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Title	Representation and participation in child care proceedings: what about the voice of the parents?
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Publication date	2016-05-02
Original Citation	O'Mahony, C., Burns, K., Parkes, A. & Shore, C. 2016. Representation and participation in child care proceedings: what about the voice of the parents? Journal of Social Welfare and Family Law, 1-21. http://dx.doi.org/10.1080/09649069.2016.1176338
Type of publication	Article (peer-reviewed)
Link to publisher's version	10.1080/09649069.2016.1176338
Rights	© 2016 Informa UK Limited, trading as Taylor & Francis Group. This is an Accepted Manuscript of an article published by Taylor & Francis in Journal of Social Welfare and Family Law on 02/06/2016, available online: http://dx.doi.org/10.1080/09649069.2016.1176338
Download date	2026-11-14 15:07:35
Item downloaded from	https://hdl.handle.net/10468/2605



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Title

Representation and participation in child care proceedings: what about the voice of the parents?

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Acknowledgments

This study was completed by the authors without any research assistance. A small amount of funding was provided by the authors' institution to cover basic travel expenses and transcription costs. The authors wish to acknowledge the support of the UCC Strategic Research Fund, the School of Law Strategic Fund and the College of Arts, Celtic Studies and Social Science.

Abstract

In Ireland, the Constitution guarantees very strong rights to parents and the family, and there has been a long and unfortunate history of failures to adequately protect children at risk. As a result, there has been much discussion in recent years about the need to improve legal mechanisms designed to protect the rights of children. By comparison, little attention has been given to establishing whether the theoretically strong rights of parents translate into strongly protected rights in practice. This paper presents new empirical evidence on the manner in which child care proceedings in Ireland balance the rights and interests of children and parents, including the rates at which orders are granted, the frequency of and conditions in which legal representation is provided, and the extent to which parents are able to actively participate in proceedings. A number of systemic issues are identified that restrict the capacity of the system to emphasise parental rights and hear the voice of parents to the extent that would be expected when looking at the legal provisions in isolation.

Representation and participation in child care proceedings: what about the voice of the parents?

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Keywords: Child protection, parental rights, legal representation, participation

Introduction

State intervention in family life to protect children at risk of abuse or neglect is an especially difficult area of law, involving the balancing of two strongly protected and competing interests: the welfare and best interests of children, and the rights of parents and the family unit. In Ireland, the Constitution guarantees very strong rights to parents and the family, and there has been a long and unfortunate history of failures to adequately protect children at risk. Consequently, the view has increasingly emerged that parental rights are too strongly protected and that there is a need to improve legal mechanisms designed to protect the rights of children. Multiple reform reports have emphasised the importance of this issue (McGuinness, 1993; Ryan, 2009; Gibbons, 2010), and a referendum in 2012 approved express constitutional protection for children's rights.[1] Academic commentary has shown a similar trend (Kilkelly and O'Mahony, 2007); indeed, the issue has been highlighted in other work by the present authors (Parkes *et al*, 2015).

Amid all this focus on the need for reform to protect the rights of children and hear the voice of the child, there has been less consideration of the adequacy of legal protections for the rights of parents and the extent to which the system hears their voice. The prevailing discourse has held that parental rights are protected too strongly, to the detriment of the rights of children. Little attention has been given to establishing whether this discourse is reflected in the practical reality of District Court child care proceedings. The almost complete non-existence until very recently of empirical research on such proceedings (O'Mahony *et al*, 2012) made it impossible to judge whether, in the pursuit of laudable child protection goals, the rights of parents are as strongly protected in practice as has been assumed in theory.

Since 2013, there has been a concerted effort to address this long-standing information deficit. The authors of this paper have engaged in an independent and detailed qualitative analysis of child care proceedings, drawing on the perspectives of professional participants across three sample counties (see, e.g., Parkes *et al*, 2015 and O'Mahony *et al*, 2016). Simultaneously, the Child Care Law Reporting Project,[2] established in 2013, has engaged in an extensive courtroom observation project, while written judgments have been published online by the Courts Service and media access has been granted for the first time. These developments have shed light on a wide range of significant issues, of which the protection of the rights of parents is just one. This paper focuses on that particular aspect of child care proceedings by examining, in particular, the issues of representation of and participation by parents in such proceedings in the Irish District Court. The paper sets out the various mechanisms that are in place to protect the procedural and substantive

rights of parents in such proceedings, and contrasts them against empirical evidence that suggests that there can, at least in some cases, be a striking gap between theory and practice.

Legal and constitutional framework for child care proceedings

The legal framework for District Court child care proceedings in Ireland rests on Article 42A of the Constitution of 1937. The provisions of the Constitution dealing with family affairs, unsurprisingly for 1930s Ireland, 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.[3] These provisions apply only to the marital family and to married parents; unmarried fathers have no constitutional rights at all,[4] while unmarried mothers have less strongly protected rights than their married counterparts. Ireland has an unfortunate history with respect to the treatment of unmarried mothers (Smith, 2007; Luddy, 2011), and their status as constitutional rights holders with respect to their children was not clarified by the courts until 1980.[5]

Whether the parents are married or not, Article 42A.2.1° qualifies their constitutional and legal 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 Child and Family Agency (CFA – formerly health boards and the Health Services Executive)[6] to identify and promote the welfare of children who are not receiving adequate care and protection (ss3(1) and 3(2)(a)). The Act replaced the Children Act of 1908, which had become increasingly outdated,[7] and sought to introduce a modern framework oriented towards prevention and underpinned by the best interests of children, while still acknowledging the primacy of the family (McGregor, 2014:773-775). The 1991 Act gives the CFA the power to apply to the District Court[8] for a range of child protection measures.[9] While this power to apply for child protection orders is obviously directed towards the goal of protecting children at risk, 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,[10] as well as procedural rights deriving from principles of natural justice, which are protected under both the Constitution[11] and the ECHR (Kilkelly, 2008, pp. 315–318).

The Act stipulates that the CFA (s3(2)(b)) and the District Court (s24) must regard the child's welfare as the first and paramount consideration, but also 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 (s3(2)). Notwithstanding the constitutional position discussed above, the 1991 Act does not differentiate between married and unmarried parents in this respect. However, in the context of

married parents, these provisions have been reinforced by a number of Supreme Court decisions stipulating 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 constitutionally protected (i.e. marital family) under the care and protection of the child's parents.[12] The circumstances that must be proven to rebut this presumption are extremely serious, and this is reflected in the high thresholds stipulated in the 1991 Act that must be met before orders can be made by the District Court.[13] This high threshold is demonstrated by comparing the number of children in care per 1,000 in Ireland with other northern European countries. At the end of year 2012, there were 5.5 children in care per 1,000 in Ireland compared to 10.1 in Norway, 9.6 in Finland and 9 in Germany. Ireland's rate is closer to other neoliberal countries such as England (6) and the United States (5.4) (Burns *et al*, 2016).

