

CHAPTER 3:

Guardianship, Access and Custody

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3.1 INTRODUCTION

A range of international human rights standards and obligations contain provisions relevant to the rights of the child in the context of private family law proceedings in Ireland. The focus of this chapter will be on the UN Convention on the Rights of the Child (UNCRC) and the European Convention on Human Rights (ECHR) and the level of protection currently afforded these rights in the context of domestic family law and practice. The focus of this chapter is on proceedings relating to guardianship, access and custody of children.

This is an area of law in a state of flux due to the recent enactment of the Children and Family Relationships Act 2015 (hereinafter the 2015 Act) and the passing and coming into effect of the referendum in November 2012 on the introduction of Article 42A on Children's Rights into the Irish Constitution.

Article 42A has only recently taken effect due to a failed legal challenge to the result of the referendum. The 2015 Act, although signed into law on 6 April 2015, has at the time of writing, yet to be commenced and is therefore not yet in force.

The 2015 Act substantially reforms domestic law pertaining to guardianship, access and custody of children and represents a major and overdue reform of this area of law. This Chapter will therefore make reference to the law currently in force as well as the changes that will be introduced when the 2015 Act takes effect.

3.2 INTERNATIONAL HUMAN RIGHTS STANDARDS IN RELATION TO GUARDIANSHIP, ACCESS AND CUSTODY

As has been pointed out by Ursula Kilkelly 'altogether, it is clear that children have a right to know and be brought up by their parents. They have a right to live with them and where they live apart, they have a right to maintain regular and direct contact with them.'¹

The United Nations Convention on the Rights of the Child in Articles 7(1)² 8(1)³ and 18(1)⁴ guarantee the right of children to have a relationship with their parents regardless of their

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- 1 Ursula Kilkelly, *Children's Rights in Ireland; Law, Policy and Practice* (Tottel Publishing 2008) 114.
 - 2 (7) 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
 - 3 (8) 1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
 - 4 (18)1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

marital status. The Committee on the Rights of the Child has further explained the rights contained in Article 7 via its General Comment No. 7 and the role of parents in the formulation of the child's identity, particularly during the child's early years.⁵

Article 7(1) protects the right of the child to know and be cared for by her parents 'as far as possible'. MacDonald points out that the phrase 'as far as possible' constitutes a stricter and less subjective test than the concept of best interests and, thus, the circumstances in which it will be in the child's best interests will be relatively narrow and strictly construed.⁶ MacDonald further notes that the term 'cared for' has been found to 'imply a more active involvement on the part of the non-resident parent than simply paying child maintenance'.⁷ He further notes that the right of the child to know and be cared for by his or her parents has been found to encompass a right to knowledge of his or her origins.⁸

A further right guaranteed by the UNCRC is that the 'best interests' of the child must be a 'primary consideration' in decision making concerning the child.⁹ Although the Convention does not contain a definition of 'best interests', the UN Committee on the Rights of the Child has published its *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* which provides that this is a concept to be applied on a case by case basis.

Article 5 of the UNCRC provides that States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the Convention. MacDonald notes that the rights of children remain constant but the manner in which they are given effect is dependent on age, development and understanding of the child and that 'the principle of "evolving capacity" refers to the process of maturation and learning whereby children

progressively acquire knowledge, competencies and understanding, including acquiring understanding about their rights and how best they can be realised.¹⁰

Article 14 of the UNCRC obliges State Parties to respect the right of the child to freedom of thought, conscience and religion and the rights of parents, and when applicable, legal guardians, to provide direction to the child in the exercise of his/her right in a manner consistent with the evolving capacities of the child. MacDonald points out that the child's right to freedom of thought, conscience and religion 'must be interpreted in accordance with the best interests of the child in accordance with Art 3(1) of the UNCRC'.¹¹ He further notes that the evolving capacity of the child as outlined in Article 5 of the UNCRC is crucial to the interpretation of this Article and in relation to parental direction, that the extent of this;

will be dependent on the age, development and understanding of the child. Direction and guidance provided by the parents should be 'child centred' and achieved through dialogue and should not go beyond that which is necessary to provide direction and guidance. It is the child and not the parent who exercises the right to freedom of conscience, thought and religion.¹²

MacDonald notes that the position of the child in respect of freedom of thought, conscience and religion is stronger than in respect of religious education. Article 5 recognises that, as between children, parents and the State, the application and enforcement of children's rights moves from being an exercise of parental responsibility (or State intervention) to an exercise in participation and, finally, self-determination. Each of the rights under the Convention must be read subject to Article 5.¹³

The International Covenant on Civil and Political Rights (ICCPR) acknowledges, in Article 23, that the family is the natural and fundamental unit group of society and is entitled to protection by society and the State. It requires State Parties to ensure equality of rights and responsibilities as between spouses to a marriage throughout the duration of the marriage and at its dissolution. In the context of dissolution, the Article also provides for the necessary protection of children. This has been interpreted, by the Human Rights Committee, as including the provision of contact with his or her parents.¹⁴ The ICCPR does not contain a best interests principle but MacDonald notes that the Human Rights Committee has made clear, in the context of the development of General Comments on the Convention, 'that the child's interests are paramount in cases involving parental separation and divorce'.¹⁵

