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Child Care Proceedings in Non-Specialist Courts: The Experience in Ireland

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Abstract

It is widely accepted that court proceedings concerning child protection are a particularly sensitive type of court proceedings that warrant a different approach to other types of proceedings. Consequently, the use of specialised family or children's judges or courts is commonplace across Europe and in common law jurisdictions. By contrast, in Ireland, proceedings under the Child Care Act 1991 are heard in the general courts system by judges who mostly do not specialise in child or family law. In principle, the Act itself and the associated case law accept that the vulnerability of the parties and the sensitivity of the issues involved are such that they need to be singled out for a different approach to other court proceedings. However, it is questionable whether this aspiration has been realised in a system where child care proceedings are mostly heard in a general District Court, using the same judges and the same physical facilities used for proceedings such as minor crime and traffic offences. This paper draws on the first major qualitative analysis of professional perspectives on child care proceedings in the Irish District Court. It examines evidence from judges, lawyers, social workers and guardians ad litem *and asks whether non-specialist courts are an appropriate venue for proceedings on an issue as complex and sensitive as child protection, or whether the establishment of specialist family courts with dedicated staff and facilities provides a better solution.*

INTRODUCTION

In many countries, it is accepted that court cases involving children and families are a particularly sensitive and challenging category of cases. Accordingly, it is commonplace in Europe for a degree of specialisation in child and family law to exist among courts and judges (Council of Europe, 2012). Similar patterns are evident in common law countries, where specialist courts or specialist divisions within courts deal with cases involving children in England and Wales, New Zealand, India, Australia and the United States. Ireland presents an interesting exception in this regard. Both private law cases concerning guardianship, custody or access and public law cases concerning child protection are held within the general courts system, and are mostly heard by generalist judges who do not specialise in child or family law, using the same facilities that are used for cases involving minor crime or road traffic offences.

In principle, the Child Care Act 1991 and the associated case law accept that child care proceedings involve particularly vulnerable parties and sensitive issues, and need to be singled out for a different approach to other proceedings. This article will examine how the location of child care proceedings within the general courts system impacts on the experience of proceedings for participants. Until recently, such an assessment was almost impossible due to the virtual non-existence up to 2013 of empirical data on the implementation of the Child Care Act. However, through original qualitative research conducted by the present authors, and the separate work of the Child Care Law Reporting Project, evidence has begun to emerge of a lack of specialisation which results in a system that does not always meet the needs of its users and in which practice varies enormously from judge to judge and court to court. Significant variations exist regarding the rates at which orders are granted; the levels of training provided to judges; the scheduling of proceedings and amount of time available for child care cases; the openness of the system to hearing the voice of the child, or to making allowances to facilitate parental participation; and the physical facilities in which the proceedings are held. The Chief Executive of the Child and Family Agency (CFA) recently questioned whether District Court child care proceedings are fit for purpose (Gartland, 2015a). In light of this evidence, this paper will assess whether non-specialist District Courts are an appropriate venue for the determination of child care proceedings, and whether there is a case for the establishment of specialist family courts in Ireland.

LEGAL FRAMEWORK FOR CHILD CARE PROCEEDINGS

The legal framework for District Court child care proceedings in Ireland rests on Article 42A.2.1° of the Constitution of 1937.[1] Unsurprisingly for 1930s Ireland, the provisions of the Constitution dealing with family affairs reflect Catholic social teaching to the effect that the authority of the family over a range of matters is superior to that of the State; the State has a subsidiary role that goes no further than supporting the family (Whyte, 1980; Keane, 2008). Accordingly, Articles 41 and 42 confer strong rights and duties on the 'Family' and on parents;[2] but Article 42A.2.1° qualifies these rights by stipulating:

> In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards any of their children to such extent that their welfare 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.

This obligation of the State is discharged through the Child Care Act 1991, which makes it a function of the CFA to proactively identify and promote the welfare of children who are not receiving adequate care and protection.[3] To this end, it gives the CFA the power to apply to the District Court[4] for a range of child protection measures.[5] The District Court is the lowest level of the Irish courts system; it is a court of local and limited jurisdiction, and judges typically[6] deal with a wide range of matters, from minor criminal and civil cases to private and public family law cases. A single District Court judge adjudicates on child care proceedings, which in a European context, is similar to England and Wales and Germany – but the Irish model differs in that these countries have dedicated specialist family courts for these proceedings,[7] whereas Ireland does not. The use of a single judge differs from countries like Norway, Sweden, Switzerland and Finland, where panels of between three and five judges/professionals/experts and lay-persons adjudicate on child removal cases at a single hearing. By contrast, proceedings in Ireland, like those in numerous other common law jurisdictions, tend to take

the form of a series of hearings, from the initial presentation of the application, through to the presentation of various forms of evidence and the ultimate decision. Adjournments typically occur between these hearings, with the number and length of adjournments being influenced by a variety of factors, including the complexity of the case and the availability of witnesses and court time. Ordinarily, the same judge will preside over all of the hearings, especially in rural areas where a single judge presides over a particular District Court, but this is not always the case. Reports in other jurisdictions have expressed concern about the impact of a lack of judicial continuity in child care proceedings (see, e.g., Norgrove, 2011:66-68), and as will be seen below, participants in our study echoed this concern in cases where the issue arises (although no clear evidence exists as to how prevalent it is).

The primary aim of the Irish system, as stated in the Long Title of the 1991 Act, is to 'provide for the care and protection of children', and the framework through which child protection orders may be sought and granted is obviously directed towards this goal. At the same time, the necessity to apply through the District Court, where the child's parents have the opportunity to contest the application, reflects the necessity to safeguard the rights of parents also. These rights include the right of parents to have custody of their children and to determine their upbringing and education,[8] as well as procedural rights deriving from principles of natural justice, which are protected under both the Irish Constitution[9] and the ECHR (Kilkelly, 2008: 315–318).

The Act stipulates that the CFA[10] and the District Court[11] must regard the child's welfare as the first and paramount consideration, and must give due consideration (having regard to his age and understanding) to the wishes of the child. To this end, provision is made for the appointment (at the discretion of the court) of a guardian *ad litem* (GAL)[12] or for the child to be joined as a party to the proceedings.[13] The Act also stipulates that in the implementation of these duties, the CFA must have regard to the rights and duties of parents, whether under the Constitution or otherwise, and to the principle that it is generally in the best interests of a child to be brought up in his own family.[14] Although this obligation is not expressly placed on the District Court, the Supreme Court has stipulated on numerous occasions that the statutory welfare principle must be interpreted and applied by the courts in light of a constitutional presumption that the child's welfare is to be found within the family under the care and protection of the child's parents.[15] The circumstances that must be proven to rebut this presumption are extremely serious,[16] as reflected in the thresholds that must be met before orders can be made by the District Court. These thresholds refer broadly to children being assaulted, ill-treated, neglected or sexually abused, and children whose health, development or welfare has been, is being or is likely to be avoidably impaired or neglected.[17]

RESEARCH DESIGN AND METHODOLOGY

Research sample and data collection

This article draws primarily on an independent qualitative case study of professional perspectives on child care proceedings in Ireland, in which 67 experienced professionals involved in District Court child care proceedings took part. Three sample counties (out of a total of 26) were chosen for the study. These counties consisted of a mixture of urban centres and rural areas. Between them, in the three years from 2011 to 2013, they accounted for c. 60% of all child care applications in the District Court

in Ireland. The data generated in this study was triangulated against the findings of the Child Care Reporting Project, which was conducted separately, using a different methodology (i.e. courtroom observation) and conducted across a wider geographical area. As outlined below in Table 1, the number of participants varied across professions; this variation is representative of the relative size of each profession's participation in these proceedings. Because court applications are just one part of a social worker's job, accounting for a minority of their time, large numbers of social workers are actively involved in child care proceedings. By contrast, GALs and legal professionals spend the majority of their time working on court proceedings, and thus a smaller number of them are active. Thus, social workers account for the highest number of participants in the study, but the smallest proportion of active participants in each area. In order to protect participants' anonymity, a more specific breakdown of the demographic profile of participants is not provided and the counties are not identified.

