

**LEGAL AID BOARD  
ANNUAL FAMILY LAW CONFERENCE  
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**DOES THE PRESENT PROCESS OF CHILD CARE CASES IN  
THE COURTS SYSTEM SERVE THE BEST INTERESTS OF  
THE CHILD?**

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## CHILD CARE CASES: THE LEGAL AID BOARD EXPERIENCE

### Introduction

In the 2011 Report on the State of the Nation's Children it stated that there were almost 1.2 million children in Ireland accounting for 25% of the total population. This was an increase of 13.4% between years 2002 to 2011. Ireland has the highest proportion of children of any EU country.

Minister Frances FitzGerald stated, "This is an immensely valuable national resource offering unprecedented potential for Ireland's future" but she also noted that "Ireland's increasing child and youth population poses significant challenges for Government in planning for the future, including increased costs relating to child care, schools and youth services."

Some of the reports highlights were as follows:

- The number of Traveller children is up 30.3%;
- The number of foreign national children is up 49.9%;
- The number of children in lone parent households is up 10.2%;
- There was a significant decrease in the number of babies born to teenage girls;
- The number of children in care of the HSE increased by approximately 16% between 2007 and 2011.

### Some Statistics

The Court Services Annual Report of 2011 tells us that supervision orders increased by 33% to 972 from 731 in 2010. Care orders made increased by 119% to 2,287 from 1,046 in 2010. There were also interim care orders totalling 4,138. This Annual Report also gave total figures of orders sought and granted as set out below. I have worked out the percentages.

	2011		
	Sought	Granted	
Fit Person Orders	13	13	100%
Supervision Orders	1,043	972	93.2%
Care Orders	2,491	2,287	91.8%
Interim Care Orders	4,365	4,138	92.5%

Any statistics should be read with caution. The number of applications does not reflect the number of families and children under HSE supervision or in HSE care as there may be multiple applications for the same family or the same child. The busiest court areas were Dublin, Cork, Waterford, Limerick, Galway and Letterkenny. There does seem to be some variation in the numbers of applications made in different counties of similar size and population base. This suggests HSE

areas have different policies on making applications for care/supervision orders. This has been noted by LAB staff and it would be interesting to see if the child law reporting project also identifies this and can give any explanation for the variation.

The Legal Aid Board Annual Report 2011 showed that the Board was involved in 616 cases involving possible State care of children.

These statistics also show that a very high proportion of applications made are granted by the Courts.

### **Children's Referendum Article 42A**

1. *The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.*
2.
  1. *In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.*
  2. *Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.*
3. *Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.*
4.
  1. *Provision shall be made by law that in the resolution of all proceedings –*
    - (i) *brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected or,*
    - (ii) *concerning the adoption, guardianship or custody of, or access to, any child,**the best interests of the child shall be the paramount consideration.*
  2. *Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1 of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.*

Other speakers will be analysing and considering the implications of Article 42A, however, three points occur to me.

1. Article 42A 2.1 clarifies how and when the State can step in to protect children. This new wording over the previous Article 42.5 I hope will shift

the trigger of intervention from focussing solely on the parent's failure to the impact of that failure on the child. It should now provide a strong constitutional foundation for our child protection system, by providing the State with the power to act when the "safety or welfare" of a child "is likely to be prejudicially affected". This new wording should encourage the State to intervene earlier in families that are struggling, to offer them support and a better protected child. Importantly, however it also contains safeguards to protect against over intervention of the State by including the phrases "exceptional cases" and "proportionate". It provides for the first time the same threshold of protection to all children regardless of whether their parents are married or unmarried.

2. Article 42A 2.2 commits the Oireachtas to bring in laws to allow a child the opportunity of being adopted where the parents have failed towards the child. The legislation will detail the circumstances necessary for the child to be eligible for adoption. Such adoptions can only take place where it is in the best interests of the child and where all other options have been explored and failed.

Currently there are approximately 2,000 children in long term foster care (defined as over 5 years) and this provision will give them the opportunity of a second chance of a stable and permanent family life through adoption.

This does, however, make the child care proceedings all the more important for parents and child if ultimately a child can be placed for adoption.

3. Article 42A 4.2 requires for the views of a child to be ascertained and given due weight having regard to the age and maturity of the child in all proceedings in respect of a child. Other speakers will be considering this aspect in detail today.

