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The right of the child to be heard? Professional experiences of child care proceedings in the Irish district court

Aisling Parkes, Caroline Shore, Conor O'Mahony and Kenneth Burns*

Introduction

Sparked by the adoption and entry into force of the UN Convention on the Rights of the Child 1989 (UNCRC) at international level, there has been a growing awareness internationally of the requirement to include the voices of children in all matters affecting them – a right protected under Article 12 of the Convention. While this fundamental right of the child is no longer as contested as it once was, the real challenge now lies in determining how and when this right should be implemented in practice. The focus of this article is on child care proceedings in the District Court in Ireland, where decisions are made about whether children should continue to live with their parents or come into state care. The paper explores the extent to which children participate directly or indirectly in child care proceedings in Ireland, which take place within what is, for the most part, an adversarial context: a system designed by and for adults, and which is exclusively run by adults. Thus, the extent to which the current system is child-centred in terms of its design and operation is an issue that merits detailed consideration.

In recent times, with the increased attention given to children's rights generally, and the undisputed need to adopt a more child-centred approach in such cases, a question arises regarding the extent to which a traditional court-centric, judge-led, adversarial approach involves children in such proceedings in a meaningful way. Indeed, this paper will argue that there is no one homogenous child care proceedings model in Ireland, and that there are a variety of ways through which the voices of children are included in such cases in various regions. Based on a national empirical study conducted across the Republic of Ireland, this article provides a snapshot of the current child care proceedings system, with a particular

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emphasis on the extent to which children are heard in care proceedings affecting them. The current international and domestic legal frameworks will be explored, as will the practical implementation of the law in the day-to-day operation of the system from the perspective of the professionals involved. In particular, this article aims to highlight a number of issues in the Irish context by posing the following questions: To what extent does Irish law, in particular, under the Child Care Act 1991 and the Irish Constitution 1937, support children having a voice in child care proceedings in the District Court in accordance with the minimum standards set out under Article 12 UNCRC? To what extent are children heard in these cases in practice? If children are heard, what direct and indirect methods are used to facilitate their participation? What factors influence whether and how children are heard in these proceedings?

This article will begin by setting out Ireland's international legal commitments as far as listening to children in child care proceedings is concerned. It will then go on to examine the domestic legal framework underpinning the existing Irish child care proceedings model. The design, methodology and findings of a national research study undertaken in Ireland on the professional perspectives of those working in the child care system on a day-to-day basis will then be examined. This article will conclude by measuring the extent to which Ireland meets its international legal obligations as set out by Article 12 UNCRC in practice in the context of child care proceedings specifically.

Ireland's international legal commitments

In September 1992, Ireland became a party to the UNCRC, thereby committing to implementing the principles and provisions contained therein into Irish domestic law and practice. While in some ways it merely sets out basic minimum rights to which children are entitled, the UNCRC nevertheless represents the gold standard in terms of how we view our children in today's society. It ultimately reflects the global move away from paternalism towards a child rights-based approach. There are 41 substantive rights under the UNCRC to which all children are entitled.[1] There are four general guiding principles under the UNCRC: the principle of non-discrimination (Article 2); the best interests' principle (Article 3); the right of the child to life, survival and development (Article 6); and the right of the child to be heard (Article 12), all of which underpin the implementation of all Convention provisions. Article 13 UNCRC recognises the child's right to freedom of expression and in particular, highlights the importance of facilitating alternative forms of expression beyond the traditional form of conventional speech. This provision requires some level of creativity in ensuring that children can effectively express themselves in practice. Given the holistic nature of the UNCRC, each of these principles and provisions must be adhered to when implementing the other rights set out in the UNCRC.

Article 12, which enshrines the principle of respect for the views of the child, serves as a linchpin for the UNCRC.[2] It sets one of the fundamental values of the Convention, as well as one of its most basic challenges. Indeed, as a general principle, Article 12 lies at the heart of the UNCRC, and provides a means through which children can exercise all of the other rights

[1] There are 196 States Parties to the UNCRC, all of which have committed to implementing the rights of children in their domestic law. The only jurisdiction in the world who is not a party to the UNCRC is the USA. Somalia finally ratified the UNCRC in January 2015 and South Sudan in April 2015. See: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en for more information.

[2] M Freeman (ed), *Law and Childhood Studies*: *Current Legal Issues, Vol 14* (Oxford University Press, 2012), p 7.

contained therein.

Article 12 provides:

> '12(1) States parties shall assure to the child who is capable of forming his or her views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 12(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.'

According to Article 12(1) and (2), every child in Ireland, without discrimination, should have the right to express his or her views in all decisions concerning him or her. Expression may be in the form of conventional speech as well as through alternative forms of expression such as through art or play in accordance with Article 13. One fundamental decision affecting children is where they will live and who will care for them. While Article 12(1) clearly sets out the general right of children to be heard in all matters affecting them, Article 12(2) of the UNCRC specifically provides children and young people with the procedural capacity to be heard in legal proceedings, either directly before the decision-maker or indirectly, through a representative (such as parent, a solicitor, a social worker or a guardian ad litem (GAL)[3]) or through an appropriate body.[4] In order for child participation to be meaningful, it is essential that children are provided with child-appropriate information concerning the decision being made and the space for participation must also be safe and child friendly. Indeed, it has been acknowledged in the context of Article 12(2) that there is a need to adapt courts and other formal decision-making bodies to enable children to freely express views in legal proceedings. In terms of court hearings, for example, this could involve more informality in the physical design of the courtroom. The clothing of judges and lawyers should also be less formal and evidence could be video-taped.[5]

Irish child care proceedings – the legal framework

Since Ireland is a dualist legal system, an international treaty must be incorporated into the domestic law of the state before it can be directly relied upon before the Irish courts.[6] To date, the UNCRC has not been comprehensively enshrined within Irish domestic law. That said, there are elements of this international agreement that have been partially integrated into Irish legislation by way of sectoral legislation and more recently, the Irish Constitution (Article 42A), which affects children either directly or indirectly. In the area of child protection and welfare, the Child Care Act 1991 (as amended) remains the primary piece of legislation. It supplements Article 42A.2.1 of the Irish Constitution, which is currently the principal legal basis for state intervention in the family through child care proceedings in the

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[3] UN Committee on the Rights of the Child, General Comment No 12 (2009): The Right of the Child to be Heard, UN Doc CRC/C/GC/12, 20 July 2009, at para 36.

[4] M Fernando, 'How Can We Best Listen to Children in Family Law Proceedings?' [2013] *New Zealand Law Review* 387.

[5] Op cit n 3, at para 34.

[6] Article 29.6 of the Irish Constitution provides: 'No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas [Parliament]'.

District Court. While Articles 41 and 42[7] explicitly recognise the rights and responsibilities of parents, Article 42A.2.1 provides:

> 'In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.'