5 UN Committee on the Rights of the Child, 'General comment No. 7 (2005): Implementing child rights in early childhood' (1 November 2005) CRC/C/GC/7.
6 Alistair MacDonald QC, *The Rights of the Child; Annotated Materials* (Family Law Jordan Publishing 2014) 24; Peter Newell and Rachel Hodgkin, *Implementation Handbook for the Convention on the Rights of the Child* (3rd Edition UNICEF 2008) 109.
7 *ibid.*
8 Alistair MacDonald QC (n6) 24.
9 Article 3 of the CRC states: 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

10 Alistair MacDonald QC (n6) 20.
11 *ibid* 37-38.
12 *ibid.*
13 *ibid* 39.
14 The Human Rights Committee, 'Wim Hendriks, Sr. v. The Netherlands, Communication No. 201/1985' (27 July 1988) CCPR/C/33/D/201/1985.
15 Alistair MacDonald QC (n6) 111.

Article 8 of the ECHR protects the right to family life which clearly applies also to children. As Kilkelly states 'The European Court of Human Rights has confirmed the relevance of Article 8 to private family law disputes and the compatibility with the Convention of decisions regarding access and custody (as well as legal recognition of family ties...) is an issue in a growing number of cases'.¹⁶

The European Court of Human Rights (ECtHR) has found that the right of a child to know and have a relationship with both of his/her parents engages Article 8 of the ECHR, given that this is an intrinsic and essential component of a child's identity.¹⁷ The ECtHR has also found a positive obligation on the State to act in a manner designed to enable the link between a child and his/her parents to be developed, from the moment of birth.¹⁸

Interestingly, the ECtHR has found, in a number of recent cases, that there had been a violation of Article 8 of the ECHR, concerning the children's right to respect for their private lives in circumstances where the State refused to grant legal recognition to parent-child relationships legally established in another State between children born as a result of surrogacy arrangements and couples who had the treatment. The ECtHR based its decisions on the undermining of the children's identity in the country in which they resided (France) and the fact that the French case-law completely precluded the recognition of a legal relationship between the children and their biological father.¹⁹

3.3 REVIEW OF IRISH LAW TO IDENTIFY GAPS

Guardianship Rights

Guardianship refers to the globality of rights, duties and responsibilities exercised by a parent in respect of a child. In *RC v JS*,²⁰ Finlay Geoghegan J. approved the following passages from *Shatter's Family Law*²¹ as an accurate general statement of the law:

Guardianship describes the group of rights and responsibilities automatically vested in the parents of a child born within marriage and in the mother of a child born outside marriage in relation to the upbringing of the child...Guardianship encompasses the duty to maintain and properly care for a child and the right to make decisions about a child's religious and secular education, health requirements and general welfare. The right to custody of a child is one of the rights that arises under the guardianship relationship.²²

16 Kilkelly (n 1).

17 See, for example, *Rasmussen v Denmark* (1985) 7 EHRR 371 and *Mikulic v Croatia* (2002) 1 FCR 720.

18 See, for example, *Marckx v Belgium* (1979) 2 EHRR 330 and *Johnston v Ireland* (1987) 9 EHRR 203.

19 *Mennesson & Ors v France*, App no. 65192/11 (ECtHR, 26 June 2014) and *Labassee v France*, App no. 65941/11 (ECtHR, 26 June 2014).

20 [2003] 4 IR 431.

21 (4th ed.) 531-532.

22 *ibid.*

While the 2015 Act does not define guardianship, it does, as outlined later in this chapter, define the rights and responsibilities of a guardian and these generally accord with the dicta above. A number of difficulties arise from the legal framework governing guardianship, access and custody of children in Ireland currently in operation, prior to the changes in law provided for by the 2015 Act taking effect. The rules relating to guardianship of children are outmoded and arguably do not adequately protect the rights of the child to have their parents act as joint guardians if they are unmarried. The rights, duties and responsibilities associated with guardianship are not defined in the legislation currently applying. In addition, where children are separated from their parents and are living, for example, in private family arrangements the current rules do not appear to permit a carer in those circumstances to be appointed as a guardian.²³

Under the regime currently in operation, the unmarried father has no right to be appointed a guardian in Ireland; the right has been expressed as the 'right to apply for guardianship'.²⁴ Kilkelly, examining the statistics on the refusal of guardianship applications expressed concern that fathers had to seek recourse to the Courts:

This highlights the urgent need to undertake reform to address the legal position of the father so that those seeking to be involved in their children's lives, but frustrated in that process, enjoy access to an effective remedy which gives due consideration to their rights but, more importantly, to the rights of their children.²⁵

In the ECHR case of *Zaunegger v. Germany*,²⁶ Judgment delivered on 3 December 2009 lends support to those who argue that the lack of provision for guardianship on establishment of paternity breaches the European Convention on Human Rights. The Strasbourg Court found a breach of Article 14 of the Convention, which guarantees equal protection of Convention rights.

