The Child Law Clinic

School of Law

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Research Brief on Guardianship Applications under Section 6C of the Guardianship of Infants Act 1964

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1. Background

Section 49 of the Children and Family Relationships Act 2015 has inserted a new section 6C into the Guardianship of Infants Act 1964. This section allows, for the first time, applications to be made to court for guardianship of children by persons other than the natural father in circumstances where the child has a guardian or guardians who are living. The key provisions for the purposes of this brief are as follows:

Power of court to appoint person other than parent as guardian

6C. (1) The court may, on an application to it by a person who, not being a parent of the child, is eligible under subsection (2) to make such application, make an order appointing the person as guardian of a child.

(2) A person is eligible to make an application referred to in subsection (1) where he or she is over the age of 18 years and—

…

(b) on the date of the application—

(i) he or she has provided for the child's day-to-day care for a continuous period of more than 12 months, and

(ii) the child has no parent or guardian who is willing or able to exercise the rights and responsibilities of guardianship in respect of the child.

…

(4) Where a person to whom subsection (2)(b) applies makes an application under subsection (1), the court shall direct that the Child and Family Agency be put on notice of the application, and have regard to the views (if any) of the Agency in deciding whether or not to make an order under subsection (1).

…

(8) In deciding whether or not to make an order under this section, the court shall—

(a) ensure that the child concerned, to the extent possible given his or her age and understanding, has the opportunity to make his or her views on the matter known, and have regard to those views, and

…

(9) Where the court appoints under this section a person as guardian of a child, and one or both of the parents of that child are still living, the person so appointed shall enjoy the rights and responsibilities of a guardian specified in subsection (11) only—

(a) where the court expressly so orders, and

(b) to the extent specified in the order and in the case of the rights and responsibilities specified in any of paragraphs (a) to (e) of that subsection, subject to such limitations as are specified in the order.

(10) In deciding whether to exercise its power under subsection (9), the court shall have regard to—

(a) the relationship between the child concerned and the person appointed as guardian of the child, and

(b) the best interests of the child.

(11) The rights and responsibilities referred to in subsection (9) are the rights and responsibilities of a guardian:

(a) to decide on the child's place of residence;

(b) to make decisions regarding the child's religious, spiritual, cultural and linguistic upbringing;

(c) to decide with whom the child is to live;

(d) to consent to medical, dental and other health related treatment for the child, in respect of which a guardian's consent is required;

(e) under an enactment specified in subsection (12);

(f) to place the child for adoption, and consent to the adoption of the child, under the Adoption Act 2010 .

…

This brief addresses three queries in relation to the operation of this section:

1. What is the definition of "day-to-care for a continuous period" under s.6C(2)(b)(i)?
2. Does the existence of a care order made under the Child Care Act 1991 make the Child and Family Agency a "parent or guardian who is willing or able to exercise the rights and responsibilities of guardianship in respect of the child" within the meaning of s.6C(2)(b)(ii)?
3. What level of obligation exists for the court to hear the views of children in applications made under s.6C?

2. Continuous Day-to-Day Care

A foster parent is one potential applicant for guardianship under s.6C. Where children are placed in the care of foster parents, legislation refers to them as being in the "custody" of those parents (as per section 43 of the Child Care Act 1991 and Articles 21 and 22 of the Child Care (Placement of Children in Foster Care) Regulations 1995).

The question that arises under this heading is whether the requirement of "day-to-care for a continuous period" can be satisfied in circumstances where the care of the children has been shared with a person other than the applicant.

The term "day-to-day care" is not defined anywhere in the 1964 Act or the 2016 Act, nor is it defined anywhere else in Irish legislation. The closest thing to a legislative definition of the term can be found in the explanatory note attached to the Guardianship of Children (Statutory Declaration) Regulations, 1998 (S.I. No. 5/1998), which states that "Custody is the physical day to day care and control of a child."

The implication of this is that the concept of "day-to-day care" is closely related with the concept of custody, which is a more established term in Irish family law legislation. Support for this view can be gleaned from the common use of the term "day-to-day care" to describe the concept of custody in the law of jurisdictions that are closely related to our own, and in Irish case law citing with approval case law that uses the terms interchangeably.