The 1991 Act sets out the legal principles and procedures to be followed for these exceptional cases and contains provisions which are partially reflective of some of the rights contained in the UNCRC, including the best interests' principle and the principle of respect for the views of the child. For example, the Child Care Act 1991 obliges the Child and Family Agency (CFA) and the courts to regard the welfare of the child as the first and paramount consideration when performing its functions. It also requires that the CFA give due consideration, having regard to his age and understanding, to the wishes of the child.[8] It is worth noting, however, that children are not automatically parties to the proceedings, they do not have an automatic right to attend and they are not guaranteed the appointment of a GAL to represent their views and interests. Indeed in considering the best interests and views of children, the court is required to have regard to the rights and duties of parents as recognised under the Constitution or otherwise. Thus, while Irish legislation clearly reflects some of the rights and fundamental principles set down in the UNCRC, the extent to which they are implemented in practice is less clear-cut; this article will attempt to shed some light on this issue.

Research design and methodology

Research sample and data collection

This paper is based on a national, independent qualitative study which took place between November 2011 and February 2015. It explores professional perspectives on child care proceedings across three counties in Ireland. Taken together, these counties account for over 50% of the applications for child protection orders made in the District Court in any given year. The professions represented consisted of guardians ad litem, social workers, judges, barristers and solicitors. A purposive sample of each core profession regularly involved in these proceedings was invited to participate. This ensured that all participants had the requisite experience to inform their perspective on this topic. A total of 67 individuals took part; 54 female and 13 male participants. Participants' practice experience in child care

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[7] 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 providing that 'the primary and natural educator of the child is the Family', and that the state 'guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children'.

[8] Section 3(2)(b). For more in-depth data on children in care and a description of care orders in Ireland, see: K Burns, C O'Mahony, C Shore and A Parkes, 'Child removal decision-making systems in Ireland: Law, policy and practice' in K Burns, T Pösö and M Skivenes (eds), *Taking Children into State Care: A Cross Country Analysis of Socio-Legal Decision-Making Systems* (Oxford University Press, 2016).

proceedings work ranged from 3 to 25 years.

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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.

TableEnd

Participants were engaged in an informed consent process that explored the aims of the study, data storage and anonymity.[9] The data was collected through focus groups and semi-structured interviews.[10]

Limitation of the study sample

Due to the restrictions posed by the operation of the *in camera* rule[11] and the unique ethical

[9] Participants are not identified by name in the findings section and some of the data has been further anonymised to avoid the participants being identified. In addition to participants' permissions, institutional permissions were also secured. The Social Research Ethics Committee at the authors' academic institution provided ethical approval.

[10] The audio and transcript data were stored on a secure university server. The data was coded in research pairs (one social work and one legal academic) using a thematic coding framework and NVivo 10.

[11] Cases involving children are heard in private (*in camera*) to protect their identity and the privacy of the family. Only officers of the court, the parties to the case and their legal representatives, witnesses and such other people as the judge allows will be in the courtroom while the case is being heard. Article 31 of the Child Care Act 1991 states that no matter likely to identify the child shall be published in a written publication or be broadcast. Section 40 of the Civil Liability and Courts Act 2004 allows solicitors, barristers and certain other categories of people approved by the Minister for Justice and Equality to attend family law cases and publish reports. Part 2 (sections 3 to 12) of the Courts and Civil Law

considerations associated with the sensitive nature of children being removed from their families, no children, young people or parents were invited to take part in this phase of the study. The researchers are cognisant of the irony inherent in an article focusing on child participation, drawn from a study that did not include any children as participants. However, the lack of clarity around the *in camera* rule, which is poorly defined in Irish law, meant that it was not possible to include children who had been the subject of child care proceedings, without the researchers being at risk of being in contempt of court. Consequently, the experiences of children can only be represented through the perspectives and voices of the adult professional participants. We have communicated with the Minister for Justice and Equality and the Minister for Children and Youth Affairs on the need for clarity on this issue.

Pre-requisites to effective involvement – information and environment

According to the Committee on the Rights of the Child in its General Comment on Article 12, there are two essential pre-requisites to children and young people being effectively heard in court proceedings.[12] First, in order to adequately prepare the child for contributing their views in an informed way, information concerning the decision must be provided to the child in advance of the decision-making process. This information must be child-appropriate and must be provided all the way throughout the proceedings. Second, children must have a safe space within which to contribute their views where they are not subject to fear or intimidation in the surrounding environment. These will be discussed in turn.

Information

At international level, it has been acknowledged that in order to ensure that the child can effectively express his or her views freely, it is imperative that they are fully informed 'about the matters, options and possible decisions to be taken and their consequences by those who are responsible for hearing the child, and by the child's parents or guardian. The child must also be informed about the conditions under which she or he will be asked to express his or her views'.[13]

Within our study, it was the position of some professionals that children are well informed of the circumstances surrounding the proceedings, and the court process:

> 'I think children are extremely aware of what's going on, you know, they are aware of social workers calling to the house. They're aware of the changes in their care arrangements … The social workers will be talking to the child and then if the court appoints a guardian the guardian will be talking to the child and then there will usually be some form of assessment phase that's begun so there'll be Lord knows how many professionals talking to the child.' (Judge, County 2)

Some practitioners indicated what they do to inform children about the process:

(Miscellaneous Provisions) Act 2013 makes further provision for *bona fide* representatives of the press attend family law cases (subject to the right of the judge to exclude any such representatives) and to publish reports. The publication of reports of family law cases is allowed under this legislation provided no names, addresses or any other details which might identify the parties are used.

[12] Op cit n 3, at para 41(a).

[13] Op cit n 3, at para 25.

> 'I usually draw pictures depicting the judge telling who is in court and I would have that conversation with them and, again, I would feed it back to the social worker maybe to go back on it with the child and see if the child has any more questions about that.' (GAL, County 3)

However, this was far from a universal approach amongst participants. Perhaps more strikingly, there was no consensus concerning whether every child even had the right to be informed about the matters that affect him or her:

> '… at times I've had the judge say you know there should be no discussion with young children about a court process because how do they understand anyway and I've heard Judge [name removed] state to parents, "you will not discuss court with your children in relation to care" … but it's about them so I have … and I suppose how do you get around to saying "well look this is actually impacted on your life but I'm not allowed to talk to you about it?"' (Social Worker, County 1)

Indeed, some participants expressed views which could be considered paternalistic in nature:

> 'I don't think it's a child-centred thing for them to have to do. Kids should be carefree and you know not even be aware this court process is going on.' (Social Worker, County 2)

These findings give rise to concerns from the outset as to whether children are provided with the information necessary to understand the nature of child care proceedings, which may undermine their ability to participate in such proceedings in a meaningful way should this opportunity be offered to them.

