

## NATIONAL REPORT: IRELAND

Geoffrey Shannon  
Law Society of Ireland, Dublin

### A. GENERAL

**1. Having regard to the concept of parental responsibilities as defined by the Council of Europe (see above), explain the concept or concepts used in your national legal system.**

The matters covered in the Council of Europe definition of parental responsibility broadly equate with the concept of parental responsibility as understood in the Irish legal system. The term 'parental responsibility' is taken to mean rights of custody, rights of access (contact) and guardianship. Parental responsibility also equates to the basis of the exercise of jurisdiction by the Irish courts of their wardship jurisdiction.

**2. Explain whether your national concept or concepts encompass:**

**(a) Care and protection**

Yes, it does. The Irish Child Care Act 1991<sup>1</sup> provides a definitive legal structure for the protection of children at risk.

**(b) Maintenance of personal relationships**

Yes, it does. Where a parent who is a guardian does not obtain custody, he or she may nonetheless apply for access to the child. The general rule is that contact between a child and his or her parent is to be maintained wherever practicable. Where immediate direct contact cannot be ordered, supervised or indirect contact will generally be granted.

**(c) Provision of education**

Yes, it does. The concept of guardianship relates not to the specific matter of a child's daily life, but to its overall welfare and upbringing, such as the provision of education.

**(d) Legal representation**

Yes, it does.

**(e) Determination of residence**

Yes, it does.

**(f) Administration of property**

Yes, it does.

**3. In what circumstances (e.g. the child reaching the age of majority or marrying) do parental responsibilities automatically come to an end?**

---

<sup>1</sup> No. 17 of 1991.

Parental responsibilities arise only in respect of 'a person who has not attained full age'.<sup>2</sup> By virtue of Sec. 2 Irish Age of Majority Act 1985<sup>3</sup> a person reaches full age on attaining the age of 18. In respect of maintenance obligations, a dependent child is defined to include a person who has attained the age of 18 years but is under the age of 23 and is receiving or undergoing a full-time course of education at a recognised educational establishment, or is suffering from a mental or physical disability to such an extent that it is not reasonably possible for him or her to maintain him or herself fully.

**4. What is the current source of law for parental responsibilities?**

The central concepts governing parental responsibilities in Ireland are guardianship, custody and access. The law relating to guardianship, custody and access is contained in the Irish Guardianship of Infants Act 1964 as amended by the Irish Status of Children Act 1987, the Irish Judicial Separation and Family Law Reform Act 1989, the Irish Family Law (Divorce) Act 1996 and the Irish Children Act 1997.

**5. Give a brief history of the main developments of the law concerning parental responsibilities.**

The principal statute governing parental responsibilities is the Irish Guardianship of Infants Act 1964. Where the parties are married at the time of the child's birth, both are conferred with joint and equal guardianship rights. Where the parents are not married, rather different considerations apply. While the natural mother of a child is deemed automatically to be a guardian thereof, a natural father who is not the husband of the mother, is not considered to be a guardian. Since the coming into force of Sec. 12 Irish Status of Children Act 1987,<sup>4</sup> the non-marital father may apply for an order conferring on him the status of guardian. Sec. 4 Irish Children Act 1997<sup>5</sup> enables the parties, by agreement, to make a statutory declaration that while not married to each other, the parties are indeed father and mother respectively of the child in question, and that they have agreed that the natural father should be appointed as guardian. Sec. 9 Irish Children Act 1997 makes it clear, should any doubt exist, that it is possible, even where a couple is separated, to award joint custody.

**6. Are there any recent proposals for reform in this area?**

No, there are not.

**B. THE CONTENTS OF PARENTAL RESPONSIBILITIES**

**7. Describe what the contents of parental responsibility are according to your national law including case law.**

---

<sup>2</sup> Per Sec. 2(1) Irish Guardianship of Infants Act 1964 (No. 7 of 1964).

<sup>3</sup> No. 2 of 1985.

<sup>4</sup> No. 26 of 1987.

<sup>5</sup> No. 40 of 1997.