In addition to spelling out the importance of protecting the substantive rights of parents, the Act provides various safeguards for their procedural rights. For example, while the Act allows for an emergency care order to be made *ex parte* (should the judge be satisfied that the urgency of the matter requires it) (s13(4)(c)), the duration of such an order is limited to a maximum of eight days; this period cannot be extended (s13(2)). The eight day period is intended to allow the CFA to carry out an investigation into the child's circumstances and its limited duration is clearly influenced by constitutional concerns relating both to the parents' substantive right to custody of their children[14] and the parents' procedural rights (specifically, the principle of *audi alterem partem* which requires that as a rule, both sides to a dispute should be heard, particularly where serious consequences attach to any court order).[15] Finally, in acknowledgment of the 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 (s29(1)), 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 (s31). 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' (s29(3)), and that the proceedings shall be as informal as is practicable and consistent with the administration of justice (ss29(2) and (4)).

In summary, it can be seen how the Child Care Act 1991 establishes a framework for child care proceedings that aims to provide for the care and protection of children, while also containing a variety of mechanisms aimed at safeguarding the rights of parents and making allowances for the sensitivity of the issues involved and the vulnerability of the parties to proceedings. On paper, the Act appears to be reasonably well-tailored to the demands of child care cases. This paper asks two key research questions that seek to go beyond what the law says on paper. First, does the manner in which the 1991 Act is implemented in practice effectively safeguard the substantive and procedural rights of parents? Second, does it make sufficient allowances for the needs of the particularly vulnerable parents who often find themselves the subject of child care cases? These questions can only be assessed by way of empirical evidence exploring the reality of District Court child care proceedings. The remainder of this article will provide such evidence, by presenting the results of a qualitative study of professional perspectives on child care proceedings in Ireland.

Research design, methodology and study limitations

This article presents the findings of an independent and interdisciplinary 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 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 across a wider geographical area. As outlined below in Table 2, 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 (albeit growing proportion) of their time, large numbers of social workers are actively involved in child care proceedings. By contrast, guardians *ad litem* (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 a specific category of active professionals 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 2: 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 (with the extended timescale being a function of minimal funding levels). Maximum 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 supervisor 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 precludes parties to proceedings from revealing information about their case to persons who are not parties in the absence of a specific court order permitting them to do so.[16] Making an application to court in respect of every parent interviewed would not have been practical, and 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 risk of being held in contempt of court. We have communicated with both the Minister for Justice and the Minister for Children about this issue and highlighted how the restrictive form of the *in camera* rule has limited the scope of this study. Despite recent reforms allowing limited access to proceedings by researchers[17] and the media,[18] 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 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.

Adversarial hearing to determine balance of rights

The fundamental mechanism through which the Child Care Act 1991 seeks to protect the rights of parents is through the assignment of decision-making to an adversarial process in the District Court, where parents have the opportunity to contest applications made by the CFA for child protection orders. In theory, the proceedings protect substantive rights by operating on the basis of a strong presumption that the best place for children is in the custody of their parents, and placing the onus on the CFA to rebut this presumption. The Act sets down demanding thresholds that must be met before orders can be made giving permission to the CFA to intervene in family life. Additionally, this process protects the procedural rights of parents by affording them an equal opportunity to the CFA to present their side of the case. On paper, this model appears well suited to protecting the procedural and substantive rights of parents. However, the evidence gathered in the study suggests cause for concern about the practical implementation of this model in at least some cases.

The first issue is that, notwithstanding the detailed and burdensome thresholds that are set down in the Child Care Act for the making of child protection orders, question marks arise as to the consistency with which they are applied. 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 is clearly undesirable. A system that seeks to protect the welfare of children while also respecting the rights of parents and the principle that a child is best cared for by his or her own family should strive to avoid a situation where similar circumstances give rise to different results.

An important finding of the present study was that a significant level of inconsistency arises between different District Court judges involved in child care proceedings. 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)

Social workers in particular commented on the undesirable nature and level of this inconsistency, and how it impacts both on how they choose to present their cases and on the manner in which decisions are made:

> … each judge then has a different personality in the District ... like if you're [in Venue 1] he will give umpteen chances for the parents to go and get legal representation and turn up and whatever. I went to a court in [Venue 2] and I went for the first time ever being in court, I went straight for an 18 year care order on a 6-year-old. The Mam never turned up. There was no legal representation. He … made an 18-year care order and that was it. (Social Worker, County 1)

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)

> [A judge] has only just come in recently and [that judge] has a very … practical approach … which would be quite different to the two judges who have been here longer who, in my view, take an extremely technical approach … (Solicitor, 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:

> I think they're quite consistent, actually, compared to what they were in the past. I'd say four or five years ago, things weren't that consistent. Of course, judges are human and deal with matters differently … they all approach a case differently, but, overall, I think, there will be a consistency. (Solicitor, County 2)

> … 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)

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 regularly discuss issues of parent/child/carer attachment … we discuss the overwhelming issues that are relevant 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 (or indeed if some of the policy of the CFA

locally is driven by the orders it knows it can and cannot obtain in the courts) (Coulter, 2013, pp. 30–31). However, its Second Interim Report, based on a much larger and 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, pp. 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, p.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. The Report also observed that a lack of knowledge of child care practice in other areas was an issue for all professionals involved, not just judges, and that this contributes to inconsistencies and should be addressed (Coulter, 2014, p. 27).

Quantitative statistics would appear to provide at least *prima facie* support for the above analysis. The Courts Service datasets 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, as illustrated in Table 3:

Table 3: Analysis of percentage of orders granted nationally under sections 13, 17, and 18 of the Child Care Act 1991, 2011-2013

Type of order	2013	2012	2011
Emergency care order applications (section 13)	520	519	Unavailable
Emergency care orders made (section 13)	**414 (80% granted)**	**424 (82% granted)**	**Unavailable**
Interim care order applications* (section 17)	6,023	5,773	4,365
Interim care orders made* (section 17)	**4,993 (83% granted)**	**4,682 (81% granted)**	**4,138 (95% granted)**
Care Order applications (long term or final order committing to care) (section 18)	1,117	1,677	2,491
Care orders made (section 18)	**889 (80% granted)**	**1,384 (83% granted)**	**2,287 (92% granted)**

*Includes extensions of interim care orders.

