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Child Care Law Reporting Project: some reflections

Carol Coulter

I have been attending child care cases in the District Courts for over six months now, along with three part-time assistant reporters. The first two volumes of our reports have appeared on the website of the Child Care Law Reporting Project, childlawproject.ie, with over 60 published in all. We have also collected basic data on about 250 cases, which will be analysed later this year. The reports are written in a way that does not identify the children concerned or their families. Other participants in the case, for example, social workers and judges, are also not identified, not because I wish to hide them from scrutiny, but because this could lead to the identification of the children, particularly outside Dublin.

Very fundamental issues are at stake in child care proceedings: the constitutional rights of the family, considered the fundamental unit of society; the unemunerated rights of children, whose rights to life, well-being and bodily integrity may be at stake; and the balance to be struck between the two where parents "fail in their duty" towards their children.

In most child care proceedings, which are initiated by the State in the form of the HSE, the only defence of the constitutional right of the family is a lawyer from the Legal Aid Board. It is a huge responsibility, and the area is

extremely complex. I am only beginning to get a glimpse of some of the complexities.

Under the constitutional amendment passed late last year, but not yet law, the child has his or her own constitutional rights, independently of the family as an institution. The extent of these rights has yet to be tested in the courts, but one named in the amendment is the right of the child to be heard in proceedings concerning him or her. That will have a major impact on how cases concerning children are conducted. A further provision is the insertion of the words “by proportionate means” into the Constitution where it refers to the State taking the place of the parents.

However, even without this amendment certain children’s rights are spelled out in legislation and in various policy statements from Government departments. The 1991 Child Care Act, under which child care cases take place, provides for the taking into care of a child who has been or is being assaulted, ill-treated, neglected or sexually abused, or whose health, development or welfare has been or is likely to be impaired or neglected, and where this will continue if a care order is not granted.

There is no doubt that in some families children’s rights to bodily integrity, to safety, even to life itself, are violated. The newspapers headlines are littered with examples. One need only recall recently the Roscommon abuse case, where the children were physically and sexually abused and neglected by both their parents, and the Monageer case, where two children and their mother were killed by their father who then killed himself, to be reminded of how serious such threats are.

However, in the majority of child care cases the reason children are taken into care is neglect. This is defined in the HSE Practice Handbook as “an omission, where the child suffers significant harm or impairment of development by being deprived of food, clothing, warmth, hygiene, intellectual stimulation, supervision and safety, attachment to and affection from adults and/or medical care.”

A rather broad definition? I certainly thought so when I first read it.

For example, is failure to use a stair gate a lack of supervision and safety? Is allowing children to watch several hours of television every day a failure to provide intellectual stimulation? Is a diet of toast and tea for breakfast and sausages and chips for an evening meal deprivation of nourishing food?

More broadly, is there a danger that preconceived notions of best practice in child-rearing, which may require levels of education and material resources lacking in some disadvantaged families, could become the basis to disrupt these families, essentially punishing them and taking their children away because they are poor and marginalised? And what about families from immigrant communities, whose ideas about child-rearing may differ from ours? These questions gave me a lot of concern.

But then I heard cases where the children exhibited developmental delay to the extent that they could not speak intelligibly when they came to school; where an intellectual disability was diagnosed in a young child, which disappeared after he spent a year in foster care; where behavioural

problems were such that the child was a danger to himself and other children - all arising from neglect.

The problem is linking such problems directly to neglect and to lack of parents' capacity to look after their children adequately. Some children may suffer from developmental delay or behavioural problems due to a disability that has little or nothing to do with their parent's parental capacity. Others may live in chaotic and unhygienic homes but be loved by their parents and love them in return.

The contested area in child care cases lies in proving the link between problems identified in the child and the inadequacies of the parents, and in whether these inadequacies can be addressed.

Among the most common problems giving rise to child neglect is the abuse of or addiction to alcohol and/or drugs. Usually before the HSE seeks a Care Order the parents, commonly the mother, are given an opportunity to seek treatment for the addiction. Often a Supervision Order is put in place.