23 There is, under the law currently in operation, no express provision in the Act of 1964 for the appointment of a non-biological guardian during the lifetime of the existing guardians. However in the recent case of *MR v SB* (2013) (unreported), Abbot J concluded that he had an implied power to appoint another appropriate person as a guardian where the court had decided that it should not return the children to the mother. He reasoned that this implied power arose under s 16 of the 1964 Act and "having regard to the general imperative of the Guardianship of Infants Act 1964 that the welfare of the child shall be paramount". Section 16 of the 1964 Act provides: "that where a parent has: (a) Abandoned or deserted an infant, or (b) Allowed an infant to be brought up by another person at that person's expense, or to be provided with assistance or to be provided with assistance by a health authority under s 55 of the Health Act 1953, for such a length of time and under such circumstances as to satisfy the court that the parent was unmindful of his parental duties, the court shall not make an order for the delivery of the infant to the parent unless the parent has satisfied the court that he is a fit person to have the custody of the infant."

24 See the Judgment of McKechnie J. in *G.T. v G.A.O.* [2007] IEHC 326, which summarised the relevant law applying to guardianship in this jurisdiction. Surveying the case-law including *SW, An infant, J.K. v. V.W.* [1990] 2 IR 437 in which the Supreme Court held that section 12 of the Status of Children Act did not confer any natural or Constitutional rights on an unmarried father, although there "may be rights of interest or concern arising from the blood link between the father and child". It also held that the High Court was incorrect in that s. 6A did not, even prima facie, confer guardianship rights on an unmarried father. What the 1964 Act as amended, did, was to grant to him the 'right to apply' for guardianship but no more.

25 Kilkelly (n1) 125.

26 App no 22028/04 (ECtHR, 3 December 2009).

Although this case dealt specifically with German custody laws as opposed to those dealing with parental responsibility, the Court made firm pronouncements on differential treatment of parents in respect of their rights and responsibilities to their children born out of wedlock.²⁷

Much of this mischief will be addressed once the 2015 Act comes into force. The 2015 Act significantly reforms the law relating to guardianship. The Act provides for automatic guardianship rights for an unmarried father who has cohabited with the child's mother for one year including a period of three consecutive months, after the birth of the child, where both have lived with the child.

The Act also provides that where the other parent of the child is the mother's civil partner or where the other person is a parent for the purpose of the provisions of the Act relating to parentage of a child for the purpose of Donor Assisted Human Reproduction, that other parent will have automatic guardianship of the child.

In addition, the Act entitles a person who is not a parent of the child who is over the age of 18 years and is the spouse, civil partner or cohabitant (for a period in excess of 3 years) of a child's parent and who has shared responsibility for the day to day care of the child for a period in excess of 2 years, to apply for guardianship of such a child.

The 2015 Act provides a statutory definition, for the first time in Irish law, of rights and responsibilities of a guardian. These include decisions as to the child's place of residence and with whom they should reside, religious, spiritual, cultural and linguistic upbringing, and consent to medical treatment.

It is noteworthy also that the 2015 Act will, once in force, put in place a regime for the attribution of parentage in the context of Donor Assisted Human Reproduction and provides for guardianship where the conditions relating to the attribution of parentage and other conditions are met.²⁸ The 2015 Act will not address surrogacy arrangements and the attribution of parentage or guardianship in the context of those arrangements.²⁹

27 While accepting that it may be necessary to attribute parental authority to the mother in a non-marital situation at birth owing to the various situations in which conceptions of births outside marriage occurs the Court said at para. 56 that: "there may exist valid reasons to deny an unmarried father participation in parental authority, as might be the case if arguments or lack of communication between the parents risk jeopardising the child's welfare. However, nothing establishes that such an attitude is a general feature of the relationship between unmarried fathers and their children". The Court, while allowing a margin of appreciation especially in dealing with custody-related matters, also considered "the evolving European context in this sphere and the growing number of unmarried parents"

28 See sections 5 and 43 and 49 of the Children and Family Relationships Act 2015.

29 In *MR v TR* [2013] IEHC 91, [2014] IESC 60, Denham CJ held that no legislation, has been passed by the Oireachtas to address the issues which arise on surrogacy arrangements. Denham CJ held that as a significant social matter of public policy it is clearly an area for the Oireachtas, and it is not for the Supreme Court to legislate on the issue. Denham CJ held that the appeal would be allowed and the orders of the High Court, permitting the registration, would be quashed.

