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## **Foster Placements and the Child Care (Amendment Act) 2007**

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### **Abstract**

The aim of this discussion is to look at the evolving rights of foster carers in relation to the *Child Care Amendment Act, 2007* and how these may challenge the rights of natural parents and affect the welfare of the child. This is an important area of research as it directly or indirectly affects all that are involved in foster care. Key areas explored include custodial and guardianship rights, the issue of challenging the rights of birth parents and children involved. The welfare of the child was of central attention, the debate on access between families and their children in care is also discussed. While new policies are placing an increased emphasis on the welfare of the child, the Child Care (Amendment) Act, 2007 has emerged as a contentious document; it gives foster carers more responsibility for the children in their care and it appears positive in relation to quality of care for children. However, it may be viewed as to challenging the rights of parents and children.

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**Key Words:** Child Care (Amendment) Act, 2007; rights of foster carers; rights of birth parents; child welfare; custodial and guardianship rights; access or visitation rights of families of children in foster care.

### **Introduction**

The overall aim of my research is to investigate the policy of foster care. In more specific terms, the research looks at the evolving rights and responsibilities of foster carers, in relation to the Child Care (Amendment) Act, 2007 and how these may challenge the rights of natural parents. The welfare of the child remains central. This is an important area of research as it directly or indirectly affects all that are involved in foster care. While new policies are placing an increased emphasis on the welfare of the child, the Child Care (Amendment) Act, 2007 has emerged as a contentious document; it gives foster carers more responsibility for the children in their care and it appears positive in relation to quality of care for children. However, it may be viewed as challenging the rights of parents and children.

Some of the key areas explored include custodial and guardianship rights, the issue of challenging the rights of birth parents and children involved. The welfare of the child was of central attention, the debate on access between families and their children in care is also discussed. The objectives of the research project included to gain an understanding of the concept of fostering; to explore what it involves and the issues that arise within fostering. It will be the first time foster carers have the opportunity to secure rights regarding children that have been in their care for a continuous period of five years or more and it is important to investigate the impact of new legislation on the emerging rights of foster carers. This piece of research also aims to investigate how new legislation will affect or challenge the rights of natural parents. Finally, it is the author's aim to examine access as a critical issue in foster care.



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Foster care is a wide and diverse area. It is becoming an increasingly important sector due to its expansion. In 2006, figures from the Health Service Executive (HSE) showed that there are over 5300 children in care of which 88% were in foster care. (O'Brien, 2007) In recent times, there has been a great deal of media attention surrounding foster care especially relating to lack of an introduction of 24 hour social work services. Legislation and policy developments are now more influential than ever due to rising numbers in foster care and the overall lack of support services. There is a need for transformation as we live in rapidly changing times; children and young people are exposed to a huge range of serious problems in society e.g. binge drinking, drugs and sexual diseases from a young age. Not only do children in foster care tend to be more vulnerable in society and need extra support; foster carers and the natural parents are also in need of all the support and guidance that are available. Prior to the introduction of the act, there was a concern that too much of social worker's time was being taken up with long-term foster care cases. These concerns raised the question of appropriate duration of time to be spent on individual cases. It was thought that giving carers more responsibility in bringing up children would reduce the work load of social workers. (Parliamentary Debates. Volume 184, No. 23, pp1-2 26/10/2006)

For the purpose of my research I interviewed a selection of foster carers and social workers, in the form of semi-structured interviews. One social worker was a previous foster carer and so was able to reflect on a wide array of knowledge along with experience of practice. The other social worker works with the fostering department. A third interview was with an experienced foster carer and a worker of the Irish Foster Care Association (IFCA). The fourth interview involved a foster care couple which have a child in long-term care so would be potential candidates to make use of the provisions of the new Act. The final interview was conducted with a foster carer who has two children in long-term care and currently one child in short-term care.