In some parts of the country, where a Care Order is sought in such circumstances, it is only granted for a relatively short period, typically a year or two, during which the parent or parents are expected to tackle the issues that led to the children being taken into care. The case then comes back for review in a year, or perhaps sooner, and the order may be discharged.

In other parts of the country, though, care orders are sought and granted until the child is 18 and so far, because I have not been able to attend a

large enough sample of cases, it is not always clear to me what the role of the court is in monitoring the welfare of the child after such an order is made.

Many of these cases seem uncontroversial, where it is clear that the parents or parents have been incapable of caring for their children for a considerable period of time, where successive attempts to tackle addictions have failed and where the children quickly improve when taken into care.

Some pose more difficult problems. These are particularly noticeable where there are cultural difficulties on the part of the parents. For example, how should the Irish state deal with the case of a Roma mother who clearly loves and cares for her children, but who is herself the victim of domestic violence which is causing anxiety and distress in the children, affecting their concentration and behaviour in school? Can she realistically be expected to break with her abusive partner, as required to do by best social work practice? Where is she to go? To a refuge where she won't speak the language spoken by the other residents, or share their background? How will she and her children deal with the fall-out of such an action in their own community? Is removing these children from their mother and placing them in the care of an Irish family really in their best interests?

And what about the African family where the parents physically discipline the children, who nonetheless seem well-fed and well cared for, who are attentive in school and are assiduous in doing their homework, but where one or more of the children reveals that they are being beaten at home? Do the children realise that this could spark off a series of events that will result

in them all being taken away from their parents, again, probably to live outside their community? For many African parents *not* physically disciplining children when they are disobedient amounts to neglect. It is, of course, not so long since the same attitude prevailed here.

But when does it become abuse under Irish law, which must prevail? Is it when bones are broken? Or when the children don't want to go home from school because one or both of their parents regularly beats them? Or, as was recently indicated in Dublin District Court, when implements are used?

All of these cases are clearly among those where two principles enunciated in the children's amendment will be relevant. One is the view of the child – in some cases the children are very clear indeed about not wanting to live at home under the prevailing conditions. However, in others they may want some parental behaviour to stop, but do not want to leave home. The other is the issue of proportionality: is a Care Order, for example, a proportionate response to the problems these children have, or would their needs be adequately met by a Supervision Order, with directions for certain changes to be made by the parents?

Of course, the supervision involved in Supervision Orders can very resource-intensive, especially if accompanied by directions requiring support for the family. Social workers must find time to visit the family regularly, therapies must be provided for parents and children, parenting courses may have to be undertaken, home help hours may be required. It may be easier, and less expensive in the short term, to place the children in foster care with an established foster family, though this will be expensive in the longer run.

Other questions that arise include the threshold at which a child should be taken into care at birth. Should the very existence of an addiction, especially if a child of this mother or parents has previously been taken into care, give rise to a move by the HSE to take a baby into care at birth without any attempt to get the parents to deal with their problems? In one such case, still before the Dublin District Court, a couple who are on a methadone maintenance programme and who have been described by the doctor in the clinic they are attending as "among the top 10 per cent of my patients" have been contesting a Care Order application since their baby was born about nine months ago. They had a child taken into care in another jurisdiction some years ago when their circumstances were different. They are contesting this application and attending every one of the daily access meetings. Yet we know there are many drug addicts whose children remain at home despite the parents leading chaotic lives.

Dr Helen Buckley, professor of social work and social policy in Trinity College and a member of my Oversight Board, has stressed to us that the issue in child care proceedings should not be addiction *per se*, but the impact of the addiction on the capacity of the parents to care for their children.

The issue of consistency in the threshold which must be reached in order to find that a child is being neglected, to the extent of requiring a Care Order application, across different HSE areas and even within them must be an area of concern.

The law stresses that the welfare of the child should be at the centre of such proceedings, and this principle is further emphasised in the amendment at present awaiting a verdict in the courts.