Table 1: Overview of professional participants in the study

Profession / role	Agency	Number of participants
Child protection and welfare social workers (practitioners and managers)	Child and Family Agency (CFA)	30
District Court Judges	Courts Service	8
Guardians *ad litem*	Barnardos*	10
Solicitors representing parents	Legal Aid Board	7
Solicitors representing either parents, children/young people and/or Guardians *ad litem*	Private Law Firms	4
Solicitors representing the Child and Family Agency	Private Law Firms	4
Barristers	Self Employed	4
	Total Participants	**67**

*Guardians *ad Litem* for this project were sourced from Barnardos as this agency provides the largest number of GALs in the country.

Data collection took place between November 2011 and January 2015. Precautions were taken to avoid identifying the participants or the counties involved. The rationale for this was to promote participation and to facilitate participants in being as candid as possible about a context and colleagues in which, and with whom, they would continue to work after the study. In addition to participants' permissions, institutional permissions were also secured from the President of the District Court, a senior manager in the CFA, the CFA Area Manager for each county, the Principal Social Worker for each child protection and welfare social work team, the Managing Solicitors for the Legal Aid Board Law Centres and the Assistant Director and Regional Head of Service for the Barnardos guardian *ad litem* service. The Social Research Ethics Committee at the authors' academic institution provided ethical approval.

Ideally, a study of this nature would have collected data from parents and children who were the subject of child care proceedings, but this did not prove possible due to the constraints of the *in camera* rule. The rule is ill-defined in Irish law, leading to variable interpretations by different judges. In spite of our best efforts, it was not possible to design a consent process that would allow for the

participation of children and parents in the study without creating a significant risk of being held in contempt of court. We have communicated with the Ministers for Justice and Children about this issue and highlighted how the lack of clarity around the *in camera* rule has limited the scope of this study. Despite recent reforms allowing limited access to proceedings by researchers[18] and the media,[19] the legal lacuna surrounding the permissibility of qualitative research with children, young people and parents about their experiences of these proceedings will continue to have a chilling effect on research. For the purposes of this study, this limitation means that the experiences of children, young people and parents can only be represented through how professionals understand and represent the issues associated with their participation.

Most of the study data was collected through single-discipline focus groups; however, for logistical reasons, all of the judges, one guardian *ad litem* and three of the solicitors took part in individual semi-structured interviews. The data was coded by the team in pairs (one social work and one legal academic) using thematic analysis and NVivo 10.

SPECIALISATION IN CHILD CARE PROCEEDINGS

Child care proceedings are a very particular type of legal proceedings. While civil proceedings may result in the issuing of injunctions or the award of damages, and criminal proceedings may result in the imposition of a fine or the loss of liberty, the prospect of children being removed from the family home and taken into the care of the State is a particularly appalling vista for any parent. Conversely, a failure to grant a care order where a child's welfare is at risk may result in exposure to future abuse or neglect. An immense responsibility rests on the judge charged with deciding whether to make an order to this effect. The proceedings do not only pass judgment on historical events; they also shape the future for the children and parents involved. Only private family law proceedings concerning custody, access or domestic violence approach the same level of sensitivity. The fact that child care proceedings centre on allegations of child abuse and/or neglect makes them arguably the most sensitive proceedings, involving some of the most vulnerable parties, that a court can deal with. The unanimous view among participants from all professions in this study was that child care proceedings are of the utmost significance:

> They stand to lose effectively the care and control of their child for the remainder of their child's childhood as a result of the proceedings. The family, dysfunctional as it may be, will never be the same again; you know, this is something which will impact upon relationships between the parents and the children for a lifetime … so it is possibly one of the most significant decisions that will be made … (Judge, County 2)

The legal framework in Ireland attempts to make some allowances for the unique sensitivities involved in child care proceedings by providing for certain features and mechanisms that are not present in other court proceedings. The first example of this is the manner in which the adversarial model of court proceedings – the norm in Irish courts – is applied in the context of child care. Parents are afforded the opportunity to contest an application for an order, but the courts have expressed a preference that a somewhat modified version of the adversarial model be operated.[20] The Supreme Court has characterised child care proceedings as being 'in essence an *inquiry* as to what is best to be done for the child in the particular circumstances pertaining.'[21] The Court justified this position on the

grounds that the child's welfare is the first and paramount consideration for the court, and takes priority over any right that the parents wish to assert through the adversarial process.[22]

This approach manifests itself in a variety of ways; the District Court is empowered to procure reports on any question affecting the welfare of the child,[23] allowing the judge to take the lead more than is typical in an adversarial system, and the rules of evidence are more relaxed than in other proceedings, so that hearsay evidence may be admitted at the discretion of the court.[24] This inquisitorial aspiration was recently echoed by the High Court; however, the Court added the caveat that while the notion that there are no winners and losers is appropriate for professional participants, it 'asks a degree of detachment that is very unlikely to be shared by a parent. The procedure is, as a matter of fact, adversarial.'[25] The approach to the admissibility of hearsay evidence varies across the country, with some judges taking a stricter line than others (Coulter, 2014: 22). It will be seen below that this sort of inconsistency is repeated in many other aspects of child care proceedings.

Additionally, several provisions in the Act acknowledge the particularly sensitive nature of child care proceedings and the extreme vulnerability of the parties involved. The Act stipulates that all proceedings under the Act shall be held *in camera* so as to protect the privacy of the parties involved,[26] and makes it an offence to publish or broadcast any material likely to lead members of the public to identify the children who are the subjects of child care proceedings.[27] It also stipulates that the courts shall sit to hear such proceedings 'at a different place or at different times or on different days from those at or on which the ordinary sittings of the Court are held',[28] and that the proceedings shall be as informal as is practicable and consistent with the administration of justice.[29]

Taken together, it can be seen that the legal framework accepts (at least at a theoretical level) that child care proceedings are not like other court proceedings, and that they should be singled out for a specialised approach. The reality, however, is that child care proceedings take place in the District Court, which is the most generalist court in the Irish courts system. Apart from major population centres, most District Court venues deal with small numbers of applications for child protection orders, which consequently make up a minor part of the Court's overall case load. Thus, the vast majority of judges dealing with child care proceedings are not specialised in this area of law; such specialisation is only possible on a *de facto* level in areas with high volumes of applications. Moreover, the physical facilities are almost never designed with child care proceedings (or family law more generally) in mind. The analysis that will follow will question whether a system in which neither the judges nor the court facilities are tailored towards child care proceedings can deliver on the legal framework's attempt to single out child care proceedings for special treatment.

