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'There isn't anything Like a GAL': The Guardian *ad litem* Service in Ireland

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Abstract

This article examines the role of the guardian *ad litem* service in Ireland within the context of public law proceedings. In the first part, the role of the guardian *ad litem* in Irish courts is outlined and this is followed by a discussion of the broader legal context informing the right of children to be heard in Irish courts. The article discusses some of the concerns about the lack of statutory regulation, standards and structure in the Irish guardian *ad litem* system. The tension inherent in expressing the wishes and views of children while making recommendations regarding their welfare and best interests is also considered. The article concludes with the view that giving children a statutory right to be heard which is not supported with adequate resources and proper frameworks is of limited value.

Keywords: Guardian *ad litem*; children's rights; legal frameworks; reform.

Introduction

Given recent efforts to structure provision of guardian *ad litem* services in Ireland (Children Acts Advisory Board, 2009; Child Care (Amendment) Bill, 2009) the aim of this article is to critically examine the legal framework facilitating the rights of children to be heard in Irish courts. The article focuses only on public law proceedings where a care order or similar order is being sought. The first part outlines the role of the guardian *ad litem* in Ireland before proceeding to a discussion of the broader legal context informing the right of children to be heard in Irish courts. In the final part, the article highlights some areas where further statutory regulation of the guardian's role is required, namely, with regard to their qualifications, role, powers and guiding principles such as independence from other parties to the proceedings. It is submitted that these issues, together with sufficient allocation of resources, should be addressed as a matter of some urgency in order to meet our obligations under the UN Convention on the Rights of the Child and other international instruments.

Prior to embarking on the discussion proper some attention should be paid to the matter of definition. A guardian *ad litem* [Latin: 'for the lawsuit'] has been defined as 'an independent representative appointed by the court to represent the child's personal and legal interests in legal proceedings' (The Law Society Law Reform Committee, 2006, p. 73). The role of the guardian *ad litem* has also been identified as involving 'investigator, child's advocate, negotiator, resource broker' (O'Kane, 2006, p. 157). Recent developments have meant that we have come closer to an agreed definition of a guardian

ad litem in Ireland. Guidance published by the Children Acts Advisory Board (CAAB) (2009, p. 3) states that the guardian's role is to 'independently establish the wishes, feelings and interests of the child and present them to the court with recommendations.' This dual role of informing and advising is also confirmed by the provisions of the Child Care (Amendment) Bill 2009, now lapsed. Section 12 of this Bill states that, where appointed, a guardian *ad litem* shall promote the best interests of the child and convey the views of the child to the court, in so far as is practicable, having regard to the age and understanding of the child.

A guardian *ad litem* may be appointed in Ireland in private or public law proceedings, although currently only the public provisions dealing with care proceedings are in effect. Under s. 26 of the Child Care Act (1991) the court may appoint a guardian *ad litem* if it is in the interests of the child and in the interests of justice to do so. The Act states that a child may not have the benefit of legal representation as well (a point which is returned to later) but there is no express statutory bar on a guardian seeking the approval of a court for the appointment of a lawyer to represent his/her views and in practice, they frequently do. Indeed, this is explicitly recognised as part of the guardian's role in the recent guidance issued by CAAB (2009). Section 12 of the Child Care (Amendment) Bill 2009, if enacted, will formally allow the court to appoint a solicitor to represent a guardian in public law proceedings, although the court will also be able to direct the solicitor appointed as to his or her duties in the case.

In terms of other aspects of the guardian's role, it seems clear from the CAAB guidance that they will be expected to meet regularly with the child; conduct a detailed inquiry into all aspects of the child's life and family, including conducting interviews with all relevant parties; liaise with legal representatives (if appointed); and at the end of the case produce a written report for the court which will contain recommendations and/or solutions to any unresolved difficulties.

There is no accurate recording of the number of guardians *ad litem* appointed in Ireland. However, it has been documented that in a 30 month period between 2001 – 2003, a total of 159 guardians *ad litem* received remuneration from the then Health Boards (National Children's Office (NCO), 2004). It should be noted that this figure does not include guardians *ad litem* involved in public law proceedings who were not receiving fees from Health Boards during that time. Disturbingly, research has found that approximately 60% of children who may require the services of a guardian *ad litem* were unlikely to have one appointed (NCO, 2004). This is due to the lack of availability of guardians *ad litem* and, in a number of cases, the absence of a written referral due to unfamiliarity with the process on the part of some judges. One of the difficulties is that there is an inconsistency about how and when guardians *ad litem* are to be appointed. The report suggested that the appointment of a guardian should remain at the discretion of the judge but guidelines should be available clarifying when such an appointment is desirable (NCO, 2004). It is estimated that the potential number of guardians *ad litem* that could be appointed per year is in the region of 200–277, based on the number of children entering the care system per year (NCO, 2004).