As previously stated, the central concepts governing parental responsibilities are guardianship, custody and access. By virtue of Sec. 11 Irish Guardianship of Infants Act 1964, any person, who is the guardian of a child, may apply to the court for an order on any question relating to the welfare of that child. Once its jurisdiction has been invoked, the court may make such order relating to the welfare of the child in question as it thinks proper. Typically, such an order would concern guardianship and custody of, or right of access to the child, although it is also possible to make an order requiring either the father or mother to make such maintenance payments as the court considers reasonable.

The meaning of the term 'welfare', for the purposes of the Irish Guardianship of Infants Act 1964, is quite widely defined. It includes, according to Sec. 2 thereof, the religious, moral, intellectual, physical and social welfare of the child in question. Sec. 3 of the 1964 Act makes it abundantly clear that in considering an application relating to the guardianship, custody or upbringing of a child, or to the administration of property belonging to, or held in trust for the benefit of that child, or the application of the income of the child, the court must have regard to the welfare of the child. This, the Sec. states, is 'the first and paramount consideration'. Although it is not the only consideration, it is, apparently, the most important one. In his judgment in *G. v. An Bord Uchtála*,<sup>6</sup> WALSH J. stated as follows:

'The word 'paramount' by itself is not by any means an indication of exclusivity; no doubt if the Oireachtas had intended the welfare of the child to be the sole consideration it would have said so. The use of the word 'paramount' certainly indicates that the welfare of the child is to be the superior or the most important consideration, in so far as it can be, having regard to the law or the provisions of the Constitution applicable to any given case.'

Guardianship means the rights and duties of parents in respect of the upbringing of their children. It encompasses the duty to maintain and properly care for the child and refers to the decisions that must be made during the child's lifetime which relate to the general lifestyle and development of the child. Being a guardian requires a person to partake in the important decisions in a child's life, for example, education, religion and general rearing.

Custody is the right of a parent to exercise physical care and control in respect of the upbringing of their child on a day-to-day basis, per DENHAM J. in *W.O'R. v. E.H.*<sup>7</sup> The parent who does not obtain custody of a child but remains a guardian is entitled to apply for access to the child. The court will consider an application for access on the basis that the best interests of the child are of paramount importance. The right of access is, ultimately, a right of the child.

Wardship is part of the Irish High Court's inherent jurisdiction over children, whereby the Court assumes the role of a parent in relation to the child (ward).

#### **8. What is the position taken in your national law with respect to:**

---

<sup>6</sup> [1980] I.R. 32 at 76.

<sup>7</sup> [1996] 2 I.R. 248.

**(a) Care**

Sec. 11 Irish Guardianship of Infants Act 1964 permits a guardian to apply to the court for its direction on any question affecting the care of a child. Where proceedings are brought before the court which relate to the care of a child, the court is obliged under Sec. 3 Irish Guardianship of Infants Act 1964 to regard the welfare of the child as the first and paramount consideration.

**(b) Education**

Art. 42 Irish Constitution of 1937 provides as follows:

‘1) The State acknowledges that the primary and natural educator of the child is the family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children...

In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State, as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.’

Clearly, this Art. provides that only in exceptional cases, where parents, for physical or moral reasons, fail in their duty towards their children, can the State as guardian of the common good endeavour to supply the place of the parents. In fact, it is true to say that Art. 42 has more to do with the family than it does with the substantive right to education. It deals with education in a wider sense than simply scholastic education. When it refers to education, it is alluding to the upbringing of the child, which it holds not only to be a right but a duty of parents. This Art. reinforces the decision making autonomy of the family. On examination, it can be seen that the intellectual structure of Art. 42 assigns a strong sense of priority to parental autonomy.

Art. 42.5 Irish Constitution is of particular importance in that it addresses the complete inability of some parents to provide for their children’s education. It has been interpreted as not being confined to a failure by the parents of a child to provide education for him/her, but extends in exceptional circumstances, to failure in other duties to satisfy the personal rights of the child.