This may appear axiomatic, but I have been struck by the number of cases where the children involved have little visibility in the proceedings. This is particularly the case in protracted and contentious cases, where the focus is on the parents and their behaviour, and positions become quite entrenched in what can become very adversarial proceedings. Despite the best efforts of many judges, adversariality is intrinsic to the proceedings; they are even couched in terms of the parents' names versus the HSE.

How can it be ensured that the children and their welfare are always at the centre of the proceedings? What are the fundamental issues involved in defining children's welfare?

We are all aware of the privileged position accorded to the married family, as opposed to other family forms, in the Irish Constitution. This featured very strongly in the Supreme Court judgment in the Baby Ann case, and has given rise to a lot of adverse commentary on that case to the effect that it showed how the existing Constitutional provision can impact negatively on the welfare and rights of children.

However, much of this commentary ignores a significant feature of the judgments in that case, which gave considerable weight, not to the marriage as such, but the importance to the welfare of children of the biological link with their parents. In his judgment Mr Justice Fennelly said: "One does not have to

seek far to find that courts widely separated in time and place have accepted the need to recognise and give weight to what has been variously characterised as the blood, or natural or biological link between parent and child."

He went on to cite a number of English cases, including a recent one by Baroness Hale in the House of Lords concerning a lesbian mother, where, according to Mr Justice Fennelly, she emphasised the importance of genetic, gestational and social and psychological parenthood.

She said: *"……in the great majority of cases, the natural mother combines all three. She is the genetic, gestational and psychological parent. Her contribution to the welfare of the child is unique. The natural father combines genetic and psychological parenthood. His contribution is also unique."*

In the same case Lord Nicholls of Birkenhead stated:

"In reaching its decision the court should always have in mind that in the ordinary way the rearing of a child by his or her biological parent can be expected to be in the child's best interests, both in the short term and also, and importantly, in the longer term. I decry any tendency to diminish the significance of this factor. A child should not be removed from the primary care of his or her biological parents without compelling reason. Where such a reason exists the judge should spell this out explicitly."

We can take it that, irrespective of the enactment of the recent constitutional amendment, this is now part of Irish law.

A similar principle is enunciated in the UN Convention on the Rights of the Child, which Ireland has ratified, where it states that the child has the right

to be brought up by his or her family and to preserve his or her identity, including nationality, and his or her family relations.

These principles are underlined by science. The science of DNA increasingly reveals the profound links between a child and his or her biological parents and, indeed, further antecedents. The principle is also underpinned by the modern psychology of child development, which stresses the fundamental importance of secure attachment to a mother figure, from birth or even before if at all possible, for the healthy development of the child. This is not possible for all children, but the formation of a secure attachment to another stable figure, either within the extended family or through adoption, can be a very satisfactory substitute.

Where this is disrupted, by parental incapacity, separation, abuse or severe neglect of the child, he or she may suffer from attachment disorder. Attachment disorder manifests itself in various ways, including developmental delay, behavioural problems and lack of empathy. These are often found in the children who are the subject of care proceedings.

Therefore from the point of view of both national and international law and from that of the psychology of child development, there is a very strong presumption in favour of a child being reared by his or her natural parents. In child care proceedings, the onus must be on the State, which is seeking child care orders, to rebut that presumption.

In some cases - for example, where a baby is abandoned by his or her drug addict mother in hospital, or where he or she is the victim of serious non-accidental injury - that presumption is clearly rebuttable. But there are others where rebuttal seems more problematic.

These are cases where the parents are contesting the care proceedings, where evidence has to be called concerning damage done to the children and the parents' capacity to remedy the damage and care for the children. Evidence will be given by social workers and, sometimes, medical and other experts. This can pose major challenges for the parents and those who represent them, where equality of arms in what is an adversarial system may be difficult to achieve.

The experts are paediatricians, psychologists, psychiatrists, speech and language therapists, educationalists, who measure the child in question against the norm for his or her peers.

