings generally.

Proposed reforms

The past decades have seen a transformation in attitudes to marriage as an institution. Increasingly, throughout Europe, marriage finds itself sharing centre-stage with new and diverse family forms not based on a matrimonial bond. Despite the growing presence of such family forms, the constitution (and to a large extent Irish law in general) continues to give scant acknowledgement to these social changes. It is arguable that the image of family promoted by the constitution – being the family based on marriage – perhaps appropriate to the Ireland of 1937, no longer tallies with the reality of family life as experienced by a significant minority of our modern population.

The Constitution Review Group discussed this issue in its 1996 report.[33] It stated that 'an exclusively marriage based definition of the family ... no longer accords with the social structure in Ireland' and advocated the removal of 'the adjectives "natural", "inalienable", "imprescriptible" from articles 41 and 42 [of the constitution]'.[34]

The group identified clearly the need for a more comprehensive definition of 'family' not confined to that based on marriage which would include an additional constitutional guarantee 'to all individuals in respect for their family life whether based on marriage or not'.[35] The review group was understandably uncertain as to precisely how this wider concept of family was to be defined. Marriage, at least in its modern form, has the distinct advantage of being easy to identify and distinguish from other family forms. It is, as the group discovered, not quite so easy to determine when a unit not based on marriage or some other legal registration is in fact a family. The permutations are, to say the least, complex.

The Constitution Review Group ultimately determined that the special position of marriage should be retained subject to a guarantee that the state would protect the family life of every individual, in particular the child. In the face of the bewildering array of options, the group

Footnotes:

33 *Report of the Constitution Review Group*, Dublin Stationery Office, 1996, pp321–332.

34 Ibid at 332.

35 Ibid at 336.

decided that the decision as to what amounts to 'family life' should be left up to the courts to decide on a case-by-case basis but it would not be confined to considering families based on marriage. In the light of this suggestion, it is useful to note that a similar guarantee in respect of family law in the European Court of Human Rights has been successfully invoked by a child, a non-marital cohabiting couple,[36] an unmarried mother[37] and an unmarried father.[38]

One of the significant conclusions of the Constitution Review Group was that article 41 of the constitution be amended by the insertion of express children's rights. In particular, the it recommended the inclusion of the: 'judicially construed unenumerated rights of children in a coherent manner, particularly those rights which are not guaranteed elsewhere and are peculiar to children'.[39]

In the earlier Kilkenny Incest Investigation Report, the investigation team, chaired by Catherine McGuinness SC (now Mrs Justice Catherine McGuinness of the Supreme Court), also proposed that article 41 of the constitution be amended to include a charter of children's rights. It stated that:

'While we accept that the courts have on many occasions stressed that children are possessed of constitutional rights, we are somewhat concerned that the "natural and imprescriptible rights of the child" are specifically referred to in only one sub-article (article 42.5) and then only in the context of the state supplying the place of parents who have failed in their duty. We feel that the very high emphasis on the rights of the family in the constitution may consciously or unconsciously be interpreted as giving a higher value to the rights of parents than to the rights of children. We believe that the constitution should contain a specific and overt declaration of the rights of born children. We therefore recommend that consideration be given by the government to the amendment of articles 41 and 42 of the constitution so as to include a statement of the constitutional rights of children. We do not ourselves feel confident to put forward a particular wording and we suggest that study might be made of international documents such as the *United Nations convention on the rights of the child*'. [40]

Conclusion

Section 3 of the *Guardianship of Infants Act, 1964* makes it abundantly clear that in considering an application relating to the guardianship, custody or upbringing of a child, the court must have

Footnotes:

36 *Johnston v Ireland* (1986), 9 EHRR 203.

37 *Marckx v Belgium* (1979), 2 EHRR 330.

38 *Keegan v Ireland* (1994), 18 EHRR 342.

39 *Report of the Constitution Review Group*, p319.

40 *Kilkenny Incest Investigation Report*, Dublin, Government Publications, 1993, p96.

regard to the welfare of the child. This, the section states, is 'the first and paramount consideration'. The Supreme Court, however, has determined that the welfare of a child must, unless there are exceptional circumstances or other overriding factors, be considered to be best served by its remaining as part of its marital family. This was dictated, the court considered in a number of cases, by the constitutional preference for the marital family exhibited in article 41.3 of the constitution and the requirement therein that it be protected from attack.[41] We see, therefore, an uneasy compromise between, on the one hand, the provisions of articles 41 and 42 of the constitution and, on the other, the welfare principle outlined in section 3 of the *Guardianship of Infants Act, 1964*.

In recent years, the Supreme Court has reiterated the primacy test by emphasising the welfare of the child, rather than the interests of its parents. In *Southern Health Board v CH*,[42] O'Flaherty J observed, in a case concerning the admissibility of a video-taped interview containing allegations of paternal abuse, that: 'it is easy to comprehend that the child's welfare must always be of far graver concern to the court. We must, as judges, always harken to the constitutional command which mandates, as prime consideration, the interests of the child in any legal proceedings'.[43]

While the ethos of the more recent case law is decidedly child-centred, the constitutional fiction that a child is always best served by a ruling that promotes the interests of its married parents must be removed in favour of a perspective that looks solely to the child's own best interests. If this more child-centred tendency is followed, it will displace one of the enduring ironies of the earlier Supreme Court case of *KC and AC v An Bord Úchtála*:[44] that is, that the welfare of the non-marital child was arguably accorded more respect than that of the marital child. The group therefore recommends that article 41 of the constitution should be amended to contain a provision respecting the precedence of the 'best interests test'. It is submitted that such a reform would bring much-needed clarity to the present situation regarding the principle and place of the child at the centre of child law proceedings.

Footnotes:

41 See, for example, *Re JH (An Infant)* (1985), IR 375

42 [1996] 1 IR 219.

43 Ibid at 238.

44 [1985] ILRM 302.

CHAPTER 3: GUARDIANS *AD LITEM*

SYNOPSIS OF CHAPTER 3

- A guardian *ad litem* is someone who 'is appointed a guardian for a law suit'. This means a temporary appointment which ends when the court proceedings are finished.
- At present there are no parameters to guide the courts or individuals appointed as guardians *ad litem*.
- There are no regulations whatever.
- There is no supervision and no accountability.

Requirements

Children are entitled to age-appropriate representation as equal parties to private or public law proceedings, which take account of:

- The declared and assessed wishes and feelings of the child, and
- An assessment, by appropriate welfare professionals, of the best interests of the child.

This calls for:

- An independent GAL service funded by central government
- The management of which will encompass the supervision, training, monitoring and accountability of GALs employed
- Emphasis to be placed on skills and experience of GALs rather than qualifications *per se*
- GAL to be an officer of the court and independent of all other parties
- Specially-trained solicitors to provide legal representation working with or without a GAL
- Complaints procedure easily accessed by children as well as others.

Public law

Public law is governed by the *Child Care Act, 1991*, sections 25 and 26 (see appendix 1)

This is where the state, as represented by the health boards, steps in to protect a child and may apply to court for a range of orders, including an order to place a child in care. In such a case, the child's interests are bound up in the functioning of the family at that time, with the interest and functioning of any substitute carers, be they foster parents or residential care staff, and they are also bound up with the interests and functioning of the statutory child protection and welfare and legal systems.

At present, a guardian *ad litem* may be appointed by the court to assess the needs and wishes of the child who could be placed in care. More usually, the court appoints a solicitor to give separate legal representation to the child. The decision of a court to appoint a GAL or a solicitor is completely haphazard and arbitrary. The judge cannot appoint a GAL and a solicitor. Judges vary in their attitude to those appointments.