The Irish Education (Welfare) Act 2000 requires a parent to ensure that his or her child attends a recognised school on each day subject to certain exceptions. A number of limited exceptions to the parents’ duty to ensure that their children go to a recognised school exist where:

- the child is registered with the National Educational Welfare Board for education provided outside the recognised system under Sec. 14;
- the child is being educated outside the State or is taking part in a programme of education, training, instruction or work experience prescribed by the Minister for Education under Sec. 14(19);
- the child is receiving a certain minimum education in accordance with Sec. 27(2); or
- another sufficient cause exists for the child’s non-attendance.

**(c) Religious upbringing**

In determining the matter of custody, the court must have regard to the religious upbringing of the child. Generally, the courts have proved anxious not to disturb the religious and moral formation of the child in question. Thus, the courts have often refused to give custody to a parent who was in a relationship with a person of a religious persuasion different to that of the child. In this respect, the courts have an unenviable task to perform. On the one hand, they must be seen to respect the initial decision of the parents regarding the child's religious upbringing. On the other hand, it can hardly be regarded as acceptable that a person will be denied custody of a child on the basis, even in part, of their religious persuasion. Here, as in other areas, one detects a serious tension between the constitutional preference for the promotion of free practice of religion and the constitutional rule against discrimination on the basis of religious profession, status or belief.<sup>8</sup> A different religious inclination is not, however, an absolute bar to custody.

**(d) Disciplinary measures and corporal punishment**

The Irish law on chastisement by parents and corporal punishment is contained in the Irish Non-Fatal Offences Against the Person Act 1997.<sup>9</sup> Parental chastisement is a defence to both a criminal prosecution and a civil claim. The only defence specifically excluded by the Irish Non-Fatal Offences Against the Person Act 1997 is to be found in Sec. 24 which abolishes any rule of law giving a teacher immunity from criminal prosecution in respect of physical chastisement of a pupil.

**(e) Medical treatment**

Sec. 23 Irish Non-Fatal Offences Against the Person Act 1997 provides that children over the age of 16 can give full consent to medical examination and treatment as if they were of full age. It states:

- '1. The consent of a minor who has attained the age of 16 years to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass to his or her person, shall be as effective as it would be if he or she were of full age; and where a minor has by virtue of this section given an effective consent to any treatment it shall not be necessary to obtain any consent for it from his or her parent or guardian.
2. In this section, 'surgical, medical or dental treatment' includes any procedure undertaken for the purposes of diagnosis, and this section applies to any procedure (including, in particular, the administration of an anaesthetic) which is ancillary to any treatment as it applies to that treatment.
3. Nothing in this section shall be construed as making ineffective any consent which would have been effective if this section had not been enacted.'

The rights of the 'mature child' when in conflict with the rights of parents were examined in the case of *Gillick v. West Norfolk and Wisbech AHA*.<sup>10</sup> In that case a doctor was held to have discretion to prescribe contraceptives to a girl under the age of 16 without the knowledge or permission of her parents, as she had reached

---

<sup>8</sup> See Art. 44.2.1° and 44.2.3° respectively.

<sup>9</sup> No. 26 of 1997.

<sup>10</sup> [1986] A.C. 112.

an age and had sufficient understanding and intelligence, which rendered her capable of fully understanding what was involved. The House of Lords, by a majority, held that parental rights yield to competent children, even those under the age of 16. Lord SCARMAN stated that it will be a question of fact in each case whether a child has sufficient understanding of what is involved to give a valid consent. Whether such a conclusion would be reached in Ireland is an open question. Arguably, the constitutional rights of parents under Art. 42 Irish Constitution might preclude such a result.

In *A. and B. v. Eastern Health Board*,<sup>11</sup> GEOGHEGAN J. held that the termination of pregnancy was ‘medical treatment’ within the meaning of the Irish Child Care Act 1991. The case concerned a child, pregnant as a result of rape, who was the subject of an interim care order. The parents objected to the termination of the pregnancy. While GEOGHEGAN J. rejected the contention that the District Judge had failed to take cognisance of the wishes of the parents, he stated:

‘[T]he Court must undoubtedly regard the welfare of the child as the first and paramount consideration but it must do so within a constitutional framework.’<sup>12</sup>

**(f) Legal representation**

All the parties involved in disputes concerning parental responsibility will generally be legally represented. Where the parties cannot afford such representation, legal aid may be available under the Irish Civil Legal Aid Act 1995.<sup>13</sup> However, under the 1995 Act, both a means test and a merits test are applied before legal aid can be granted.