### **Foster Care**

In Ireland, fostering means taking care of someone else's child in their own home. It offers alternative family care to children whose parents cannot provide for them adequately in their own families. This may be on a short or long term basis. Foster care involves a range of activities undertaken by those in who care for other people's children and in which the state acts as an intermediary figure between the natural and foster care family. (Ruegger and Rayfield, 1999) Children may enter care voluntarily or under a care order; if a parent consents to placing their child(ren) in care, or if the child(ren) are abandoned or orphaned it is voluntary care. In some cases, the state may apply to the courts for an order to remove the child(ren) from their home. When a child is taken from the family home they are in the responsibility of the state and the HSE (Health Service Executive) has a statutory duty to promote the welfare of the children in care. The HSE may be supported by non-statutory agencies and each foster child has his/her own social worker. An important principle of foster care is to maintain and develop relationships between the child in care and their own family as well as with the foster family. (Shannon, 2008)

There are complex but fundamental differences between the roles, rights and responsibilities of a foster carer and a biological parent. A foster carer is ultimately providing a parental role in the daily duties of bringing up a child but does not have full rights of a parent. Ultimately, the control and responsibility for a child in care is shared by three groups; natural parents, foster carers and the state.

### **Children's Rights**

Under the constitution children are not specifically afforded rights. It fails to recognise the child as a person with individual rights. However, children are included in the category of citizens and therefore hold rights to be held equal before the law, to have their personal rights respected, defended and vindicated by the state. Under the constitution, children also have the right to company, care and parentage of their parents. Ireland is a



signatory to the United Nations Declaration of the Child of which the Child Care (Amendment) Act, 2007 situates itself within this framework. The UN Convention was the first comprehensive statement of the rights of children, it recognises their dependence and vulnerability to injustice. It includes political, social, economic, cultural rights as well as children's right to protection. Article 9 vindicates that children are not to be separated from their parents against their will, except when it is in the child's best interests or the law says so. (IFCA, 1999) The state is required to respect the right of the child to maintain contact with his/her parents unless it is not in their best interests. The Irish Foster Care Association (IFCA) outlines a number of additional rights that they would like to see foster children have, such as the right to know the details of their personal circumstances and to be able to make complaints in confidence. (IFCA. 1999)

### **The Rights of Parents: Access & Responsibilities**

In the Constitution, Article 41 recognises the family as a fundamental body in society and the state therefore guarantees to protect the family. The family based on marriage hold rights that are superior to the state; *'the primary and fundamental unit group of society and as a moral institution possessing inalienable rights, antecedent and superior to all positive laws.'* (Bunreacht na hEireann, 1937) In the past, this had deployed state intervention with the exception of extreme circumstances in which parents; *'fail in their duty towards their children,'* in which such circumstances the state has a duty to intervene. *'but always with due regard for the natural and imprescriptible rights of the child'* (Kilkelly and O'Mahony. 2007 and Bunreacht na hEireann, 1937) In such cases the state can remove the parents custodial rights with a court order.

Custodianship and guardianship are two important terms in foster care; however, there appears to be a lack of clarity in this area especially regards guardian rights. Foster care involves a change in legal custody over the child but does not involve any changes to



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legal guardianship. When a child is brought into care, they are in custody of the state. The legal custody is concerned with the physical care and control of the upbringing of the child e.g. feeding, clothing etc on a day-to-day basis. (Shannon, 2008) The agency with legal custody can determine where the child is to live, give consent to medical or psychiatric examination, treatment or assessment, and give consent to a passport. Parents of a child in voluntary care can retrieve custody at their request. The HSE is obliged at all times to give consideration to the wishes of the original custodians.

In foster care, the parents retain guardianship. There are some aspects of the child's life which the state has no authority and only the parent can give consent, such as surgery, marriage, join the army or represent him/her in the law. (Kadushin, 1980, p313) If a child is in care, a guardian has a right to be consulted on all matters affecting the upbringing of the child, e.g. consent to passports and change of name (Shannon, 2008) In Ireland, the only way a mother or father can give up guardianship is if the child is placed for adoption.

**The Rights, Duties and Responsibilities of Foster Carers**

The Child Care (Placement of Children in Foster Care) Regulations, 1995 outlines a number of duties of foster carers in order to promote the child's health, development and welfare, for example, to permit the HSE to visit the child in the foster home. Other duties upon foster carers include informing the HSE of any significant event affecting the foster child, any change that affects their ability to care, seeking appropriate medical treatment if the child has an illness or injury and co-operating with the HSE in facilitating access.