'Modified' adversarial model

As outlined above, the Child Care Act 1991 provides that the welfare of the child is the first and paramount consideration for both the CFA and the court in child care proceedings, and one particular manifestation of this principle is the aspiration set down by the Irish Supreme Court that child care cases take a more inquisitorial format than other court proceedings. However, even when affirming that aspiration, the High Court has acknowledged that the proceedings remain located within an adversarial framework. This tension between two different models is evident in professional

perspectives on proceedings. Judges mostly described the proceedings as having a hybrid character that is part inquisitorial, part adversarial:

> They are, they're hybrid. They're inquisitorial and they are evidence based, but they're not as strict in terms of evidence base as the criminal process would be. They are adversarial in the sense that if … if evidence is contested, the only way to contest evidence is adversarial. There is no other way of doing it … yes, it is adversarial at times, and very adversarial at times. (Judge, County 2)

> … sometimes you see the rules being switched on and switched off, you know; it's about the best way to describe it. It isn't constantly adversarial, and it isn't constantly inquisitorial. (Judge, County 1)

One judge emphasised the adversarial aspect more, while still stressing the focus on the welfare of the child:

> I think it has to be adversarial … You cannot take children from their family without a fulsome analysis and respect for fundamental rights … But it doesn't have to be a blood-letting. The CFA must establish its case within the parameters of the relief they seek and the parents are entitled to defend and uphold their rights under the Constitution and the law. However, the focus is on the child; it should be focused so that the adversarial elements do not overshadow that. (Judge, County 2)

As against that, one of the eight judges interviewed stated that proceedings should be primarily an inquiry rather than an adversarial process:

> … I will not allow an adversarial approach in the court and where I get it I put an end to it as quickly as possible … I see [that] it's an inquiry into the welfare of these children and the health professionals and the parents should have that at the heart of their concerns as well, and it's my obligation to ensure that the welfare of the children takes priority in the matter … (Judge, County 3)

Solicitors and barristers characterised the proceedings as adversarial, but tended to see this as a necessary aspect of the system:

> I'd agree that it is adversarial. It has to be adversarial I think. Because if you're dealing with a case as serious and as sensitive as child care, you have to challenge the evidence … There are huge issues about admissibility of evidence. And you know, those can't all be glossed over by saying this is an inquiry … these cases have to be taken very, very seriously. And if they are taken very seriously, as seriously as they should be, then that inevitably means that they are adversarial. (Barrister, County 2)

Social workers, on the other hand, expressed concern that the adversarial process results in a 'battle' where the best interests of children are obscured by other issues, which calls into question whether the welfare of the child genuinely is the first and paramount consideration:

> … once people walk into the court it becomes about who wins and who loses. (Social Worker, County 1)

> I think sometimes the child gets lost. In the melee and the circus of what is the legal system, I absolutely believe over the past couple of years that I've been in court that the child is completely forgotten about. It's become this battle between the two sets of solicitors … (Social Worker, County 2)

A particularly detrimental aspect of the adversarial process is that it makes it difficult for social workers to work with the parents towards the best interests of the child after the proceedings. This is partly because social workers, conscious of the adversarial model and the fact that their evidence will be challenged (often quite vigorously), are inclined to present overwhelmingly negative evidence[30] about the parents, with the result that their relationship with the parents is damaged:

> The way that social work reports and evidence is constructed is to fling as much mud at parents to completely and totally decimate them. It's seen as necessary to make the case … I've seen 40 page reports which have only contained negative statements about the parents, and that just cannot be right … It can really affect relationships between the social worker and the parents, the adversarial model. (GAL, County 2)

To compound matters, the parents' respect for the social worker may be undermined by having seen that social worker being vigorously questioned in court:

> The adversarial system can perhaps I think make that parent more resistant to working with the social care professionals … I think it must be extremely difficult sometimes for a parent to go outside of the court room where they have just seen their legal representative spend an hour or two hours or two days chipping and poking holes in the case that the professionals are making to then go out and be able to recognise that the professional really is telling them what's best for them, their child, their family. (Judge, County 2)

Clearly, it is much easier to express the principle that child care proceedings should be less adversarial than to give effect to that principle in practice. Similar difficulties has been documented in New South Wales (Wood, 2008: 412-417), notwithstanding the fact that legislation there specifically provides that proceedings before the Children's Court "are not to be conducted in an adversarial manner".[31] In Ireland, the First Interim Report of the Child Care Law Reporting Project observed that while "[i]t is very important that the exceptional power of the State to remove children from their families is subject to the stringent oversight of the courts … ways of reducing the adversarial nature of the proceedings and seeking a consensus on the best outcome for the children need to be explored" (Coulter, 2013: 24; see further Coulter, 2014: 28). More recently, the Chief Executive of the CFA has called for a more inquisitorial approach in child care proceedings, stating that in spite of efforts to make them less adversarial, they have in fact become more adversarial (Gartland, 2015a).

Protection of privacy and the in camera rule

Child care proceedings are concerned with sensitive and intimate matters that clearly should not be disclosed in public. The need for privacy goes further than the details of the case; the very fact of being involved in child care proceedings carries a social stigma for both the parents and the children involved, and the possibility of friends, neighbours or relatives becoming aware of that fact is a significant stress factor. Accordingly, the purpose of the *in camera* rule is to protect the privacy of the parties involved in proceedings. The rigid application of this rule has, until quite recently, sought to protect this privacy at the expense of a transparent system of child protection. It is ironic, therefore, that a clear finding of this study is that even such a rigid application of the rule does not necessarily protect the privacy of parties very well. Echoing findings from other jurisdictions (e.g. Pearce et al, 2011: 54, 65), the data shows that the effective operation of the rule in practice is greatly undermined by the nature of the physical facilities in which child care proceedings are held, and both the identity of the parties and the details of their cases risk being exposed:

> … calling it *in camera* is a nonsense, you know. Everybody knows what everybody else is there for, everybody can see the upset in the faces of the people coming out of the court; it's not *in camera* … (Solicitor, County 1)

> … there are very few consultation rooms in this building. So, because we get social work reports so late, quite often, like we're reading reports to parents in the corridor beside other people, and there could be disclosures to sexual abuse, there could be very, very, very sensitive information in those reports, which the parents may never have

> heard before. And a lot of these parents can't read, so you have no choice but to read it with them. … And it's just wrong. It's really wrong. (Solicitor, County 2)

Clearly, inadequate facilities, the design of which fails to account for the particular sensitivities associated with child care and other family law proceedings, are a major impediment to the effective implementation of the *in camera* rule.

Scheduling of proceedings and time available

Section 29(3) of the Child Care Act 1991 stipulates that the courts shall sit to hear such proceedings 'at a different place or at different times or on different days from those at or on which the ordinary sittings of the Court are held'. Shannon has observed that '[t]he concern here is obviously to set the child care process apart from the normal court process, both physically and symbolically' (Shannon, 2010: 227). The evidence gathered by this study indicates that unless a separate and dedicated court facility is available (of which there is only one in the country), this does not really happen in practice. In most areas, child care forms a relatively small part of the diverse work of the District Court, and court buildings are often very small. As a result, there is little or no separation between child care proceedings and other proceedings. In some venues, parents involved in child care proceedings may find themselves sharing waiting areas with people attending criminal trials, which can be a very intimidating experience and has the effect of exacerbating an already stressful situation. As well as the obvious impact on the parents who have to attend the hearing, this will be particularly distressing for children who may be in the waiting room; moreover, it is a factor that makes professionals in a gatekeeping role reluctant to consider bringing children to court:

> You know, why are our cases being held up for an hour while the judge is dealing with three criminal cases where there's guards in and out, and there's handcuffs and there's shouting and roaring and so on, and this is the context in which the private or public family issues are being dealt with … the separateness of the childcare courts doesn't exist and needs to exist. (Solicitor, County 1)

> I didn't think it was really conducive for a family going in because it felt like a ... cattle mart because there was so many people going in and out and people being called over and it was very, very dysfunctional for a family … There's a lot of sitting around. People get very frustrated in these venues. If a child came into them then you know I think it would be wholly inappropriate unless there was another designated area they come in. It's very, very hard. The last day [name removed] and I were in court one of the mother's partners threatened the father of the case and it was on-going in the courtroom … You have guards. Everyone is handcuffs. Everyone is battened down. (Social Worker, County 3)

Thus, it can be seen how inadequate facilities combine with inappropriate case scheduling to undermine another mechanism contained in the Act intended to make allowances for the vulnerability of the parties.

