The role of a solicitor representing Parent's in Child Care Proceedings under Part IV of the 1991 Act as amended

– does the parent have any real say?

This article is to explore the role of a Solicitor representing parent's interests in Child Care Proceedings. This role is best divided between one's role prior to and during the hearing, and post hearing.

The District Court is the originating Court in Child Care proceedings save for Special Care Orders which fall within the inherent jurisdiction of the High Court. The District Court has an extensive jurisdiction in Child Care proceeding in that it can make Orders placing children in care up until the age of 18years.

Generally speaking the test that is to be applied by the Court is <u>whether parenting of the child is "good enough".</u>

In deciding whether it is good enough the Court must enquire as to the veracity of the actions alleged by the HSE, the needs of the child and the capacity of the parent(s).

Though the Child Care Act like the Guardianship of Infants Act does confirm that the Court must have regard to the welfare of the child as the paramount consideration, it is often the case that the Court's options cannot fulfil this criteria and that the only option available to the Court is determining <u>what is the least detrimental alternative.</u>

The Court engages in an inquisitorial role (SHB-v- CH IR 1996) yet must determine matters through the adversarial system applying the law as set out in the legislation, the Constitution, the European Convention of Human Rights.

The Court must further determine the role of all parties in such proceedings. In Child Care proceedings, as well as legal representation for the Health Service Executive and the Parents, there often can be legal representation on behalf of the Child /Children and possibly the Guardian Ad Litem.

The constitutional protection of the rights of a child is a matter that needs clarification and strengthening and I acknowledge that the present Government is committed to bringing forth the Constitutional amendment on the rights of a child in the near future.

When one discusses this issue, it is worth remembering that children do not exist on their own and that the legislation and the Constitution all point to the view that as far as practicable that it is generally in the best interest of a child to be brought up in it's own family.

For this to have any real meaning the need for early intervention, proper family support and the front loading of services needs to be revisited urgently.

General details

The legislation which authorises the Court to place children into the care of a Health Service Executive (hereinafter called the H.S.E.) is dealt with under the Child Care Act 1991, the main sections of which came into operation on 18 December 1996. The Child Care Act 1991 was amended by part 6 of the Health Act 2004, replacing the Health Board for the H.S.E.

The 1991 Act replaced the Children Act 1908; it modernised the language and clarified the roles and obligations of each party.

Section 3 of the Child Care Act 1991as amended states that the HSE shall:

> ***(a) Take such steps as it considers requisite to identify children who are not receiving adequate care and protection and coordinate information from all relevant sources in relation to children in its area;***
> ***(b) having regard to <u>the rights and duties of parents</u> whether under the constitution or otherwise, regard the welfare of the child as the <u>first and paramount consideration</u> and insofar as it is applicable, give due consideration, <u>having regard to the child's age and understanding, to the wishes of the child;</u>***

***(c) Have regard to the principal that <u>it is generally in the best interest of a child to be brought up in its own</u>* <u>family.</u>**

It confirmed that the <u>Court's paramount consideration is the child's welfare</u> and further <u>confirmed that due consideration must be given to the wishes of the child.</u>

<u>The Constitution of Ireland – BUNREACHT NA hÉIREANN</u>

<u>Article 42</u> of our Constitution 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 parents but always with due regard to the natural and imperscriptible rights of the child .***

In *Re Article 26 and the Adoption Bill 1987 [1989] IR 656 The* Supreme Court confirmed that *"the rights of a child who is a member of a family are not confined to those identified in article 41 and 42 but are also rights referred to in article 40, 43 and 44."*

In *G. -v –An Bord Uachtala [1980]IR 32 at 56, Chief Justice* O'Higgins found that *"the child has the right to be fed and to live and to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being."*

Similarly Denham J. in *North Western Health Board v H.W. and C.W. [2001] 3 IR 622)* stated *"that the Courts have a constitutional jurisdiction to intervene to protect the constitutional rights of a child. The Courts will protect such rights whether legislation exists or not."*

The European Convention of Human Rights

The convention is part of domestic law pursuant to the European Convention on Human Rights Act 2003 and is beginning to impact on this area of law.