In New Zealand, the Care of Children Act 2004 replaced the term "custody" with the term "day to day care", and defines the term in s.8 as including "care that is provided only for 1 or more specified days or parts of days" (emphasis added). Adopting this model, the Irish Law Reform Commission in its 2010 *Report on Legal Aspects of Family Relationships* recommended that the term "custody" be replaced with the term "day-to-day care" in Irish family law legislation; but this recommendation did

not include any change in the boundaries of what was encompassed by the term, and was a change in terminology only.[1]

The same closeness between the concepts is evident in relevant case law. For example, in the House of Lords decision in *J v C*,[2] the court repeatedly referred to "custody, care and control" when describing the concept of custody. This decision was cited at length and with approval by the Irish Supreme Court in *WO'R v EH*.[3] Numerous decisions of the Irish courts have approved the definition of custody set down in Shatter's *Family Law*, namely: "Custody essentially means the right to physical care and control."[4]

In *DO'H v HSE*, Abbott J considered the boundaries between the terms "custody", "access" and "day-to-day care":

> "… where there is more cooperation between the parents one very often finds there is joint custody of the parents, with a provision for the day-to-day care of the children and that by, let's say the mother, and that day-to-day care might be from Monday to Friday, or even to midday on Saturday with the day-to-day care for the rest of the minority part, of the week given to the husband, and in these cases "custody" and "day-to-day care" are used as terms to provide a euphemistic and not combative way of describing what in more contentions cases would be "custody" and "access". And that being so there is, in practice, not a clear dividing line between two concepts."[5]

When an award of joint custody is made, day-to-day care may on occasion be awarded primarily to one parent; but equally it can be shared between two parties, as evident from the following passage of Abbott J's judgment in *MR v SB*:

> "… the lack of definition of the concept of custody within the Act has been used with great flexibility to cater for the era of shared parenting. The most impressive example of such treatment is where an order for joint guardianship and joint custody is made subject to day to day care being shared between the parents over time slots of days within a week or a month."[6]

What this material indicates is that it is possible for day-to-day care to be shared between more than one party as part of a joint custody arrangement. While some custody arrangements may involve rigid divisions as to when day-to-day care is exercised (e.g. one party may only exercise day-to-day care at weekends), others

[1] Law Reform Commission, *Report on Legal Aspects of Family Relationships* (LRC 101-2010), p.11.
[2] [1970] AC 668; [1969] 1 All ER 788.
[3] [1996] 2 IR 248.
[4] See, e.g., *RC v IS* [2003] 4 I.R. 431 at 439; *FN v CO* [2004] 4 I.R. 311 at 318.
[5] [2007] IEHC 175.
[6] [2013] IEHC 647 at para.19.

may be more fluid (as alluded to by Abbott J in *MR v SB*). In circumstances where one party is responsible for a significant portion of the care of children on every single day, it would seem to be highly artificial to adopt an interpretation under which they would be found not to have exercised day-to-day care for a continuous period merely because part of the daily care of the children was shared with another party. This is particularly so if the appointment of the applicant as guardian would be in the best interests of the child; a narrow and artificial interpretation of the qualifying criteria for appointment should not be allowed to trump best interests which is, according to s.3 of the 1964 Act, the first and paramount consideration for the Court when hearing applications under the Act.

If the intention of the legislature had been that a continuous period of say-to-day care could be so easily interrupted, a definition could have been included that would have achieved that end. In the absence of any such definition, it would seem far more in keeping with the intention of the legislature, with Irish family law more broadly, and with the paramountcy of best interests, to adopt a more flexible interpretation of the concept that allows day-to-day care to be "continuous" within the meaning of s.6c(2)(b)(i) even where it is shared with another party.

3. Definition of Guardianship

The question that arises under this heading is whether the existence of a care order made under s.18 of the Child Care Act 1991 excludes an application being made under s.6C on the basis that the Child and Family Agency is, by virtue of the order, a "parent or guardian who is willing or able to exercise the rights and responsibilities of guardianship in respect of the child" within the meaning of s.6C(2)(b)(ii)?

Under s.18(3) of the Child Care Act 1991, the effect of a care order is that the CFA shall:

> *(a) have the like control over the child as if it were his parent; and*
>
> *(b) do what is reasonable (subject to the provisions of this Act) in all the circumstances of the case for the purpose of safeguarding or promoting the child's health, development or welfare;*
>
> *and shall have, in particular, the authority to—*
>
> > *(i) decide the type of care to be provided for the child under section 36;*
> >
> > *(ii) give consent to any necessary medical or psychiatric examination, treatment or assessment with respect to the child; and*

(iii) give consent to the issue of a passport to the child, or to the provision of passport facilities for him, to enable him to travel abroad for a limited period.