The separation of child care proceedings from other court proceedings is just one issue of concern with respect to scheduling. Our data suggests cause for concern regarding the extent to which pressure of time undermines the ability of at least some judges (particularly in rural areas) to give due consideration to the available evidence. These concerns were not uniform. Participants in County 2 (an urban centre with high case volume) stated that sufficient resources were available, and emphasised that judges will take as long as it takes to hear a case fully:

> I do believe [County 2] currently has the right measure. Really, in an ideal world, one would have more child care courts, in better venues and with the benefit of better resources … (Judge, County 2)

> … these cases require time, expertise and commitment … these are dealt with excellently by the judges that they appear before here. I mean, it's not uncommon to take days to deal with these cases. (Barrister, County 2)

However, participants from County 1 had a clear perception that judges are overloaded with cases:

> I mean, no matter how hard, in fairness, our District Court judge works, you finish one case and there's half a dozen more waiting for hearing dates ... it's not for lack of hard work where he's concerned … I think he's left with a very, very difficult workload, you know. (Solicitor, County 1)

Participants from both Counties 1 and 3 confirmed that caseloads have been steadily growing:

> I put in originally just a half a day to accommodate it, that I thought that would be enough, and that I would find time for long cases occasionally in between other business escalates then to this stage so that there are two allocated half days and in fact I don't have scheduled business on the [identifying information removed] and my juvenile court, court generally finishes about lunchtime, and I'll use the [identifying information removed] as well for the CFA contested hearings. And even at that it still isn't enough. (Judge, County 1)

> … there is [*sic*] way more cases now then there was say 10 years ago. I mean, if somebody asked me 10 years ago, you know, "What's the volume of work?", I would have said you'd always have four or five on the go. I probably have 25 on the go now … I think there's too many of these cases now for the resources that are there. (Solicitor, County 3)

Participants in Counties 1 and 3 also stated that the pressures of heavy caseloads and limited time can result in some hearings being rushed:

> There simply isn't the time for the court to give consideration to the issues that are there … Proceedings have to move very quickly … That's not to say that judges want to just cut it short and get to the very end of it; there are very good judges who want to spend the detail of time, but time is a real pressure. (Solicitor, County 1)

> I think child care cases are very time consuming, they take up a lot of time. They don't get the time that they deserve … If they are in a list in a full family law day, down in a District Court, with a judge who is exceptionally busy, I'm sure, himself, and you're getting reports the morning of, and you're in and out of court, 10 or 15 minutes, without getting a full and proper hearing, and I mean I just think it's far from ideal. (Solicitor, County 3)

Thus, in two out of three counties studied, shortfalls in the number of available judges and hearing dates can create time pressure that has the potential to undermine the extent to which reports and oral testimony are fully considered and absorbed by the court. Again, the Child Care Law Reporting Project has made similar findings, commenting that there is 'severe pressure on the courts hearing child care cases … [c]learly there is not enough capacity in the system to give every case the time and attention it needs. While the District Court is defined as a court of "summary" jurisdiction, no-one can describe the taking of a child away from his or her family as a "summary" matter' (Coulter, 2013: 32). Alternatively, rather than rush the hearing, courts sometimes repeatedly adjourn cases, with new problems emerging or the original reason for the application for the care order being replaced by another (Coulter, 2014: 23–24). Clearly, neither situation is desirable; child care proceedings appear to be suffering from being a low priority for court time in areas where they form a small proportion of the overall court docket.

Judicial training

The final issue to be discussed concerning the capacity of the general courts system to accommodate the particular requirements of child care proceedings is the availability of formal and specialised training for District Court judges in issues relating to child care law, child welfare and hearing the voice of the child. The evidence gathered indicates that this has only recently been made available to judges who adjudicate on child care cases, and the level of such training is not uniform across the country. Since 2012, judges in County 2 have been provided with an induction prior to commencing in the position and regular training once in post:

> Well, we're very fortunate in the District Court in that we do have a training process that we go through when we're appointed. When I started two years ago it was a two-week training process where we would shadow other judges; that's now been extended to a four-week process … We also have annual conferences and so on which are extremely useful. So it's something that I think that's developing and can continue to develop I hope. (Judge, County 2)

> Judges have had in-depth training of several days with child professionals … in hearing the voice of the child. We have attended several lectures on attachment … We have had people deliver papers on mental health issues. We've had cultural mediation nuanced training. We focused, more recently, on that rather than black letter law, but we have had black letter law training as well in domestic and international law issues relevant in the area. …. So, really, we have a lot of judicial training … It's been a saturation since 2012 … (Judge, County 2)

However, judges appointed prior to 2012, and judges from Counties 1 and 3 (at the time of interview), received little or no advance training, and receive variable levels of continuing professional development:

> I think it's no secret that the entire judicial model could be, would be assisted by more extensive training … it's a steep learning curve to even learn the language of it. (Judge, County 2)

> No, I never received training on it, no. I had some experience as a family lawyer years ago. I would have read up on matters; I would have attended conferences down the years. I've gone to conferences on guardianship *ad litem*; I've spoken at conferences about these matters; but specifically, I mean, no course was put together to train us, if I can put it that way. It's like, by osmosis you'll pick up things here and there, you know? (Judge, County 1)

> … partly to my shame and partly to my embarrassment and partly with pride, I had only done two family law cases in 21 years … that was the sum total of my experience of family law. My experience in childcare and similar applications was nil. (Judge, County 1)

If the welfare of the child is to be given genuine priority in child care proceedings, then recent developments in County 2 in respect of induction and on-going specialised training for judges need to be continued and expanded across the entire country.

INCONSISTENCY IN CHILD CARE PROCEEDINGS

Lack of specialisation in child care proceedings on the part of judges and court facilities in child care proceedings has a range of negative consequences, as outlined in the previous section. One specific issue, which may partly (if not entirely) flow from of a lack of specialisation, is a distinct lack of consistency in the approach of various courts and judges to a range of issues within child care proceedings. It is clearly desirable that the functions and powers set out in the Child Care Act be exercised and conducted in as consistent a manner as possible according to relatively clear criteria. Of necessity, a significant amount of discretion has to be left to individual judges to allow them to deal with each case on its own particular circumstances; any decision relating to children cannot be a

mechanistic process. Having acknowledged that, undue inconsistency from case to case or from judge to judge in the exercise of their powers (such as the making of orders, the application of the rules of evidence or ascertaining the views of children) is undesirable on a number of levels. It introduces a level of arbitrariness into proceedings; it makes the operation of the law uncertain and unpredictable, and it makes it difficult for lawyers to advise their clients and for citizens to regulate their conduct in accordance with the law.