The solicitor's role

There is no professional course run for solicitors who do this work, although in other jurisdictions the need for special training is recognised. What experience should a solicitor have to take on the separate representation role? The nature of the relationship between solicitor and client is completely different from that with an adult client and often carries a great deal more responsibility.

Private law

Private law is governed by *Children Act, 1997*, section 11 (see appendix 2). In private law cases, the parties to the litigation are generally the parents. This usually means that the child is in the care of one or other parent in a situation of breakdown of the parental relationship. Where legal proceedings are instituted, there is *de facto* evidence that the parents are not able to resolve the issues without court intervention. Is that process detrimental to the child and, if so, should a GAL be appointed automatically?

An Initial Welfare Report (IWR) prepared by a guardian *ad litem* is recommended to assess at an early stage in the proceedings the child's welfare, wishes and feelings. This affords the court the option to give further directions and to decide if the appointment of a GAL is required.

Experience shows that it is all too easy for reports, practitioners and the courts to focus on the adults as they relate to children and not on the children's' interests *per se*.

RECOMMENDATION

The GAL service should consist of a panel of available professionals who have significant experience in the field of child care and who can demonstrate an understanding of the professional tasks of child welfare and the child care and family law systems, of statutory child care and family law processes and of the responsibilities of key workers in the system.

GUARDIANS *AD LITEM*

Research which has been carried out into the operation of the guardian *ad litem* (GAL) system in Ireland confirms that confusion and uncertainty abound about the remit of the GAL, and the way in which this role should be interpreted and carried out (Kelly, 1998; Walsh, 1997). This is a serious shortcoming, when it is considered that those most affected by this service (namely, the children and families who find themselves involved in public child care proceedings and private family law proceedings) are already – by virtue of the proceedings initiated – at a point of high vulnerability and likely to be very stressed by the proceedings already instituted. There is evidence to support the contention that those families who are most likely to be on the receiving end of child welfare statutory intervention by health boards are often single parent families, in socially and economically deprived circumstances, and who lack social supports (Buckley *et al*, 1997).

Families caught up in a marital breakdown situation, regardless of social class and economic standing, are also likely to be functioning at a less than optimal level whilst legal proceedings relating to the breakdown are taking place. In these situations, the welfare of the child/children involved may take second place to the crisis of the breakdown of the marital relationship, to the point sometimes that it has a prolonged adverse effect on the child/children involved.

To have a GAL system existing without regulation, supervision or accountability is not only unsatisfactory from the point of view of those children and families in the middle of such proceedings; it is also unsatisfactory from the point of view of the other stakeholders involved: the courts and legal professionals; the health board and health board professionals; and the other related professionals and individuals who are, or who may be, affected by the appointment of a GAL. It is also, of course, unsatisfactory from the perspective of those acting as guardians *ad litem*.

In the absence of either regulations or guidelines to inform and direct the GAL service, the appointment of guardians in either public or private law proceedings is left entirely in the hands of individual judges. How guardians fulfil their role then becomes a matter of individual interpretation. Whilst there is a view that the court should retain full autonomy in relation to the appointment of GALs, the presence of an unregulated system poses some worrying questions:

- What choice is available to the court in relation to who is appointed?
- Who advises the court?

- Are they impartial or parties to the proceedings?
- Is there agreement between the different parties to proceedings about the pool of people who may be suggested to the court?
- What qualifications and expertise do guardians have?
- What are the ethical and professional standards that they work to?
- Are they independently appointed as individuals or do they present themselves as employees of voluntary bodies?

The current situation is unsatisfactory in that there are no parameters laid down to guide either courts or individuals appointed as guardians. Theoretically and practically, anyone could be appointed as a GAL. Social workers and lawyers alike, as combined 'stakeholders', have both professional and ethical responsibilities to ensure that the parameters of the service are specified, that it is an organised, professional service which operates independently of vested interests, and is open to the best possible candidates to form the best possible pool of expertise from which selection can be made. Such a service will ultimately enhance the capacity of the judicial system in making difficult decisions in complex child care and family law proceedings.

Therefore, there exists the need for a system to be put in place which will ensure that children in need of representation before the court receive this through a properly established, resourced and monitored GAL system.

In considering what this should entail, the following issues need to be addressed:

- What do we want from the GAL service?
- To what standards or principles do we think it should operate?
- How best should it be structured to meet these stated aims?

If consensus can be reached between the various stakeholders involved, judges, solicitors, families, statutory and related professionals and (last but certainly not least) children will ultimately benefit.

Core principles

A child who is a subject of, or significantly affected by, the outcome of court proceedings has a right to age-appropriate representation at these proceedings. Representation should not be of lesser significance or standard than that afforded to other parties to the proceedings. Children have a right to be heard as equal parties to proceedings which significantly affect their lives.

Chapter 3: Guardians ad litem

Representation for children consists of two separate aspects:

- The child's declared and assessed wishes and feelings in relation to the specific court proceedings and possible alternative remedies, and
- An assessment, by appropriate welfare professionals, of what is in the child's best interests, given the specific court proceedings and possible alternative remedies available.

In order to ensure that the child has equal representation before the court, it is necessary therefore for children to have both legal and guardian representation. This has been termed dual representation in other jurisdictions.

Irish legislation and independent representation of children

The concept of a GAL and independent representation for children is an entirely new development in Ireland. It was first given legislative effect in public law cases under sections 25 and 26 of the *Child Care Act, 1991*. Section 11 of the *Children Act, 1997* amends and extends the *Guardianship of Infants Act, 1964*, and section 28 thereof authorises the court to appoint a GAL for a child. This section of the Act, however, is not yet operative.

Public law proceedings

Sections 25 and 26 of the *Child Care Act, 1991* were implemented in Ireland in October 1995. Section 26 of the *Child Care Act, 1991* deals with the appointment of a GAL and it simply states as follows: 'If in any proceedings under Part IV or Part VI, the child to whom the proceedings relate is not a party, the court, if it is satisfied that it is necessary in the interests of the child and in the interests of justice to do so, can appoint a GAL for the child'.

That is as far as the section goes. It is bare in terms of assisting practitioners and judges alike in determining:

- Who should be appointed a guardian? The section does not specify whether the guardian should be a child welfare professional or a lawyer. This means that the court has the widest of power to appoint any person as a guardian and, if the parties are not satisfied with the appointment, they have no redress under the Act
- What qualifications, if any, should that person have? As the section stands, it is open to the court to appoint a person with no qualifications whatsoever and with no scrutiny (not even a Garda check) to carry out this most important role. Surely this is a highly undesirable state of affairs?

- What experience, if any, should that person have? There is no indication that the GAL should have any experience whatsoever
- What is the role of a GAL appointed by the court? Is the guardian's role one where they present the wishes of the child to the court or one where they present what they consider to be in the child's best interest to the court?
- The duties of the guardian. Is the guardian obliged to meet the child? Is the guardian obliged to meet the parents? Is he obliged to meet the health board?
  Does he have to prepare a report for the court?
- The powers, if any, of the guardian. Can the guardian be effective if he does not have the authority to control the proceedings in some way, (for example, have the authority to re-enter the proceedings, to expedite the proceedings or to seek assistance from the courts?)
  The guardian is not a party to the proceedings and nor is the child, where a guardian is appointed, so as it stands the guardian has no power at all in relation to the proceedings.

The dearth of detail in relation to the GAL has led to difficulties. Many questions remain unanswered:

- Should GALs have access to files, whether they are held by the health board, by hospitals, by doctors or schools?
- Should they have full and free access to all of those files in every case or should this be decided on a case-by-case basis?
- Does this clash with the law relating to privilege which attaches to medical files and possible qualified privilege which attaches to social work files?
- Is the GAL's role terminated once the proceedings are concluded or should he play a role in ensuring that a care plan presented to the court is properly put into effect?