In Ireland, guardians *ad litem* may be employed by non-statutory agencies or be self-employed. Non-statutory organisations, such as Barnardos and the ISPCC, that supply guardians *ad litem* to the courts have been found to employ persons with appropriate qualifications and training (NCO, 2004). No such vetting or monitoring was found in relation to self-employed guardians *ad litem* (NCO, 2004). Since 2009, NGOs such as Barnardos have followed the CAAB guidance (2009) on the role, criteria for appointment, qualifications and training of guardians *ad litem*. The CAAB criteria for the appointment of guardians *ad litem* stipulate that a candidate should possess both a third level qualification in social work recognised by the National Social Work Qualifications Board, psychology or other third level qualification relevant to the role and at least five years' postgraduate experience of working directly in child welfare/protection systems.

The Broader Legal Context

International instruments

There are a number of key international conventions that set the context for the guardian *ad litem* service in Ireland. The international legal right of a child to be heard is contained in a number of human rights conventions and the appointment of a guardian *ad litem* can be a key component of the efforts of the state in implementing this right. The United Nations Convention on the Rights of the Child (UNCRC) (1989) contains two articles, 3 and 12 that need to be considered. Article 3 states that the child's welfare should be a paramount consideration in court proceedings whilst Article 12 is concerned that a child who is capable of forming his or her own views has a right to express these views in matters affecting him/her. The Convention also affirms the child's right to be heard in any judicial and administrative proceedings affecting him/her, either directly from the child or through a representative. According to the National Children's Office Review (2004), countries adopted different approaches in attempting to implement these articles of the Convention. For example, children have the right to legal representation only in Australia whilst in France, judges act in a more conciliatory manner by advising on appropriate decisions early in the case (NCO, 2004). In Ireland, the rights contained in the UNCRC have not been incorporated into Irish domestic law and as a result, they are considered practically unenforceable by children in Irish courts (Martin, 2000).

Children's rights to information and representation were further enshrined in the European Convention on the Exercise of Children's Rights (1996) which Ireland has signed but not yet ratified. The focus of this Convention is primarily on procedural rather than substantive rights such as accessing information and participating in cases that concern their welfare. For example, Article 3 ensures that a child should receive all relevant information, should be consulted and be permitted to express his or her views. Article 4 provides that a child has the right to apply in person or through another for a special representative in judicial proceedings.

The European Convention on Human Rights and Fundamental Freedoms (ECHR) is also of relevance here, particularly given that it has been incorporated into Irish domestic law in the form of The European Convention on Human Rights Act (2003). As such, it is possible to initiate legal action in the Irish courts claiming a breach of the ECHR. Article

6 of the ECHR guarantees children as legal rights holders under the Convention the legal right to be heard in all proceedings affecting their civil rights and obligations as well as in criminal law matters. Under Article 6(3) a child has the right to represent him/herself in person or through a representative of his/her own choice.

The Irish Constitution

Arguably the Irish Constitution can be viewed as more of an inhibitor than promoter of the right of children to be heard given that the law is, on balance, more in favour of protecting parental autonomy than children's rights (Shannon, 2010). Articles 41 and 42 of the Irish Constitution do not recognise children's rights in particular but rather guarantee the rights of the married family *as a unit* to protection against undue interference from the State (Cousins, 1996; Ombudsman for Children, 2005). Article 3 of the UNCRC is reflected, albeit in a more qualified form, in s.24 of the Child Care Act (1991) which obliges the courts to have regard to the wishes and welfare of the child while 'having regard to the right and duties of parents, whether under the Constitution or otherwise'. A similar commitment to the paramountcy or best interests principle is contained in *Children First: National Guidelines for Child Protection and Welfare* (Department of Health and Children, 1999) with the concomitant acknowledgement of the need to balance this with the rights of the parents.

The Ombudsman for Children (2005) has highlighted an apparent conflict between the welfare principle and the guarantees to the family within the Constitution based on Supreme Court decisions such as *KC and AC v. An Bord Uchtala* and *North Western Health Board v. HW and CW*. Indeed, there is little doubt that a constitutional amendment modelled on Article 3 of the UNCRC ('that the child's welfare should be a paramount consideration in court proceedings') would considerably strengthen the right of children to be heard in any proceedings in which their welfare was at issue in this jurisdiction. Such a change was recommended as far back as 1996 by the Constitution Review Group (1996) and has since been reiterated by the United Nations Committee on the Rights of the Child (1998). While it is worth noting that in the High Court decision of *FN v. CO*, Ms. Justice Finlay-Geoghegan held that children have a constitutional procedural right to both have their views heard if they are of sufficient age and maturity to be able to offer a view and to have their welfare protected in any disputes about custody, this decision has had little impact on practice.