Approach of judges to cases

In light of the above, an important finding of this study was that a high level of inconsistency arises between different District Court judges involved in child care proceedings – at least with respect to how the process is conducted (the outcomes of individual cases were outside the scope of this study). In Counties 1 and 3, participants were unanimous in identifying this issue:

> … the approach can vary enormously between court and court and judge and judge. (Solicitor, County 1)

> I would take issue with how much ... how the different cases run and how the decisions are made comes down to a judge's personality. Like you just said there [a particular judge] is very interested so we all dance to [that judge's] personality and style and moods and it is in the same in each courthouse … (GAL, County 1)

> I think the difficulty you have here, you have [judges] who are totally polar opposites. (Social Worker, County 3)

As against this, in County 2, opinions were split. Some participants identified a similar inconsistency from judge to judge:

> It's a chaotic system which is very, very dependent on the judge of the day and their views and their opinions, and how they want their courts to work and what they want you to do. (GAL, County 2)

However, others stated that more consistency was in evidence in County 2, particularly in recent years, and that this was a positive thing:

> … there's a team of judges that are here over the past number of years, I'd say it's a fairly consistent pack. And … you know exactly what's going to be said when the judge is saying it, taking you through the provisions of the Act, the threshold, the standard, the evidence accepted, etcetera, proportionality. And I think that's very useful. Very, very useful. (Barrister, County 2)

A particular example of how inconsistency manifests itself is that some judges take a more 'creative' view of their role in interpreting and applying the Act than others, in order to reach what they perceive to be the best outcome for the child:

> I take a kind of a creative approach sometimes to get over a solution and sometimes I would fly kind of close to the sun in terms of orders and enforceability … I have not found the boundaries because I got around it other ways which is not good law … I don't know about the legality of what I would do in the supervision orders but I fly on one wing and wait to see what will happen … (Judge, County 1)

While this judge admitted to taking a creative approach to interpreting the law (and was praised by other professionals for doing so), the evidence suggested that other judges tend towards a more rigid approach to applying the Child Care Act:

> … when [Judge X] took a sabbatical for the year or whatever and [Judge Y] came on and it was a very different, he was the letter of the law and we had been asking for supervision orders with the most fantastic stuff in it ... and

> [Judge Y] then comes around and says 'I can't do any of this, look I can't grant B, C and D' and then we were … not even realising that ... (Social Worker, County 1).

The inconsistent approach of judges to cases can create particular problems in circumstances where there is a change of judge midways through a case, such as where a moveable judge sits in for the local District Court judge for a particular hearing or hearings:

> … this is a very sensitive case, a hugely sensitive case … and he comes down, within five minutes he's going to discharge the order and send everything into a spiral. And my colleague here stood up to him and said, 'you're just plain wrong, Judge. And you're only dealing with this now; this is carefully managed for a long time, and you're in here now and you're threatening to do this.' (Solicitor, County 3)

Some judges admitted to having very little awareness of what happens in other courts:

> I have no idea what other judges [do] ... I had never sat in court seeing a judge in any childcare case, ever … Isn't that amazing? I've never seen it. I don't know what the other guys do. (Judge, County 1)

However, other judges identified a more collaborative and collegial approach:

> … I don't want to give the impression that we take a Court of Criminal Appeal approach to this. We don't. We each determine the matter before us based on the law and the facts, but we do discuss issues – I mean, we regularly discuss high-level issues that arise in cases. … We read each other's decisions, decisions of courts in other jurisdictions etc. (Judge, County 2)

The Child Care Law Reporting Project has separately confirmed the existence of regional variations in practice. Its First Interim Report cautioned that it had not yet gathered sufficient data to be able to say how prevalent they are and to what extent they flow from the policy of the CFA locally or from the practices of the judges in the different courts (Coulter, 2013: 30–31). However, its Second Interim Report, based on a much more representative dataset, went so far as to suggest that regional variations extended not just to the orders sought and made, but to the thresholds applied by courts for the taking of children into care and the evidence required to support an application (Coulter, 2014: 14–19). It was observed that this variation was 'considerable': 'Circumstances that would not have met the threshold in some courts allowed for orders to be made in others, and evidence of quite severe abuse and neglect did not satisfy the court of the need for long-term Care Orders in certain courts' (Coulter, 2014: 15). This is a cause for significant concern; in our view, the rigid operation of the *in camera* rule until very recently, which has made child care proceedings virtually invisible, has been a significant contributory factor to this situation.

Quantitative statistics would appear to provide at least *prima facie* support for the above analysis. The Courts Service datasets[32] available for 2011, 2012 and 2013 have made it possible to calculate the percentage of successful applications for the whole country for each order for those years. In the three counties that formed part of the present study, a significant variation can be identified in the rates at which orders were granted. Exact figures per county per year will not be given here, as they would render the counties identifiable. Broadly speaking, across the three counties over the three years from 2011-2013, the rate of orders granted per county per year ranged from a low of 66% to a high of 99%.

These variations do not simply arise as between different counties; they also arise as between different judges within counties. In County 3, there was evidence of a distinct difference between the proportions of orders granted indifferent areas. In one judge's area, not a single application for an

interim care order was refused in 2012 or 2013, and just 2% of applications for supervision orders were refused. Solicitors commented on the willingness of this judge to grant interim care orders in particular:

> They're given for the asking. We never have a case – rarely – that an Interim Care Order doesn't succeed … I think the court is too quick to grant them. That would be my overall impression. (Solicitor, County 3)

By contrast, in another judge's area, almost half of all applications across supervision orders, interim care orders and full care orders were refused in both 2012 and 2013; only emergency care orders were granted at a high rate. Given the relatively small geographical area involved in a single county, it is difficult to account for such a striking variation. Coulter suggests that a lack of knowledge of practice in areas other than their own is an issue for all professionals involved in child care proceedings, not just judges (Coulter, 2014: 27). This is a recipe for inconsistency, and should be addressed. A Practice Direction[33] was introduced in the Dublin Metropolitan District Court in 2013 addressing various issues of case management, and more extensive measures of this sort, coupled with more extensive judicial training, have potential to foster greater consistency on a nationwide basis. However, as long as child care cases are spread across a large number of judges who focus on it to greatly varying degrees in their work, inconsistency seems inevitable.

Mechanisms for hearing the views of children

A specific issue where this striking inconsistency in the approach of judges to child care cases manifests itself is in the extent to which judges are willing to take steps to ascertain the views of the children who are the subject of the proceedings, and the manner in which they go about doing so. Article 12 of the United Nations Convention on the Rights of the Child 1989 (CRC) requires that the views of children who are capable of forming them be ascertained in all matters affecting them, and be given due weight in accordance with their age and maturity. The Committee on the Rights of the Child has stipulated that compliance with Article 12 is a key factor in determining the best interests of the child.[34] It was mentioned above that the Child Care Act 1991 contains two express mechanisms through which the views of children can be ascertained in child care proceedings: the appointment of a guardian *ad litem*, or the joining of the child as a party to proceedings, with a solicitor appointed to represent that child. However, as currently drafted, the Act makes it discretionary rather than mandatory for the District Court to avail of these options in cases where it is satisfied that 'it is necessary in the interests of the child and in the interests of justice to do so'.[35] Outside of these formal mechanisms, certain judges may be willing to meet with children involved in child care proceedings.