Until recently foster carers had no rights regarding the children in their care. However, since the introduction of the Child Care (Amendment) Act, 2007, for the first time long-term foster carers are being afforded rights regards the children in their care. The absence of rights for foster carers has in some circumstances coincided with an inadequate amount of support. For example, there is no legislation, requiring foster carers to undergo training



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before they take children into care. The Pilot Inspection on Foster Care (2004), found that support to foster carers depended on support available and 44% of relative foster care placements were unapproved. Furthermore, it was found link workers are not assigned

until the review of a placement is carried out, in some cases a family may be waiting up to 12 months for this review to take place. (Department of Health and Education, 2004).

Overall, there appears to be a continual appeal for an improved status of foster carers for their contribution to working with children. The importance of treating foster carers as professionals has been re-affirmed in recent policy documents. Perhaps, the development of the Child Care (Amendment) Act, 2007 will provide a path to promote their status.

#### **The Child Care (Amendment) Act, 2007**

The Child Welfare and Protection Policy Unit in the Department of Health and Children, is responsible for the formulation and monitoring of policies in relation to foster care. Foster care in Ireland is governed by the Child Care Act (1991) and the Child Care (Placement of Children in Foster Care) Regulations (1995). In addition, foster care is supported by the National Standards for Foster Care (2003).

The changing nature of foster care has influenced the development of new legislation. The Child Care (Amendment) Act, 2007 was enacted on the 8<sup>th</sup> May 2007. It allows a foster carer who has had a child in their care for a continuous period of five years or more to apply for a court order regarding the care of the child. The purpose of the Act is to give foster carers and foster relatives increased autonomy for long-term care. It is important to clarify that while the measures set out in the new legislation are significant to the care of the children, the Act does not involve major fundamental changes to foster care. Custodial and guardianship rights are unaffected, as the state continues to be the guardian of the child while he or she remains in their care.



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The court may grant an order to a foster carer pending a number of conditions including that they have been taking care of the child for 5 yrs, it is in the child's best interests, the HSE consents prior to granting the order, the HSE has obtained the consent of the parent or person acting in loco parentis if the child is in voluntary care. If the child is in care

under a care order, the HSE must inform the parent or person acting in loco parentis of the application. The child's wishes must be taken into consideration as far is practicable.

If the order is granted, the Health Service Executive (HSE) will continue to support the children in care and the foster carers and will remain responsible for the overall welfare and protection of children in care. Foster carers will have '*control over the child as if it were the child's parents and do what is reasonable to safeguard and promote the child's health, welfare and development*'. (Parliamentary Debate, 26/10/06, p8) It gives foster carers greater responsibility as they would not have to rely on the HSE to make certain decisions regarding the child's welfare. With the order, foster carers are entitled to give consent for medical or psychiatric examinations, treatment and assessment. There are also able to consent to the issue of a passport for the child and bring the foster child abroad for a limited period. In granting the order, the court may impose restrictions or conditions. If the birth parent or relative refuses to give consent, the HSE has the authority to give consent if it is in the child's best interests. When a child in care reaches the age of 16, he or she may consent to surgical, dental and medical treatments. Any other functions of the HSE in the child's interest will continue, for example, access arrangements and care plans. The order will cease if for any reason the placement comes to an end or the child reaches 18 or is married.

The introduction of new legislation, the Child Care (Amendment) Act, 2007, means that the position of the foster carer is undoubtedly strengthened as a result of an acquirement of rights over children. It may denote that in some circumstances, if parents consent, they will be legally less involved in their children's lives while on foster placement. One may



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question will this impact on the relationship between foster children and their natural parents. It appears to conflict with the right of parents to remain involved in the decision-making process concerning the welfare and life of the child in care. The argument could be made that in some cases, unless the parent(s) had to be involved, they would not be and new legislation will allow natural parents further distance themselves from their children's lives. The possible infringement of parental rights will undoubtedly bring the potential of conflict between parents and foster carers. Foster carers may be more open to criticism from birth parents, creating tension and problems at access or when decisions need to be made on the behalf of the child in care. However, it is important to note, that the new provisions of the Act are limited to issues of consent and the carer's position regarding custody is not strengthened (Shannon and Power, 2007).