Further to these specific questions, there are additional areas of concern:

1) It is clear that the appointment of a guardian is entirely at the discretion of the court, and it is not automatic once child welfare proceedings are issued. Section 25 of the Act allows for a child to be joined as a party to any proceedings pursuant to Part IV or Part VI:
'If in any proceedings under Part IV and Part VI, the child to whom the proceedings relate is not already a party, the court may, where it is satisfied having regard to the age, understanding and wishes of the child and the circumstances of the case that it is necessary in the interests of the child and the interests of justice to do so, order that the child be joined as a party to or shall have such of the rights of a party as may be specified by the court in either the entirety of the proceedings or such issues of the proceedings as the court

may direct. The making of any such order shall not require the intervention of a next friend of the child'.

2) This section goes on further to indicate that the court 'may, if it thinks fit' appoint a solicitor to represent the child in the proceedings and may give directions as to the performance of his duties which may include, if necessary, directions in relation to the instruction of counsel. There is no further detail regarding whether or not any solicitor appointed on behalf of a child should have had experience in the area of family law/child care law. While this section details that the solicitor may well have duties in respect of the child, there is no elaboration as to what that person's duties might be.

A significant difference between sections 25 and 26 is that in section 25 the child is joined as a party to the proceedings and therefore a solicitor acting on behalf of a child has some input and control over the timetabling of the proceedings. However, the shortcomings outlined with regard to section 26 are equally applicable here:

- What experience should a solicitor have when acting on behalf of a child?
- What is the role of the solicitor?
- What is the duty of the solicitor to the court and to the child?
- Is the solicitor's relationship with the child client the same as the relationship the solicitor would have with an adult client?

3) In both sections 25 and 26, it is stated that the costs are to be paid by the relevant health board. This can lead to problems as it is most important that both the GAL and the solicitor acting for a child are independent and seen to be so. Having the costs paid by one of the parties to the proceedings is surely inappropriate.

4) As currently formulated, these sections are mutually exclusive: either a solicitor or a guardian is appointed for a child at the discretion of the court. The *Children Bill, 1999* proposes to amend and extend the *Child Care Act, 1991*, thus authorising the Children's Court to deal with applications to place children in special care units and so depriving them of their liberty. In these circumstances, it must be considered essential that the child has a GAL and is separately represented. This section will be governed by sections 25 and 26 which, as already outlined, are clearly lacking.

The limited research that has been carried out since the implementation of sections 25 and 26 of

the 1991 Act indicates that a variety of different professionals, social workers, child care workers, teachers, psychologists, psychiatrists and solicitors have been appointed as GALs under the *Child Care Act, 1991* and that there exists a lack of clarity on the part of those both acting in this role and those affected by the appointment on the exact function of a GAL (Walsh, 1997; Kelly, 1998).

Private law proceedings

The section of the *Children Act, 1997* allowing a GAL to be appointed in private law proceedings has not yet come into force, but, as drafted, it does not provide any guidance or specification relating to the role or function of a guardian. The *Guardianship of Infants Act, 1964* regulates private law disputes in regard to custody and access of children. Section 28 of the *Guardianship of Infants Act, 1964*, as amended, inserts the following provision: 'If in proceedings under section 6(a), (11) or (11)(b), the child to whom the proceedings relate is not a party, the court may, if satisfied, that having regard to the special circumstances of the case, it is necessary in the best interests of the child to do so, appoint a guardian *ad litem* for the child'.

The private law provision for a GAL is as lacking in detail as its public law counterpart. There is no indication as to:

- Who should be appointed guardian?
- What qualifications, if any, that person should have?
- The experience, if any, that person should have?
- The role of the GAL
- The duties of the GAL
- The powers, if any, of that guardian.

Section 28(2) of *Children Act, 1997* does, however, state that a person who has prepared a report pursuant to section 47 of the *Family Law Act, 1995* might be appointed as the GAL. Clearly the legislature does not see any difference between the duties and roles of the expert witness and the duties and roles of the GAL.

With regard to the balance of this section, the court 'where it is necessary in the best interest of the child, that the GAL ought to be legally represented ... may order that the GAL be so represented in the proceedings'.

This section goes on to state that the cost of the fees and expenses of the GAL appointed pursuant

to sub-section 1 and the costs of obtaining legal representation pursuant to an order under sub-section 4, shall be paid by the parties to the proceedings concerned and in such proportions or by such a party to the proceedings as the court may determine. This means that if the parties can afford the guardian and/or the legal representation, then the child's interests will be represented. If the parties cannot afford it, then the child remains without a voice.

The position of the child in public law proceedings

In public law proceedings, a child who is the subject of care proceedings is caught between family and state and is generally no longer in the care of his or her own family but in the care of the state. The child's interests in a statutory child welfare situation do not stand alone, and we are infinitely misled if we believe or assume that they do. The child's interests in this situation are bound up in the interests and functioning of the family at that time, with the interests and functioning of any substitute carers, be they foster parents or residential care staff, and they are also bound up with the interests and functioning both of the statutory child protection and welfare system, and that of the legal system.

The real position of the child where the state has intervened in its life in relation to parenting function is that it is part of a super-system consisting of a family/professional system – not one or the other, but all connected together. The child, at the time of welfare proceedings, is located between the family and the state, between family care and substitute care, in a temporary position pending the outcome of the proceedings. The GAL appointed in child welfare proceedings needs to be able to communicate with and work with both family members and health board professionals, and needs to be competent to assess the efficacy of the functioning of both statutory system and family system in order to assess what is in the child's best interest.

The position of the child in private law proceedings

In private family law proceedings, the child is generally still in the care of one or other parent but in a situation of family breakdown. When marital breakdown occurs, the normal stability or 'homeostasis' of the family system is disrupted. Individual members of the family system are for a period of time off-balance and lacking equilibrium until such time as the crisis has passed and the situation resolved. Only when family members have established new patterns of coping are they able to regain optimal functioning. In the intervening period, optimal functioning is difficult and children are affected by this situation.

Marital breakdown is often by its nature disruptive for the children involved. While the majority

of separating couples are able to attend to their children's needs during this period and to minimise the effects on their children, it is not always the case, particularly where conflict continues between parents. In the cases where legal proceedings under the *Children Act, 1997* are instituted, there is already *de facto* evidence that the parents involved have not been able to resolve the issues without recourse to the courts.

In such situations, an argument can be made that children affected by such proceedings should have a guardian appointed, initially to assess what is in the child's best interest, and to report to the court on the child's wishes and feelings. The court will then have access to this Initial Welfare Report (IWR) and can take into account the welfare of the child in a way that is not currently possible. It will also have the option of giving further directions to ensure that the welfare of the child is protected and considered during the proceedings before it. This should include the continued appointment of a guardian where it considers it is necessary to do so. The criteria for the appointment of a GAL in private law proceedings are set out in section 28 of the *Guardianship of Infants Act, 1964*, as inserted by section 11 of the *Children Act, 1997*, and allows a court to appoint a guardian 'if satisfied that having regard to the special circumstances of the case it is necessary in the best interests of the child to do so'.

The reference to 'special circumstances' suggests that a GAL will not be as readily appointed in private law cases.

Representation across public and private proceedings

While the remit of the GAL should be the same in the two sets of proceedings (namely, to assess and report on what is in the child's best interest given the actual court proceedings involved and also to report on the child's wishes and feelings), there may need to be a differing emphasis on how the GAL carries out this role, given the particular circumstances that exist.