In light of the evidence on the inconsistent approach among judges to presiding over child care proceedings and deciding on whether to grant orders, it is unsurprising that the evidence also indicates an inconsistent approach to the exercise of the court's discretion to hear the views of the child. Our research indicates that, contrary to what the CRC requires, chronological age, rather than maturity or capability of forming a view is the primary factor that determines whether children are heard. Different professionals take different views as to the age at which children should be heard, with figures ranging from nine to thirteen years old; but in any event, it is clear that young children are far less likely to be heard at all (Parkes et al, 2015). This is out of line with the approach of Irish law to other issues; for example, in cases concerning international child abduction that are heard under

the Brussels II *bis* Regulation, children as young as five years old are often deemed capable of forming a view and thus have their views ascertained.[36] While the CRC allows for less weight to be attached to the views of less mature children, it does not allow for their views to be completely excluded once capability to form a view has been demonstrated.

The frequency of indirect representation, through a guardian *ad litem* or a solicitor who attends court and speaks on behalf of the child, is uneven across the country; in some venues it is commonplace, while in others, it is quite rare. In County 2, GALs are used in a clear majority of cases:

> … judges want guardians, most of them want guardians to tell them, like, 'that's the CFA position, what do you think is in the best interests of the child'. An independent view on it. They're reluctant to let guardians out. (Barrister, County 2)

By contrast, the information elicited from participants in County 1 indicates that indirect participation occurs only in a minority of cases:

> I can go to a court and see a list of 30 cases and I can hear that there are guardians appointed in two or three of those, you know that's just the straw poll on a given [day] … (Solicitor, County 1)

In County 3, one solicitor observed that one judge would appoint GALs in "three, maybe four" out of every 10 cases, whereas another judge "would be almost 10 out of 10". (The latter judge confirmed this, stating that GALs are "invariably" appointed.)

While the evidence presented above is limited from a quantitative perspective, it is broadly consistent with the findings of the Child Care Law Reporting Project, which indicates that GALs were appointed in half of the cases covered by the Project in 2013-14 (which accounted for approximately 20 per cent of all applications nationally), with regional variations in the rate of appointment from just 17.9 per cent in one venue to over 80 per cent in another (Coulter, 2014: 7, 10 and 61).

In Counties 2 and 3, children are very rarely made a party to the proceedings and represented through a solicitor:

> Only once in my time [20 years] doing these cases has a child actually been joined to the proceedings and instructed a solicitor. (Solicitor, County 3)

However, in County 1, this mechanism, while still relatively unusual on the whole, is often used by one particular judge for 'older children' (GAL) or 'difficult teenagers' (Social Worker) from approximately the age of 14 years upwards. The Child Care Law Reporting Project indicates that of 486 cases covered by the Project across the country in 2013-14, children were represented by a solicitor in just seven (Coulter, 2014: 7, 61). Clearly, this mechanism is utilised very rarely across the country, and County 1 is something of an outlier in using it at all.

Direct participation by children again is something that occurs to at least some extent in County 2, but almost never in Counties 1 and 3. In County 2, when this occurs, it mostly takes the form of judges meeting with the child, usually in chambers or in an empty courtroom with the Registrar and perhaps the GAL present:

> Well, we started off doing it in Chambers and one child said to me, 'your room is lovely, Judge. Thanks for the biscuits. But I want to see where this happened. I want to sit in your chair.' And I thought about that and I thought, 'why not?' There was nobody in court at the time. It was done at a time when the people weren't there, because

> we bring them in at a time where they're not going to be listening to the drama that goes on in court. So we had the meeting in an empty courtroom. The registrar was still working. (Judge, County 2)

In County 3, the picture was mixed; one judge is not willing to meet with children, whereas another is occasionally willing to meet with older children:

> I just don't think [one judge] is child friendly, and I think [that judge would] terrify the living daylights out of a child. (Solicitor, County 3)

> ... it's not common for me to meet the children. I appoint the guardian *ad litem* but I have made it clear to the guardian *ad litem* [that] if the child wants to see the judge and wishes to speak to me, I will, but I will not seek to get the child in … I would say I haven't seen any child under the age of 13, but it's not necessarily that I put a strict rule on it but that has just been the reality … (Judge, County 3)

In County 1, participants indicated that it is rare for children to attend court or to be interviewed by judges, although it might very occasionally happen:

> I would never interview a child, even if the clerk was present and the child wanted to come into the room – I wouldn't do it … (Judge, County 1)

> … I tend to shy away from that. I don't think it's proper to expose a child to legal proceedings, coming to court, fretting and worrying. Occasionally if the child asks to see the judge, I will say, 'of course, come in, come in'. But generally I would ask her to come in accompanied, you know. But even then, it can be a little stilted … I would for my own protection or most judges for their own safeguarding would say, 'well, the clerk will stay with us.' So you end up, four people in a room who have never really met, well just little or nothing in common with each other. So the opportunity for a deep and meaningful exchange and a heart to heart is limited. (Judge, County 1)

Social workers tended to express a preference that children not attend court, largely because they feel that the environment is completely inappropriate for children due to the adversarial nature of the system, the inadequacy of the facilities and the proximity to criminal hearings in some venues:

> I believe no child, if it's not necessary – life and death – has any place being inside in an actual courtroom. (Social Worker, County 1)

> … the anxiety levels of even coming into a child in care review, not to mind to say … walking into the court, the whole court system, all the solicitors, they are fire fighting, crisis managing, and with the best intentions in the world we deal with very vulnerable young people who would possibly really, really struggle to maintain themselves in such an adversarial system. (Social Worker, County 3)

The right to be heard is both a substantive right in itself as well as a key component of the best interests principle. If child care proceedings are to be adapted to meet the particular needs of the parties involved in them, then hearing the voice of the child should be the norm, and the means through which this is achieved should be clearly formulated. This study shows that in Ireland, children are afforded the opportunity to be heard in an uneven and inconsistent manner in proceedings that will lead to one of the most important decisions of their life – namely, whether they should be separated from their parents. Where the voice of the child is excluded from child care proceedings – and the evidence suggests it often is – this contravenes Article 12 of the CRC, and undermines the capacity of the court to make a decision that accords with the child's best interests.

The recent announcement of the reform of the GAL service (Gartland, 2015b) is welcome, as is the approval in a referendum of a constitutional amendment on children's rights in 2012.

Significantly, the wording of the amendment mirrors that of Article 12 by providing that legal provision will be made to ensure that the views of children capable of forming views must be ascertained and any decision that is made must prioritise the best interests of the child.[37] This reform, if properly implemented, has the potential to have a significant impact by making it mandatory to hear the views of children in child care proceedings, rather than discretionary as is currently the case. A legal challenge to the outcome of the referendum meant that the amendment did not become law until May 2015; at the time of writing, it remains to be seen how this constitutional obligation will be translated into legislation and practice. The findings of this study demonstrate that full and effective implementation of this right will require more than a few lines of legislation or policy. The courtroom environment needs to be made more child-friendly so that adult gatekeepers are less reluctant to involve children, and professionals such as judges and solicitors will require uniform levels of training in speaking with children. We have produced more detailed evidence on this point elsewhere (Parkes *et al*, 2015).

ARE SPECIALIST FAMILY COURTS THE ANSWER?