The items listed under sub-paragraphs (i) to (iii) above are encompassed by guardianship; however, they are not exhaustive of the rights and obligations of guardianship. These rights and obligations are itemised in s.6C(11) of the 1964 Act:

(a) to decide on the child's place of residence;

(b) to make decisions regarding the child's religious, spiritual, cultural and linguistic upbringing;

(c) to decide with whom the child is to live;

(d) to consent to medical, dental and other health related treatment for the child, in respect of which a guardian's consent is required;

(e) under an enactment specified in subsection (12);

(f) to place the child for adoption, and consent to the adoption of the child, under the Adoption Act 2010 .

Therefore, if a care order were to render the CFA a "parent or guardian who is willing or able to exercise the rights and responsibilities of guardianship in respect of the child" within the meaning of s.6C(2)(b)(ii), it would have to be by virtue of the broad reference in s.18(3)(a) of the 1991 Act to the Agency having "like control over the child as if it were his parent". In this regard, there are at least two items on the above list of rights and responsibilities of guardianship that are not encompassed by a care order: the right to determine the child's religious upbringing (paragraph (b) above), and the right to consent to adoption (paragraph (f) above).

On the first point, the right and responsibility right to determine the child's religious upbringing does not pass to the CFA where a care order is in force, but remains with the child's guardians. This is clearly illustrated by the Child Care (Placement of Children in Foster Care) Regulations, 1995, which reserve decision-making over a child's religious upbringing to guardians rather than the CFA where a child is in foster care. Article 8(1) of the Regulations provides that the CFA:

… in selecting persons from a panel maintained by it under article 5 of these Regulations to foster a child in its care, shall endeavour to respect the wishes (if any) of every person who in law is a guardian of the child as to—

(a) the religious upbringing of the child, and
(b) the religion of the persons with whom the child is to be placed.

(2) Where it is not possible for a health board to comply with the wishes of the guardian as to the religious upbringing of the child or the religion of the foster parents, the board may make such arrangements for the care of the child as it considers reasonable in the particular circumstances of the case and shall inform the guardian accordingly.

(3) In any case where a guardian of a child is dissatisfied with arrangements made by a health board under sub-article (2) of this article, the board shall inform the guardian of the provisions of section 47 of the Act and shall, if so requested in writing by the guardian, apply to the District Court under that section for directions in the matter.

In the same way, where a care order is in force, the CFA clearly does not have the authority to place the child for adoption, and consent to the adoption of the child. This authority resides exclusively with guardians; the CFA may apply to the High Court for an order under s.54 of the Adoption Act 2010 dispensing with the consent of guardians, but may not consent to the adoption of the child.

What this clearly demonstrates is that a care order does not equate to an order for guardianship, and does not make the CFA a "parent or guardian who is willing or able to exercise the rights and responsibilities of guardianship in respect of the child" within the meaning of s.6C(2)(b)(ii). A care order is mostly analogous to custody with some limited and specified additional powers of consent included; it does not extend to a full appointment of guardianship. In *O'S v Doyle*, the Supreme Court stressed that "[t]he right to custody of a child is one of the rights that arises under the guardianship relationship. However, the concept of custody and guardianship must not be conflated."[7]

Since not all of the rights and responsibilities of guardianship pass to the CFA upon the making of a care order, the CFA is not a "parent or guardian who is willing or able to exercise the rights and responsibilities of guardianship in respect of the child" within the meaning of s.6C(2)(b)(ii). Accordingly, the existence of a care order is not a bar to an application under this section. Under s.6C(4), "the court shall direct that the Child and Family Agency be put on notice of the application, and have regard to the views (if any) of the Agency in deciding whether or not to make an order under subsection (1)." The section does not require that the consent of the CFA is a pre-condition to making an order appointing the applicant as a guardian. Holding that the CFA is a "parent or guardian who is willing or able to exercise the rights and responsibilities of guardianship in respect of the child" would create a situation whereby the CFA would have an effective veto on applications, in that an application for guardianship under s.6C by a foster parent could only succeed in circumstances

[7] [2013] IESC 60 at [27].

where the CFA declared itself unwilling to exercise the rights and responsibilities of guardianship. This would be a perverse interpretation.