There can be no doubt about it, these experts are essential and perform an invaluable service. There is no doubt either that some children are injured or psychologically and developmentally damaged by their parents either deliberately or through those parents' own inadequacies, addictions, illnesses, particularity mental illness, or criminality. As a society we cannot turn our backs on these children and allow them to be sacrificed in the name of the sanctity of the family. Our main tool in protecting them are the State agencies to whom we give this task and the experts they employ or commission.

But what about the occasions on which such experts may be wrong?

No-one is infallible, and the history of child protection in this and the neighbouring jurisdiction sadly contains many examples of where the experts got it wrong, and either failed to intervene in a family when it was necessary to do so to protect a child; or intervened to break up a family that was blameless in its treatment of its children.

Everyone now knows the name of Professor Roy Meadow, the paediatrician who was one of the pioneers of child protection and who was the first to identify the syndrome, Munchausen Syndrome by Proxy, where parents, usually mothers, appeared to invent or produce illnesses in their children in order to obtain attention from medical professionals. He was knighted for his work and was first chairman of the Institute of Paediatricians and therefore had enormous authority in the world of child protection.

His evidence was largely instrumental in the wrongful conviction of solicitor Sally Clark in 1999 for the murder of her two baby sons, who died in cot deaths. Her conviction was quashed in 2003 after she had served three years in prison, from which her mental health never recovered. She died in 2007 from alcohol poisoning.

Her father, a retired senior policeman, complained to the British General Medical Council about Professor Meadow's role in her conviction, particularly his evidence that it was almost impossible statistically for two or more cot deaths in a family to be accidental. This evidence was later decisively rejected by statisticians.

The GMC found against him, Professor Meadow successfully appealed to the High Court, the GMC then appealed to the Court of Appeal, which upheld in part the High Court decision, but Professor Meadow's reputation never recovered.

This was a very tragic case, where a mother not only suffered the loss of her children through SIDS but then faced the trauma of being wrongly accused and convicted of having caused their deaths. It demonstrates the danger of courts accepting uncritically the evidence of an eminent expert, especially when he or she strays into an area (in this case, statistics) where they are not expert.

Of course, we cannot conclude from this that all protestations of innocence of responsibility for children's injuries from parents and carers should be taken at face value. Again in the UK, the case of Baby P, who, despite having been seen 60 times by social workers and health care professionals, died in 2008 from injuries inflicted by his mother's boyfriend, showed the challenges faced by child protection professionals and the level of deceit sometimes practised by parents and other adults who hurt children.

Yet issues surrounding the causes of unexplained injuries to very young children, who are unable themselves to describe what has happened, remain very contested. In a recent article in the Law Society *Gazette* barrister Hilary Lennox described the latest developments in medical thinking in the US on what has been known as "shaken baby syndrome". The article outlined the many revisions to this theory that have taken place

since the conviction of British nanny Louise Woodward in Massachusetts in 1997. Many of the symptoms previously thought to be evidence of fatal shaking can now be attributed to a variety of natural and accidental causes. Clearly the whole area of non-accidental injury to infants is a hugely challenging one for medical professionals and lawyers alike.

These cases all concern alleged and actual physical injury. The situation is even more difficult when it comes to allegations of psychological harm or the threat to a child posed by a person with mental illness. Most people suffering from mental illness can and do love and care for their children. Yet we know from harrowing cases in this and other jurisdictions that children can be harmed and even killed as a result of psychological and behavioural problems on the part of their parents. How can this be predicted and prevented?

This has been a very contentious issue in the UK, where some media organisations have highlighted cases where they claimed serious miscarriages of justice occurred and children were wrongly removed from their parents, usually on foot of advice from experts who claimed the parents represented a threat to their children on the grounds of their own behaviour and mental state.

Most disturbingly, this view was given substance by a report last year from Professor Jane Ireland of the University of Lancaster on expert reports for child care courts, which found that two-thirds of the reports in her survey fell below an acceptable standard. One in five of those giving expert evidence in child care proceedings were not registered with any of the

appropriate professional bodies representing psychologists and psychiatrists, and very few engaged in clinical practice, instead pursuing careers as expert witnesses in court.