A common thread running through many of the points raised above is that they are attributable at least in part to the fact that child care proceedings in Ireland mostly take place within the general courts system. Consequences of this fact include a failure to temper the adversarial model in the way that the Supreme Court has suggested should happen; inadequate physical facilities that are unsuitable for hearing child care cases; scheduling practices that frequently fail to separate child care proceedings from other proceedings, and fail to allocate sufficient time to child care in at least some venues; uneven levels of specialist training for judges and other professionals involved in the proceedings; and enormous inconsistencies in practice, arising at least in part from a lack of knowledge of practices pertaining in other areas and courts. All of this raises the question of whether many of these difficulties could be overcome by the establishment of specialist family courts, in which child care proceedings would be handled by fully trained staff in dedicated, specialist facilities. This course of action was endorsed by several participants in the study, and the following quote is indicative:

> … if you had a dedicated court of a certain panel of judges to deal with this sort of thing, you could get a better, more consistent approach. And you would of course, I think, you would develop a far sharper jurisprudence and expertise – provided, of course, that the judges are properly selected and trained. (Judge, County 1)

The suggestion that specialist family courts should be established in Ireland is not new; it was first made by the Law Reform Commission in 1996, when the approach of the Irish courts to family law matters was described as a 'system in crisis' (LRC, 1996: ii). No empirical evidence was produced by the Commission; but based on a consultation exercise, the Report identified many of the same problems that were discussed above, including inadequate physical facilities, an absence of specially trained judges, inconsistency between courts and judges in decision-making and excessive caseloads (LRC, 1996: 9-16). It is disappointing in the extreme to see that our study provided detailed evidence of all of these issues continuing to exist almost 20 years later. The Report made a series of recommendations, including the establishment of a system of regional family courts with unified jurisdiction over family matters, dedicated physical facilities tailored to the needs of family law,

integrated support services and dedicated judges with suitable experience and training (LRC 1996, 22-46). Few of the Report's recommendations (and none of those just mentioned) were implemented.

Of course, the establishment of a separate court or court division dedicated to cases concerning families or children will not, in itself, rectify the difficulties identified above unless it is properly designed and resourced. The devil is in the detail, and it has been observed that 'there are as many models of a family court as there are proponents of it' (Hoggett, 1986: 16). It is important to emphasise that specialisation, rather than mere separation, is what really matters in this context. In Australia, research has documented many of the same difficulties that we have documented in Ireland, notwithstanding the fact that specialist children's courts exist at State level. Similar findings have been made in each of Victoria (Sheehan and Borowski, 2014: 101-108), Queensland (Queensland Child Protection Commission of Inquiry, 2013: 464-474) and New South Wales (Wood, 2008: 528-543). A common finding was that even though a dedicated children's court exists, cases outside of major metropolitan centres are often heard by a generalist judge who does not specialise in child law.

Conversely, even within a general courts system, potential exists to make significant improvements by improving physical facilities and case management, addressing staffing levels and providing specialist training to professionals. Nonetheless, our view is that there is a limit to what can be achieved through the latter approach. Participants in our study characterised family law and child care as being the 'lowest of the pile' and the 'poor cousin' within the general courts system; as discussed above, the limited time allocated to child care in some venues is a particular manifestation of this. This echoes findings elsewhere (e.g. Queensland Child Protection Commission of Inquiry, 2013: 455). Participants also highlighted the fact that some District Court judges lack interest in this area of law. In the words of one Judge in County 1, 'there are too many judges doing this kind of work who don't want to be doing it. And that is dynamite. They are making orders to get rid of it.' In such a context, there may be room for improvement, but child care will always struggle to receive the attention and resourcing that it deserves. Judges and other professionals who spend the clear majority of their time on other issues are not incentivised to significantly upskill in the area of child care. By contrast, in a specialist family court, child care would not have to compete with criminal law and other matters for attention and resources, and it would be easier to ensure that staff involved in such proceedings had an appropriate level of interest, experience and specialist training. Indeed, this was among the reasons cited by the Family Justice Review in England and Wales when recommending the establishment of a Single Family Court (even though family divisions had existed within the general courts for over a decade). The Report encouraged that this court be staffed by judges who specialise in family law and professionals who receive specialist, inter-disciplinary training (Norgrove, 2011: 68-77 and 81-89).

Following the General Election of 2011, the Fine Gael/Labour coalition adopted a Programme for Government which committed to holding a referendum to amend the Constitution "to allow for the establishment of a distinct and separate system of family courts to streamline family law court processes and make them more efficient and less costly".[38] In 2013, the Minister for Justice, Equality and Law Reform invited submissions on the matter of the potential establishment of specialist family courts. The Law Society of Ireland made a submission in which it referred back to the 1996 Law Reform Commission report and commented that '[m]uch has changed, yet little has changed' (Law Society, 2014: 5). The Law Society argued that many of the 1996 recommendations remained relevant, and called for the implementation of all of the reforms mentioned above, as well as for efforts to make

proceedings less adversarial (Law Society, 2014: 37). This position has been echoed by the Government's Special Rapporteur on Child Protection (Shannon, 2014: 98). In 2014, the second interim report of the Child Care Law Reporting Project argued that '[f]or child care cases alone there is a compelling case for a specialist family court to be established as a matter of urgency', citing the inconsistency in the approach of the courts to child care cases as the primary reason for such a reform (Coulter, 2014: 27).

Over time, the Government moved away from the referendum strategy (Finn, 2014); a constitutional amendment was not necessary to establish a specialist family court, and since referendums in Ireland are notoriously fraught with political difficulties, it seems more prudent to proceed without one. At the time of writing, the plan remains live, and the construction of a new family court building in Dublin is at an early stage of planning and consultation (O'Keeffe, 2014). However, beyond this, no detail or concrete measures have yet been announced, and significant points of detail need to be resolved. Spatially, Ireland is one of the most unbalanced countries in the European Union with half of the population living in less than 20 per cent of the surface area of the State (Hughes, 2015). Consequently, there is a limit to the number of specialist regional family courts that could feasibly be developed; each centre would require a critical population mass to justify the investment of dedicated judges and buildings. This type of regional centralisation of child care and family law matters, which has already been possible in Dublin due to spatial density and a large population, would not be all positive. Families would have to travel a significant distance to attend proceedings in these dedicated courts instead of in their local District Court. Given the often chaotic nature of some of these families' lives, this change could negatively impact on the frequency and quality of parental participation.

However, this obstacle is hardly insurmountable, and a balance could be struck through combining specialist regional facilities in some areas with travelling specialist judges and refurbished facilities in existing court buildings in other areas. For example, in Queensland, the recommended solution was the appointment of additional specialist judges in key locations where the greatest case load arises; this was to be achieved in part by appointing generalist judges as magistrates of the Children's Court where they had already developed a *de facto* degree of specialisation by managing child protection lists (Queensland Child Protection Commission of Inquiry, 2013:464-466). The key point is that the principle of specialisation is agreed on by the Law Reform Commission, the representative body for solicitors, the Government's Special Rapporteur on Child Protection and the only two empirical studies on child care proceedings in Ireland (namely the present study and the Child Care Law Reporting Project). Our analysis and conclusions also find common cause with the Family Justice Review in England and Wales and multiple reform reports in Australia. Moreover, specialisation in the area of family law is now commonplace among judges and courts across Europe (Council of Europe, 2012). The case is becoming unanswerable and further delays are increasingly difficult to justify.