Environment

The Committee on the Rights of the Child has stated that a child should never be heard in open court; their participation should take place under conditions of confidentiality.[14] The Child Care Act 1991 attempts to achieve this end through the *in camera* rule, which provides that proceedings under the Act shall be held *in camera* so as to protect the privacy of the parties involved.[15] The Act 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.[16] Although the in camera rule may ensure that the hearing of the details of the case, and any actual evidence given directly by the child, will be strictly confidential, the effectiveness of this rule does not, in practice, extend past the physical boundary of the courtroom door. If children are brought to the court, they wait in the same public waiting areas with other attendees. These waiting areas are shared spaces, often including people attending for criminal and/or civil proceedings as well as those for a number of individual child care cases. In most Irish courts, there is very rarely any opportunity for privacy, and those children present are visible to anyone in attendance, and sometimes even to members of the public simply walking past the courthouse. This situation, which has also been documented in other jurisdictions,[17] gives rise to confidentiality concerns from a number of

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[14] Op cit n 3, at para 43.

[15] Section 29(1).

[16] Section 31.

[17] See, for example, R Sheehan and A Borowski, 'Australia's Children's Courts: An assessment of the status of and challenges facing the child welfare jurisdiction in Victoria' (2014) 36(2) *Journal of Social Welfare and Family Law* 95, at p

perspectives:

> 'With lots of young people how can they have their confidentiality and their privacy respected when they see young people down outside the court that they actually know from another residential unit or you know that sometimes things can get very messy because they're all put together at the same time … the chances of them knowing each other is extremely high' (GAL, County 1)

Due to overcrowding in court waiting areas and the lack of private spaces in which consultations between clients and their legal representatives, social workers and children may take place, details of a child's personal circumstances may well be overheard by other people who have no connection to or involvement with that child's life:

> 'You are actually packed like sardines into this really small space and it's quite an intense space, you know, because you've social workers there, you've parents there, you've young people there … There's nothing anonymous about it … you've solicitors having consultations surrounded by sort of a dozen ears' (Social Worker, County 1)

> '… 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 …' (Solicitor, County 2)

In addition to the issue of privacy, the Committee has also noted that it is not possible for a child to be effectively heard in an intimidating environment or one that is:

> '… hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges, sight screens, and separate waiting rooms.'[18]

The reality of child care proceedings, as illustrated by this research, paints a very different picture to that proposed by the Committee. Participants were almost unanimous in their opinion that the environment of the court itself, as currently experienced, is an unsuitable one for children. The possible negative connotations which the idea of 'court' might have in the child's mind, and the tense and sometimes 'intimidating' atmosphere of the courthouse, were mentioned in this regard:

> 'It's very intimidating. The association of a court is criminal, let's be fair. We are often next to the criminal proceedings waiting for the judge …' (Social Worker, County 1)

> 'They're not particularly child friendly. There's no children's room here for instance. There's no, as far as I'm aware there's no witness waiting room or equivalent facility for a child. I know from being in practice how awful it is standing outside in that corridor.' (Judge, County 2)

One of the consistent themes that arose from the research is that – contrary to express provisions in the Child Care Act 1991[19] – it is common practice for criminal cases and child

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[18] Op cit n 3, at para 34.

[19] Section 29(3).

care proceedings to happen in close proximity to each other, both in time and location:

> 'Two weeks ago there was a knife fight outside the court from the criminal court … Now there are occasions where we would have young teenage children down there, it's a wholly inappropriate scene to take young people to, do you know, to discuss their care … it's not a place where family stuff should take place' (Social Worker, County 1)

> '… there is going to be a certain set there on the day, there's going to be professionals, there's going to be people involved in care proceedings, people involved in criminal proceedings and there's going to be solicitors and guards and prison officers and exposing any young person or vulnerable person to that I would just query the whole system as to how they can be protected within that, you know.' (Social Worker, County 3)

Accordingly, it is clear that in a significant number of cases, child care proceedings in the Irish District Court fall far short of both of the essential pre-requisites to effective child participation. Not only are children not always provided with the information necessary to ensure effective involvement in the case affecting them; the environment of the courts is often not conducive to the creation of a safe, child-friendly space.

Taking children's views seriously

While Article 12 does not require that the views of the child be determinative or conclusive, it does require that their views be taken into account. In this context, it has been acknowledged that 'the fact that young children express themselves differently from adults does not justify dismissing them'.[20] It has been pointed out that Article 12 'stipulates that simply listening to the child is insufficient; the views of the child have to be seriously considered when the child is capable of forming his or her own views'.[21] Once a child has expressed his or her views, it is imperative that the court explains to what extent the views of the child were considered and why they were agreed or disagreed with. Santos Pais highlights the fact that participation cannot be genuine if it provides no opportunity for the child to understand the consequences and impact of his or her opinions and views.[22] Thus, as part of the decision-making process, the court should explain to the child directly or indirectly, the extent to which his or her views were taken into consideration. How common an occurrence this type of judicial explanation is in the counties covered by this study remains unclear from the available data. Only one judge specifically referred to this aspect of the role:

> '… it allows us then to get into that conversation about "well you know there is a decision coming up, the purpose of this meeting is for me to hear your views on that but at the end of the day I'm the person making the decision. I will take your views into consideration but I can't guarantee that your views will be the decision that I'll make but it's something that I will pay a lot of attention to".' (Judge, County 2)

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[20] G Lansdown, *Can you Hear Me? The Right of Young Children to Participate in Decisions Affecting Them: 36 Working Papers in Early Childhood Development* (Bernard Van Leer Foundation, 1995), p 3.

[21] Op cit n 3, at para 28.

[22] M Santos Pais, *Child Participation*, Documentação e Direito Comparado, n 81/82 2000, available at: www.gddc.pt/actividade-editorial/pdfs-publicacoes/8182MartaPais.pdf, p 99.

Article 12 of the UNCRC envisages a two-stage process for eliciting the views of the child. The first stage is a determination of whether the child is capable of forming a view; if so, that child should be facilitated in expressing that view. The second stage involves deciding how much weight to attach to that view in the decision-making process; this is to be determined in accordance with the age and maturity of the child. Article 12 acknowledges that children, similar to adults, have different levels of competence at different stages of their lives; they are not to be viewed as a homogenous group in society when it comes to being of sufficient maturity. The Committee on the Rights of the Child has accepted that maturity refers to the ability of the child to assess and comprehend the implications of a particular matter and in the context of Article 12, this means the capacity of the child to express her or his views on issues in a reasonable and independent way.