In *Eriksson v Sweden 1989 12 EHRR 200* the European Court of Human Rights held that the natural family relationship is not terminated by reason of the fact that a child is taken into care. The enjoyment by a child and a parent of each other's company is a fundamental element of family life. The curtailment or denial of access would thus be a prima facia violation of article 8 of the European Convention of Human Rights. Access according to the European Court of Human Rights is an automatic right of the child in care not to be denied unless there is clear evidence that it is contrary to the welfare of the child.

Further in *Olsson v Sweden 1988 11 EHRR 259* the Court noted that there was an obligation on national authorities to take appropriate practical measures to facilitate reunion with the parents.

It would seem that the consequences of these decisions seem to suggest that if a child is to be taken into care

1. **it should be for the shortest possible period,**
2. **that the parents should be kept informed and consulted in relation to all major decisions in relation to their children,**
3. **that the parents should be facilitated with all reasonable access,**
4. **that regular reviews by the HSE should occur to see whether the circumstances that lead to the children being placed in care continue to justify the ongoing order.**

The Child Care Act 1991 increased the types of orders that the HSE can seek in relation to the care of children and the circumstances in which such orders can be made.

The HSE can under the 1991 Act apply for various orders:

- **emergency care orders, S.13.**
- **interim care orders, S17.**
- **full care orders, S18.**
- **supervision orders, S19.**

The grounds on which these orders can be made are quite wide and the consequences of such orders can be quite significant for the children and their parents.

Because of the serious consequences of these proceedings, a Child Care trial can resemble criminal law proceedings. Like most criminal cases only a small percentage are contested, but in those cases the HSE as applicant would be obliged to prove their case.

PreTrial

To prepare the case properly and to consider the best options for the parents, one would need and is entitled to know what the nature of the case being made against the parents by the HSE. This necessitates full and proper Disclosure.

There are various High Court decisions which clearly set out the HSE's obligations in relation to disclosure in advance of a case being set down for hearing (see *The State (D) v G and Others [1990] ILRM 19 and The State (F) v Superintendent B Garda Station and Others [1990] ILRM 243).*

In particular the Respondent should seek *'copy statements and reports, if any, or summary of all evidence being relied upon, including case conference notes and results'*. See *Southern Health Board – v – Judge David Riordan and KS & MS,* Quirke J 16 January 1998.

Once this information has been furnished, one can then assess the merits of the case and in particular consider whether he or she should obtain independent professional evidence.

If the HSE refuses/declines to furnish this information, the applicant should make an application to the District Court for this information.

The In camera Rule

Section 29 clearly states that Proceedings under *Part III* , *IV* or *VI* shall be heard otherwise than in public. This is very strictly applied and prohibits parties from showing or distributing any material relating to third parties and further prohibits discussing it's details. Failure to comply with this prohibition can lead to contempt of court proceedings being issued.

Prohibition on publication or broadcast of certain matters.

Section 31 states "*No matter likely to lead members of the public to identify a child who is or has been the subject of proceedings under Part III , IV or VI shall be published in a written publication available to the public or be broadcast*"

Appointment by the Court of a guardian ad litem

Section 26 of the 1991 Act also provides for the appointment by the Court of a guardian ad litem (the GAL). The role of the GAL is to independently advocate on the part of the child(ren) what is in its interest and welfare while also setting out the child(ren) s wishes.

The guardian ad litem service is provided by a number of different agencies. The costs of the guardian ad litem are provided by the HSE.

Guidelines on the role, criteria for appointment, qualifications and training of GAL were published in May 2009. Regretfully there are still significant gaps which need to be addressed.

Separate legal representation for a child

The Court can also under section 25 of the 1991 Act appoint separate legal representation for a child. The costs of separate legal representation are provided by the HSE.

Again it is unclear the circumstances in which a child should be separately legally represented and is very much dependent on the discretion of the Court. A child who is appointed a solicitor cannot also have a GAL appointed.

Issues at Trial

The common issues at trial are the jurisdiction of the Court, role of the Court, the applicability of the rules of evidence and in particular the hearsay rule, the admissibility of reports and right of representation in court.