Access and Custody of Children

Custody refers to day to day care and control of the child. Pursuant to section 10(2) of the Guardianship of Infants Act, 1964, as amended, a guardian is entitled, as against other non-guardians, to custody of their child. Married parents are joint custodians of their child even after the dissolution of the marriage. Under the system currently in operation, an application can be made for custody pursuant to the Guardianship of Infants Act by an unmarried father, even where he is not a guardian of the child. Section 11A of the 1964 Act permits a Court to make an Order for joint custody in respect of a child and the approach of the Irish Courts has been to do this where it is appropriate and workable in the individual case. In practice, this does not necessarily mean that the child will reside with each parent for an equal proportion of the time as primary residence is often agreed and/or awarded to one parent notwithstanding the joint custody order.

Section 57 of the 2015 Act amends the 1964 Act by providing that relatives and certain persons may apply for custody of a child. Once the 2015 Act comes into force, the new section 11E of the 1964 Act will permit a number of categories of person to apply for custody of a child. A relative or a person with whom the child resides, where that person is, or was married to, or was in a civil partnership with the child's parent, or was for a period of 3 years, the cohabitant of the parent and has for a period of more than 2 years shared responsibility with the parent, of the day to day care of the child, will be in a position to apply.

Similarly, an adult who has, for a continuous period of more than 12 months, provided for the child's day to day care and the child is without a guardian who is willing or able to exercise the rights and responsibilities of guardianship in respect of the child, will be able to apply for custody of that child. The Court will be empowered under the section to appoint such persons jointly with a child's parent and make orders as to the residential arrangements for the child where these are not agreed and specify contact arrangements, where appropriate.

Other relevant reforms contained in the Act include the following: altering the guiding principle of 'welfare of the child' to the 'best interests' of the child; requiring the Court to have regard to the fact that unreasonable delay in proceedings may be contrary to the child's best interests; providing for an improved mechanism for enforcing contact and custody orders and removing the two stage process for non-parents seeking access or contact through the courts.

Access is the means of ensuring that the child is able to maintain a relationship with the parent with whom he/she is not residing. It is an important tool in realising the child's rights. Under the law currently in operation, a mother or father may apply for access pursuant to section 11A of the 1964 Act. A relative or person acting in *loco parentis* can apply to the Court for access pursuant to section 11B of the 1964 Act. There is a leave requirement for applications under section 11B and the Court must, in determining whether to grant leave, have regard to all of the circumstances including the

connection of the application to the child, the risk of disruption to the child's life and the view of the child's guardians.

Once leave is granted, the test is the welfare of the child. The denial of access or the placing of limitations on access, are only legally tenable if in line with the welfare of the child. The Supreme Court, in a recent case, upheld the decision of the High Court to suspend/curtail overnight access between a child and his father on welfare grounds.³⁰

The 2015 Act will, once in force, amend the provisions of the 1964 Act relating to access by substituting the terms 'mother and 'father' for 'parent' and clarifying the right of a parent who is not a guardian to apply for custody or access of a child. Section 11B of the 1964 Act, which regulates relative access, will be amended to specifically include a person with whom the child resides or has formally resided (replacing the concept of *in loco parentis* for the purpose of that section) and abolishing the leave requirement for applicants. The 2015 Act will, once in effect, also add the views of the child and the extent to which it is necessary to make an order to facilitate access to the statutory circumstances to which the Court must have regard in considering the application.

Clearly, issues arise as to the enforcement of custody and access orders by the Courts. Kilkelly points out that:

Parents with custody can and do frustrate or make access to children difficult for the non-residential parent and, in such circumstances, the only remedy available is to return to the family court. However, the courts are reluctant to impose sanctions on parents who fail to comply with an order for access and are left with little choice but to remind parents of their duties in this area, including the duty to act in the best interests of their child by ensuring that access take place and attaching conditions to the order to make it more effective.³¹

The 2015 Act aims to improve this situation by providing for the making of enforcement orders pursuant to section 60 of the Act which will, once in effect, amend section 18 of the 1964 Act. One of the powers of the Court, when granting an enforcement order, will be to grant additional access in order to allow any adverse effects on the relationship caused by the denial of access to be addressed and direct that the Applicant and/or Respondent attend a parenting course or family counselling – either individually or together and receive information on the possibility of availing of mediation to resolve the dispute. The section also provides for the voice of the child to be heard in the context of enforcement proceedings. The 2015 Act will, when in force, also permit an application for re-imbursment of necessary expenses incurred by a parent or guardian of a child incurred due to the non-exercise by the other guardian or parent of their rights to custody or access.

30 *MM v GM* [2015] IECA 29.

31 Kilkelly (n 1) 155.

Best Interests of the Child

Section 45 of the Children and Family Relationships Act 2015 will, once in force, amend section 3 of the Guardianship of Infants Act, 1964, mainly to provide that the best interests of the child shall be determined by Part V of the 2015 Act. Section 31 of the Act, contained in Part V, sets out the factors and circumstances to which the Court must have regard in determining what is in the best interests of the child, for the purposes of the Act. This is not an exhaustive list but includes the benefit to the child of having a meaningful relationship and sufficient contact with each of his or her parents and with other relatives or other persons involved in the child's upbringing, except where this is contrary to the child's best interests, the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the child and his or her other parent and to maintain and foster relationships between the child and his or her relatives, and the history of the child's upbringing and care including that relationship between the child and the parent(s) or relative concerned.