In both public and private law proceedings, the GAL is appointed by the court to represent the child's interests during the proceedings. Given the interface between the public and private sphere, between the state and the family, in all such cases, it is important that the guardian be able to retain a 'meta' position in relation to their role – in other words, to have an understanding of and ability to work in a systemic manner, taking cognisance not only of the individual and psychological processes but also those of interpersonal and systemic processes, and to remain beneficially distant from (as opposed to directly involved in) the particular dynamics of the martial breakdown or child protection process underway.

The child in both sets of proceedings is entitled to representation before the court, and this representation should address not only the child's right to a voice but also the issue of the child's best interests and welfare in relation to the proceedings before the court.

RECOMMENDATIONS

1) There should be dual representation in public law cases for children: a GAL and a solicitor for the child.

2) The *Child Care Act, 1991* needs to be reformed to give the child the automatic right to be made party to the proceedings.

3) The solicitor for the child should act on instructions from the GAL unless the child wishes to give instructions which are in conflict with those of the GAL, and is able, having regard to their age and understanding, to give such instructions. If that is the case, the solicitor's role is to argue in court on the basis of the child's wishes. In that event, the GAL would remain in the case to advise the court on what in their opinion is in the best interest of the child. In certain circumstances, it may be necessary for the GAL to have their own legal representation.

Temporary appointment

Guardian *ad litem* literally means 'a guardian appointed for a law suit' and as such indicates a temporary appointment which comes to an end when the court proceedings are completed. In other jurisdictions, it is not considered desirable that a GAL should remain involved on an on-going basis following the resolution of legal proceedings and so would be appointed on a temporary basis for the duration of the proceedings. This is a principle that should be adhered to in an Irish system.

It is presumed that there will be continued involvement of relevant professionals from health board or mental health settings who will be able to provide continuing support and monitoring if necessary. This function should, however, be designated to the already existing relevant professionals within existing welfare structures and should not be a function of guardians appointed for the duration of court proceedings.

A GAL has no authority and no role in a continuing involvement in child welfare or family law cases, beyond a hearing and resolution of the legal situation. It is too likely that if they remain involved, they will create confusion, conflict and splitting in the professional/family system.

As the situation stands under the 1991 Act, any party has liberty to apply to the court for directions (including the possibility of re-entering the proceedings) in the event of further examination of the case being deemed necessary. It is therefore possible under current legislation to reactivate the appointment of a GAL.

The role of the guardian *ad litem*

If the purpose of the appointment of a guardian is to establish and report on a child's wishes and feelings, and also to assess, report on and act in the best interests of the child who is the subject of the court proceedings, then the guardian may be seen to have an number of different roles:

- Investigator
- Reporter
- Protector
- Spokesperson, and
- Monitor.

One implication of this multi-role function is that the guardian should ideally be a person of considerable skill and expertise in dealing with children, families and other involved

professionals. A second implication is that the guardian should have the authority and ability to ensure that the child's best interests are safeguarded by those individuals and agencies already involved in the child's life. This may include the need for guardians to be legally represented themselves in any proceedings which affect the child. In any event, the GAL should become an officer of the court in the same way a solicitor or probation officer is.

Guardians need to be competent and expert in their ability to carry out the function of representative of a child in court proceedings, and demonstrate considerable skill and expertise in the core tasks of communicating with (and assessing) children, families and involved professionals and the functioning of the various family and professional systems. Their expertise need not be exhaustive, however. If the guardian is given equal status in the proceedings alongside other parties, then he or she can also call on expert witnesses to provide additional evidence and assistance where necessary.

Confidence in the system

In both sets of proceedings, but especially in the case of child care proceedings, there are many different stakeholders who are affected by the appointment of a GAL. These include:

- The child at the centre of the proceedings
- The child's parents and other family members
- Statutory health board professionals involved in the child and family
- Legal professionals representing family or the state
- The courts themselves, and
- The government departments of heath and justice.

It is essential that all stakeholders, and particularly those most directly affected by an appointment (namely, individual children, their families and, in the case of child care proceedings, those professionals with statutory responsibilities) have confidence in any system that is established and in the credentials and expertise of any individual guardians appointed. It is therefore essential that the departments of health and children and justice co-operate in the development of a regulated and competent GAL system, and in its maintenance and monitoring.

A situation where a GAL can be appointed to work closely with children and has not been given Garda clearance is clearly intolerable.

The independence of the guardian

In order for the different stakeholders to have confidence in a guardian, it is important that the guardian is not only independent, but is also seen to be independent in his or her role – to be acting for the child alone and not to be seen to be compromised through association or location with other parties in the proceedings. If the guardian is to fulfil a function as protector to the child during the proceedings underway, the guardian must be able to maintain an active and alert presence on behalf of the child during the proceedings.

One implication of this is that the formulation of any panel or system of regulation for guardians needs to be considered extremely carefully so that their independent status is safeguarded. A second implication is that issues of legal liability, immunity and confidentiality would need to be considered and catered for. A third implication is that the management of a panel of guardians would need to be carefully considered, in particular issues of supervision, monitoring, training and accountability.

It is significant that the establishment of the Northern Irish GAL system three years ago opted for the creation of an independent GAL service, located separately from the judicial and welfare services, and funded directly by the Northern Irish Health and Social Services Executive, thus ensuring that the service has developed into one which offers both accountability and transparency through its independent status. The core principle of the independence of guardians needs to be promoted in the development of a system in this jurisdiction.

The role of a guardian vis-à-vis the expert witness

If the role of the guardian is taken to be one which incorporates the protection of the child's best interests and involves the monitoring of other agencies and services provided for the child, it suggests a more involved and active role than that normally taken by an expert witness, but should not preclude the involvement of expert witnesses as required. In the UK, a recent research study examined the role of guardians and expert witnesses in complex child welfare proceedings and concluded that: 'In complex cases, the guardian's skills and competences (e.g. in areas of attachment and bonding, risk assessments, separation and loss) come into play, but in the *first* instance they help determine the additional issues which will need to be addressed by specialists whose job includes but is not necessarily restricted to an assessment of these issues'.
(Brophy & Bates, 1999, p98, original emphasis).

The role of the expert witness should continue to be of assistance to courts where GALs have

been appointed and GALs, like other parties to the proceedings, should be able to call on expert witnesses to assess and report on specific issues related to the child's welfare, as necessary.

Criteria for appointment

An important question arises regarding the question of qualifications and training for guardians and it is submitted that the most important criteria should be those of skills and experience rather than qualification *per se*.

If a system for the appointment of 'approved' guardians is to be put in place, criteria need to be established in relation to desirable or essential qualifications, but also for the demonstration of the necessary skills required to carry out the role. The critical areas that need to be considered include:

- The ability to communicate with and assess children in situations of stress
- The ability to communicate with and assess parents, parental functioning and family dynamics
- The ability to understand and assess attachment patterns between children and significant others
- The ability to communicate with and assess the functioning of other professional systems involved with the child
- The ability to understand and utilise the legal system as it affects the child and the child's interests in proceedings, and
- In public law cases, the knowledge and experience of the dynamic interplay of family and professional systems as this impinges on the child, and the ability, as far as possible, to maintain a 'meta' position in relation to this.

Guiding principles about structure, accountability and job specifications

The GAL service should, if it is to serve adequately the needs of children in both private and public law cases, consist of a panel of available professionals who have significant experience in the field of child care and who can demonstrate an understanding of the child care or family law systems, of statutory child care and family law processes and of the professional tasks and responsibilities of key workers in the system.

The GAL panel should offer a range of expertise, to take into account the widely varying circumstances which can exist in statutory child care cases and family law cases and to offer culturally-appropriate representation and expertise to children from our increasingly diverse

society. Any panel should be appointed in a situation of open competition to allow for the best candidates to be appointed. The selection of GALs should be according to agreed criteria, which would specify skills, and the knowledge and experience base and would include references.