**The Issue of Access in Policy Documents**

Access is a major part of foster care and can be an extremely controversial issue. It may be described as a right and a duty of visitation, initiating communication with the child on a temporary basis. (Shannon, 2008) It is commonly presumed to be a right of the parent but in more correct terms it is a right of the child. According to the European Court of Human Rights; access is the right of the child and cannot be denied unless there is evidence it would be harmful to the welfare of the child. (Shannon, 2008) Under the Child Care Act (1991) Section 37, the HSE shall facilitate reasonable access to a child in care by his/her parents or loco parentis (this could include previous foster carers) or any other person who may have a bona fide interest in the child. (Government of Ireland, 1991) It is important to remember children can refuse access with a non-custodial parent and under the Guardianship of Infants Act, 1964 their wishes must be taken into consideration.

Access is a critical issue in foster care and has huge implications for the child's future. It determines whether or not they will they grow up aware of their background and familiar with their birth parents and family or will they be oblivious to their origins or at have no



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ties with their background. It can be a particular cause of tension between foster carers and natural parents. From a child's perspective it can be very upsetting, they may feel forced to take sides or 'pumped' for information.

Natural parents may also find access very difficult. Any time spent with their children is under restrictive arrangements, it usually scheduled and timed and may be nonnegotiable, often creating a sense of surrealism. The role of foster carer in access can be easily overlooked due to the intense focus on the child-parent relationship. However, they have to accommodate the parents into their home and deal with the child's distress every time the parent leaves.

It is important to make the point that not in all situations, is contact between natural parents and children in foster care positive. In some cases, it would be detrimental to the children's wellbeing. Children may also not want to remain in contact with their parents. This raises the concern that some children may be pressurized into contact with their birth parents involuntarily.

**Empirical Findings**

The aims of my research were to find out from the respondents will the Child Care (Amendment) Act, 2007, challenge the rights of birth parents and children in care, and also how it will impact on the welfare of children in care with particular focus on contact and access.

***The Issue of Challenging the Rights of Birth Parents and Children***

Prior to the introduction off the Child Care (Amendment) Act, 2007, foster carers had no rights regarding children in their care. All interviewees feel its introduction signals a growing recognition of the role of foster carers. Foster carers appeared doubtful that the rights of birth parents would be challenged due to the new Act, 2007. Social workers pointed out that those children in care for 5 years or more were very unlikely to return to



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the parents. One foster carer believed that for a lot of children in care, their parents would not be capable of making daily and long-term decisions and also felt that to a certain degree a parent gives up those rights when the child has to be taken into carer.

The social workers tended to take different perspectives; one viewed that it would absolutely challenge parenting as the Act, 2007, suggests implementation would involve a 'power change' or 'paradigm change'. A portion of the power shifts to the foster carer along with greater security over the child. Another social worker commented that most children that are in care for at least 5 years are under a statutory care order, therefore the parent's rights would already have shifted to the state. And if after 5 years, parents have not shown any real commitment to children then perhaps it would be in the child's interest for the state or foster carer to maintain rights over the child.

The possibility of some children having their rights 'trampled on' arose. There is a concern under the 2007 Act children's rights to their parents could be excluded. One social worker illustrates that not every child wants their parent's right to consent taken away, a lot of children are quite happy to be in long-term care and have good relationships with their parents, "There's nothing wrong with having to go to the parent to sign forms...not every child is looking for their parents to be obliterated from their life, and you know a lot of children in long-term foster care are quite integrated into two families". But she acknowledges this involves a huge cohesion between all parties involved which can be near impossible to achieve but it can happen in some cases.

***Contact and Access***

The Child Care Amendment Act, 2007 has the potential to affect contact and access of foster care placements. There is a concern that as a result of the Act, 2007 there may be a possibility of diminishing contact. One foster carer took the perspective that it would not interfere as contact is always promoted in placements. Another foster carer replied it could reduce contact and this may be good or bad depending on what is in the child's best



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interest, it was pointed out that in some situations reduced contact may speed up foster carer's actions or provide a more stable background for the children.

Both social workers saw the potential for such an order having a negative affect on the involvement of natural parents, for example, the HSE signing consent forms and excluding the parents' wishes. Therefore, there is a concern that there may be a break of a link between children and their natural parents that could possibly be strengthened down the road if foster children continually refused access.