Also included are factors relating to the needs of the child. Section 31(2)(c) provides for the child's physical, psychological and emotional needs in light of the child's age and stage of development and the likely effect on him or her of any change of circumstances. Section 32(1)(e) and (f) require that the child's religious, spiritual, cultural and linguistic upbringing and needs and the child's social, intellectual and educational upbringing and needs must be considered.

The age and any special characteristics of the child, and their views, if ascertainable, must also be taken into consideration. Section 31(2)(k) requires the Court to take into consideration the capacity of the parent or relative concerned to care for and meet the needs of the child, to communicate and co-operate on issues affecting the child, and to exercise the relevant powers, responsibilities and entitlements to which the application relates. This statutory guidance is welcome.

3.4 INTERNATIONAL HUMAN RIGHTS STANDARDS IN RELATION TO THE RIGHT OF THE CHILD TO BE HEARD

The UNCRC makes clear that children are to be viewed as active individuals in a position to have as full an input as possible into matters affecting them.³² Article 12 of the UNCRC

32 The Article states as follows:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those 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.
2. For this purpose, the child shall in particular be provided an opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of the national law.

provides that the child who is capable of forming his or her own views has the right to express those views freely in all matters affecting them and that due weight should be given to those views in accordance with the age and maturity of the child. Article 12(2) provides that, in particular, the child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The importance of Article 12 as a guiding principle of the Convention, closely allied to the Child's right under Article 13 to freedom of expression and required for the purpose of the realisation of the other rights under the Convention has been articulated by the Committee on the Rights of the Child in General Comment No. 12 on the right of the child to be heard.³³

In relation to the capability requirement the Committee have stated that this is not to be interpreted as a limitation but rather 'an obligation for States Parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible'.³⁴ In essence therefore, it is not for the child to first prove his or her capacity but rather a presumption that the child has the capacity to form his or her own views.

The Committee underlines that:

Full implementation of Article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences.³⁵

In terms of mechanisms by which a child should be heard the committee recommends that where possible, the child should be given the opportunity to be heard directly and if indirectly effected, the child's views must be transmitted correctly to the decision maker by the representative. It is also recommended that codes of conduct be developed for representatives who are appointed to represent the views of the child.

As noted by MacDonald:

The qualification contained in Article 4 in relation to economic, social and cultural rights, that States parties shall undertake implementation of those rights "to the maximum extent of their available resources" does not apply to civil and political

rights, including those enshrined in Art 12. Accordingly, implementation of Art 12 should not be dependent on the availability of resources.³⁶

The Committee on the Rights of the Child, has in the context of General Comment No. 12, emphasised the interaction between Article 12 and Article 5 of the UNCRC, which deals with the evolving capacity of the child. The General Comment encourages an approach to parenting where children can freely express views and be taken seriously as this approach 'serves to promote individual development, enhance family relations and support children's socialization and plays a preventative role against all forms of violence in the home and family'.³⁷ At paragraph 93, the Committee urges States to promote parent education programmes which 'build on existing positive behaviours and attitudes and disseminate information on the rights of children and parents enshrined in the Convention'.³⁸

Disputes about child custody in respect of which there is an EU dimension and to which EU Regulation 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, (known as Brussels II bis) applies, requires the Court to hear the voice of the child before making orders pertaining to the child's welfare and custody. This is mandated by the terms of the Regulation itself. This is currently achieved via the procurement of a section 47 report and/or judicial interview of the child.

3.5 REVIEW OF IRISH LAW FOR ASCERTAINING THE VIEWS OF THE CHILD

A number of pieces of child and family law legislation already contain provisions aimed at ensuring that the voice of the child is heard. These include the Guardianship of Infants Act, 1964, as amended and the Child Care Act, 1991, as amended. Section 25 of the Guardianship of Infants Act, 1964, as amended, states:

In any proceedings to which section 3 applies, the Court shall, as it thinks appropriate and practicable having regard to the age and understanding of the child, take into account the child's wishes in the matter.

The parameters of section 25 were considered by Finlay Geoghegan J. in *FN v CO*,³⁹ involving a custody dispute in respect of two children aged 14 and 13 between the

33 UN Committee on the Rights of the Child, 'General comment No. 12 (2009): The right of the child to be heard' (20 July 2009) CRC/C/GC12.

34 *ibid.*

35 *ibid.*

36 Alistair MacDonald QC (n 6) 32.

37 UN Committee on the Rights of the Child (n 33) para 90.

38 *ibid* para 93.

39 *FN v CO* [2004] IEHC 60.

children's father, his new wife and the paternal grandfather and the children's maternal grandparents. The mother of the children was deceased, having died in 1995 since which time the children effectively lived with their maternal grandparents, the Applicants.