As can be seen, in 2011, the CFA was granted over 90% of all full and interim care orders applied for. The rate was lower in both 2012 and 2013, but remained steadily over 80%. This high rate of care orders granted is not unique to Ireland: for example, 92% of care order applications were accepted by the courts in Finland in 2012 and for the years 2008-2010 in Norway, 84-88% of applications to the county board led to a care order (Burns *et al*, 2016).

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%. County 1 displayed a particularly high rate of orders granted. The statistical information

corroborates statements made to similar effect by social workers in the study. The explanation offered related to the extensive work done in advance of going to court, as well as caution about ensuring that the tests set down by the Constitution and the Child Care Act 1991 are met:

> … we have [a] 100% success rate going back five years … some of the directions we have sought have not been granted … The application *per se* has been granted but not necessarily the proposed outcomes secured. The second thing is, no application gets lodged before a court 'til we've satisfied ourselves that there is a *prima facie* case. So there's a high level of checks and balances … I think also our legal advice would be not to go to court if we don't have the burden we need … (Social Worker, County 1)

A careful filtering process and a high standard of preparatory work by social workers and the CFA's legal representatives is one very plausible explanation for the high rate at which orders are granted, and if it is the sole reason, then it should be seen as a positive thing. However, the evidence gathered indicated that other factors may also be at play that may sometimes result in proceedings becoming weighted against parents, contrary to their design. For example, there is the potential for an element of defensive practice: no judge wants to take the chance of leaving a child in a situation where he or she is being abused or neglected. Second, where the CFA's filtering process is so rigorous, a natural assumption can develop over time on the part of a judge that the CFA would only make an application where it has strong grounds for doing so. One of the judges interviewed from County 1 quite candidly gave expression to both of these concerns:

> An unsuccessful application is almost unknown. One ... for a care order … will occasionally result in a conservative supervision order but even that would be rare. It would be more likely to be adjourned on undertakings than to be refused. The fact that the HSE [now CFA] [is] involved indicates that there is a problem and something needs to be done about the problem … as the years go on the pressure increases to make the order because I have occasionally made orders that tended to favour the parents more than the [CFA] had been asking for and I have frequently found that I was wrong and that the children have been damaged because I listened attentively to the case being made on behalf of the parents. As the years go on and as I see more I find an eternal terrible pressure on myself more to make the orders that the [CFA] are [*sic*] opting for or asking for … (Judge, County 1)

The preceding quote hints at the pressure and strain that these cases place on judges who, under the Irish model, bear the sole responsibility for decisions (in a similar way to judges in England and Wales and parts of the USA). By contrast, in jurisdictions such as Northern Ireland, Switzerland, Sweden, Norway and Finland, panels of three or more individuals, including professionals, lay persons and judges share the decision-making responsibilities (Burns *et al*, 2016).

In County 3 (where the judges were above by a social worker as 'polar opposites'), there was evidence of a distinct difference between the number of orders granted in the areas presided over by different judges. 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.

The high rate at which some courts grant applications for child protection orders does not necessarily indicate any problem in itself. However, coupled with the data about the inconsistent rates at which orders are granted, and the general level of inconsistency of approach among District Court judges, it does raise a serious question as to whether orders are granted too readily in at least some venues, particularly at the interim stage. If it were proven that this were the case, then it would suggest that cases do arise where parents' rights are less strongly protected than they should be. This is worthy of more detailed study.

Legal representation

In light of the gravity of what is at stake in child care proceedings, and the potential complexity of the legal process, participants in the study were unanimous in expressing the view that legal representation for parents is essential, both as a matter of protecting the basic rights of parents and of ensuring that the proceedings are properly conducted. The following quote is indicative of many from our study and echoes findings from similar studies in other jurisdictions (Thomson *et al*, 2015, p. 4):

> … it's that kind of fundamental principle. It's like going into prison for 10 years – you need a lawyer, and you should get it, no matter what. (Judge, County 1)

Indeed, aside from the protection of the rights of parents, the provision of legal representation can also benefit the child. The Queensland Child Protection Commission of Inquiry has argued that legal representation for parents improves the quality of decision-making: "In an adversarial system, the court relies on the parties to uncover and present the main facts and arguments in the case and this can only occur if all parties are adequately represented. By challenging unreliable information, producing independent evidence of a parent's strengths and supports, and offering other less intrusive alternatives, the parents' legal representation can provide the court with the most accurate information before a life-altering decision is made" (Queensland Child Protection Commission of Inquiry, 2013, p. 476).

In Ireland, the Legal Aid Board provides free legal representation to parents who cannot afford it themselves. The function of the Board is to provide legal aid and advice in civil cases to those who fit the criteria set out in the Civil Legal Aid Act 1995. The aforementioned criteria include a merits test under s.28 of the Act, where aid will only be granted if for example the applicant has grounds for instituting or defending the proceedings or there are no alternative means to deal with the issue. This will not generally be applicable in child care cases, where parents will always be considered to have the right to contest applications. There is also a means test based on the disposable income of the applicant. The thresholds set for financial eligibility are a disposable income of not more than €18,000 and capital resources not exceeding €100,000, excluding the applicant's home.[19] While a monetary contribution is normally required and determined with regard to the means of the applicant under s29 of the Act, this requirement is not imposed in child care cases.[20]

In the majority of child care cases, the parents are relatively likely to meet the means threshold; most cases tend to involve families from lower socio-economic backgrounds. People who

are struggling to function as parents tend not to be functioning financially. This means that legal aid will be granted in the vast majority of cases. The Child Care Law Reporting Project suggests that in 2013-14, fewer than 10% of respondents in child care proceedings were represented by private solicitors (Coulter, 2014, p. 6). For those who do not meet the criteria and are unable to pay, there have been examples of the Court ordering that the CFA cover the costs of legal representation.[21]

The evidence gathered in this study indicates that parents are effectively always offered legal representation, and only find themselves without representation where they choose to represent themselves or fail to engage with the process. Judges do everything in their power to ensure that parents are represented, and while it is not unusual for parents to be unrepresented at initial hearings, the judges try to ensure that representation is in place for later hearings:

> … they would come into court occasionally unrepresented, but the court would do somersaults to get them to take legal representation. (Judge, County 1)