### **What Constitutes Parental Failure?**

The Children's First National Guidelines for the Protection and Welfare of Children set out the following:

1. Signs and Symptoms of Child Neglect

This category of abuse is the most common. A distinction can be made between "wilful" neglect and "circumstantial" neglect. Wilful neglect includes a direct and deliberate deprivation of a child's most basic needs e.g. withdrawal of food, shelter, warmth, clothing, contact with others whereas circumstantial neglect more often may be due to stress/inability to cope by parents or carers. Neglect is closely correlated with low socio-economic factors and corresponding physical deprivations. It is also related to parental incapacity due to learning disability/drug alcohol dependency/mental health issues.

The neglect of a child is "usually a passive form of abuse involving omission rather than acts of commission". It comprises "both a lack of physical

caretaking and supervision and a failure to fulfil the developmental needs of the child in terms of cognition stimulation”.

## 2. Signs and Symptoms of Emotional Abuse

Emotional abuse occurs when adults responsible for taking care of children are unable to be aware of and meet their children’s emotional development and developmental needs. Emotional abuse is not easy to recognise because the effects are not easily observable. “Emotional abuse refers to the habitual verbal harassment of a child by disparagement, criticism, threat and ridicule and the inversion of love whereby verbal and non-verbal means of rejection and withdrawal are substituted”.

## 3. Signs and Symptoms of Physical Abuse

Unsatisfactory explanations or varying explanations for such events as bruising, fractures, swollen joints, burns/scalds, abrasions, lacerations, damage to body organs, poisoning, failure to thrive.

## 4. Signs and Symptoms of Child Sexual Abuse

Child sexual abuse often covers a wide spectrum of abusive activities. It rarely involves just a single incident and usually occurs over a number of years. Child sexual abuse frequently happens within the family.

At Appendix A I have put the titles to Case Histories Volume 2 of the Child Care Law Reporting Project. They make for grim reading. Carol Coulter will be giving us her insights into this project later today.

### **Child and Family Agency**

No-one can under-estimate the challenges of Social Workers and other care support staff in dealing with these difficult cases. The Child & Family Agency will bring together a dedicated focus to child protection, family support and other key children services for the first time in the history of the State. The Agency will be as broadly based as possible and will include some services that:

- (i) may prevent problems arising for a family in the first instance;
- (ii) identify problems and provide support at early stage; and
- (iii) assist children and families in managing serious problems requiring specialised interventions beyond their own resources.

Ultimately the Agency will consist of one of the largest public agencies in the State with a staff of over 4,000 employees and a budget of over €550 million. The appointment in April of this year of Ms Norah Gibbons as Chairperson of this new agency augers well for its future. It has the potential to be a powerful vehicle for reform and ensure greater integration between child welfare and protection and family support and lead to better outcomes for these children and their families. The Report of the Independent Child Death Review Group (2012) noted that often parents had resisted supports that might have been in the best interests of their

children and it was often the sheer determination of the Social Workers that such supports were actually provided.

The Children's Rights Alliance on their commentary on the Agency says:

*Traditionally, contact with child protection services has aroused fear among families that their children will be taken into State care. A public campaign should be run to promote the full breadth of the Agency's work which will include providing family support and services for children in care, as well as child welfare and protection. Addressing a possible perception that the Agency will solely focus on suspected child abuse and neglect cases may be an early challenge for the new Agency. An atmosphere must be created where families and children experiencing difficulties will co-operate with and seek support from the Agency without fear or stigma. Furthermore, the Agency must rebuild public confidence in its work and boost staff morale. Improving public perception of its services will, of course, depend on better experiences and outcomes for children and families and those working in the service.*

### **The Role of the Legal Aid Board in Child Care Cases**

The Child Care Act 1991 imposes a duty on the HSE to make application for a care order or a supervision order in respect of a child who requires care or protection which he or she is unlikely to receive in the absence of such an order being made. A care order results in a child being placed in the care of the HSE. A supervision order authorises the HSE to have the child visited periodically for the purpose of satisfying itself in relation to the welfare of the child and giving any necessary advice to the parent(s) as to the care of the child. Emergency care orders can be made where there is an immediate and serious risk to the health and welfare of a child while interim care orders can be made if an application for a full care order has been made or is about to be made and a full hearing has yet to take place.

The District Court is the Court with jurisdiction to make all of the aforementioned orders and the Circuit Court on appeal from the District Court. There are varying practices in different District Court areas where often these cases have to be dealt with in the normal family law list than in the Dublin Metropolitan District area, where at the moment there are two family courts that focus exclusively on child care cases. Other speakers and in particular Judge Horgan, President of the District Court, will discuss the Court process and the operation of the recent practice direction.