The skills-based characteristics include the following:

- Communication with children and families
- Ability to negotiate
- Therapeutic skills in intervention
- Understanding of and skills in systemic work in relation to statutory/family systems
- Knowledge of and experience in the statutory child care field, and
- Report-writing and courtroom experience and skills.

The experience-based characteristics should include the following:

- An absolute minimum of five years' experience of post-qualification work with children and families
- Workers from the statutory services who have the necessary types and levels of experience. These could have a particularly rich role to play but would need to comply with a stipulation that they do not report on the authority that they had been employed by for a certain number of years. (Without any criticism to health boards intended, such a period of 'decontamination' would ensure a distancing of loyalty, and at the same time make use of the valuable experience of knowing the internal workings.)
- A guardian should not previously have had contact with a specific family or child in another capacity
- The performance of GALs should be reviewed regularly and their appointments should be on a contractual, temporary, renewable basis
- There should be a complaints procedure built in, which would be open to all parties involved in individual proceedings
- The administration of the service should be overseen by a body representative of the varying stakeholders involved: for example, the judiciary, legal professionals, the statutory child care system and the social work profession
- A GAL should function within the regulated system as an independent professional practitioner who receives support and training from within the structure but who maintains a core independence
- The GAL service should be funded from central government sources to ensure that local

child care budgets are protected.

The organisation of a guardian *ad litem* system

The GAL is a court-appointed individual who reports to the presiding judge on the circumstances of individual cases. Whereas the system in England and Wales opted for a combination of both internal local authority and voluntary organisation management, it is noteworthy that the more recently established Northern Irish system has been developed as a 'stand-alone' service. An equivalent independent service should be established in the Republic, operating as an accountable, professional service for the representation of children and their welfare during relevant court proceedings, staffed by experienced welfare professionals. While it is yet uncertain what the demands on such a service would be (given the delay in the implementation of the relevant sections of the *Children Act, 1997*), it is already evident that the ad-hoc system as currently exists for the provision of guardians in public law proceedings is not able to meet current demands for guardians in that sector. Where demand is uncertain, where the real and perceived independence of the guardian is of paramount importance and where involvement of the GAL will be time-limited, the establishment of an initially centralised centre is the most practical option for the organisation of the service.

In both the UK and Northern Irish systems, the role specifically in public law proceedings is carried out by qualified social workers. This is because social workers have both the expertise and knowledge of the process and dynamics involved in child protection work and for that reason are most often appointed as guardians in public law cases. Social workers play a central role in assessing, intervening and supporting families in difficulty, and also in working with and being responsible for care plans for children in the care of health boards. The social work file is often the health board record that will detail the contact between statutory professionals and a family and/or child in any individual case. In a situation where a child care case comes to court under the *Child Care Act, 1991*, and section 26 appointing a GAL is brought into operation, the social workers' records and performance are likely to be examined by the GAL representing the child's interest. Social workers in the current system are the key decision-makers in child protection cases. Responsibility rests with them alone.

Overview

The law as it stands in the Republic is nothing less than chaotic. It falls well short of what is required and what the state has agreed to sign up for, having ratified the 1989 *UN convention on*

the rights of the child and signed the 1996 *European convention on the exercise of children's rights*.

It may be argued that the state has discharged its duty with the inclusion of sections 20 and 27 of the *Child Care Act, 1991* and section 47 of the *Family Law Act, 1995*. (A largely similar provision is inserted in section 7 of the *Domestic Violence Act, 1996*.)

Sections 20 and 27 of the *Child Care Act, 1991* and section 7 of the *Domestic Violence Act, 1996* are widely used in the Irish District Court, primarily due to the absence of a Probation and Welfare Service in the Family Law Courts. It is clear that judges seek some independent assistance when making very difficult decisions in custody and access disputes, but it is also clear that section 20 is used in circumstances not covered by the legislation (for example, where the court is not considering a care order or a supervision order and is simply seeking assistance in terms of the decision to be made regarding custody and access).

It cannot be said by the state that either of these sections discharges our obligations under the *UN convention on the rights of the child* or the *European convention on the exercise of children's rights*. The duty of the author of the report pursuant to these sections is to report to the court, but there is no duty to give a voice to the child's wishes. The author is in the role of an expert witness to assist the court.

Section 47 of the *Family Law Act, 1995* is used more widely in the Circuit and High Courts and, similarly, the author of the report is not obliged to place the child as his or her primary concern. Indeed, this section indicates that the report is to relate to any question affecting the welfare of a party to the proceedings, thus disregarding the welfare of the child as the child is not a party to those proceedings. As earlier indicated, section 28 of the *Guardianship of Infants Act, 1964* (as amended) sets out that the author of the report under section 47 can be the GAL. There is a critical difference between the role of an expert witness and the role of the GAL. The duty of an expert witness is to report to the court on a set of facts which have presented themselves to that court, to gather information and to make recommendations in relation to proceedings before the court. While the expert witness may interview the children who are caught up in a custody or access dispute, it is not his role to explore their wishes, to present them to the court or to ensure that those wishes are the court's primary concern, nor has he any control over the proceedings. He is simply asked to submit the report. Often the report prepared is never seen by the judge as the proceedings may settle before the matter comes on for hearing. These provisions go some

way towards improving the management of family law disputes. However, they are well short of what is necessary.

The independent report amounts to information gathering for a court. It does not involve the separate representation of children and their interests. In both public and private cases, it is all too easy for reports to focus on the adults as they relate to children and not the children's interest *per se*, and indeed this is arguably their function in the first place.

Reform

With regard to the *Child Care Act, 1991*, sections 25 and 26 should be repealed. There should be a new part of the Act drafted, headed *Representation for children*. The first section should read something along the following lines:

'**1)** In any proceedings before a court under this Act in relation to the care and protection of a child, the court, having regard to the rights and duties of parents, whether under the constitution or otherwise, shall regard the welfare of the child as the first and paramount consideration.

2) In any proceedings before a court pursuant to Part IV or Part VI of the Act, the child to whom the proceedings relate shall be joined as a party to these proceedings. The making of any such order shall not require the intervention of a next friend in respect of the child; where the court makes an order under sub-section 1, the court shall appoint a guardian *ad litem* for the child and a solicitor to represent the child. Any person appointed as a guardian *ad litem* pursuant to the order of the court may, if that person thinks fit, appoint a solicitor in order to represent the guardian *ad litem* in the proceedings.'

The new legislation should go on to detail the rights, the duties, the obligations, the qualifications and experience of both the GAL and the legal representatives. The precise details as to what these should be have been previously alluded to. Any GAL or solicitor appointed should be wholly independent of any of the parties to the proceedings and must be seen to be so. Accordingly, the costs of the implementation of such a comprehensive service should be funded from central government and not through the health boards.

Private law

With regard to section 28 of the *Guardianship of Infants Act, 1964*, as inserted by section 11 of the *Children Act, 1997*, this should be similarly amended. There should be a separate part of the

Act dealing with representation of children and the first sections should cover the following:

'1 a) In any proceedings before a court under this Act concerning the care and protection of a child, the court, having regard to the rights and duties of parents, whether under the constitution or otherwise shall:

a) Regard the welfare of the child as a first and paramount consideration

b) In any proceedings before a court pursuant to section 6(a), (11) or (11) (b), the child to whom the proceedings relate shall be joined as a party to those proceedings. The making of any such order shall not require the intervention of a next friend in respect of the child

c) Where the court makes an order under sub-section 2, the court may appoint a guardian *ad litem* and/or a solicitor to represent the child. Any person appointed as a guardian *ad litem* pursuant to order of the court may, if that person thinks fit, appoint a solicitor in order to represent the guardian *ad litem* in the proceedings'.