Concerns about the Guardian *ad litem* Service

As noted, a review of the guardian *ad litem* service was announced in the National Children's Strategy (2000) and was commissioned by the National Children's Office in 2003. The review examined the role of the guardian *ad litem*, the adequacy of the current system, including its funding and management and made recommendations for the future development of the service. The report published in 2004 reported on the extent, quality and nature of the service. The authors acknowledged the limited empirical data collected as there was only a small number of responses to questionnaires, despite their attempts at an extensive consultation process. Consequently, the data gathered was largely of a qualitative nature derived from focus groups and meetings. The study concluded that

there was a deficit of international empirical research on the effect of guardians *ad litem* particularly in relation to outcomes for children.

However, some relevant literature is available. A study undertaken by the Children's Society (2000 in NCO, 2004, p. 10) in the UK suggested that 'substantial contributions are made by a GAL to the court process, based on the views of children, families and other professionals' through their role as facilitators. The study also found that guardians *ad litem* were important in relation to decisions reached when children were received into care. There was a suggestion that they added weight to the recommendations of social workers when they reached similar conclusions about the action required. The National Children's Office report (2004) refers to research conducted by Ruegger (2001) in the UK who found that in a study of 136 children, the majority expressed positive views about the guardian *ad litem*. On the other hand, a significant number of children seemed confused about the guardian's role, which they believed was to represent their wishes rather than their best interests. There was also some lack of understanding around confidentiality. However, the NCO goes on to note that there is agreement in the literature that 'children need a voice, particularly in public law proceedings affecting their care, welfare or liberty' (NCO, 2004, p. 25).

The primary function of a guardian *ad litem* is to make recommendations in relation to a child's best interests which may differ from the wishes of the child. Many writers have commented on the tension between representing the child's views and wishes versus making recommendations to the court on their best interests and welfare (Corrigan and Forde, 1995; Timms, 1995; Walsh, 1997; Fortin, 1998; Coulican, 2000) and the two concepts may at times be in conflict with each other. Piper (1998) observes that there is no one theoretical framework underpinning advocacy for children. On one hand, there is a rights based view for greater self-determination for children and on the other, a welfare-based view that centres on the view that children need to be protected. In addition, Clark (1996) found that a dynamic sometimes existed between professionals and older children which resulted in priority being granted to welfare needs over representational rights. The difficulty involved in trying to integrate the child's desires into decision making, without forgoing their best interests and placing too much responsibility on them, has also been recognised by Timms (1995).

In this regard, the statutory recognition afforded the dual role of the guardian in the Child Care (Amendment) Bill is greatly to be welcomed. The current ban on the appointment of both a guardian and a solicitor for the child under the Child Care Act would seem to stem from a misunderstanding of the guardian's role in child care proceedings as solely an 'advocate' for the child's wishes. The system also compares unfavourably to the British system in which a 'tandem model' evolved where the guardian *ad litem* must appoint a legal representative for the child (NCO, 2004). Since the introduction of the Children Act (1989) in the UK all children in public law proceedings must be appointed a guardian *ad litem* who is an experienced and qualified social worker in the absence of good reasons why this should not be done (Department of Health, 1995; Timms, 1995; Monro and Forrester, 1995; Head, 1995; Fortin, 1998). The guardian *ad litem* role in the UK was also extended to assisting the court in the management of a case.

Significant criticism has been expressed in Ireland in relation to the dearth of detail surrounding the appointment of guardians *ad litem* in the Child Care Act (1991) (Walsh, 1997; Kelly, 1998; Shatter, 1997; Martin, 2000; NCO, 2004; The Law Society Law Reform Committee, 2006; Shannon, 2010). Unfortunately, aside from the provision that the HSE is responsible for the costs of the guardian service, the 1991 Act is silent on many matters of considerable import to the guardian's role. These include the parameters of the guardian's role, the powers which they possess and the qualifications and experience required in order to act as a guardian. This has clear implications for practice. Research undertaken by Kelly (1998) found considerable variation not only in the manner of appointment but also in the number of visits carried out by guardians. The Review Report (NCO, 2004, p. 40) notes that at times 'it would appear that availability was more important than suitability' and also refers to occasions when solicitors have been appointed as a guardian *ad litem*. While international experience suggests that the qualifications required for the role vary considerably (some countries like the USA run a volunteer service, for example), many writers (Corrigan and Forde, 1995; Walsh, 1997; Kelly, 1998) agree that guardians should be a social worker or other child care specialist with considerable expertise in working with children and dealing with matters in relation to children. The Review Report (NCO, 2004) recommended that professionally qualified social workers with a minimum of three years post qualifying experience should be employed as guardians but other experienced child care practitioners could be considered in particular circumstances (NCO, 2004).