The Applicant grandparents sought to be appointed guardians of the children and sole custody of them on the basis that the children had been residing with them in Ireland since 1998. A section 47 assessment was carried out, and the trial judge interviewed the children in chambers. In her findings of fact, the learned trial judge found, among other things, that the children were of an age and maturity to have their wishes taken into account; that each girl considered the applicants as *de facto* parents and regard their home as being with them; that they each wished to remain in Ireland and objected to moving to England; and that it would be detrimental to their welfare to require them to move to England against their wishes and that it was in their interest to have regular contact with their father.

It was held that section 25 of the 1964 Act required the courts to take positive action within the terms of the section.

While it was noted that section 25 only demands that the wishes be taken into account, it was held that in considering the weight to be given to such wishes, the statutory purpose of section 25 must be considered. It was noted that an individual in respect of whom a decision of importance was being made, including those under section 3 of the 1964 Act, had a personal right under Article 40.3 of the Constitution to have the decision made in accordance with natural and constitutional justice. Those principles include the right of a child, of appropriate age and understanding, to have their wishes taken into account by a Court in making a decision to which section 3 of the 1964 Act applies and it was held:-

Hence s.25 should be construed as enacted for the purpose of *inter alia* giving effect to the procedural right guaranteed by Article 40.3 to children of a certain age and understanding to have their wishes taken into account by a court in making a decision under the Act of 1964, relating to the guardianship, custody or upbringing of a child.⁴⁰

This decision underscores and clarifies the importance of section 25. It was also noted, in respect of the right of the children to have decisions taken in the interests of their welfare:

It appears to me that the right of a child to have decisions in relation to guardianship, custody or upbringing, taken in the interests of his/her welfare is a personal right of the child within the meaning of Article 40.3 and therefore one which the State pledges to vindicate as far as practicable.⁴¹

40 *ibid.*
41 *ibid.*

As identified by Mary O'Toole SC,⁴² there are effectively five methods in our current system by which the wishes and views of a child can be ascertained: by direct evidence from the child, by the child speaking privately to the judge, by the appointment of a Guardian *ad litem*, by ascertaining the views of the child through a section 47 assessment and by providing for the child to be separately legally represented as a party to the proceedings.⁴³

Direct Evidence from the Child

Section 28 of the Children Act, 1997 permits a Court to accept the unsworn evidence of a child under 14, provided that the child can give an intelligible account of evidence relevant to the proceedings. However, this is not an approach that has found much favour with parents or practitioners in the private family law context for reasons relating to the pressure such an approach could place on a child and the potential trauma of the court environment and process.

Child Speaking Privately to the Judge

This creates obvious evidential difficulties in that the child's statements to the Judge cannot be tested in cross-examination. In *O'D v O'D*, in a decision of Abbott J., delivered on 26th May 2008, the Judge sets out the process for interviewing children and the circumstances in which such interviewing should take place. At paragraph 10, he sets out the approach the Court should take in talking to children in cases such as this:

1. The judge shall be clear about the legislative or forensic framework in which he is embarking on the role of talking to the children as different codes may require or only permit different approaches.
2. The judge should never seek to act as an expert and should reach such conclusions from the process as may be justified by common sense only, and the judge's own experience.
3. The principles of a fair trial and natural justice should be observed by agreeing terms of reference with the parties prior to relying on the record of the meeting with children.
4. The judge should explain to the children the fact that the judge is charged with resolving issues between the parents of the child and should reassure the child that in speaking to the judge the child is not taking on the onus of judging the case itself and should assure the child that while the wishes of children may be taken into consideration by the court, their wishes will not be solely (or necessarily at all,) determinative of the ultimate decision of the court.
5. The judge should explain the development of the convention and legislative background relating to the courts in more recent times actively seeking out the voice of the child in such simple terms as the child may understand.
6. The court should, at an early stage ascertain whether the age and maturity of the child is such as to necessitate hearing the voice of the child. In most cases the parents in dispute in the litigation are likely to assist and agree on this aspect. In the

42 Mary O'Toole 'The Voice of the Child and the Role of the Guardian ad Litem' (Seminar of the Irish Family Lawyers Association, Summer 2013).
43 *ibid.*

absence of such agreement then it is advisable for the court to seek expert advice from the section 47 procedure, unless of course such qualification is patently obvious.

7. The court should avoid a situation where the children speak in confidence to the court unless of course the parents agree. In this case the children sought such confidence and I agreed to give it them subject to the stenographer and registrar recording same. Such a course, while very desirable from the child's point of view is generally not consistent with the proper forensic progression of a case unless the parents in the litigation are informed and do not object, as was the situation in this case.

It is clear from the above that Abbott J. considers parental consent necessary in this context and that a stenographer be present.