It has been expressly acknowledged by the Committee that '[c]hildren's levels of understanding are not uniformly linked to their biological age'.[23] The degree to which the views of the child are taken seriously depends on their understanding of the issues concerned, according to both their age and maturity. The impact of the outcome on the life of the child must also be taken into consideration; the greater the impact, the more relevant the assessment of the maturity of that child.[24] As Heneghan points out, '[i]f Article 12 is to have any meaning it must be the expression of views by the particular child on the particular child's terms, as the particular child sees their world'.[25] Accordingly, the degree to which a child is mature enough to make a decision or hold a view on a matter must be judged on a case-by-case basis, each child being treated as an individual in their own right.[26]

In this study, when it came to children attending court, it became apparent that chronological age was by far the most common determining factor for the large majority of participants. Despite age being proposed so widely, there appeared to be no specific criteria or agreement around this. Some participants did speak of determining a child's capacity for participation based on 'maturity' or 'understanding'; however, for the majority who referred to chronological age, there was significant variance of opinion, often apparently derived from quite arbitrary beliefs. There was no uniform approach to the question of the age above which it becomes appropriate for children to be asked to express their views, although the transition into adolescence was commonly cited:

> 'only age appropriate cases, so I do it for … well usually the child by 9 or 10' (Social Worker, County 1)
>
> 'I'd find it very difficult to involve a child of less than 12 in the proceedings. And why is that? Rigid thinking on capacity I guess …' (Judge, County 1)
>
> '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 of what has happened.' (Judge, County 3)

Some judges did refer to individual difference, development and maturity in children, unrelated to chronological age, in terms of considering ability to participate:

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[23] Op cit n 3, at para 29.

[24] Op cit n 3, at para 30.

[25] M Heneghan, 'Children and Lawyers Acting for Children in Legal Proceedings – What does a child's right to be heard in legal proceedings really mean?': www.childjustice.org/docs/henaghan2005.pdf. Date last accessed: 23 September 2010.

[26] Op cit n 3, at para 29.

> '… really all children are so different. There are some very, very bright children who could participate in something like, at eight years and there are, you know kids who mightn't fully be able to you know, participate at fifteen.' (Judge, County 1)

> 'If the guardian says, "the young person wants to see the judge", and if they are sufficiently mature and asking for this, I will see the child. The guardian will have given a pen picture of the child – level of maturity etc. The Court will note the chronological age of the child but more importantly their emotional and psychological age and level of understanding and any relevant mental health concerns.' (Judge, County 2)

While there was evidence of some professionals paying close attention to the difference between age and maturity, the tendency among professionals to rely on chronological age as a factor determining whether or not children are given the opportunity to express their views is concerning.

Importance of the skills of the listener

An additional barrier to meaningful participation in the proceedings is that children cannot have a voice if the professionals concerned are not adequately trained to hear them. A significant number of participants in this study expressed the view that the quality of the participatory experience for the child is directly influenced by the communication style and skill level of the judge concerned, which was seen to vary greatly from judge to judge:

> 'Some judges are suited to meeting children, some of them are not …' (Barrister, County 2)

> 'I have had very good experiences where the judge has been excellent. I had one recently which was excellent and I think it was heard outside of the (named days of the week) and I thought it made an awful difference because he made a specific time to see this girl and it went extremely well. And he was good with her and she was good with him and I felt she got a hearing that day.' (GAL, County 1)

> '… some are really okay with it and comfortable and seem to ask all the right questions and manage it in the right way, and others you can see they're doing their best, but they're struggling with what am I supposed to say to this 15-year-old or whatever.' (GAL, County 2)

> 'I think it would depend on the judge. I think a child meeting Judge [X] in chambers would be fine. But … I suppose I just don't think … Judge [Y] is child friendly, and I think he'd terrify the living daylights out of a child.' (Solicitor, County 3)

It emerged from the data that judges responsible for hearing child care proceedings may sometimes receive training in communicating with children and child development, but a significant number of judges will not have done so. This situation, combined with the unsuitable and non-conducive courtroom environments referred to earlier, was highlighted by some participants as informing their opinion that it was not in the best interests of children subject to child care proceedings to participate directly in the process:

> 'I can't think of any circumstance in which I think it's appropriate, where judges have no training as to how to communicate with children, so if there's training

> there and if there's a capacity for a judge to learn how to go about doing that then maybe there's scope for it.' (Solicitor, County 1)

Some judges themselves somewhat candidly echoed the views of other professional participants when outlining why they might not regard direct participation as preferable to less direct involvement

> '… a guardian ad litem is appointed and they develop a relationship with the child over a number of months, it could even be into a year or two, that I feel I'm getting a much better picture of the reality of the child than I would in a snapshot of 30 minutes inside in the court chamber and I don't feel adequately qualified to be assessing a child within that short period.' (Judge, County 3)

Thus, if direct participation is to be an available and effective option for children who are involved in child care proceedings, some level of judicial training in speaking with children would seem to be imperative. Positive steps have been taken in this regard in recent years, but there is scope for the expansion of judicial training to cover all areas and all judges.

Participatory mechanisms

In the Irish context, there are a number of mechanisms envisaged under the Child Care Act 1991, which, in theory, allow for child participation of a direct and indirect nature. These include: a direct conversation between the child and the judge; the obligation to grant a request made by a child to be present at a hearing or at a particular part thereof, unless it would not, having regard to the age of the child or the nature of the proceedings, be in the child's best interests; the appointment of a guardian ad litem for the child (who is mandated to present both the views of the child as well as what he/she considers to be in the child's best interests to the court); and finally, the child being joined as a party to the proceedings and represented by a solicitor. However, according to the insights of professionals who work within the system on a daily basis, it appears that the practical operation of these provisions of the Act does not necessarily reflect the spirit of Article 12 of the UNCRC.

Direct participation

Analogous to other jurisdictions, the primary mechanism through which the direct participation of children in Irish child care proceedings is facilitated is by way of a direct conversation between the child and the judge, either in chambers or in a cleared courtroom.[27] As with the other mechanisms, significant inconsistency arises from judge to judge and court to court in the frequency with which this occurs and the approach taken to it, a finding which largely corresponds to the experience in other countries.[28] Within the current study, it was found that this practice occurs to some extent in County 2, but very infrequently 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

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[27] R Hunter, 'Close Encounters of a Judicial Kind: "Hearing" Children's "Voices" in Family Law Proceedings' [2007] CFLQ 283, at p 290. P Parkinson and J Cashmore, 'Judicial Conversations with children in parenting disputes: the views of Australian Judges' (2007) 21(2) *International Journal of Law, Policy and the Family* 160, p 168.

