

# *Guardians Ad Litem: Giving Children the Right to be Heard in the Irish Legal System?*



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# Convention on the Rights of the Child

- Article 12 :
  - *1. States Parties shall assure to the child who is capable of forming his or her own 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.*

■ 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.*

# Introduction

- A guardian *ad litem* (guardian at law): an independent representative appointed by a court to represent a child's personal and legal interests.
- The best interest principle: a legal device which is used by courts to ascertain what is best for a child.
- “**welfare and wishes**”- Geoffrey Shannon, *Child Law* (Thomson Round Hall, Dublin, 2005) n240.

# Positive Impact

- UK Children's Society (2000):
  - very positive impact on the court process.
  - some proceedings are made shorter, more child-focussed and less contentious
- Ruegger (2001): children felt that the guardian *ad litem* service had had a positive impact for them .
  - Maria Ruegger (ed.) *Hearing the Voice of the Child: The Representation of Children's Interests in Public Law Proceedings* (Russell House Publishing, Dorset 2001)

# This presentation:

- analyse the role of the guardian *ad litem*;
- Establish whether the guardian *ad litem* does facilitate the international legal right of children to be heard;
- guardian *ad litem* can be a vital component of the efforts of a state to implement this right;
- that there are many shortcomings relating to the position;
- Irish Constitution;
- lack of regard for the rights of children

# Limits of the Research

- *in camera* rule ;
- The Courts and Civil Liability Act 2004 : Pilot Project on Reporting Family Law;
- National Children's Office Research,  
*Review of the Guardian Ad Litem Service: Final Report from Capita Consulting Ireland, in Association with the Nuffield Institute for Health*, (National Children's Office, Dublin 2004)

# *Why Guardians ad Litem are Needed*

- Court environment can be a daunting and distressing one for children.
- But right to be heard in U.N. Convention on the Rights of the Child, 1989.
- Section 33 of the Judicial Separation and Family Law Reform Act 1989: “*proceedings shall be as informal as is practicable and consistent with the administration of justice.*”

# *The Constitution of Ireland*

- Family as ‘the necessary basis for social order’;
- Article 42.5: State can intervene only in, “*exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children*”.
- Law is, on balance, more in favour of the rights of parents and the family (based on marriage) than those of children.
- Prerogative under Art.40.3.1 that the Irish Constitution “defend and vindicate” personal rights.

# Public Law Proceedings

- Child Care Act 1991, Section 26,  
Appointment of guardian *ad litem* for a  
child.
- 26.—(1) *If in any proceedings under Part IV or VI the  
child to whom the proceedings relate is not a party, the  
court may, if it is satisfied that it is necessary in the  
interests of the child and in the interests of justice to do  
so, appoint a guardian ad litem for the child.*

# Private Law Proceedings

- Children Act 1997 (Section 28) Appointment of guardian *ad litem* for a child and provision for separate representation.
- *If in proceedings under section 6A, 11 or 11B the child to whom the proceedings relate is not a party, the court may, if satisfied that having regard to the special circumstances of the case it is necessary in the best interests of the child to do so, appoint a guardian ad litem for the child.*

# Role of the Guardian *Ad Litem*

GAL should be a person who can:

- interview the relevant parties;
- represent the wishes and feelings of children;
- represent the best interests of children.

  

- In Ireland: “an independent person appointed by the court to represent the child’s personal and legal interests”
  - *National Children’s Office, Ireland’s Second Report to the Committee on the Rights of the Child* (Stationery Office Dublin, July 2005) UN Doc. CRC/C/IRL/2 2006, para 59.

## *Re: T (A Minor):*

- Judge Waite L.J. :  
(guardian *ad litem*) “*must act in what he believes to be the minor's best interests, even if that should involve acting in contravention of the wishes of a minor who is old enough to articulate views of his own...*”
- -I *Re: T (A Minor) (Child: Representation)* 17 [[1994] *Fam 49.*] at 58

# Role of Judges

- differing instances of appointment of guardian *ad litem*;
- rural areas;
- Committee on the Rights of the Child

# Discretion

- Turkmenistan in 2006, the Committee expresses that it is, *“concerned that courts have the discretion to decide whether to admit children to proceedings affecting them***[1]**.
- [1] Committee on the Rights of the Child, Concluding Observations: Turkmenistan, (UN Doc. CRC/C/TKM/CO/1, 2006) para. 29.