The Supreme Court in 2001 considered the question of the interviewing of children in chambers in *AS (Otherwise AB) v RB*.⁴⁴ Lavan J. had heard an application for a decree of nullity, together with reliefs pursuant to the Guardianship of Infants Act, 1964 and other statutory reliefs. The trial judge interviewed the child of the parties in chambers. This formed one of the grounds of appeal to the Supreme Court. The Supreme Court held:

While I can understand the approach adopted by the trial Judge to this matter in proceedings of this nature, the fact remains, that, as a matter of principle the only evidence which a trial Judge, in family law proceedings, as in other proceedings can receive his evidence on oath or affirmation given in the presence of both the parties and their legal representatives. It has long been recognised that trial Judges have a discretion as to whether they will interview children who are the subject of custody or access disputes in their chambers, since to invite them to give evidence in Court in the presence of the parties or their legal representatives would involve them in an unacceptable manner in the marital disputes of their parents. Depending on the age of the children concerned, such interviews may be of assistance to the trial Judge in ascertaining where their own wishes lie and that would undoubtedly have been the case in with Ru in these proceedings. It is however, sufficient to say, that while the objection to the Trial Judge having seen Ru in his chambers was well founded, as there is no serious issue as to the legal custody of Ru and the question of access, if it cannot be agreed, must be determined now in the High Court no order is required in respect of the proceedings under the Guardianship of Infants Act.⁴⁵

The Supreme Court did not offer any clear principles in relation to this procedure. O'Toole notes the views of Clissman and Hutchinson (2006) who argue that 'it is profoundly unclear where the judicial discretion to hear the views of an infant in this way is derived from'.⁴⁶ They conclude that the information gathered in this process either

constitutes the giving of evidence or is gathered by the judge but is not properly before the Tribunal of fact when the hearing resumes. The authors also point out that section 23 of the Children Act, 1997 permits the admission of the statement of a child under certain circumstances without requiring the child to come to court to give sworn evidence.

Appointment of a Guardian *ad Litem*

The Children Act, 1997, inserted a new section 28 into the Guardianship of Infants Act, 1964 to provide for the appointment of a Guardian *ad litem* in guardianship, custody and access proceedings. The provision has not, as yet, been commenced with the result that it is not currently possible to have a Guardian *ad litem* appointed in private family law matters. Even if the provision were to take effect serious issues arise in relation to the funding of a Guardian *ad litem* in private law; the cost presumably having to be borne by the parties to the proceedings.

In the case of *AB v CD*,⁴⁷ Abbott J. confirmed that neither the Circuit nor the High Court had the power to appoint a Guardian *ad litem* in the context of private family law proceedings.

In *C v W*⁴⁸ Abbott J. was dealing with an appeal from the Circuit Court to the High Court of a decision to permit a father to relocate to Hong Kong with his two children. During the course of the appeal to the High Court, an argument was made that the High Court was empowered to appoint a Guardian *ad litem* to represent the children or to make them parties to the proceedings and to provide for them to be separately represented.

It remains to be seen whether the coming into effect of Article 42A will have an impact in this area.

Ascertaining the Views of Children via a Section 47 Report

Section 47 reports are a widely used tool in private family law proceedings in this jurisdiction. They are provided for in section 47 of the Family Law Act, 1995. Generally, the assessor will provide a report to the Court to assist in determining a family law dispute and make recommendations as to practical arrangements for the care and custody of the children in circumstances where the parties are no longer living together. However, it is not clear that the purpose of a section 47 report is in fact to adduce the views of the child.

Separate Representation for Children

This approach confers on children and young people an active role in the proceedings affecting them. This model requires that the child be made a full party to the

44 *AS (Otherwise AB) v RB* [2001] IESC 106.

45 O'Toole (n 39).

46 *ibid* 21.

47 *AB v CD* [2011] IEHC 435.

48 *C v W* [2008] IEHC 649.

proceedings and instruct their own lawyers to represent them in said proceedings. The benefits of this approach may be more discernible in the child care context than in private family law disputes where there is a risk of children becoming embroiled in intractable disputes between their parents. Mary O'Toole SC points out that the research suggests that children in those family law disputes do not wish to have responsibility for the outcome of proceedings and would prefer not to be separately represented in those contexts.

Taking the human rights standards and the notion of the evolving capacity of the child and the constitutional amendment into account, a sea change is necessary on this issue in Irish law and practice. At present, the views of the child in private family law proceedings fall to be dealt with in a section 47 report or via the child talking to the judge in chambers. Section 47 reports were not specifically designed for this purpose and are extremely costly to parties. The option of the child talking to the Judge in chambers is one fraught with complexity in terms of the evidential issues it raises and the fact that few judges are trained for this role.