> I insist on parents being represented, simple as that. And if a case comes in and a parent is not represented and is making an application for legal aid, I'll adjourn it. (Judge, County 2)

> I don't like to deal with cases without parents being legally represented … I really do push the boat out to ensure they understand the importance of legal representation and to go and seek it and if that means deferring, where there's an application for a Full Care Order, to make an Interim Care Order pending proper legal representation of the parents, I really encourage it, yeah. They're vulnerable. (Judge, County 3)

The Legal Aid Board, while under enormous resource pressures in an era of increasing demand and diminishing resources (Legal Aid Board, 2013, pp. 19 and 38), gives priority to child care cases over all other work:

> Within the Legal Aid scheme we prioritise child care proceedings, that someone can come into us on [identifying information removed] morning and we will do our damndest [*sic*] to be in court with them … [that] afternoon with a full set of reports and again we have a procedure where we can kick in very quickly. (Solicitor, County 1)

However, in spite of these efforts, it may take some time for the Legal Aid Board to provide a solicitor, and in at least some venues, the court may go ahead and make an emergency or even an interim order in the absence of representation:

> Well, the CFA will insist that the orders are made. They will seek to go ahead on the basis that there is a risk to the child. So, in terms of adjourning, yes, they might be adjourned but an order would be made. So it's not an adjournment in the true sense … And you'll have a lot of these ones where you'll have new born babies, which is highly contentious, where the mother might still be in hospital, obviously, and has just given birth and then the CFA will rush into court on that day – sometimes without the knowledge of the mother – to get the emergency care order. So, obviously, there is no chance of representation. The emergency care order is, invariably, granted. I don't think I've ever heard of one coming to us that hasn't been granted on that basis. (Solicitor, County 3)

The Child Care Law Reporting Project indicates that of the cases covered by the Project in 2013-14 (which accounted for approximately 20 per cent of all applications nationally), parents were unrepresented in a hearing dealing with an application for an interim or emergency care order in 26.7 per cent of those cases (Coulter, 2014, p. 6). This seems to be a relatively high figure given what is at stake, particularly in interim care order applications. The legislation rightly allows limited scope for very short-term emergency orders to be made on an *ex parte* basis where the welfare of the child

requires it. However, while emergency care order applications by their nature involve crisis situations and will often be made *ex parte*, interim care orders should normally be sought on notice, which should allow for legal representation to be put in place. The fact that the application is interim only does not mean that the procedural rights of parents are an insignificant consideration, especially since it is common for interim care orders to be repeatedly extended (Coulter, 2014, p. 3).

Aside from initial applications, unrepresented parents also feature in subsequent hearings in a small number of cases. Some parents make a conscious choice to self-represent, but the more common reason for parents being without legal representation is that they are not engaging, or in a position to engage, with the process:

> … my experience is … where you have a parent who is not represented it's usually because they're not engaging. (Solicitor, County 1)

> I think it's mostly by choice, people to be representing themselves. I think … the type of parents we deal with – it's not possible for them to organise, go into the right office at the right time to meet the right person; so just by continuous missed appointments and missed phone calls and missed letters, they can't organise legal representation for themselves, and I don't think there's a lot the system can do about that. (GAL, County 1)

Where parents do represent themselves, participants identified a number of negative features that follow, both for the parents themselves and for the proceedings as a whole:

> A parent who is unrepresented may not fully appreciate the consequences of the Order they are consenting to. And certainly the judge can explain that but that is not the same as independent legal advice. The judge is not their legal advisor. It's not appropriate. (Judge, County 2)

> They're not properly heard I think … obviously they don't present their cases as well as they would if they were represented. They tend to concentrate again on their own needs and their own issues and they're not properly heard in my view. (Solicitor, County 1)

For the most part, however, it is clear that legal representation is provided to parents in child care proceedings once they engage with the process. That being so, Masson has observed that '[p]arental engagement is a necessary but not a sufficient condition for successful representation' (Masson, 2012, p. 202); the evidence presented below supports the notion that other factors also impact significantly on the overall process of representation.

Although it is rare for parents to instruct private solicitors, they may choose to do so, and the District Court Rules 1997 (Ord 51, r1) provide for the granting or withholding of costs of any party to civil proceedings in the Court at the discretion of the Court. The High Court recently ruled that this applies even if the parents would have been eligible for legal aid,[22] although the Supreme Court is currently considering an appeal that challenges this principle. District Court judges often stress the importance of the participation of parents in proceedings, and the necessity of legal representation for that purpose, and thus they may be willing to award costs even if the court ultimately rules against the parents.[23] However, all of the above is entirely at the discretion of the Court, and there is no obligation to take either of these courses of action. Where private solicitors are instructed, the participants in this study indicated that it can affect the dynamic of the proceedings, as they are often not as well versed in child care law as Legal Aid Board solicitors, and do not enjoy the same relationship with the other professional participants:

> Occasionally it's an awful nuisance when people … have private solicitors who have no experience and they charge enormous fees and they are out of their depth; they can't challenge it successfully, they don't know where to start in constructing a defence. Now they move on fairly quickly because the person can't pay their fees and so it falls back to the Legal Aid Board who have skills and who have experience and who … know where to negotiate with the [CFA]. (Judge, County 1)

On the other hand, as hinted at in the above quote, participants were eager to stress the quality of the work done by Legal Aid Board lawyers who represent parents:

> There's nobody treating it in a trite or disrespectful manner, this is serious stuff and you'd be impressed with the way, particularly solicitors for parents come to the table, whether it's to contest or to concede. You know, it's impressive. (Judge, County 1)

> They mightn't meet them until that morning, say, for some of them but oh, they do get well represented. (Social Worker, County 2)

In light of the clear importance of legal representation to the protection of parental rights in child care proceedings, this is heartening evidence, and it would be expected that the system would operate in such a way as to facilitate this and maximise the ability of lawyers to represent parents. However, while the evidence suggests that lawyers who represent parents perform their role to a high standard, comments made by many of those lawyers indicate that they do so in spite of (rather than because of) the system in which they work. Again, this echoes findings from similar studies in other jurisdictions (Pearce *et al*, 2011, p. 113). First, the clients themselves are often extremely difficult to work with:

> The biggest people who it's particularly difficult for is people with mental health issues or very strong ... with personality disorder problems, with active addiction issues … it's almost impossible to really represent them because they're not, a lot of them, at the time, are not really in a position either to consider advice, give proper instructions and definitely not in a position properly to give evidence whereby at least an explanation can be given. (Solicitor, County 1)