[28] F Raitt, 'Judicial Discretion and Methods of Ascertaining the Views of the Child' [2004] CFLQ 151, at p 156. P Tapp, 'Judges are Human Too: Conversation between the Judge and the Child as a means of giving effect to section 6 of the Care of Children Act 2004' (2006) *New Zealand Law Review* 35. N Taylor and J Caldwell, 'Judicial Meetings with Children: Documenting Practice within the New Zealand Family Court' (2013) *New Zealand Law Review* 445, at p 462.

present:

> ‘I’ve had children where I’ve brought them to meet the judge because they’ve either asked, or I’ve just felt the judge really needed to meet this child, to understand, to know what they were like and to hear what they have to say. And they’ve always been very amenable to that.’ (GAL, County 2)

> ‘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)

> ‘I have met a number of children who have been involved in the proceedings … to allow them opportunity to give me their views on their care situation and I have been extremely impressed by their ability to be able to do that, their ability to be able to participate in that way, their willingness to engage and the clarity that they can bring to making their views known. I think perhaps there is a traditional fear in bringing children into a courtroom that it’s not a place for a child but I think in these particular cases we really have to look at that again.’ (Judge, County 2)

There are no quantitative statistics available on the frequency of such meetings; the data that is available suggests that it is (in the words of one social worker) ‘rare’, with indirect participation through the guardian ad litem being by far the more common approach.

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:

> ‘Children don’t get to go to court … they actually want to speak to the judge … but our court system is not set up in child care in relation to that.’ (Social Worker, 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 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 … There is no ideal kind of method of mediation. That’s why the guardian tends to be the best conduit for the child in those circumstances.’ (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)

Even when a private conversation with the judge was an option, there was a lack of consensus among participants about how exactly this should occur:

> 'There's a whole different feel to a judge's chambers, when you are being brought in then and you are felt much more welcome in a judge's chambers than you would in an actual court setting.' (Social Worker, County 1)

> 'The reason why I like to meet with the child in the courtroom is so that the child actually gets to see where the decisions are made and also the fact that there is the recording system within the court so we can utilise that because that recording system doesn't extend to chambers so that we can keep a record of what is said and not said and what goes on …' (Judge, County 2)

Apart from direct conversations between judges and children, section 30(2) of the Child Care Act recognises a situation where a court is obliged to accede to a request by the child to be present at the hearing. However, this is immediately qualified by a proviso that the court does not have to accede to such a request where 'having regard to the age of the child or the nature of the proceedings' it would not be in the interests of the child. Generally, in practice, a request from a child to be present at a hearing will be in response to a professional asking them if they wish to be directly involved in this way. As children are not automatically parties to child care proceedings and rarely may be joined as a party at the discretion of the presiding judge, the question of attendance must be put to them by their social worker, or occasionally, their guardian ad litem. However, several such professionals described being less than encouraging when discussing this issue with children:

> 'I never invite the child until such a time as the judge has said "Why is Mary Jane not here" and then I will go "Want to go court?", "No", "Grand", my car is skidding out of the actual car park …' (Social Worker, County 1)

> 'I have had some very vulnerable teenagers who are not able for the court arena and I would be saying that in the report. I would also be saying that directly to the teenagers "I don't think you're able for it at the moment. We can talk about it again".' (GAL, County 1)

This cautionary approach amongst social work practitioners towards children's direct participation in the court process has not gone unrecognised by the judges involved:

> '… my own understanding is that often the people they are speaking with will try to discourage them.' (Judge, County 1)

Some participants queried whether children were even being advised by the child care professionals working with them that direct participation in court was an option for them:

> 'In a guardian's report I've never seen them say, "I've asked the child whether they want to come to court" …' (Barrister, County 2)

One judge stated that she/he will seek to ensure that the child has the opportunity to vindicate his/her rights in this respect:

> 'Children of sufficient age and understanding must be told that they have rights and options. They have rights under the legislation to be present for the hearing or part of the hearing. They have rights to come in and talk to the Judge. They have

> rights if they're mature enough to ask to discharge their guardian and to have a solicitor and be joined themselves as a party to the proceedings. And it becomes relevant if the guardian is telling me that the child or young person has very definitive views which are inconsistent with their welfare and those of the guardian. So we ask the guardians to outline for the young person their options at that point.' (Judge, County 2)

The picture that emerges from the data is that there is some degree of direct participation in County 2, although it is not commonplace, while it is almost non-existent in Counties 1 and 3. The reasons given for this low level of direct participation varied, but what became apparent from the responses is that adult parties to the proceedings act as gatekeepers to child participation within the courts and determine whether a child will have a direct voice within proceedings of which they are the subject. In making this determination, a key consideration, particularly for social workers and GALs, is whether attendance at and participation in court proceedings is in the child's best interests. As already outlined above, the current court environment, as experienced by the professional participants, was deemed in the vast majority of cases to be an inappropriate place to which to bring a child. Some participants held particularly strong views in this regard:

> '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)

> '… you know children need to be kind of as far away from this process as possible to make life as normal as possible for them.' (Social Worker, County 2)

Some professionals considered not just the environment, but the content and significance of the proceedings also, in terms of the potential impact on that child:

> '… the pressure of bringing the children into such a formal setting and where there is a huge expectation on them to get the judge to change his mind I think it's quite emotionally abusive.' (GAL, County 1)

> 'I think it depends on what message that child is then given by the judge and how that's managed, or the child suddenly wants to see the judge every second week because they think they're going to have the power to change their current circumstances. So I think it needs to be managed very delicately and it depends on the child and their age.' (Social Worker, County 2)

> '… a child coming in might feel that they're being placed with the responsibility of the whole family scenario, they're being put in a conflictual position and I take the view … 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 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.' (Judge, County 3)

Interestingly, judges from one county in particular shared the cautions and concerns of the other professionals involved in respect of the direct participation of children in the court proceedings affecting them. The reasons given by these judges mirrored those expressed by other participants, and tended to concentrate on the prospect of children giving evidence rather than on children simply being present:

> 'I would try to avoid calling children to give evidence in most types of family law proceedings, because it would tend to polarise them on one side' (Judge, County 1)

> ‘I don’t think it’s proper to expose a child to legal proceedings, coming to court, fretting and worrying …’ (Judge, County 1)

> ‘I mean, I’ve had guardians say, “Judge – the child wants to speak to you” (well, now, in court, that would be). And I’ve had then – I have to be very careful there, because the child gets into the witness box, and the next thing is, the lawyer for mother or the father wants to cross-examine the child. So you have to be kind of, well, “this is tricky now” – you know? If somebody wants to come into an adversarial system, they’re entitled to – the other side are entitled to cross-examine. So this is where – I spoke about this welfare paradigm competing – and this inquisitorial paradigm – competing with the adversarial’ (Judge, County 1)

The latter reference to the right to cross-examine, while legally speaking is a rule of evidence, is yet another example of the Irish courts using the voice of the child for forensic purposes, something which is at odds with international best practice since the Committee on the Rights of the Child has made it clear that facilitating expression of the child’s views is for the benefit of the child concerned and is not to be used as evidence in court proceedings.