From a Legal Aid perspective, most of the Respondents (parents) who have been served with applications under the Child Care Act 1991, are financially eligible for Legal Aid as set out in the Regulations. The normal process of getting Legal Aid is for the person to apply to a local law centre for legal services and for them to be financially assessed. While unfortunately the Board has waiting lists for many of its services at the present time, child care proceedings are prioritised and are dealt with as a matter of urgency. In Dublin there has been established a dedicated child care law centre where there are solicitors who specialise in this particular area. Many of the Respondents to child care applications have serious problems such as drug or alcohol dependency, social isolation and mental health issues which contribute to the additional problems of poverty which often present.

The challenge of the Legal Aid Board solicitors is to test the evidence presented by the HSE and their witnesses and, if appropriate, the evidence of the Guardian ad Litem and to ensure that they vigilantly evaluate the quality and transparency of the HSE decision making. In effect, it is important that they ensure high standards in the presentation of these cases to the Court. At the same time, the Legal Aid Board solicitor must take their client's instructions and present their case and their views to the Court and engage in the process while at the same time ensuring that the clients fully understand what is happening and the consequences. This is certainly a challenge where many of the Respondents in these cases are already disadvantaged and are often vulnerable people themselves.

A challenge that we face in the Legal Aid Board is in the imbalance between the resources of the Board and those of the HSE. Of the total cases dealt with by the Legal Aid Board only a small number concern public child care cases, however, these cases demand a very significant amount of time and resources and attention. The LAB has a total budget this year of €32m for all civil legal aid cases and mediation service. We can only spend a proportion of that on child care cases. By contrast, England and Wales even having taken all private family law cases (except domestic violence) out of scope of legal aid, will still spend £470m on public child law cases including the cost of Guardian ad Litem. The Board welcomes any developments which help improve the system and achieve efficiencies in the process and hearings which are fair and transparent.

### **Family Courts**

Many of you will be aware that Minister Shatter has proposed and Government have committed to the establishment of a family Court system. A Consultative Seminar is being held on Saturday 6<sup>th</sup> July to discuss how the family court structure might be established and how it would operate in practice. Clearly child care cases will be a key component.

### **Conclusion**

Finally, I would like to say something about the LAB staff who work in this particularly challenging area of work. They give extraordinary commitment to their clients, working to tight deadlines and often well outside normal working hours. This work can take its toll physically and emotionally and is often not appreciated. So I could not let this opportunity pass to thank them for their hard work and commitment to their clients and to this work.

My paper raises questions rather than answers them and I look forward to hearing the other speakers for the day on a range of topics on this area of law and practice.

Muriel Walls  
June 2013.

## Case Histories Volume 2

1. Introduction to Case Histories
2. High Court asks English courts to take over case
3. English mother agrees to transfer of case to England
4. Care orders for three children with special needs
5. Care order for two young children where sex abuse alleged
6. Full care orders for four children in rural town
7. Couple directed to mediation as part of Supervision Order
8. Child leaves residential centre for foster care
9. Care Order for teenager discharged
10. Care Order for child with non-accidental injury
11. Care Order adjourned to get views of child through GAL
12. Interim Care Order extended for four African children
13. Overnight access denied to mother with history of drug abuse
14. Court can lift in camera rule
15. Care Order for abandoned African girl
16. Supervised access for mother of 10-year-old
17. Full Care order for girl whose mother is alcoholic
18. Child remains in care despite mother's objection
19. Young girl to remain in care because of alcohol addiction and violence
20. HSE must inform Minister of its failure to comply with regulations
21. Trafficked girl taken into care
22. Judge orders speech and language therapy "forthwith"
23. Mother with mental health difficulties considers adoption
24. Six-year-old remains in residential unit abroad
25. Interim Care Order renewed for boy with psychological needs
26. Supervision Orders for four children
27. Care Order for 16-year-old adjourned for family therapy
28. Two young children taken into care without opposition
29. Full Care Order for African boy
30. Drug addict's newborn taken into care
31. Full care order for abandoned African sisters
32. Full Care Order granted and SNA ordered while mother undergoes psychotherapy
33. Full Care Order for only five months while full care plan produced
34. Two families seek to care for infant
35. Care Orders for young children of drug user