> … the people themselves, that would be a huge issue, I think, and the challenges that they present with. I just had a quick look down through the cases that I've had and you're dealing with an awful lot of mental health issues, you'll have people that have schizophrenia, bipolar … Drug taking, and all of whatever that manifests itself in, in the person. Defiant behaviour. Learning difficulties, cognitive problems … There's hardly a case, really, that doesn't involve some element of that, isn't it … So they are presenting themselves with the challenges in terms of us getting instructions … (Solicitor, County 3)

Given the nature of child care proceedings and the prevalence of mental health and addiction issues among the parents involved (Coulter, 2014, p. 36), there is little that can be done to alleviate this difficulty. While better family support and earlier intervention may help to limit the cases that make it as far as a court application, those that do reach that stage will often involve elements of chaotic lifestyle on the part of the clients (a fact that is not unique to Ireland; see Masson, 2012, p. 207). However, other more avoidable problems also present themselves, which might not be faced to the same extent by lawyers acting for the CFA. A significant challenge faced by solicitors and barristers acting for parents is pressure of time and case load – often exacerbated by the late exchange of significant documentation – which leaves lawyers with minimal time to consult with their clients, take instructions and prepare for court:

> All parties are encouraged to meet each other in advance of Court. I understand that many times that's not possible because the lawyers for the parents either haven't got the reports from the social workers, or they haven't got the

> reports from the guardian. Or, even if they have the reports, they haven't been able to get their client in to see them. (Judge, County 2)
>
> … I think all this talk about representing parents and constitutional rights, it's all a hill of beans until we get time to prepare our cases properly. And we don't get time to prepare cases properly because nine times out of ten they come the night before, or the morning of it. And I think that's a fundamental issue for me. (Barrister, County 2)
>
> That's another difficulty then, the reports and not getting your reports, as you say. You might not get the reports until the morning of or the evening before … I mean, if you've got five or six clients and you're getting the report that morning and you're there trying to go through it … When you've five other clients wanting to speak with you as well. So it has a huge impact. You don't have an opportunity to go through the report properly with your client and have the chance to cross-examine properly. You're scanning the report, trying to pick out the pieces that are new and work on that. But it's not on a level playing field, really. The [CFA] solicitor has the report and has been fully briefed by the social worker, and we're given a very minimum amount of time to speak with our client and to go in and defend. You know, you're on the back foot straightaway. (Solicitor, County 3)

A further concern that has arisen in recent years, in the aftermath of the economic crisis that began in 2008, is that the Legal Aid Board does not have sufficient resources to obtain expert reports in cases where the lawyer acting for the parent feels that this is needed:

> … the Child and Family Agency, well of course they have their experts … to controvert that evidence we must have an expert of equal standing. And therefore we're looking to the Legal Aid Board for that. But there's a substantive difference in rates. For instance the current rate is €390. Yet you'll have clinical psychologists and other instructed, they'd be talking about thousands … You can't get experts. Because the Legal Aid Board won't pay for, won't pay a realistic rate … So it's a huge problem for legal representation of parents as well. (Barrister, County 2)
>
> Lack of resources, I suppose, is one of the main things, isn't it? We just don't, from A to Z, seem to have the resources to get parental capacity assessments, psychological assessments, psychiatric reports. We just don't have the resources, the money, to try and do the same for our clients. So if we take issue with the CFA's reports, it's very difficult for us to get an independent report, particularly for a physical injury or a sexual abuse case ... We've a fee structure of €385 for a report from a consultant and, generally, they're not interested in doing it for €385. I mean, you'll get a couple of people here and there that will do them, but generally speaking, it's like pulling teeth. So it's a constant struggle. (Solicitor, County 3)

This difficulty has also been noted in research conducted in the Australian Capital Territories (Thomson *et al*, 2015, pp. 5–6).

Clearly, significant efforts are made by judges and by highly committed Legal Aid Board solicitors (and barristers instructed by the Board) to protect the rights of parents via the medium of legal representation. The message that emerges from the above evidence is that there are ways in which the system could be adjusted to assist them in this vital task. If everyone agrees that legal representation for parents is absolutely essential in child care proceedings, it seems reasonable to suggest that the jobs of those legal representatives should not be made any more difficult than they have to be. It cannot be said that this is currently the case.

Parental participation

Apart from legal representation, a related, but nonetheless distinct question is the extent to which parents are able to actively participate in child care proceedings rather than relying entirely on their

lawyer to express their views. Participants emphasised the desirability of active participation on the part of parents:

> … I think it's extremely important that they're afforded the opportunity to participate to the fullest extent in proceedings. They are the parent of the child. 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 … so it's a very profound process and their participation is extremely important … I think one of the most effective ways of ensuring that the parent will participate is where the parent actually feels that they come to court, they may be heard but you know they may not get what they want but they will at least get a hearing. (Judge, County 2)

> You want them to participate in the proceedings; it's imperative that they participate in the proceedings from the child's perspective. So the Court is inclined to leave the case stand until the parent arrives … if you can convey to them that they're important, that their participation is important, I think it gives them a sense that ongoing participation in the life of their child (who may be in care long term) is still important for the child. (Judge, County 2)

If parents are to be able to participate effectively in child care proceedings, it seems obvious that they should be facilitated as far as possible in understanding the proceedings and in feeling comfortable enough to express themselves to the best of their ability. As already noted, parents involved in child care proceedings frequently present with mental health or addiction issues or learning difficulties, and the proceedings need to be run in such a way as to allow for this. Accordingly, sections 29(3) and (4) of the Child Care Act 1991 provide that hearings shall be as informal as is practicable and consistent with the administration of justice. The phrasing of this provision, which refers to the need to be 'consistent with the administration of justice', reflects that fact that there is something of a tension between an aspiration of informality and the seriousness of what is at stake. Participants emphasised that a certain degree of formality is very important:

> I think a degree of formality is important for people to realise this is a court and it has consequences because I'm thinking of [a particular judge who] … would bring you into chambers and it'll all be ostensibly very informal and people can let their guard down. One should never forget he's the judge and he's the most judicial and judicious of all judges, so this idea of 'I'll lull you all and we're all pals here', I don't think it's fair to people actually, especially if you're not represented. (Solicitor, County 1)