Jane Fortin states, in the context of English proceedings, that 'research re-inforces the view that children who do obtain separate legal representation find the support they receive thereby extremely helpful. In particular, a separate representative may be able to gain children's confidence and support them in long-running intractable contact disputes'.⁴⁹ The author goes on to state that 'a heightened appreciation of human rights law seems to have provoked a judicial acknowledgement that children may have a "right" to participate in judicial proceedings involving them'. Two decisions in particular of the UK Courts receive attention from Fortin. In *Mabon v Mabon*⁵⁰ Thorpe J., stated:

Unless we in this jurisdiction are to fall out of step with similar societies as they safeguard Article 12 rights [UNCRC], we must, in the case of articulate teenagers, accept that the right to freedom of expression and participation outweighs the paternalistic judgment of welfare.⁵¹

Fortin also instances the case of *Re L (family proceedings court): appeal jurisdiction*⁵² in which Munby J. was at pains to point out that a 15-year-old's rights under Articles 6 and 8 of the European Convention on Human Rights had been breached in circumstances where a declaration of parentage had been issued in respect of her without any notice to her or permitting her to attain party status.⁵³

Article 42A.2 of the Irish Constitution requires that provision be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° which

includes guardianship, custody and access of children, in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

The amendment requires that laws be enacted for securing, in the case of a child who is capable of forming them, the views of the child and putting them before the Court. Due weight is to be afforded those views, having regard to the age and maturity of the child. There is a constitutional obligation on the legislature to introduce legislation to give effect to this provision.

The child must also be capable of forming and expressing a view. This will require a finding by a trial judge as to the level of maturity of the child. The use of the term 'provision shall be made by law' affords the legislature a relatively wide discretion as to the scope of the right. It is noteworthy that a right of full participation in the proceedings is not the result of this wording - simply that the voice of the child is heard in the context of the proceedings.

Hearing the Voice of the Child under the Children and Family Relationships Act 2015

Section 32 of the 2015 Act will, once in force, permit the Court to direct the procurement of a report from an expert in writing on any question affecting the welfare of the child or to determine or convey the child's views. The section provides that the Court shall, in deciding whether to make the order, in particular, have regard to a number of factors, including the age and maturity of the child, the nature of the issues in dispute, the best interests of the child and whether the making of the order will assist the child in the expression by the child of his or her views. The child as the subject of the report, is entitled to a copy of the report whether a party to the proceedings or not, although the Court must consider, in line with the factors set out in the section, whether the child should be furnished with the report.

An expert appointed under the section must ascertain the maturity of the child and, where requested by the Court, ascertain whether or not the child is capable of forming his or her own views. Where the expert concludes that the child is capable of forming his or her own views on the matters that are the subject matter of the proceedings, he or she should ascertain those views and furnish a report to the Court putting before it the expressed views of the child concerned.

The Act provides that the fees and expenses of the expert shall be paid by the parties. Questions therefore arise as to what is to happen where the parties do not have the means to fund the work of the expert.

It has been argued, since the passing of the referendum on Article 42A, that the State would have to establish a system in order to give effect to the constitutional amendment in respect of hearing the voice of the child. Again, it is noteworthy that the State is required to ascertain the views of the child as far as practicable. It is arguable that the

49 Jane Fortin, *Children's Rights and the Developing Law* (3rd edn, Cambridge CUP 2009) 259.

50 *Mabon v Mabon* [2005] EWCA Civ 634

51 Fortin (n 46) 260.

52 *Re L (family proceedings court): appeal jurisdiction* [2003] EWHC 1683 (Fam)

53 Fortin (n 46) 260.

word 'securing' means that the State should also be responsible for funding the procurement of the views of the child. This would be in keeping with the comments of the Committee on the Rights of the Child as outlined above. However, the 2015 Act places the onus in this regard on the parties to the proceedings, at least in respect of the use of an expert to meet the obligation of hearing the voice of the child in the proceedings. The appointment of such an expert is a discretion inherent in the Court and it presumably does not usurp or unseat the other methods by which the voice of the child can be heard.

3.6 Conclusion and recommendations

The evolving nature of the law relating to guardianship, access and custody of children in this jurisdiction provides an opportunity to address the gaps in protection for the rights of the child. That opportunity has been, to a large extent, grasped by the enacted, but not yet in force, 2015 Act. In particular, it is clear that the changes to the law relating to guardianship are essential to ensuring that children are afforded the opportunity to have both parents actively involved in decision making processes affecting them.

In addition, the right of the child to be heard in the context of private family law proceedings needs to be addressed, particularly in terms of providing effective and accessible mechanisms to ensure that this is a meaningful and realisable right for children involved in private family law proceedings.

Thus, some recommendations are as follows:

- > The 2015 Act should be commenced without further delay.
- > A fully funded system in which the right of the child to have their voice heard in the private family law context, in line with their constitutional and international human rights should be put in place.
- > Arrangements relating to surrogacy should be legislated for and in a manner consistent with the rights of the child pursuant to international human rights law.
- > The State should ensure full compliance with international human rights law in this area by encouraging parents to exercise their rights in a manner consistent with the best interests of the child and the evolving capacity of the child.
- > Child inclusive mediation and other child centred methodologies should be explored, implemented, and fully funded in the private family law system.

CHAPTER 4:

Health and Healthcare

Professor Geoffrey Shannon