4. Right of the Child to be Heard

The right of children to be heard in matters affecting them has been globally recognised since the enactment of the UN Convention on the Rights of the Child in 1989, Article 12 of which provides:

> *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.*

In domestic Irish law, this right of the child finds expression on two levels. First, there is a specific constitutional and statutory obligation to ascertain the views of children who are capable of forming them; and second, there is a procedural right of children to be heard that is protected by the Irish Constitution.

(a) – Obligation to Ascertain the Views of the Child

The Thirty-first Amendment to the Constitution inserted a new Article 42A entitled Children, with Art. 42A.4 stating:

> *1° Provision shall be made by law that in the resolution of all proceedings –*
>
> *(i) brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or*
>
> *(ii) concerning the adoption, guardianship or custody of, or access to, any child,*
>
> *the best interests of the child shall be the paramount consideration.*
>
> *2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section 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.

As outlined by Geoffrey Shannon, in child protection, adoption, guardianship, custody, and access proceedings, Art. 42A.4.2° requires the court to:

(i) First, to ascertain the views of the child, and

(ii) Second, to give due weight to those views.[8]

On the question of when a child is to be deemed capable of forming his or her own views (at which point the obligation to ascertain those views takes effect), guidance can be found in the case law applying the Hague Convention and the Brussels II (bis) Regulation. In *N v N*,[9] the High Court described the process as follows:

(i) The starting point is that the child should be heard.

(ii) Maturity determines whether child capable of forming views.

(iii) Age is relevant only to the weight to be attached.

In deciding to hear from a six-year old child, Finlay Geoghegan J stressed: "Anyone who has had contact with normal six year olds knows that they are capable of forming their own views about many matters of direct relevance to them in their ordinary everyday life." In *UA v UTN*,[10] the Court was strongly influenced by a clear and cogent desire expressed by boys aged seven and nine years old to stay with their mother and refused to order their return to their jurisdiction of habitual residence.

(b) – Procedural right of the child to be heard

Article 40.3 of the Constitution guarantees certain fundamental rights to all citizens of the State, including the child.[11] This provision was interpreted by Finlay Geoghegan J in her High Court ruling in *FN v CO* as follows:

> "It is also well established that an individual in respect of whom a decision of importance is being taken, such as those taken by the courts to which s. 3 of the Act of 1964 applies, has a personal right within the meaning of Article 40.3 of the Constitution to have such decision taken in accordance with the

[8] G. Shannon, *Children and Family Relationship Law in Ireland – Practice and Procedure* (Dublin: Clarus Press, 2016) at 25.

[9] [2008] IEHC 382.

[10] [2011] IESC 39.

[11] As acknowledged in the Supreme Court ruling of *G v An Bord Uchtála* [1980] 1 IR 32.

> principles of constitutional justice. Such principles of constitutional justice appear to me to include the right of a child, whose age and understanding is such that a court considers it appropriate to take into account his/her wishes, to have such wishes taken into account by a court in taking a decision to which s. 3 of the Act of 1964 applies. 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 the child."[12]

In the recent decision of the High Court in *A O'D v Judge Constantine G. O'Leary*, Baker J concluded that "[b]ecause of the extent to which a child care order can impact on the rights of a child, it must be the case that the child has a right to fair procedures", noting the ruling of Finlay Geoghegan J in *FN v CO* meant that a child has a right to have "decisions made in regard to its guardianship and custody taken in the interests of its welfare [as] a personal right of the child within the meaning of Article 40.3 of the Constitution".[13]

(c) – Specific Provision in Guardianship of Infants Act 1964

The Guardianship of Infants Act 1964, pursuant to amendments made by the Children and Family Relationships Act 2015, now gives effect to Article 42A.4.2° for the purposes of these proceedings in the form of s.6C(8), which provides:

> *(8) In deciding whether or not to make an order under this section, the court shall—*
>
> > *(a) ensure that the child concerned, to the extent possible given his or her age and understanding, has the opportunity to make his or her views on the matter known, and have regard to those views …*

As per the case law cited above, this provision falls to be interpreted in light of the child's procedural right to be heard.

Additionally, s.25 of the 1964 Act 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.*

[12] [2004] 4 IR 311 at 322.

[13] *A O'D v Judge Constantine G. O'Leary* [2016] IEHC 555 at [89].