While it may be undesirable that proceedings become too informal, the data collected in this study indicates that the more common difficulty is that they may remain too formal and inaccessible, particularly due to the use of technical legal language. Research in England and Wales (Brophy *et al*, 2005, p. 44) and Victoria (Sheehan and Borowski, 2014, p. 104) has suggested that parents often have little understanding of care proceedings. Participants in this study similarly raised a number of concerns about the extent to which parents in Irish care proceedings fully understand what is happening in court, due to the language used and difficulties relating to their own capacity:

> I think I find that very difficult to observe where, you know, a parent doesn't understand what's being talked about and I think sometimes it's, you know, even the cognitive capacity of a parent that … the vocabulary and the jargon that's being used in the courtroom is very inaccessible to some people … (GAL, County 1)

> Some, because of mental health difficulties, you know they'd say when you come out, 'what happened in there now, what happened in there?' (Barrister, County 2)

> We're dealing with a very vulnerable cohort of people for the most part. In terms of understanding, even with the solicitor, even with their own solicitor, at times I can't say with my hand on my heart 100% that they always grasp

> it, when you've people with mental health issues, addiction issues, you know can't always say … that they fully understand every piece. (Social Worker, County 3)

Parents who struggle to understand proceedings will clearly also struggle to participate in those proceedings in any meaningful way. It is therefore unsurprising that this study also found that there may sometimes be issues with the extent to which parents feel able express their views during the course of proceedings. Some social workers perceive that solicitors tend not to encourage parents to actively speak up, preferring instead to speak for their client (a point admitted by solicitors). The phenomenon of solicitors preferring to speak on behalf of their clients in care proceedings, 'not simply because of the formalities, but for fear of what they might say', has also been documented in England and Wales (Pearce *et al*, 2011, p. 68). Additionally, participants observed that some parents are not able to cope with the courtroom environment or taking the stand:

> … that frustrates a number of the parents that I work with because they want their voice to be heard in court and I suppose that would be the feedback I hear from it: they don't feel their voice is heard because they don't get a chance to speak, because their legal advice is telling them to say nothing or not to take … the stand. (Social Worker, County 1)

> … I would have certainly had some parents who have mental health difficulties, who want to say stuff but the environment of the court just … they can't cope with it … (Social Worker, County 1)

> … my experience is, a lot of clients don't want to give evidence because they feel constrained that they can't really go up against the social worker who has all that in the report. And they let you say what it is that they want said to the court, but they don't want to get in there themselves. And I think that does limit their participation … (Barrister, County 2)

It is common for judges make specific allowances for this and allow parents to speak up without taking the witness stand, but this was not uniform; at the opposite end of the spectrum, participants indicated that one particular judge was reluctant to allow the parents to speak at all:

> I think the judge doesn't try to alienate parents by putting them on the stand, he would speak to them from where they are sitting … (Social Worker, County 1)

> They speak up behind their lawyers' back. They don't always want to get into the witness box … I will frequently take their evidence, with the consent of everybody there, in that fashion so that they can participate in that way. But not many parents want to walk up to a witness stand. (Judge, County 2)

> … very often, the judge would make an order without the clients being heard. You would really have to press them; if it was contested, you would really have to press Judge [name removed] to hear your client. And I suppose, strictly speaking, the client should be heard. (Solicitor, County 3)

A comparatively recent development has been the attendance of advocates at hearings who assist parents in understanding the proceedings and communicating their views. These advocates are separate to the legal representative and can focus entirely on facilitating communication without needing to deal with the many other tasks facing the parent's lawyer. Where advocates have featured in proceedings (most prominently in County 2, but to a lesser extent also in the other counties), participants were overwhelmingly positive about the impact they have on parental participation:

> A lot of those cases they would have advocates and I think the advocates are amazing … (Solicitor, County 2)

> I found them very helpful … we are hugely under pressure as well, trying to get through this report and everything, and you're not sort of stopping to say, 'do you actually understand what that was?' And the advocate will stop and say, 'now this is what this means, and do you follow that and do you understand that?', and check in with them and re-phrase it. And that's very helpful. And they also – I think the individual finds it a huge support. (Barrister, County 2)

> I'd love to see more advocates helping parents with capacity issues … you can often see an advocate explaining something midway, and you can slow down or stop then for a period. You mightn't stop because that engagement might stop, but the judge might note the areas where there's that chit chat going on, and you know then what you need to ensure that there is clarity on. (Judge, County 2)

> … if I was looking at improvements I would perhaps be looking at greater availability of advocates or support people who could actually support the parent to engage in that more directly. (Judge, County 2)

These are encouraging indications and stand in stark contrast to the earlier data regarding the ability of parents to participate where an advocate is not present. If meaningful participation of parents in proceedings is desirable – and the participants in this study certainly felt that it is – then consideration should be given to rolling out the availability of advocates on a broader basis. Clearly, this will require additional resources as well as suitable training for advocates.

Conclusion

Contemporary literature and discourse quite rightly places a lot of emphasis on examining the extent to which child care and other family law proceedings adequately hear the voice of the child. The purpose of this paper has been to ask: what about the voice of the parents? At face value, the legal framework for child protection in Ireland provides very strong protection for the rights of parents. The fear that this strong protection may sometimes operate to the detriment of children has been a pre-occupation of legal debate in Ireland for some time. It is important to point out that evidence gathered in other parts of this study has revealed concerns that child care proceedings in Ireland may sometimes become more focused on parental rights than on the best interests of the child (Parkes *at al*, 2015). Nonetheless, this paper reveals that the manner in which the system responds to parental rights and accommodates the voice of the parent may not always be in line with the picture that is painted by looking at the legal provisions in isolation.

While proceedings are theoretically weighted in favour of parents, the reality is that applications are granted at quite high rates nationally and exceptionally high rates in some areas. A question mark exists as to whether orders might be made too quickly in at least some cases. Some judges admit to seeing the CFA as being on the side of right, and of feeling pressured by the fear of what might happen if an order is refused. Legal representation, which professionals universally see as absolutely essential, is mostly provided to parents who want it, and Legal Aid Board lawyers perform their role to a very high standard; but the conditions in which they work make their task more challenging than it needs to be. Finally, courts adjudicate on parents' rights at the conclusion of proceedings in which those same parents may have difficulty participating in or even understanding the process.

All of the above paints a picture of a system that does not always place as much value on the substantive and procedural rights of parents in practice as its design on paper might suggest. While

these issues do not arise in every case, the evidence suggests that they arise more often than they should, and that where they do arise, serious questions arise from the perspective of the constitutional and ECHR rights of parents. In addition, the current format of the *in camera* rule, and the lack of clarity around the exceptions to it, limits parents from discussing their experiences in court after the event and from contributing to research projects like the present one. This raises questions around the distribution of power in this sphere and the capacity of the system to learn from and respond to the needs and concerns of parents.