As in the public law proceedings, the service must be seen to be independent and the costs should be funded through central government.

Conclusion

Having considered the domestic law, as it presently stands, it is clear that specific reform is urgent and necessary, and new legislation with comprehensive regulations addressing the provision of a GAL system must be put in place if we are to comply with our obligations in respect of children rather than simply continue to mouth platitudes.

References:

- Buckley, H, Skehill, C & O'Sullivan, E (1997), *Child protection practices in Ireland:* a case study. Dublin: Oak Tree Press.
- Kelly, G (1998), *The guardian* ad litem *service in Ireland: a service or a disservice?* Unpublished dissertation in partial fulfillment of the Advanced Diploma in Child Protection and Child Welfare, TCD, Dublin.
- Walsh, T (1997), *The child's right to independent representation: developments arising from the* Child Care Act, 1991. Vol 3 (2) 66-72.

APPENDIX 1:
EXTRACT FROM *CHILD CARE ACT, 1991*

Power of court to join child as a party and costs of child as a party:

'25. **(1)** If in any proceedings under Part IV or VI, the child to whom the proceedings relate is not already a party, the court may, where it is satisfied having regard to the age, understanding and wishes of the child and the circumstances of the case that it is necessary in the interests of the child and in the interests of justice to do so, order that the child be joined as a party to, or shall have such of the rights of a party as may be specified by the court in either the entirety of the proceedings or such issues in the proceedings as the court may direct. The making of any such order shall not require the intervention of a next friend in respect of the child.

(2) Where the court makes an order under sub-section (1) or a child is a party to the proceedings otherwise than by reason of such an order, the court may, if it thinks fit, appoint a solicitor to represent the child in the proceedings and give directions as to the performance of his duties (which may include, if necessary, directions in relation to the instruction of counsel).

(3) The making of an order under sub-section (1) or the fact that a child is a party to the proceedings otherwise than by reason of such an order shall not prejudice the power of the court under section 30(2) to refuse to accede to a request of a child made thereunder.

(4) Where a solicitor is appointed under sub-section (2), the costs and expenses incurred on behalf of a child exercising any rights of a party in any proceedings under this Act shall be paid by the health board concerned. The health board may apply to the court to have the amount of any such costs or expenses measured or taxed.

(5) The court which has made an order under sub-section (2) may, on the application to it of a health board, order any other party to the proceedings in question to pay to the board any costs or expenses payable by that board under sub-section (4).

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.

(2) Any costs incurred by a person in acting as a guardian *ad litem* under this section shall be paid by the health board concerned. The health board may apply to the court to have the amount of any such costs or expenses measured or taxed.

(3) The court which has made an order under sub-section (1) may, on the application to it of a health board, order any other party to the proceedings in question to pay to the board any costs or expenses payable by that board under sub-section (2).

(4) Where a child in respect of whom an order has been made under sub-section (1) becomes a party to the proceedings in question (whether by virtue of an order under section 25(1) or otherwise), then that order shall cease to have effect.'

APPENDIX 2:
EXTRACT FROM *CHILDREN ACT, 1997*

(Please note that these sections are not yet in force)

Appointment of guardian *ad litem* for a child and provision for separate representation:

'28. **(1)** If in proceedings under section 6A, 11 or 11B the child to whom the proceedings relate is not a party, the court may, if satisfied that having regard to the special circumstances of the case it is necessary in the best interests of the child to do so, appoint a guardian *ad litem* for the child.

(2) Without prejudice to the generality of sub-section (1), in deciding whether to appoint a guardian *ad litem*, the court shall, in particular, have regard to:

a) the age and understanding of the child

b) any report on any question affecting the welfare of the child that is furnished to the court under section 47 of the Act of 1995

c) the welfare of the child

d) whether and to what extent the child should be given the opportunity to express the child's wishes in the proceedings, taking into account any statement in relation to those matters in any report under section 47 of the Act of 1995, and

e) any submission made in relation to the matter of the appointment as a guardian *ad litem* that is made to the court by or on behalf of a party to the proceedings or any other person to whom they relate.

(3) For the purposes of this section, the court may appoint as a guardian *ad litem* the person from whom, under section 47 (1) of the Act of 1995, a report on any question affecting the welfare of the child was procured, or such other person as it thinks fit.

(4) If having regard to the gravity of the matters that may be in issue or any other special circumstances relating to the particular case, it appears to the court that it is necessary in the best interests of the child that the guardian *ad litem* ought to be legally represented, the court may order that the guardian *ad litem*, be so represented in the proceedings.

(5) The fees and expenses of a guardian *ad litem* appointed pursuant to sub-section (1) and the costs of obtaining legal representation pursuant to an order under sub-section (4) shall be

paid by such parties to the proceedings concerned, and in such proportions, or by such party to the proceedings, as the court may determine.'

CHAPTER 4:
ALTERNATIVE DISPUTE RESOLUTION AND THE ROLE OF THE GUARDIAN *AD LITEM*

SYNOPSIS OF CHAPTER 4

- There is a need to balance the rights of parents and the rights of the child to be free of emotional conflict.

- In private law disputes between parents we have to identify the process as being highly stressful for their children. Where a court is the place of first resort without any attempt to avail of alternative dispute resolution (ADR), a GAL should be automatically appointed by the court to make a brief assessment of the risk of emotional or other abuse to the children. The court, having read the report, would decide if a full assessment by a GAL was required.

Types of alternative dispute resolution:

- Divorce/separation education programme. (Should this be mandatory prior to the issue of private law proceedings?)
- Negotiation
- Mediation. Mediators see the voluntary nature of their service as an important feature. If a GAL were to be appointed by a court and the parties attended mediation by order of the court, the GAL could help in arriving at a satisfactory solution from the child's point of view. However, the GAL must report to the court and issues regarding the confidentiality of mediation would have to be resolved
- Arbitration
- Judicially-hosted settlement conference
- Court-mandated family systems consultation
- Section 20 report: *Child Care Act, 1991.*

Chapter 4: Alternative dispute resolution and the role of the guardian ad litem

Introduction

Parents have a constitutional right of access to the courts for adjudication on disputes regarding their children. Such proceedings can carry a heavy emotional and financial cost to the parties involved and, through them, to their children. There is, therefore, a need to balance the constitutional rights of the parent with the rights of the child to live free of emotional conflict. This requires a philosophical shift in thinking. Parents should be expected and facilitated to use alternate dispute resolution (ADR) processes in order to avoid and diminish emotional damage to the child. Children whose parents are unable or unwilling to resolve their differences through ADR and instead pursue adversarial court proceedings would thus be identified as likely to be living in situations of high emotional stress and at risk of emotional abuse.

Parents would be informed that although they had a right to apply to the courts, to do so would serve as a risk indicator that their children were or could be at risk of emotional abuse by virtue of the inter-parental conflict. The emphasis therefore changes to the promotion of conflict resolution through ADR, with the courts seen to be a last resort rather than the current situation whereby ADR may be dismissed because of the parental wish/need to further the conflict in court irrespective of the damage this may do to their children.

One should recognise, however, that in some very particular circumstances, particularly in situations of risk, alienation of a child, abduction of a child or abuse of a parent or child, then the involvement of the court may be necessary and, indeed, beneficial.

Children whose parents continue to litigate would automatically have a guardian *ad litem* appointed by the court to protect the interests of the child. This would be so in all private and public law cases involving children coming before the courts. The guardian *ad litem* would make a preliminary brief assessment as to whether or not the child might be at risk of emotional abuse. A number of risk factors would be considered and if any of these were present, then the court would have a responsibility to order a full assessment by the guardian *ad litem*.