Section 3 of the 1964 Act prescribes that in matters such as the guardianship of a child, "the court… shall regard the best interests of the child as the paramount consideration." Again, s.6C(10) states that "the court shall have regard to… the best interests of the child". The importance of these two sections, and the repeated reference to "the best interests of the child", is evidenced by the wording of s.31:

> *(1) In determining for the purposes of this Act what is in the best interests of a child, the court shall have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family.*
>
> *(2) The factors and circumstances referred to in subsection (1) include:*
>
> *…*
>
> *(b) the views of the child concerned that are ascertainable (whether in accordance with section 32 or otherwise); …*

While the 1964 Act provides for children to be heard, it is not prescriptive as to how this shall occur. One specific options is the appointment of a child expert to ascertain a child's view and to guide the court on what weight should be applied to any such views, as is provided for in s.32(1)(b). Geoffrey Shannon has noted that appointing a "child's views expert" under this section of the 1964 Act "can be viewed as enriching the scope for the full and proper realisation of Articles 42A.4.1 and 42A.4.2."[14] Section 32(1) of the 1964 Act states:

> *In proceedings to which section 3(1)(a) applies, the court may, by order, do either or both of the following:*
>
> > *(a) give such directions as it thinks proper for the purpose of procuring from an expert a report in writing on any question affecting the welfare of the child; or*
> >
> > *(b) appoint an expert to determine and convey the child's views.*

Such an order may be made by the judge based on a perceived need, or following an application by a party to the proceedings;[15] however it should be noted that the fees and expenses of an expert appointed under s.32(1)(b) will be paid for by the parties to the proceedings, in accordance with s.32(9). The role and responsibilities of an expert, following the making of such an order, are set out in s.32(6):

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[14] G. Shannon, *Children and Family Relationship Law in Ireland – Practice and Procedure* (Dublin: Clarus Press, 2016) at 63.

[15] S.32(2).

An expert appointed under subsection (1)(b) shall—

(a) ascertain the maturity of the child,

(b) where requested by the court, ascertain whether or not the child is capable of forming his or her views on the matters that are the subject of the proceedings, and report to the court accordingly.

In practice, such a request for an 'expert' report would be made in accordance with the District Court (Children and Family Relationships Act 2015) Rules 2016, Order 58, Rule 14, which states:

(1) An application to the Court by a party to make an order:

(i) under section 32(1)(a) or section 32(1)(b) of the Act, or (ii) under section 47 of the Family Law Act 1995

may be included in writing in the summons, or made at the hearing.

(2) The Court may exercise the power of its own motion to make an order:

(i) in proceedings to which section 3(1)(a) of the Act applies, under section 32(1)(a) or section 32(1)(b) of the Act, or (ii) under section 47 of the Family Law Act 1995

at any time and from time to time during the proceedings, having heard the parties.

Such a report is essentially a new feature in Irish law, separate to those usually sought under s.20 of the Child Care Act 1991 or s.47 of the Family Law Act 1995. It would appear that if the judge is not prepared to speak to the children directly, this may be the most appropriate mechanism for seeking the children's views on any matter which the court deems important to the current proceedings.

While the Child and Family Agency may argue that the children's social worker(s) would have already sought the children's views on a regular basis, the references to provisions in the Constitution and legislation contained in this brief clearly note that their views should be sought in matters relating to guardianship specifically. As such, an independent child expert would seem to be the best placed, and most neutral, person to achieve the goal of ascertaining the children's views on the current matter, and of determining what weight to attach to those views based on the children's age and maturity.

However, it should be stressed that if the Court declines to appoint an expert, the Court's obligation to ascertain the views of the child remains, and thus some other mechanism must be employed instead if the child's constitutional rights are to be vindicated and the court's constitutional obligations discharged.

Finally, as an alternative mechanism for seeking the children's view in an independent manner, it should be noted that s.12(a) of the 1964 Act provides for the court to make an order for a 'section 20' report under the Child Care Act 1991:

> *(1) In making any order under this Act, the court may impose such conditions as it considers to be necessary in the best interests of the child.*
>
> *…*
>
> *(4) Where, in any proceedings pursuant to this Part, it appears to the court that it may be appropriate for a care order or a supervision order to be made with respect to a child concerned in the proceedings, the court may, of its own motion, or on the application of any person, adjourn the proceedings and make such directions under section 20 of the Child Care Act 1991 as the court may deem appropriate.*