The early evidence available on the use of advocates to assist parents in participating in proceedings in Ireland is encouraging, and more extensive evidence from England demonstrates the potential for advocates to have an extremely positive impact, especially where the parents involved may have learning difficulties (Tarleton, 2007). Measures including resources and training should be implemented to make this service available to any parent who wishes to avail of it. In addition to this, at a minimum, a more consistent approach to the application of the thresholds for making child protection orders seems necessary. Measures such as increased transparency, professional training and interaction between professionals in different areas can help to address this issue; we have advocated elsewhere that proposals to establish a specialised family court could provide a vehicle through which the benefits of such measures could be maximised (O'Mahony *et al*, 2016). The Legal Aid Board is clearly under-resourced, both in its capacity to obtain expert reports and in its own staffing levels; but more lawyers will only generate a limited amount of extra preparation time on its own. A Practice Direction[24] was introduced in the Dublin Metropolitan District Court in 2013 addressing various issues of case management; more extensive measures of this sort need to be introduced that minimise the common practice of extensive documentation being sent to lawyers acting for parents at the last minute before the hearing. Taken together, these reforms could greatly enhance the capacity of the system to protect the rights and hear the voice of the parents, without the need to amend the law establishing the rights themselves.

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[1] See Thirty-First Amendment to the Constitution (Children) Act 2015. The implementation of the amendment was delayed until 2015 due to an unsuccessful legal challenge to the outcome of the 2012 referendum.

[2] See www.childlawproject.ie.

[3] 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.

[4] See *State (Nicolaou) v An Bord Uchtála* [1966] IR 567.

[5] In *G v An Bord Uchtála* [1980] IR 32, it was recognised that while unmarried mothers are excluded from the protection of Articles 41 and 42, they (unlike unmarried fathers) have residual constitutional rights under the broad guarantee of 'personal rights' in Article 40.3, stemming from the fact of motherhood and the natural relationship which exists between the mother and the child.

[6] Previously, under the Children Act 1908, child protection work was predominantly undertaken by charitable organisations linked to the Catholic Church up to the 1970s (Skehill, 2004, pp. 179 and 311), following which it was taken over by area Health Boards (O'Sullivan, 2009, pp. 311-312). The Health Boards were merged into the Health Services Executive by the Health Act 2004, and the functions of the Executive under the Child Care Act 1991 were transferred to the CFA by the Child and Family Agency Act 2013.

[7] In *MF v Superintendent of Ballymun Garda Station* [1990] ILRM 767, Finlay CJ commented that the difficulty that the Court had had in applying the Children Act 1908 in the circumstances of the case at hand demonstrated that 'the necessity for a modern Children Act making a more efficient and simpler procedure for the protection of children available to the courts remains one of urgency.' Similarly, O'Flaherty J commented that '[w]hile the Children Act 1908 may have been an enlightened piece of legislation when enacted it is now showing its age.'

[8] 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, pp. 304–314.

[9] These include supervision orders (s19), emergency care orders (s13), interim care orders (s17) and full care orders (s18). For a comprehensive examination of all child protection mechanisms in Ireland, including voluntary care, see K. Burns *et al*, in press (b).

[10] See Articles 41 and 42 of the Constitution and the Guardianship of Infants Act 1964.

[11] 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.'

[12] 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).

[13] In *North Western Health Board v HW* [2001] 3 IR 622, 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. The thresholds set in ss13, 17, 18 and 19 of the Child Care Act 1991 for the granting of the various child protection orders are phrased somewhat differently, referring 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. While the constitutional presumption noted above has only been expressly recognised in relation to marital families, the threshold stipulated in the 1991 Act are the same for all cases, and the present study did not disclose any evidence of the thresholds being applied differently by reason of marital status.

[14] In *State (DC) v Midland Health Board* (High Court, unreported, 31st July 1986), Keane J held that a statutory provision which allowed for the removal of a child from the custody of his parents for longer than was necessary to carry out an assessment of his welfare would constitute a breach of his parents' constitutional rights.

[15] See, e.g., *Keating* v. *Crowley* [2003] 1 ILRM 88, where a provision allowing for an interim barring order to be granted *ex parte* without any time limit on its effect was declared unconstitutional as a disproportionate interference with the principle of *audi alterem partem*. The Court specifically referred to the eight day time limit in provisions of the Child Care Act 1991 dealing with emergency and interim care orders as a model of how *ex parte* applications can adequately balance constitutional rights.

[16] It is established that the courts have a discretion at common law to lift the *in camera* rule in the interests of justice or in pursuit of a crucial public interest – see *Eastern Health Board v Fitness to Practice Committee of the Medical Council* [1998] 3 IR 399. The case law in this area has mostly been focused on the release of documentation, especially to aid in the preparation of litigation or the investigation of allegations, and has generally resulted in parties to whom documents are released being bound to confidentiality as to the contents of the documents. See, e.g., *HSE v McAnaspie* [2012] 1 IR 548; *JD v SD* [2013] IEHC 648; *Health Service Executive v B (Lifting In Camera Rule)* [2013] IEDC 13, http://www.courts.ie/Judgments.nsf/0/ED83510E07FF6A9D80257BA90057BED5, and *Child and Family Agency v R* [2014] IEDC 3, http://www.courts.ie/Judgments.nsf/0/81244C30D971B40A80257CAC0035CC97.

[17] Child Care (Amendment) Act 2007, section 3, as implemented by the Child Care Act 1991 (Section 29(7)) Regulations 2012 (SI 467/2012).

[18] Courts and Civil Law (Miscellaneous Provisions) Act 2013, section 8.

[19] http://www.legalaidboard.ie/lab/publishing.nsf/Content/Leaflet_13.

[20] http://www.legalaidboard.ie/lab/publishing.nsf/Content/Leaflet_13.

[21] *Health Services Executive v SK* [2010] IEDC 2, http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/48b03f97c77ad11b80257baa00526f41?OpenDocument.

[22] *Health Services Executive v OA* [2013] IEHC 172, http://www.courts.ie/Judgments.nsf/0/D97662F46B717ADD80257B640050B239.

[23] See, e.g., *Health Services Executive v LC* [2013] IEDC 22, http://www.courts.ie/Judgments.nsf/0/6F76DA0826C0E94780257CAC003496C8 and *Health Services Executive v PO* [2013] IEDC 23, http://www.courts.ie/Judgments.nsf/0/B892A7E814224F6C80257CAC0034E806.