Risk factors

- Inter-parental conflict centering on the child
- Overwhelming anger by at least one parent and compelling need to punish the spouse
- Signs of unreasonable rejection by the child of the non-custodial parent indicating that there might be active alienation of the child by one parent from the other
- Current or past history of physical, sexual or emotional abuse
- Child has witnessed spousal abuse
- Previous criminal history of one or both parents
- Substance abuse by parent
- Abduction of the child by one parent or relocation by custodial parent without consultation with the non-custodial parent
- Evidence of significant emotional or behavioural disturbance in the child.

Alternate dispute resolution programmes

If parents are to avoid court, then alternate dispute resolution must be promoted by providing information on services which can provide programmes to help parents resolve their differences and to devise and implement a post-separation/divorce parenting plan. The information could be provided from health centres, GPs, citizen information centres and so on. Health boards and voluntary bodies could hold information sessions to explain the options of alternate dispute resolution programmes that are available. The recently-piloted 'Family Services Projects' of the Department of Social Community and Family Affairs which was set up 'to provide a high quality information service on a one-stop shop basis ... about the range of supports available for families' could serve this function in a nationally co-ordinated way.

The alternate dispute resolution programmes that could be provided are discussed below.

1) **Divorce/separation education programmes**

Divorce education programmes are designed either for parents or for parents and children to help them cope more effectively with the problems that result from separation/divorce. There is increasing evidence that educational interventions for divorcing parents can enhance parents' understanding of their children's experience, parents' knowledge of effective post-divorce parenting practices, and parents' ability to communicate and co-operate effectively to reduce children's exposure to conflict. The aims of these

programmes are:

- To increase children's competence by teaching specific skills to identify divorce-related feelings in themselves
- To reduce children's feelings of isolation and misconceptions about divorce
- To increase children's awareness of how divorce affects their parents
- To increase appropriate ways children respond to anger
- To improve parental competence in handling children's divorce-related concerns
- To help parents understand and cope with their own feelings about their divorce
- To teach parents basic conflict resolution skills.

Divorce education programmes have been shown to be effective.[1] Attendance at such programmes could be made a mandatory requirement prior to the issuing of proceedings in marital separation or divorce. If attendance were a requirement, it would ensure that all parents would receive this education and not just motivated parents. Mandatory attendance at such divorce education programmes is required in 396 jurisdictions in 35 states in the USA.

Mandated attendance has several advantages: it gives a clear message to parents that the courts take the welfare of children seriously, and re-litigation rates of parents who attend divorce education programmes, even when mandated to do so, are significantly lower than for parents who have not.[2]

2) Negotiation

Negotiation is by far the most common way of resolving family disputes following marital separation. The negotiation is conducted by the parties themselves with the option of legalising the agreement with their solicitors. It is by definition voluntary and non-binding. It is a process that gives the parent complete control so that no settlement will be reached until both parties are agreed. As a result, parties are usually more satisfied and less bitter. The courts do not have to deal with the matter.

3) Mediation

Parents who require assistance in agreeing formal parenting plans can already avail of

Footnotes:

1 Arbuthnot, J & Gordon, DA (1996), 'Does mandatory divorce education work? A six-month outcome evaluation', *Family and Conciliation Courts Review*, 34 (1), 60-81.

2 Arbuthnot, J, Kramer, K & Gordon, D (1997), *Family and Conciliation Courts Review*, 35 (3), 269-279.

mediation from the Family Mediation Service (FMS) of the Department of Social Community and Family Affairs. This service has been in existence for approximately 15 years and is currently being developed nationally. Family mediation services are also available in both the voluntary and private sectors. Like negotiation, mediation is a non-binding process but, similarly, there is the option of arranging for the agreement to be made legally binding. The mediator helps parties to reach a negotiated settlement of their differences. The mediator does not have the power to render any decisions. He serves only to help the parties arrive at their own solution to their own disputes. Mediation gives the parents power to devise agreements that meet their specific needs and those of their children. It encourages the parties to work together. As with negotiation, it shows children that divorce does not necessarily result in anger and hatred. From the court's point of view, mediation reduces the number of hearings involving family disputes. Research has shown that 'individuals who negotiate their parenting disputes through mediation are also much more satisfied with the process and the outcomes than those who contest their cases in court'.[3] Most parents who participate in mediation, whether by choice or by judicial mandate, reach agreement.

The US Commission on Child and Family Welfare conducted its own survey on programmes in the five states that mandate parents to mediate their disputes. They found similarly high settlement rates. Settlements were reached in 80% of the cases in Maine in 1993, 71% of the cases in Florida in 1994 and 56% of the cases in North Carolina in 1995. Some parents may only be able to resolve their difficulties regarding their children at mediation but can resolve the other difficulties, like financial issues, in other fora, such as in court.

In this jurisdiction, clients attend mediation on a voluntary basis only. Mediators see this as an important feature of enabling couples to reach agreement through facilitation rather than coercion. In addition, the proceedings of mediation are specifically inadmissible in evidence under sections 9 and 45 of the *Family Law Act, 1996*. This has the dual effect of ensuring confidentiality of the process, and precluding the mediator from having a reporting function either voluntarily or by subpoena. If mandatory mediation were to be introduced, it would need to be done carefully. It has a different character from established

Footnotes:

3 *Parenting our children: in the best interest of the nation*, Report of the US Commission on Child and Family Welfare, 29 September 1996.

practice in Ireland and it would be necessary to distinguish it – maybe with a different name and/or location – so that voluntary cases (probably the majority) could continue to have the confidence and protection they currently enjoy.

Where a guardian *ad litem* has been appointed by a court, their attendance at mediation with the parents, on behalf of the child could help in reaching agreement. By definition, these would be cases where either the judge had ordered attendance at mediation or the guardian *ad litem* has persuaded the parents to attend. It would have to be clear from the outset of the mediation, however, that ultimately the guardian *ad litem* has a reporting function to the court. The guardian's observations of the couple's behaviour in mediation could significantly influence his assessment of the child's circumstances. This would have secondary advantages in both informing the guardian and conversely tending to persuade the parents to behave reasonably. However, once again the implications regarding confidentiality and independence in the mediation process, as well as the legal implications regarding inadmissibility of certain information gained in mediation (referred to above), would need further consideration and clarification. A consultative process for practice development would thus be required, especially between those in the disciplines of guardian *ad litem*, mediation and lawyers.

4) Expert assessment

This is already a widely-used process, where the court may order or the parents agree to nominate an expert to carry out an independent assessment of the family and make recommendations regarding parenting plans. Such assessments, in the vast majority of cases, obviate the need for a court hearing. Parents usually settle on the basis of the report, knowing that the opinion of the expert is likely to have an important influence on the court's ultimate decision.