One judge, whilst acknowledging the dilemmas inherent in inviting children to participate directly within the court process, highlighted that the initial presumption should always be that such participation is their right:

> ‘I think the starting point is that they are entitled to a level of participation in proceedings. They are at the centre of it and they need to have that. I appreciate that people have strong views about children not being in court and not being involved in the process. But on balance, I think I’ve had an opinion about the traumatic or the potential trauma for children being involved in court proceedings. That would be involved now at the extent of being cross-examined and so on so forth. The opinion was that for some children it could be very damaging. For some children it could be cathartic. The problem is you wouldn’t know for 30 years which one it was.’ (Judge, County 2)

Of all the professional groupings, solicitors, barristers and judges were the most likely to see qualified positives in a child being present in court within the current system.

> ‘… if you are of a certain age of maturity that you are able to sort of be in that environment and listen to other people decision-making or speaking about you, you can, you are a stakeholder, you’ve a place at the table people will listen to what it is you have to say, but there’s a trade-off there.’ (Solicitor, County 1)

There was a clear majority opinion amongst all professional groups that direct participation by children within child care proceedings is welcome in theory. However, for some, it is the reality of the current experience that is deemed far from ideal for the child. This reality included the intimidating environments already mentioned, and the adversarial nature of the process into which the child would be entering. The overriding message was that the system as it currently operates is not a child friendly or even ‘safe’ environment for a child, and some spoke of a need to create different systems and environments to facilitate greater direct child participation:

> ‘We don’t work within a setting that has a way of including children safely at the moment and I think if that was there we would do it and we would look at it case by case’ (Social Worker, County 1)

Guardian ad litem

Section 26(1) of the Child Care Act 1991 provides for the appointment of a GAL in circumstances where it is 'necessary in the interests of the child and in the interests of justice to do so'. Unlike other jurisdictions where the GAL model exists,[29] the Act provides little guidance on the circumstances in which a GAL might be appointed, beyond the fact that the child cannot already be a party to the proceedings if a GAL is to be appointed. Moreover, there are no provisions in the Act itself concerning the role of the GAL in such proceedings or the qualifications that a GAL should have.[30] The accepted role of the GAL that has evolved is a dual role of communicating the child's wishes to the court, and advising the court on the child's best interests.[31] In 2009, the Children's Acts Advisory Board (CAAB) issued non-binding guidance on the role and qualifications of the GAL, as well as some limited guidance on when a GAL might be appointed, including factors such as the complexity of the case, the ability of the child concerned to express his/her feelings, the presence of an issue about a child's identity or nationality or where the child's liberty is at risk.[32] As this guidance has no legal weight, it tends to fall entirely to the discretion of the individual judge to decide on whether to appoint a GAL.

In this study, the frequency of GAL appointment varied significantly across counties. In County 1 it was experienced as the exception rather than the norm:

> '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 2 by contrast, the opposite situation pertains, and GALs are appointed in the 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)

> '… we have a high level of guardian ad litem associated with cases …' (Social Worker, County 2)

> 'Well, there would be guardians in I think the majority of cases that would come

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[29] In Northern Ireland, the Guardian Ad Litem Agency (NIGALA) was established under the Guardians Ad Litem (panel) Regulations (Northern Ireland 1996 (SI 1996/128) in accordance with the Children (Northern Ireland) Order 1995 (SI 1995/755), art 60(7). For further information see: www.nigala.hscni.net/. Similarly in Scotland, a curator ad litem is appointed in welfare proceedings where the child is too young to engage separate legal representation. This person may possess a legal or social work qualification. Safeguarders are appointed in Scotland in the non-adversarial children's hearings where it is considered necessary to do so in accordance with the Children (Scotland) Act 1995. C Donnelly, 'Reflections of a Guardian Ad Litem on the Participation of Looked-after Children in Public Law Proceedings' (2010) 16(2) *Child Care in Practice* (2010) 181. L Davis, 'In Practice: Children in Court' [2007] Fam Law 65. A Bilson and S White, 'Representing Children's Views and Best Interests in Court: An International Comparison' (2005) *Child Abuse Review* 220.

[30] See further N Carr, 'Guiding the GALs: A Case of Hesitant Policy-making in the Republic of Ireland' (2009) 12(3) *Irish Journal of Family Law* 60.

[31] See A McWilliams and C Hamilton, '"There isn't anything like a GAL": The Guardian ad litem Service in Ireland' (2010) 10(1) *Irish Journal of Applied Social Studies* 31.

[32] Children's Acts Advisory Board, *Giving a voice to children's wishes, feelings and interests* (Children's Acts Advisory Board, 2009), available at: www.caab.ie/Publications/PDFs---Publications/Giving-a-Voice-to-Childrens-Wishes,-Feelings-and-I.aspx), pp 6 and 9–10.

> before us, particularly cases that are going on for a period of time.' (Judge, County 2)

In County 3, a discrepancy was evident as between judges in the county: 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.)

There is no definitive published information relating to the frequency of GAL appointment in child care cases currently available. While the evidence presented above is relatively 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.[33] Clearly, therefore, there is little consistency in how judges choose to exercise the discretion granted to them by the legislation.

Attitudes towards the guardian ad litem role varied significantly between professionals, dependent upon the participants' experiences. Solicitors were more likely to identify positives in the appointment of a GAL (although this view was not unanimous):

> 'The top of the pile is the person who has both the skill and communication with the children … I have great respect and great time and I have great regard for the positive contribution to the decision-making that the guardian's report makes … let's see that as the optimum in our system at present in terms of representing children and children's participation in the process.' (Solicitor, County 1)

> 'I would rely a lot on what the guardian has to say, and I would talk a lot to the guardian as to what they think is happening here. How are they finding the client? I find them a great source of help usually. Even if they do end up agreeing with the social workers, I tend to kind of get to the root of why they're agreeing with the social workers and what's the rationale behind it.' (Solicitor, County 3)

However, this perceived level of skill was not the experience of many other participants, who identified variations in the quality of practice across guardians. Some participants explained these differences in quality, as earlier outlined, as a result of lack of definition and regulation of the guardian role, and this was perceived almost universally as a deficit in the service;

> 'My sense is, you know, the role of the guardian ad litem is unclear. I think it's unclear for the court, I think it's unclear for the guardians, I think it's unclear for the social workers, I think it's unclear from the general society. You know, I don't think it's defined clearly.' (Social Worker, County 3)

This lack of clarity was acknowledged by the guardians themselves, who also articulated a number of other challenges to their role, including its intrinsic duality, the risk of losing focus on the interests of the child within an adversarial court process, and a perceived duty to attempt to calm the often choppy waters of the child care proceedings process:

> 'I think it can be a contradictory role at times, so you have a child's wishes and

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[33] C Coulter, *Second Interim Report: Child Care Law Reporting Project* (October 2014), available at: www.childlawproject.ie/wp-content/uploads/2014/10/Interim-report-2-Web.pdf, pp 7, 10 and 61.