In *Southern Health Board v CH [1996] 1 IR 219*. It confirmed that the Court can rely on the hearsay evidence of videotapes of interviews by

a social worker with a child if the judge finds that the child is either incompetent to give evidence or finds as a distinct condition that the trauma the child will suffer makes it undesirable for the child to give evidence.

Subsequently Section 23 (3) of the Children's Act 1997 gave statutory effect to this decision.

Post Trial

If care orders are made, the Court should ensure a care plan is put in place for each child. The Court can direct regular reviews in order to assess the child(ren) s progress in care, the necessity and regularity of these reviews differs in each Court.

Applications under s.47 of the Child Care Act

The Court can play an active role pursuant to Section 47 of the Child Care Act.

In the decision of *Eastern Health Board v District Judge James Paul McDonnell and others [1999] 1 IR 74* McCracken J. in the High Court held the District Court can retain some form of control and apply conditions with regard to the care of a child.

Mr Justice McCracken found that Section 24 of the 1991 Act is not qualified in any way and places an obligation on the Court when dealing with proceeding under the 1991 Act and such obligations cannot be delegated or passed on to the HSE. The learned High Court Judge further confirmed that Section 47 applies not just where proceedings are before the Court but also in situations where the child is already in the care of the HSE.

He further went on to state that Section 47 is an all embracing and wide ranging provision which is intended to entrust the ultimate care of a child who comes within the Act in the hands of the District Court.

Further in the decision of the *Western Health Board v K.M.* 14th March 2001, High Court unreported and 21st December 2001 Supreme Court. It held that the Court is empowered to do whatever

is appropriate in the circumstances to achieve the objectives of the 1991 Act in relation to the welfare and wishes of a child.

In this particular case, it was confirmed that the Court is empowered to direct the placement of a child with relatives outside the State with or without a time limit. In affirming that decision McGuinness J. in the Supreme Court stated that *"the 1991 Act is a remedial and social statute which should be construed as widely and liberally as can be fairly done".*

Section 47 gives the Court wide jurisdiction in relation to what orders can be made under the Act and also obliges the Court to oversee it's implementation.

An application under Section 47 applies to any child that is in the care of the HSE whether by Order or voluntarily and further can be made by any party. See *HSE –v- NC and EC (Respondents) and TOC (Guardian ad Litem) McMenamin J delivered on the 21st January 2008*.

Applications under s.37 of the Child Care Act

Section 37 obliges the HSE in such cases to facilitate reasonable access to the child by his or her parent or by any person acting in loco parentis in respect of the child or by any person who has a bona fide interest in the child. See *Eriksson v Sweden 1989 12 EHRR 200* as previously referred to.

Section 37 is a parent centred section and does not reflect the common view that access is the right of the child to the parent rather than the other way round.

Child Care Regulations

Once a child is placed in care the placement of children is governed by the Child Care (placement of children in foster care) regulations 1995 (SI 260 of 1995).

Though each child should have a social worker appointed for each child it is this writer's experience that this is not the case and with the recent embargo on replacements there are several cases whereby a child has not been allocated a social worker.

This does raise issues in relation to proper supervision of children in care and the complying by the HSE under regulation 17(1) which states that a child in foster care should be visited by an authorised member of the HSE as often as the HSE considers necessary having regard to the terms of the plan for care. Notwithstanding the principal, the child must be visited in a time not exceeding three months during the first two year period commencing on the date the child is placed with the foster parents.

Furthermore pursuant to regulation 18(1) the HSE must arrange for the care of each child in foster care to be reviewed as often as may be necessary but in any event at intervals not exceeding six months in the first two year period and thereafter no less than once every year.

<u>Applications under S43A of the Childcare Act 1991.</u>

The Child Care (Amendment) Act 2007 brought in Section 43a. This section allows for foster parents to have enhanced rights, so as to have on behalf of the Health Service Executive, the like control over the child as if the foster parent or relative were the child's parents.