5) Arbitration

Arbitration differs from negotiation and mediation in that the parties agree to submit all or part of their dispute to a neutral third party for a binding decision. The benefits of arbitration include:

- Parties are able to choose the decision-maker rather than being assigned a judge
- There is a large degree of procedural flexibility in that parties can agree to submit expert or other witness testimony at a time and place convenient for all involved
- The process is speedy and less costly

- The process is final and binding and therefore there are no on-going trials, appeals or delays.[4] The disadvantages are that discovery is generally limited, decisions are usually not appealable and it has been argued that arbitrators tend to 'split the baby' in trying to give something to all parties. Arbitration is similar to mediation in that there are fewer constraints, pressures, costs and other burdens placed on the divorcing spouses. The formality, hostility, and long and complicated processes of litigation are replaced by a less formal, friendlier atmosphere in which the parents will sit down and, in essence, have a discussion. This discussion, with attendant compromises and agreements, will lead to mutual respect, an increased level of satisfaction with the outcome and a higher compliance rate, all of which will naturally be reflected in their children's present and future emotional well-being. The process, therefore, protects the parties from the emotional distress of having to deal directly with each other's respective accusations and grievances.[5] The arbitrator can shuttle between the disputing parties in an attempt to resolve conflict. This is very helpful if the joint presence of the parties with the arbitrator is untenable: for example, when domestic violence is or has been part of the couples' experience. It avoids the possibility that one party can intimidate the other. Each party can appear with their own lawyer.[6] Arbitration has been sanctioned as a viable means of dispute resolution by the US State and Federal Appeals Courts and typically includes a legal procedure that entails a hearing, presentation of evidence under oath, cross-examination by counsel and power of subpoena by the arbitrator, among other aspects of the hearing process.[7] It is recommended that the lawyers at the start of an arbitration draft an agreement that structures the proceedings and focuses the issues to be resolved. Child-oriented arbitration can then have many of the safe guards of the traditional arbitration process (for example, representation by counsel) but with less of the stress of a formal trial or hearing. It is, therefore, very similar to a competent child and family forensic evaluation but one where the recommendations are replaced by an award or decision by the arbitrator.

Footnotes:

4 Bendix, Helen (1994), *An introduction to alternate dispute resolution*, 504 Pli/Lit 11.

5 *Family and Conciliation Courts Review*, 33 (4), 1995.

6 Levine, W (1991), 'Matrimonial arbitration: an option for the 1990s', *The Massachusetts Lawyers' Weekly*, 19, 1249.

7 American Academy of Matrimonial Lawyers (1991).

6) Judicially-hosted settlement conferences

In the American state of Oregon, a trial judge may order a settlement conference at any time at the request of any party or on his own motion. This conference is hosted by a judge other than the trial judge. The court may direct the parties to appear before it for a conference to consider the possible settlement of the case. A party may oppose the setting of a conference, but such requests are rare.

In domestic relations cases, the time reserved for the conference is typically two hours. Prior to the conference, each party is required to provide to the court information on what matters are at issue: for example, custody, visitation rights and so on. Supporting affidavits are provided. A copy of each party's most recent settlement proposal is also provided. Although the parties are not required to exchange their proposal, they are encouraged to do so at the outset of the conference. None of the documents are filed in the official court file unless requested by the party.

The conferences are semi-voluntary (in other words, if requested by one party) and can be requested for different reasons. Some litigants need to express their hurt and anger and need a judge who will listen to them. The conference may also be requested so that the client can hear from an authoritative source (the judge) what the law and probable outcome at trial would be, were that to happen. Many lawyers use settlement conferences to get their clients (or opposing counsel) to focus on the case, get prepared and make a settlement proposal. A settlement conference can also ask advice from an expert.

The format of the conference can be tailored to meet the parties' needs. If the litigants are comfortable with each other, a mediation-type procedure may be appropriate. Here, the litigants and their lawyers meet the judge, with each side presenting a synopsis of the controversy and a proposal for settlement. The judge can then meet each side confidentially to discuss the matters on which there is disagreement. Alternatively, he may meet the lawyers and their clients separately. The clients may never meet. Judges, who are familiar with the 'traditional' method of judging, may not be comfortable meeting with litigants because of the strong emotions expressed by the litigants or concerns about the ethics of the procedure.

Specific training is usually required for the judge. Many judges feel uncomfortable about keeping information confidential that would otherwise be *ex parte* (and unethical)

communications. If the settlement conference judge is not also the trial judge, most interpretations of judicial codes of ethics do not prohibit this procedure.[8] The parties must believe that the settlement conference will not prejudice their case if the conference fails and the matter goes to trial.

7) Court-mandated family systems consultation

There are situations when parents are unable to resolve their difficulties and devise a parenting plan due to temporary or long standing dysfunction within the family system. The court is unlikely to be able to effect change in such a system. Such parents may voluntarily agree to attend or the court may order attendance at a family centre to enable therapy to take place. It differs from mediation in that it is a clinical intervention rather than a facilitation of parents in devising their own parenting plan as in mediation. It seeks to transform a pathological family system to enable change to take place and a parenting plan to be devised and/or implemented. There might well be qualifications on the level of confidentiality that such a process would have. Here, the guardian *ad litem* may have an important role in linking the process with the court and monitoring progress on behalf of the child's best interests and on the court's behalf.

8) Report under section 20 of the *Child Care Act, 1991*

This avenue is open to a court in custody proceedings, where the judge is concerned that there may be risk to a child to the extent that it should be placed in the care or under the supervision of a health board. In these circumstances, the court is empowered to order that the health board 'undertake an investigation of the child's circumstances' and determine whether and to what extent it should take action with respect to the child.

The application of this section in practice is anomalous in that the conclusion of such investigations is often that there is 'absence of risk' merely on the basis of minimalist criteria that are dictated by 'resource limitations' of health boards rather than the reality of the child's life-situation. Thus, the section positions the health board as arbiter of its own criteria as to whether it 'could' rather than 'should' take steps to protect a child in circumstances of serious conflict between the parents that are effectively emotionally

Footnotes:

8 LaMar (1996), 'Judicially-hosted settlement conferences in domestic relations cases', *Family and Conciliation Courts Review*, 34 (2), 219–228.

abusive to the child. Indeed, health boards do not have a statutory obligation to consider the emotional welfare of children. Consequently, in many cases, section 20 reports do not address those aspects of the child's welfare that the court has been primarily concerned about in making the order for the report.

GALs may have a useful role to play in this process. While GALs are often appointed in cases where health boards opt to take care proceedings, there is also a case to be made for the involvement of a GAL in the process of deciding whether the health board should take such action.

There is also concern that section 20 is more widely invoked than is appropriate. In the absence of other remedies and services, it tends to be used inappropriately by the District Court as a last resort means of obtaining a recommendation by default. Consequently, there is a waste of resources, with waiting lists of six months or more There is often an accompanying bureaucratic ill-treatment of the families concerned. There is need for a national review and co-ordination of the application of the section.

PROPOSED REFORM OF THE LEGISLATION

Public law: ***Child Care Act, 1991***

Representation for children

'1) In any proceedings before a court under this Act in relation to the care and protection of a child, the court, having regard to the rights and duties of parents, whether under the constitution or otherwise, shall regard the welfare of the child as the first and paramount consideration.

2) In any proceedings before a court pursuant to Part IV or Part VI of the Act, the child to whom the proceedings relate shall be joined as a party to these proceedings. The making of any such order shall not require the intervention of a next friend in respect of the child; where the court makes an order under sub-section 1, the court shall appoint a guardian *ad litem* for the child and a solicitor to represent the child. Any person appointed as a guardian *ad litem* pursuant to the order of the court may, if that person thinks fit, appoint a solicitor in order to represent the guardian *ad litem* in the proceedings.'

Private law: ***Children Act, 1997***

'1) In any proceedings before a court under this Act concerning the care and protection of a child, the court, having regard to the rights and duties of parents, whether under the constitution or otherwise shall:

a) Regard the welfare of the child as a first and paramount consideration

b) In any proceedings before a court pursuant to section 6(a), (11)(b), the child to whom the proceedings relate shall be joined as a party to those proceedings. The making of any such order shall not require the intervention of a next friend in respect of the child'

c) Where the court makes an order under sub-section 2, the court may appoint a guardian *ad litem* and/or a solicitor to represent the child. Any person appointed as a guardian *ad litem* pursuant to order of the court may, if that person thinks fit, appoint a solicitor in order to represent the guardian *ad litem* in the proceedings.'