> feelings and you've got what's in the child's best interest, so while you can advocate for the child and put forward the child's opinion, you may not agree with the child in terms of what the child's best interests are and I think that's usually when the battle happens in court. You very rarely will get any issues around what the child is saying, everybody is usually very accepting of the child's opinion and the child's wishes and feelings, but usually it's the piece around what is in the child's best interest and particularly if you aren't agreeing with the child sometimes that can be perceived as you undermining the child and the child's wishes and feelings.' (GAL, County 1)

A number of social workers described tensions between their own role and that of the guardians, sometimes as a result of the two roles being seen to overlap. Social workers stated that the child's wishes and views are commonly incorporated into the reports that they write for court. However, given the discretionary nature of what is included in the social work report, it is possible that children will not always be guaranteed an input into the outcome of the proceedings. It should also be noted that a social work report, coming as it does from a party seeking a particular outcome to the proceedings, lacks a certain quality of impartiality. How much detail is given in social work reports, and whether the potential gravity of the court proceedings and their potential consequences are discussed with the child, is unclear:

> 'I'd always bring the wishes of the child into the court and report to the judge, whether I'm agreeing with it or not makes no … I mean, for example, I went up to visit the children last Monday, told them we are going for another care order, they said we don't want to be in care, blah, blah, blah; that goes into my court report that these are the wishes of the child, so I feel that that is very much my job I suppose really in relation to bringing forth the wishes of the child and their opinion in relation to care orders and their opinion in relation to what the outcome they would like to see.' (Social Worker, County 1)

> 'I mean like the HSE [Health Service Executive – now Child and Family Agency] reports will all have a section in it [about] what the child wants.' (Judge, County 1)

> 'I think people forget about this, but that's our role.' (Social Worker, County 2)

> 'Yes, I suppose like in my report I would outline as well like you know the child's wishes, whether they want to go home or not if it's appropriate depending on their age but I would include that in my own report. So there's a little bit of duplication I think there too.' (Social Worker, County 3)

Some social workers experienced the GAL's opinions being given more weight in court than their own:

> '… we have a high level of guardian ad litem associated with cases, which speaks volumes to me; we have no credibility when we go to court. Why do you need a GAL for such cases, sometimes, do you know what I mean? Because our job is to gain the wishes of the child and the voice of a child anyway. I get it on some cases, but I just think that guardian ad litem is going to be listened to more than social workers …' (Social Worker, County 2)

> 'As a social worker and obviously my role would also be to represent what's in the children's best wishes and sometimes I suppose, sometimes I feel that maybe the role of the guardian ad litem kind of maybe undermines that role a little bit … we might have been working with families for a long time and have built up

> relationships with the children and are equally able to advocate on what's in their best interests …' (Social Worker, County 3)

Judges, for their part, saw a role for the guardian in speaking on behalf of the child in situations where direct child participation in the court might be inadvisable; to advise the court as to whether a child wishes to participate directly, or to facilitate the use of creative methods of participation:

> 'Well the guardians will often bring letters from children, worksheets, workbooks from children, you know, I think we're as limited as our imaginations can be there in ensuring that the child can indirectly participate in proceedings.' (Judge, County 2)

> 'Now, they would have been transferred to me by the guardian ad litem, in other words "Johnny asked me to give you this letter", okay. And you see within that letter I might know there's a desire for that child to actually speak to me so I would say, we'll just say Johnny, "Would you tell Johnny I received his letter", I would tell the guardian ad litem "this is my response and if Johnny wants to talk to me about anything etc., etc., then I'd be very happy to meet him" or her. So I would leave the control back with the child to decide do I want to meet the judge or don't I.' (Judge, County 3)

Interestingly, one judge highlighted a new practice in their court, perhaps in an attempt to standardise the role somewhat in response to the types of concerns expressed by the participants above:

> '… we've started a practice, which I don't know was universally welcomed by guardians, to begin with, of saying that the guardian must, (A): engage with the child. The task required of the guardian isn't a paper analysis. The guardian must engage with the child regularly, even when the child is non-verbal. … (B): tell the judge whether the guardian feels what their level of maturity is and whether their view fits reasonably with their welfare (as perceived by the guardian).' (Judge, County 2)

The guardian ad litem is clearly the most common mechanism through which children are afforded the opportunity to express their views and participate in child care proceedings in Ireland. Nonetheless, over 20 years after its introduction, it remains replete with difficulties surrounding a lack of clarity on key issues such as function, criteria for appointment and qualifications, as well as inconsistency in rates of and reasons for appointment. It is thus welcome that plans have been recently announced for an extensive reform of the GAL system, including status, roles and responsibilities, the qualifications and criteria for the appointment of GALs, their legal representation and the management of a transparent service.[34]

The child joined as a party to proceedings

Section 25 of the 1991 Act provides that in any case where the court is considering the granting of an order in relation to the child, the child may be joined as a party to the proceedings and be afforded separate legal representation at the hearing. It is important to note that, as with the appointment of GALs, it is within the discretion of the court as to

[34] F Gartland, 'Department planning "extensive reform" of guardian scheme', *The Irish Times*, 9 June 2015.

whether or not such an order should be made. The court must be satisfied that it is in the interests of justice and in the interests of the child concerned. Ward has noted that 'the need for separate representation will probably only arise in the case of older children who have a level and degree of understanding of their circumstances'.[35] If, having considered the age, understanding and the wishes of the child concerned, the court is of the opinion that a separate legal representative should be appointed for the child, then any order appointing a GAL in that case will automatically cease. This is unlike the system in the United Kingdom which allows for dual representation of the child through the appointment of both a GAL and a separate representative for the child – and was once termed the 'Rolls Royce' of child care representation.[36]

In cases where the child is made a party to the proceedings, the court can direct the extent of their involvement in practice. They may be allowed to attend some or all of the case concerned. The restrictive nature of this provision in terms of the agency given to the child concerned is manifest, particularly where it allows the court to direct that counsel be appointed for the child. Section 25(3) provides that the power of the court to join the child as a party to the proceedings will not prejudice an application by the child to be present at the hearing of proceedings.

While this mechanism is a positive one in theory, the extent to which it is used in practice is rare. 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.[37] For the three counties covered by this study, the data suggests that solicitors are rarely used as a method of indirect participation for children, especially in Counties 2 and 3:

> '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)

> 'That would be very infrequent.' (Judge, County 2)

> 'I've only ever heard of it once.' (Social Worker, County 2)

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' (SW) from approximately the age of 14 upwards.

> 'I believe one of the new trends that's happening in the [County 1] District Court when you're talking about teenagers or older teenagers that one of the judges is appointing solicitors to represent the children as opposed to a guardian ad litem representing the children because there is this considered view that once the children reach a certain age that they can instruct a solicitor' (GAL, County 1)

Numerous participants (including solicitors themselves) were of the view that representation by a solicitor was not the preferred route of indirect participation for children in child care proceedings. The reasons given for this included lack of training and skills-set in communicating with children:

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[35] P Ward, *The Child Care Acts – Annotated and Consolidated* (Thomson Roundhall, 2nd edn, 2005) p 109.