The key findings of the study included the following:

- 20 per cent of instructed psychologists were found to be inadequately qualified for the role on the basis of their submitted curriculum vitae;
- 90 per cent of the instructed experts maintained no clinical practice external to the provision of expert witness work, with only 10 per cent having a clinical practice;
- Two-thirds of the reports reviewed were rated as below the expected standard, with only one third between good and excellent.
- In one court, all expert witness psychology reports were generated by witness companies, who take a commission for the instructions.

Professor Ireland acknowledged that the report had its limitations, including that the sample was small, but her findings are still very disturbing. While the shortcomings she identified are not directly relevant to Ireland for various reasons, including the absence of expert witness companies, they are indirectly relevant in two respects. Firstly, a small number of families flee the UK with their children to Ireland when care orders have been made or are about to be made for one or more of their children, and the HSE must take into account the existence or imminence of such orders. It is unlikely that any of the impugned reports features in any of these cases, and the Family Justice Council, which commissioned the report, considered that these reports were unlikely to have had a decisive impact on court

decisions. However, no-one can be certain of this, and in many cases this was the only expert evidence given.

A second cause for concern is that legal and child care practices in use in the UK tend to migrate across the border or the Irish Sea and many of the child care professionals working in the Irish system were trained there, so that British methods and attitudes are likely to have an influence here. The Professor Ireland report provides a very useful template to help us avoid these pitfalls and ensure that the use of expert psychological evidence in Irish courts meets the highest standards.

Her recommendations include having all witnesses registered to practice with the appropriate professional bodies; the competence of experts to complete specific aspects of reports being more thoroughly assessed by the judiciary; and the instruction of experts being restricted to those currently engaged in clinical practice.

There is no doubt of the need for expert evidence in cases concerning children who may be at risk. This risk can be very grave indeed, as a few examples from the past few years in this country show.

Three months ago a father in west Cork drowned his three-year-old daughter before killing himself the same way. In 2011 a mother drove off a pier into the Atlantic with her two children. All drowned. In 2010 in Ballycotton, Co Cork Una Butler lost every member of her immediate family after her husband John killed their little girls and then himself. In 2009 a father in Wexford burned down the family home with his wife and two

children inside. He then shot himself in the head. Christopher Crowley killed his daughter Deirdre when located by Gardai almost two years after abducting her. In 2007 in Monageer, Co Wexford Adrian Dunne picked out coffins for himself, his wife and their two daughters days before all four were found dead in their home. That's ten children in six years, and the list is not exhaustive.

In most of these cases, however, the family was not the subject of the attention of the social services, underlining how difficult it is to predict and prevent such tragedies. Nonetheless, it emerged in hindsight that mental illness or mental disability, either long-term or temporary, was a factor in most of them. Una Butler has spoken publicly and eloquently of the need for those who suffer from mental illness to be assessed for the risk they may pose to their children, and some international studies have shown that a high proportion of people suffering mental illness (41 per cent of mothers with mental illness in one US study) have thoughts of killing their children.

Another area where expert evidence is crucial is the mercifully rare number of cases where non-accidental to a child is involved. Where the child is very young he or she cannot describe what has happened, and it is up to the medical experts to describe the injuries and put forward explanations for them. If it appears most likely they were caused by the parents a Care Order will usually be sought, though some alternative methods of dealing with this situation do exist.

How are the families involved to challenge the evidence given by these experts? They are unlikely, in most cases, to have the resources to find their

own experts who might be able to question the explanations put forward by those commissioned by the HSE. And, while it is imperative that children are protected from harm deliberately inflicted by adults, the history of such cases shows that medical evidence cannot always be accepted uncritically. We must avoid the mistakes that have been made in the UK, and ensure that expert evidence is a resource for the court, not a weapon for the State authority. And it is important to emphasise that experts are not infallible, they can get it wrong and they can be challenged.

Where this is not possible and cases are contested, it is important that the evidence of expert witnesses is challenged knowledgeably. The first duty here falls on the shoulders of legal practitioners, who will bear the burden of mastering the discipline involved to the extent necessary to explain it to the judge. The judiciary will also have to ensure that they master the appropriate disciplines likely to feature in their courts and become skilled in the evaluation of scientific evidence – an argument for more specialisation in our courts.