CONCLUSION

In common with many other jurisdictions, Irish child care law accepts that child care proceedings raise unique demands and sensitivities that call for a tailored approach that differs from that employed in

other types of court proceedings. Specific examples of this acknowledgment by the legal framework include the modified adversarial model, the *in camera* rule and the requirement that child care proceedings be held at separate times and in separate places to other proceedings. However, where the Irish system differs from many comparable systems is that it attempts to realise these aims within the general courts system, with little in the way of specialised staff or facilities. The evidence presented in this paper suggests that the aspiration of a tailored approach is frequently not realised in practice. Child care proceedings are often highly adversarial in nature, to the detriment of the parties; and inadequate facilities and scheduling practices mean that they are often held in close proximity to other proceedings (including criminal proceedings), with limited protection for the privacy of the parties involved. In addition to these failings in the implementation of specific legal measures, there are further examples of practice in child care proceedings that arguably fail to take full cognisance of the particular needs of these cases. Only some judges receive specialised training in the area; insufficient time is allocated to hearing complex child care applications in some venues; and enormous inconsistencies in practice exist across venues and courts. Orders are granted at significantly higher rates in some areas than in others, while the views of children are regularly ascertained in some venues but frequently excluded elsewhere.

Certainly, measures could be implemented that would address many of these issues within the existing generalist District Court model, and experience in other jurisdictions shows that the establishment of a Family or Children's Court is not a panacea. Nonetheless, it is our view that the location of child care proceedings within a general court system, where they may not always receive the dedicated and trained staff, the physical facilities, the court time or the consistent practices that they need and deserve, is at the root of many of the difficulties currently experienced. Efforts to make child care a priority or a special case within the general courts system have had limited success to date, and are always likely to be limited by the fact that child care is forced to compete with other areas of practice that experience higher volume. There is a compelling case that more effective and holistic reform could be achieved through the establishment of specialist family courts that provide staff, facilities and support services that are specifically tailored to the unique and pressing demands of child care cases. The announcement of plans to this effect is welcome; it is now time to provide the necessary detail, follow-through and resources to make those plans a reality.

[1] For a more detailed description of the Irish child care system, see Burns et al (2016a).

[2] Article 41 of the Irish Constitution recognises the 'Family' (defined as the marital family) as 'the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law', and provides that '[t]he State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.' Article 42 builds on this by granting strong rights to parents with respect to the education of their children. For an explanation of how this constitutional framework has affected the framing and interpretation of legislation governing child protection, see below, text accompanying footnotes 21-27.

[3] Sections 3(1) and 3(2)(a).

[4] Note that a sub-category of cases known as special care cases, which involve children being detained for their own protection, are processed through the High Court rather than the District Court, reflecting the seriousness involved in any deprivation of liberty. See Part IVA of the Child Care Act 1991 (as inserted by Part 3 of the Children Act 2001), discussed in Kilkelly (2008: 304-314).

[5] These include supervision orders (section 19), emergency care orders (section 13), interim care orders (section 17) and full care orders (section 18).

[6] Note that in some major urban centres, a small number of judges *de facto* specialise in family law; however, the vast majority deal with a wide range of cases.

[7] In England and Wales, a single Family Court was established by section 17(3) of the Crime and Courts Act 2013 following the recommendations of the Family Justice Review (Norgrove, 2011). See also Burns et al (2016b).
[8] See Articles 41 and 42 of the Constitution and the Guardianship of Infants Act 1964.
[9] The right to fair procedures in decision making (which had previously been a common law right) was given constitutional status in *Garvey* v. *Ireland* [1981] IR 75, at 97, where O'Higgins CJ stated that 'by Article 40, s.3, there is guaranteed to every citizen whose rights may be affected by decisions taken by others the right to fair and just procedures. This means that under the Constitution powers cannot be exercised unjustly or unfairly.'
[10] Section 3(2)(b).
[11] Section 24.
[12] Section 26.
[13] Section 25.
[14] Section 3(2)(b) and (c).
[15] See, e.g., *Re JH (an infant)* [1985] IR 375; *North Western Health Board* v. *HW* [2001] 3 IR 622; and *N* v. *Health Services Executive* [2006] 4 IR 374, as discussed in Kilkelly and O'Mahony (2007).
[16] In *North Western Health Board* v. *HW* [2001] 3 IR 622, in discussing what must be proven to justify intervention in family life, the majority judges all referred to circumstances approximating to an immediate threat to the child's life; an immediate threat of serious injury; or an immediate threat to the child's capacity to function as a human person.
[17] See sections 13, 17, 18 and 19 of the Child Care Act 1991.
[18] Child Care (Amendment) Act 2007, section 3, as implemented by the Child Care Act 1991 (Section 29(7)) Regulations 2012 (SI 467/2012).
[19] Courts and Civil Law (Miscellaneous Provisions) Act 2013, section 8.
[20] For a discussion of the key differences between the adversarial and inquisitorial models in the context of child care proceedings, see McGrath (2005).
[21] O'Flaherty J, *Southern Health Board* v. *CH* [1996] 1 IR 219, at 237 (emphasis in original).
[22] See *ibid* at 238, where O'Flaherty J stated: 'It is true, of course, that the rights of the father must be safeguarded, as far as practicable … But when the consequences of any encroachment on the respective rights is considered, it is easy to comprehend that the child's welfare must always be of far graver concern to the Court.'
[23] Section 27. Normally, reports would be provided by CFA child protection and welfare social workers, and if requested, guardians *ad litem*.
[24] *Southern Health Board* v. *CH* [1996] 1 IR 219 at 239. This loose approach can be contrasted with the more formalised statutory abolition of the rule against hearsay in England and Wales in the context of evidence given by children in s.96(3) of the Children Act 1989 and in civil proceedings generally in the Civil Evidence Act 1995.
[25] *Health Services Executive* v. *OA* [2013] IEHC 172 at [63] to [64].
[26] Section 29(1).
[27] Section 31.
[28] Section 29(3).
[29] Sections 29(2) and 29(4).
[30] On this see further Coulter (2014), 28.
[31] Children and Young Persons (Care and Protection) Act 1998, section 93(1).
[32] These datasets may be accessed at http://www.childlawproject.ie/statistics/.
[33] DC05, Practice Direction: Case Management in Child Care Proceedings, available at http://www.courts.ie/courts.ie/library3.nsf/16c93c36d3635d5180256e3f003a4580/84736e284d5c9f5080257c83003c3557?OpenDocument.
[34] See Article 12, United Nations Convention on the Rights of the Child, as interpreted in Committee on the Rights of the Child (2013): [53]-[54]), where the Committee stated that '[a]ny decision that does not take into account the child's views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests.' See further Parkes (2013).
[35] Sections 25(1) and 26(1).
[36] See, e.g., *A v A (otherwise McC)* [2009] IEHC 460, in which the views of a child who had just turned five years old were taken into account by the court. In *MKD v KWD* [2012] IEHC 378, the court ordered that a boy aged four years and 11 months should be interviewed, but subsequently determined that he was "not yet of an age or on the evidence a degree of maturity at which it would be appropriate for the Court to take into account his views". In *N* v. *N* [2008] IEHC 382 at [32], Finlay Geoghegan J commented that "[a]nyone who has had contact with normal six year olds know that they are capable of forming their own views about many matters of direct relevance to them in their ordinary everyday life."
[37] Article 42A.4.2°of the Constitution now provides that in child protection proceedings, as well as in private family law proceedings, "Provision shall be made by law for securing, as far as practicable, that in all proceedings … 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."
[38] Fine Gael and Labour (2011) *Programme for Government 2011-2016,* http://www.per.gov.ie/wp-content/uploads/ProgrammeforGovernmentFinal.pdf, p.49.

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