[36] *Mabon v Mabon and Others* [2005] EWCA Civ 634, [2005] Fam 366, para [25]. See also Family Justice Review, *Final Report* (November 2011): www.gov.uk/government/uploads/system/uploads/attachment_data/file/217343/family-justice-review-final-report.pdf, para 95.

[37] C Coulter, *Second Interim Report: Child Care Law Reporting Project* (October 2014), available at: www.childlawproject.ie/wp-content/uploads/2014/10/Interim-report-2-Web.pdf, pp 7 and 61.

> 'I don't have that training … the guardian has which is the 5 years post-qualification social work experience … in that case it's a case of doing the best you can beyond simply representing what the child is dryly telling you as our legal instructions.' (Solicitor, County 1)

Despite the relatively rare appointment of solicitors to represent children in these proceedings, and the expressed reservations about the appropriateness and use of the role, the positive aspects of involvement of the solicitor in representing the child, as opposed to other indirect methods, was outlined in this example by one participant:

> 'I actually thought it worked out very well because as distinct from a guardian ad litem that comes from a social work background … In this particular case, I suppose this is only in the last 6 months, I spoke to the solicitor who was very competent in the area and he pointed out what his client, a 16-and-a-half-year-old boy was saying, all seemed very reasonable to me. Fortunately, the principal social worker was in court, I said this is what they're saying, it seems to me to be reasonable, what do you think? Yeah, we'll do that, we'll do that, we ended up withdrawing the proceedings, the application for supervision order, on the basis that the child was saying to his solicitor directly … if you have somebody there beyond the social work framework, you know, I think sometimes you can get a clearer view that it's not, you know muddled in with other issues.' (Solicitor, County 3)

Given the difficulties surrounding the use of the GAL in child care proceedings, it is not surprising that similar difficulties and inconsistencies have arisen (albeit to a lesser extent) around the use of solicitors to separately represent a child. This mechanism clearly offers distinct benefits that are not provided by a GAL, and therefore it should be maintained as an option; if it is to achieve its potential, steps need to be taken to adequately train solicitors to perform this role, and to clarify for judges when a solicitor might be appointed. The mutual exclusivity of GALs and solicitors is potentially a significant barrier to the appointment of solicitors, particularly in areas with high levels of GAL appointments, and this should be reconsidered.

Discussion

This study has identified a number of aspects of the current operation of child care proceedings in Ireland which appear to be non-compliant with international minimum standards as set out by Article 12 UNCRC in respect of effective and meaningful child participation. According to the UN Committee on the Rights of the Child, the actual wording of Article 12 leaves no room for discretion on the part of states parties.[38] In fact, it places a 'strict obligation' on states parties to fully implement this right for all children.[39] Since Article 12 applies to all children capable of forming views, the Committee has specifically discouraged states parties from introducing age limits both in law and in practice which may impact on the effective implementation of this fundamental right.[40] Thus, in theory, in accordance with Article 12, all children capable of forming views should have the

[38] Op cit n 3, at para 18(a)(i).

[39] Op cit n 3, at para 18(a)(i).

[40] Op cit n 3, at para 21.

opportunity to express their views in child care proceedings.[41] In principle, this provision entitles even very young children who are capable of forming views to have a voice in child care proceedings, regardless of the means through which they express themselves.[42] The evidence collected in this study suggests that very young children are facilitated in participating (whether directly or indirectly) in child care proceedings in Ireland to a significantly lesser degree than older children.

Despite child care proceedings, by definition, focusing on the welfare and protection needs of specific children, it is unclear from our data whether all children are even informed that they are at the centre of child care proceedings and that they have a right to a voice therein. Furthermore, it appears that very few children participate directly (by means of attendance at court) in the proceedings, which will have a significant role in determining their future care and living arrangements. As far as indirect participation is concerned, child representation by a solicitor was found to be very rare. Appointment of a GAL was more common; however, the level of such appointment is inconsistent across the country and even within individual courts. Children are rarely, if ever, given the ability to choose the manner in which they participate in the case. Thus, there is no standard practice across Ireland concerning whether or not children will be heard in child care proceedings affecting them and as a consequence, no guarantee that their voices will be heard.

In the current system as it stands, there appears to be no criteria or guidelines for any of the involved professionals regarding when a child should or should not be directly involved in these proceedings. It is these adult professionals – social workers, solicitors, judges and GALs – who are the decision makers and gatekeepers to the court proceedings for the children concerned. There is a consensus across professions that child participation is a good thing in theory but that Irish child care proceedings are not conducive to this in practice. This does not appear to be based on an ideology/belief system that is opposed to children's participation per se, but rather is a response to the current child care proceedings model in place, where the court environment is viewed as an intimidating one, with an adversarial model at its centre and an absence of a supportive, child-friendly process through which the child might participate safely and openly. Thus, while professionals claim to be in favour of child participation in the theoretical context of an ideal system, some might argue that this lets them off the hook in terms of facilitating children being heard under the existing framework.

It should be noted that there have been multiple calls for the establishment of a specialist family court in Ireland, and indeed we have argued elsewhere that the evidence presented in this study shows that such a reform is long overdue.[43] Thus, in the event that a specialist family court is established, the openness to change of the current professionals working within the system would be put to the test. That said, even in the absence of a specialist court, there are some measures that can be adopted in the meantime which could serve to create a more child-friendly environment for implementation. These include care proceedings being held in separate care only sessions in separate buildings from regular legal proceedings;

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[41] Indeed the Committee has asserted that 'Article 12 applies both to younger and to older children'. UN Committee on the Rights of the Child, General Comment No 7 (2005) on *Implementing Child Rights in Early Childhood*, UN Doc CRC/C/GC/7 (1 November 2005), para 14.

[42] Op cit n 3, at 1.

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

shedding some light on the level of judicial training in this area so that gaps can be identified and addressed;[44] and finally, increasing resources with a particular emphasis on regulating the training and supply of GALs for such proceedings.

Conclusion

The recent announcement of the reform of the GAL service 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. 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, and professionals such as judges and solicitors will require uniform levels of training in communicating with, and hearing the voices of children through a variety of child appropriate ways. This will of course require resources, but also changes in practices and cultures such that children are provided with adequate information to participate in an informed manner; that their views are taken seriously once expressed, and that they are kept informed of the decisions taken and the reasons underpinning these decisions.

[44] In New Zealand for example, there are guidelines in place for judicial conversations with children. See: www.justice.govt.nz/family-justice/about-us/info-for-providers/info-for-lawyers/judges-guidelines-decisions-with-children. See also J Boshier, 'International Family Justice from a New Zealand Perspective' (2008) *International Family Law* 149.