With regards to access, one social worker felt that at the moment a lot of foster carers simply go along with access but if they has a little more power they may be encouraged to make a stand and say '*we're not doing access*'. Again, this is pointed to potentially benefit the children that do not want to go to access. There is a concern that the tensions of access can continue the conflict between the carers and the parents instead of contributing towards promoting a positive relationship between them.

***Question of the Welfare of the Child***

The foster carers interviewed agree that there is potential to promote the welfare of the child under this new legislation. They believe the wellbeing of the child on a daily basis will be enhanced, the ruling that foster carers can sign forms will reduce the tension and stress in the household, as there is consensus that these forms can be a source of stress for foster carers and children undoubtedly absorb this. One foster carer commented that children, '*realise no matter what age they are they know they are different in a sense they can't bring something from school and get it signed straightaway*'. She stresses that this causes a lot of disturbance for children as often feel they really stand out especially in schools and therefore in that respect under this new Act, children will feel more involved in the foster family and more secure. This view suggests that there is now a potential to reduce possible stigma foster children may experience. A more stable background will be provided for children if foster carers had more control over their upbringing.



Social workers were slightly more hesitant as they stressed the need for every case to be examined carefully and individually and for the needs of the child to be considered in every situation. In every foster placement there is a need for a full comprehensive assessment of the child's needs and of the foster carer's ability to provide appropriate care and whether the care placement meets the child's needs was emphasised. If this is not done, there is a danger of an absence of assessments which could pose a risk to the child's welfare and if at 5 years some the HSE's responsibilities are removed and *'there is a greater distance between the child and agency responsible for safe-guarding the child'*.

There was a concern raised that the child's welfare *'might get a little lost in this act'* and a recognition that this act could be taken advantage by some people, she referred to a fear the children may become *'locked into a value position that maybe they shouldn't be in'*. An interesting perspective provided by one social worker<sup>2</sup>, was that this could be a valuable opportunity for children in the *'twilight zone'* who have lost all contact with their birth family to really identify with their foster family and therefore give them a more stable childhood.

Both social workers interviewed believe there is a huge 'lag' between practice and policy. One commented, *'policy is policy, it can't feed them, and they can't be cared by it'*. A lack of resources was referred to, such as an inadequate number of social workers and foster carers as well as specialised units and no proper psychiatric unit in the Southern area. These concerns may have the potential to threaten the welfare of the foster child.

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<sup>2</sup> This is taken from Mary Cregan, who is currently carrying out research on children that have lost all contact with their natural family and may be adopted.



## **Conclusions**

The Child Care (Amendment) Act, 2007 has emerged as a contentious document. It is evident in recent policies there is an increasing emphasis on the welfare of the child. Children are increasingly viewed as individuals with a voice and views that matter. From a positive aspect it has the potential to improve the quality of life for children in care, to make them feel more stable in the foster care home, and give them more of a voice in matters affecting them. On the other hand, it has been argued that the Act may challenge parent's rights and even children's rights in some situations. Therefore the Act, is welcomed but not without caution.

The 2007 Act does give foster carers new rights for the first time regarding children in their care. Some foster carers would argue that the Act is not doing enough in terms of foster carers' rights. However, if the provisions of the Act were implemented with the appropriate resources and assessments it would be a significant achievement. It is recognised that there is a need for careful analyses and assessment of every child in care and children need to be helped to understand their family situation in a way that is appropriate to their age. Any further developments without these important supports could pose a potential risk to children. It is the author's opinion, if the parent wants a strong relationship with the child, they will strive for this regardless of assumptions of rights being challenged. Therefore, signing consent forms should not decipher what sort of relationship they have with their children.

Foster care is as such the way of the future, numbers are increasing each year, and there has been particular growth in relative foster care. Undoubtedly there will be many issues in foster care to face in the future, e.g. the growth of new communities in Ireland, this will in particular challenge care provision on a new level, there will be a need for awareness of a range of cultural perspectives and practices. There is widespread acknowledgement of a need for more resources, reviews, assessments, supports, funding,



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foster carers, social workers in foster care. A failure to implement these valuable resources will undoubtedly place vulnerable children at risk.



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