[24] DC05, Practice Direction: Case Management in Child Care Proceedings, available at http://www.courts.ie/courts.ie/library3.nsf/16c93c36d3635d5180256e3f003a4580/84736e284d5c9f5080257c83003c3557?OpenDocument.

References

Brophy, J., Jhutti-Johal, J. & McDonald, E. (2005). *Minority Ethnic Parents, their solicitors and child protection litigation*. London: Department of Constitutional Affairs.

Burns, K., O'Mahony, C., Shore, C. & Parkes, A. (2016). Decision-making systems for the reception of children into State care in Ireland: Law, policy and practice in Burns, K., Pöso, T. & Skivenes, M.

(eds.) *Child Welfare Removals by the State: A Cross-Country Analysis of Decision Making Systems*. Oxford: Oxford University Press. (In Press)

Burns, K., Pöso, T. & Skivenes, M. (2016). Child protection removals by the state: future directions in research and practice in Burns, K., Pöso, T. & Skivenes, M. (eds.) *Child Welfare Removals by the State: A Cross-Country Analysis of Decision Making Systems*. Oxford: Oxford University Press. (In Press)

Coulter, C. (2013) *Interim Report: Child Care Law Reporting Project*. Retrieved from http://www.childlawproject.ie/wp-content/uploads/2013/11/correctedinterimreport.pdf [Accessed 8th May 2015]

Coulter, C. (2014) *Second Interim Report: Child Care Law Reporting Project*. Retrieved from http://www.childlawproject.ie/wp-content/uploads/2014/10/Interim-report-2-Web.pdf [Accessed 8th May 2015]

Gibbons, N. (2010) *Roscommon Child Care Case: Report of the Inquiry Team to the Health Service Executive*. Dublin: Health Service Executive. Retrieved from http://www.oneinfour.ie/content/resources/RoscommonChildCareCase.pdf [Accessed 8th May 2015]

Keane, R. (2008) The Constitution and the Family: The Case for a New Approach in Carolan, E. & Doyle, O. (eds), *The Irish Constitution: Governance and Values*. Dublin: Thomson Round Hall.

Kilkelly, U. (2008) *Children's Rights in Ireland: Law, Policy and Practice*. Haywards Heath: Tottel.

Kilkelly, U. & O'Mahony, C. (2007) The Proposed Children's Rights Amendment: Running to Stand Still? "*Irish Journal of Family Law"* 10(2), 19–25.

Legal Aid Board (2013) *Annual Report 2013*. Retrieved from http://www.legalaidboard.ie/lab/publishing.nsf/650f3eec0dfb990fca25692100069854/1fd5fe238b87689880257d62002f55a4/$FILE/LAB%20Annual%20Report%202013.pdf [Accessed 8th May 2015]

Luddy, M. (2011) Unmarried Mothers in Ireland, 1880–1973. "*Women's History Review*" 20(1), 109–126.

Masson, J. (2012) 'I think I do have strategies': lawyers' approaches to parent engagement in care proceedings. "*Child and Family Social Work*" 17, 202–211.

McGregor, C. (2014) Why is history important at moments of transition? The case of 'transformation' of Irish child welfare via the new Child and Family Agency. "*European Journal of Social Work*" 17(5), 771-783.

McGuinness, C. (1993) *Kilkenny Incest Investigation: Report Presented to Mr. Brendan Howlin T.D., Minister for Health, by South Eastern Health Board*. Dublin: Stationery Office. Retrieved from http://www.lenus.ie/hse/bitstream/10147/46278/4/zkilkennyincestinvestigation.pdf [Accessed 8th May 2015]

O'Mahony, C., Shore, C., Burns, K. and Parkes, A. (2012) Child Care Proceedings in the District Court: What Do We Really Know? "*Irish Journal of Family Law*", 15(2), 49–55.

O'Mahony, C., Burns, K., Parkes, A. and Shore, C. (2016) Child Care Proceedings in Non-Specialist Courts: Lessons from Ireland "*International Journal of Law, Policy and the Family*" 30(2) (In Press).

O'Sullivan, E. (2009) Residential child welfare in Ireland, 1965-2008: an outline of policy, legislation and practice: a paper prepared for the Commission to Inquire into Child Abuse. Retrieved from http://www.childabusecommission.ie/rpt/pdfs/CICA-VOL4-10.pdf [Accessed 8th May 2015]

Parkes, A., Shore, C., O'Mahony, C. and Burns, K. (2015) The Right of the Child to be Heard? Professional Experiences of Child Care Proceedings in the Irish District Court. "*Child and Family Law Quarterly*" 27(4) (In Press).

Pearce, J., Masson, J. & Bader, K. (2011) *Just Following Instructions: The Representation of Parents in Care Proceedings*. Retrieved from http://ssrn.com/abstract=1844663 [Accessed 8th May 2015]

Queensland Child Protection Commission of Inquiry (2013) *Taking Responsibility: A Roadmap for Queensland Child Protection*. Retrieved from http://www.childprotectioninquiry.qld.gov.au/__data/assets/pdf_file/0017/202625/QCPCI-FINAL-REPORT-web-version.pdf [Accessed October 22nd 2015]

Ryan, S. (2009) *Commission to Inquire into Child Abuse Report*. Dublin: Stationery Office. Retrieved from http://www.childabusecommission.ie/rpt/ [Accessed 8th May 2015]

Sheehan, R. and Borowski, A. (2014) Australia's Children's Courts: An assessment of the status of and challenges facing the child welfare jurisdiction in Victoria. "*Journal of Social Welfare and Family Law*" 36(2), 95–110.

Skehill, C. (2004) *History of the present of child protection and welfare social work in Ireland*. Lampeter: Edwin Millen Press.

Smith, J. (2007) *Ireland's Magdalen Laundries and the Nation's Architecture of Containment*. Notre Dame: University of Notre Dame Press.

Tarleton, B. (2007) Specialist advocacy services for parents with learning disabilities involved in child protection proceedings. "*British Journal of Learning Disabilities"* 36, 134–139.

Thomson, L., McArthur, M. & Camilleri, P. (2015) Is it 'fair'? Representation of children, young people and parents in an adversarial court system. "*Child and Family Social Work*" 20, 1–10.

Whyte, J. (1980) *Church and State in Modern Ireland 1923-1979*. Dublin: Gill and MacMillan.