It is also arguable that experts be taken out of the adversarial system altogether as far as possible, and a panel of experts who would give objective evidence to the court, not specifically supporting one side of the argument, drawn up. They would then be nominated by the court to assist it. To this could be added the recommendations of Dr Ireland flowing from the UK survey.

Because the majority of children whose cases come before the child care courts are from poor and marginalised backgrounds it can be difficult to

hear their voices in the process. The Legal Aid Board does sterling work in representing the parents in care proceedings, but inevitably the professionals in the HSE and their lawyers, who are in court every day of the week, will be better able to articulate what they want from the court than will people who may have difficulties with legal concepts, or even with the English language. It is hard to avoid the growth of familiarity between the judiciary and the legal practitioners and social workers that appear regularly before them.

In addition, the social workers concerned may have a rigid attitude to certain types of people or certain types of problem and how to deal with them. For example, one doctor who is an expert in drug treatment told me that the HSE has a particular attachment to urinalysis as an indicator of drug and alcohol abuse. He said that this tool can be misleading, as an occasional user of opiates who can function perfectly well in society can have as positive a urinalysis as a person who is injecting several times a day. A much better indicator of substance abuse and its impact on a person's ability to function and to parent is the presentation of the person, according to this expert. Yet I have not seen this criterion feature in any of the cases involving substance abuse.

There is a high proportion of immigrant families coming before the child care courts, particularly from African and Roma background. This poses particular cultural challenges for social workers and the courts, as normal family life in these communities may be very different to what is considered normal in Irish social work and legal circles. For example, the physical chastisement of children is normal in many African cultures, and does not

necessarily indicate that the child is being abused – though in some cases they clearly are.

How realistic is it for us to expect a wife in some Asian cultures, or in the Roma community, to break with their partner who may be violent and forge a life alone with children, when she would in all likelihood then be ostracised within her community? Is it appropriate for us to expect couples from other cultures always to have separate legal representation? Are our social workers being adequately trained to deal with these issues?

And what about the children? The children's amendment, if and when it comes into force, provides for the voice of the child to be heard. As yet we have no idea how this will be done. At the moment in some of the courts hearing child care cases the court appoints a guardian ad litem. In other courts GALs are almost unheard of, though where the child is in his or her late teens a solicitor may be appointed to represent him or her.

Guardians ad litem do not operate within a coherent system. They are not regulated. While most are former social workers, no qualifications are specified in legislation. Some come from a background in the HSE, which may raise issues as to their independence. Others do not. Despite these problems, there is no doubt that it is far better for children that they have a GAL to speak for them. There is a need, however, for the courts to be consistent in their use.

Ways need to be found to reduce the adversarial nature of contested child care proceedings. In the vast majority of cases the parents are not guilty of

any wrong-doing; they are unable to parent their children adequately because of their own disadvantage or disability. Yet they are sometimes subjected to hostile or condescending cross-examination. Where parents are at all involved in the process every effort should be made to come to an agreement with them about the best way forward for them and their children before orders are sought. Mediation clearly has a role here. This is the stated objective of the new head of the Child and Family Support Agency, Gordon Jeyes.

A word of caution is needed here: there will be instances where agreement cannot be reached between the parents and the social services and adjudication is needed. Fair procedures must be observed throughout and both parents and children must continue to be adequately represented. Furthermore, every effort must be made to ensure that those who regularly use the system, those working in the HSE, are not at an advantage in the mediation process as against the parents, who will have had no experience of it. It is possible to manipulate the mediation process.

- These are very tentative suggestions about some aspects of the childcare system. It is far too early to come to any conclusions about how it is working on the basis of the few months' observation, which has not extended yet to the whole country. However, it is a pleasure and a privilege to be able to see how the courts are operating in this difficult and sensitive area, and hopefully bring light to bear and stimulate public debate on how to protect vulnerable children after so many instances of failure.