# right to information

- Manual on Human Rights Reporting :
- *‘the child should be provided with the necessary information about the possible existing options and the consequences arising therefrom. In fact, a decision can only be free once it is also an informed decision’.*

# Figures

- Health Boards that in 2002, there were 96 cases for which guardians *ad litem* were appointed by Health Boards;
- Estimate that GALs used in 40% of cases where they could have potentially been used.

-National Children's Office, *Review of the Guardian Ad Litem Service: Final Report from Capita Consulting Ireland, in Association with the Nuffield Institute for Health*, (National Children's Office, Dublin 2004)

# Lack of Availability of the Service

- ‘In practice, it is quite common for a child to have no representation to assist in giving him a voice in proceedings which will affect him very directly’.

*-Shannon, G (2006) ‘Achieving Rights Based Child Law in Ireland’ Law Society of Ireland Conference on Achieving Rights Based Child Law, Dublin, Ireland, 14th October 2006.*

# Private Law

- This condition, “obviously precludes such appointment in all but the most pressing cases”.  
-Geoffrey Shannon, *Child Law* (Thompson Round Hall, Dublin, 2005) p. 251.
- The number is, “probably fewer than 10 per annum nationally, and perhaps only a handful.”  
—Capita Research

# Factors

- Lack of awareness of judges about the service;
- There is also the fact that there is a shortage of availability of these experts.
- High cost of service;
- Lack of regard for capacities of the child.

# Who can Act as GAL?

- usually social workers. [1]

-represent child's best interest *and* views

(*Re: T (A Minor)(Child: Representation)* 17 [ [1994] Fam 49. ] )

- occasionally solicitors. [2]

-duty to follow instructions of client

[1] Law Reform Commission, *Report on the Family Courts'* (Dublin: Government Publications, 1999)

[2] Conal Gibbons, *'Aspects of Childcare in the District Courts'* (2007) 2 Judicial Studies Institute Journal 169

# ‘Dual Representation’ Model

- Section 26(4) of the Child Care Act 1991.
- Solicitor requests GAL, GAL appointed a solicitor.
- child left without legal representation;
- and unable to be a party

# Children's Views

- expressed positive views;
- lack of understanding around role of GAL;
- lack of understanding around confidentiality.
- *Maria Ruegger (ed.) Hearing the Voice of the Child: The Representation of Children's Interests in Public Law Proceedings (Russell House Publishing, Dorset 2001)*
- *“The process of children’s participation must be transparent, honest and accountable.”*  
- *Committee on the Rights of the Child, Draft General Comment on Article 12 (31 July 2007) n1.*

# Indirect Representation

- ‘divided loyalty’- wishes v. welfare;
- *“The role of the representative must not be confused with the obligation to ensure that the best interests of the child are a primary consideration.”*  
-Committee on the Rights of the Child, Draft General Comment on Article 12 (31 July 2007 Para. 21

# Meeting Directly with the Judge

- Section 17(2) of the Guardianship of Infants Act 1964;
- Judge is not under **any obligation** to hear a child;
- Some judges feel it may be inappropriate.
- Committee on Rights of Child: direct is preferable.

# Guardian *ad Litem* / Advocate Model

- Guardian *ad litem* service for very young or vulnerable and the most complex cases.
- Advocacy-based service in cases which are not as complex.

# Model of Implementation

- *make the child aware of the right;*
- *ascertain whether the child wishes to exercise it;*
- *decide on a method of facilitation. If the child wishes to exercise the right, the options are guardian ad litem, advocate, and/ or direct interview by judge;*
- *If the child wishes not to exercise the right to be heard, the best interests still needs to be ascertained. The options are via social report or guardian ad litem.*

# Other Reforms

- Statutory guidelines to assist the court;
- Definition of the role;
- Training of judges on this area of law;
- A National Guardian ad Litem Service.

# The Facilitation of the Child's Voice in Proceedings as a Right

- Section 28 of the Children Act 1997 ‘special circumstances’;
- CRC ‘any circumstances’.
- Draft General Comment on Article 12:  
*‘In cases where a child is not provided with an opportunity to express her/ his views, the reasons for that decision should be provided.’*

# *Committee on the Rights of the Child:*

*“The right of children to be heard and taken seriously ... establishes a new social contract with children, which recognises them as rights-holders, entitled to be heard on all issues of concern to them, in every environment”*

- Committee on the Rights of the Child, Draft General Comment on Article 12 (31 July 2007) n1.