It authorises foster parents to do on behalf of the Health Service Executive what is reasonable, subject to the provision of the Act and the Regulations for the time being enforced under the Act, in all circumstance of the case for the purpose of safeguarding and promoting the child's welfare, development of the child and in particular give consent to:

1. **Any necessary medical or psychiatric examination, treatment or assessment,**
2. **With respect of the child to the issue of a passport to or the provision of passport facilities for the child to enable the child to travel abroad for a limited period.**

A number of these Orders have been made to date subject to certain provisions and restrictions.

How this section sits with Section 23 subsection 3 and 24 of the 1991 Act still is to be determined. Unless proper provisions and restrictions are put on this Section, it could be argued that this has the effect of undermining the rights of the parent and as a consequence could be constitutionally challenged.

Special Care

The High Court has an inherent jurisdiction to make orders which are necessary to protect the health and welfare of children. See *HSE-v-SS and Ors delivered on the 15th June 2007.*

Special Care was to be put on a statutory footing firstly by way of S.16 of the Children's Act 2001 and latterly by way of the Child Care (Amendment) Bill 2009 but this remains outstanding.

In recent years that Court has exercised such powers to authorise the detention of vulnerable children in secure care where such a course of action is necessary to protect their welfare.

It is my understanding these Orders should only be made in exceptional circumstances, for the shortest possible period and for the purpose of providing treatment and /or education.

The suitability of facilities, the success and significant costs of Special Care needs to objectively examined.

Conclusion

It is my experience that the resources available for child care are too limited, thus when intervention does occur it is often too little too late. This can be seen in the low level of successful outcomes for children in care and particularly in the low level of success for children placed in special care.

It is worth noting the latest report of the special rapporteur in child protection, Mr Geoffrey Shannon pointed out that two thirds of children who leave care after 18 become homeless within 2 years. Such a statistic can only but point to the conclusion that the present system is not succeeding and a new approach needs to be considered.

Areas which need to be clarified:

Greater clarity on the role of the Court in Childcare proceedings. The Court has to balance the role of independent arbitrator in relation to the evidence versus having a role of an inquirer.

Greater clarity on the role of all parties in the proceedings in particular the right of a Guardian Ad Litem to be legally represented and how this fits within the adversarial system that exists.

Greater clarity on the Rules of Evidence and the applicability of same. The need to standardise practices in relation to running of Child Care proceeding in the country i.e. admissions of reports, appointments of Guardian Ad Litem, appointment of Solicitors etc.

Greater clarity on the standard of what is good enough parenting.

Greater clarity on what rights remain with parents as guardian after a Care Order is made, travel, medical care, contraception.

Greater clarity on the benefit of placing children in care where they are of a certain age and are opposed to the placement.

Greater clarity on the benefit of placing children in care where they are separated from their siblings.

Greater clarity on the benefit of placing children in care where they will not receive the appropriate care.

Areas which need to be improved:

The need to improve the expectations for and the outcomes of children in care.

The need for foster homes to be properly and regularly reviewed.

The increasing case load of Child Care social workers and it's impact on the service.

The need for Peer review and Stress testing of professional opinions.

The need for greater up-to-date training on social work practices, psychological, psychiatric and behavioural practices.

The need to provide greater Court time in order to allow child care proceedings to be properly heard.

The need to improve the support services available to families to avoid children being placed in care unnecessarily.

The need to ensure that a holistic view as to what is in the interest and welfare of a child is maintained. Thus obliging the Courts to ensure that Orders placing children in care should be as short as possible a period, that they should be constantly reviewed, that the relationship of the parents should be encouraged and maintained where possible and when the child leaves care that proper supports are put in place.

<u>Areas which need to be changed:</u>

The need to have an aftercare programme put on a statutory footing.

The need for early intervention, proper family support and the front loading of services

Section 28(2) to be amended to allow District Court the jurisdiction to make further Orders after children have been placed with foster parents outside the Court's area by extending the jurisdiction to where the parents and guardians continue to reside.

Therapeutic foster parents to be identified trained and provided.

A national procedure to be implemented to allow parents know when and how they can seek a change of social worker.

The need to review the Adoption laws to consider making adoption more available including open adoption.