As observed above, CAAB (2009) recommended (in line with best practice in England and Wales) that guardians should hold a social work or equivalent third level qualification together with five years post qualification experience yet these guidelines are without a statutory basis and are therefore unenforceable. Again, the situation is in marked contrast to the British system where guardians *ad litem* are appointed by the Children and Family Court Advisory and Support Service (CAFCASS) and clear procedures exist under the Children Act 1989 Guidance and Regulations.

This lack of a statutory scheme can contribute to the development of difficulties. The Review report (NCO, 2004) observes that the majority of guardians *ad litem* in Ireland were performing their role in a capable and professional manner but refers to some reports of questionable practices such as guardians *ad litem* stepping outside the boundary of their role, over lengthy involvement in a case and some instances of blatant inexperience in child care practice (NCO, 2004). Other problems reported during the study centred on the lack of legal training of some guardians who were 'often not clear as to who the "client" was, with no clearly-defined reporting or liaison mechanisms' (NCO, 2004, p. 42).

A final issue concerns the independence of guardians which has long been considered crucial to the role of the guardian and which has been recognised by CAAB (2009) as one of the core principles informing the guardian's work. In Ireland, guardians *ad litem* are expected to be autonomous whilst reviewing the work undertaken by professionals employed by the Health Boards, now the Health Service Executive (HSE). However, they are also dependent on the HSE to meet their costs. This could be seen as a possible

conflict of interests (NCO, 2004). In Northern Ireland, a completely new and independent national agency was established in 1996. This resulted in part from some unease in the UK about the possible lack of independence in panels administered by local authorities in the past (Coulican, 2000). As noted, the UK has also recently set up a non-departmental agency, the Child and Family Courts Advisory and Support Service (CAFCASS) absorbing the former guardian panels (NCO, 2004). A similar national structure for Ireland was one of the options put forward for consideration in the Review Report (NCO, 2004). Other alternatives included the establishment of regional panels, the development of a volunteer advocacy service, a centrally-regulated service and the development of a guardian *ad litem* service in conjunction with an independent advocacy service. The Review report (NCO, 2004) concluded that there was a need for a guardian *ad litem* service involving vulnerable children and/or complex cases but recommended an advocacy service for less complicated cases, in view of the potential cost. In addition, the report highlighted the need for the introduction of specific changes in legislation to facilitate the development of such a service (NCO, 2004). However, to date no decision about the form any future service may take has been reached.

Conclusion

This article has described the manner in which the guardian *ad litem* service is currently operating in Ireland. Initially, the relevant legislation and guidance governing child welfare and the representation of children was identified. The dilemma between the child's views and wishes versus best interests and welfare were discussed revealing the need for, and right of, children to be involved in decisions that affect them. This must at the same time ensure that children are not rendered more vulnerable than they are already by their involvement in court proceedings. A detailed examination of the guardian *ad litem* service points to a large number of difficulties and shortcomings with the current system.

Despite the very welcome clarification afforded by the CAAB (2009) guidance, the need for further *statutory* provisions elaborating on the role and legal powers of the guardian in an Irish context is clear if Ireland's responsibilities under the UNCRC and other international conventions are to be fully met. Within this, consideration should be given to providing for a presumptive scheme whereby a guardian is appointed unless it is demonstrated that it is not necessary to do so in light of the large numbers of cases in which they are potentially required (NCO, 2004). The Child Care (Amendment) Bill 2009, if enacted, will go some way towards this end in that it will grant an express power to the court to appoint a solicitor to represent a guardian and, as noted, it will recognise for the first time in Irish legislation the dual role of the guardian. However, there remains an urgent requirement for the development of a detailed statutory framework within which guardians *ad litem* may be appointed, outlining principles such as independence which apply to their work and the precise nature and range of their powers. Such changes, if they are to be sustainable and effective, must be accompanied by the allocation of adequate resources. As Fortin (1998, p. 157) comments '[c]hildren may have all sorts of substantive rights but they are of little value if they cannot enforce them'.

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Child Care Act 1991

Child Care (Amendment) Bill 2009

The European Convention on Human Rights Act 2003

England

Children Act 1989

Children Act 1989 Guidance and Regulations, Part 1

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