**9. What is the position taken in respect of the child’s right to be heard with regard to the issues mentioned under Q 8a-Q 8f? What relevance is given to the age and maturity of the child?**

The Irish judiciary does not favour children being present in court while cases concerning them are taking place. Sec. 11 Irish Children Act 1997, which inserts a new Sec. 25 into the Irish Guardianship of Infants Act 1964, allows the court, as it thinks appropriate and practicable having regard to the age and understanding of the child, to take account of his or her wishes in any proceedings with regard to the issues mentioned under Q 8a-Q 8f. In this regard, the Irish High Court in March 2004 held that children aged 13 and 14 years of age were of an age and maturity to have their wishes taken into account.<sup>14</sup> This case is the first to draw a link between the personal right of a child under Art. 40.3 Irish Constitution to have a decision made in accordance with natural and constitutional justice and the provisions of the Irish Guardianship of Infants Act 1964. As the High Court stated:

‘[S]ection 25 [of the 1964 Act] should be construed as enacted for the purpose of, *inter alia*, giving effect to the procedural right guaranteed by Art. 40.3 to children of a certain age and understanding to have their

---

<sup>11</sup> [1998] 1 I.L.R.M. 460.

<sup>12</sup> *Ibid.* at page 475.

<sup>13</sup> No. 32 of 1995.

<sup>14</sup> *F.N. and E.B. v. C.D., H.O. and E.K.*, High Court, 26.03.2004, Finlay-Geoghegan J.

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.’

The case of *A.S. (or se A.B.) v. R.B.* addressed the issue of a judge seeing a child in chambers. KEANE C.J. urged caution with regard to doing this, noting that the only evidence that should be received by a trial judge is that on oath in the presence of the parties to the case. However, he was of the view that interviews may help the judge in determining the wishes of the child.

Sec. 11 Irish Children Act 1997, which inserts a new Sec. 28 into the Irish Guardianship of Infants Act 1964, should also be noted in that it makes provision in Irish law for the appointment by the court of a guardian *ad litem* to act on behalf of any child in private law proceedings involving guardianship, custody of, or access to, a child. This section is one of two sections of the Irish Children Act 1997 not yet in force. The guardian *ad litem* is, effectively, an independent representative appointed by the court to represent the welfare and wishes of the child. At best, the Irish child’s right to be heard in the aforementioned applications is discretionary. The net result of such discretion is a chaotic system of representation for children with significant variations as to the operation of the provision of representation throughout Ireland.

**10. Do(es) the holder(s) of parental responsibilities has (have) the right to administer the child’s property?**

No.

**11. If yes, explain the content of this right.**

Not applicable.

**12. Are there restrictions with respect to:**

**(a) Certain goods and/or values (inherited property, gift...)**

Yes.

**(b) Salary of the child**

The Irish Minimum Wage Act 2000 applies to all employees in Ireland including children. That said, sub-minimum rates of pay apply to children and those aged 18 or older if it is their first entry into employment. For children, the minimum wage is 70 % of the standard minimum wage.

**(c) Certain transactions**

Yes.

**13. Are there special rules protecting children from indebtedness caused by the holder(s) of parental responsibilities?**

Generally no. However, if a child has been made a ward of court, special rules apply.

Do the contents of parental responsibilities differ according to the holder(s) of parental responsibilities (e.g. married, unmarried, parents not living together, stepparents, foster parents or other persons). If so, describe in some detail how it differs.

Where the parties are married at the time of the child's birth, both are conferred with joint and equal guardianship rights.<sup>15</sup> Where the parents are not married, rather different considerations apply. While the natural mother of a child is deemed automatically to be a guardian thereof, a natural father, who is not the husband of the mother, is not considered to be a guardian unless one of three conditions are met:

- a man, not being married to the mother of his child at the time of its birth, may subsequently acquire guardianship by marriage to the aforementioned mother;
- alternatively, the natural father may apply to the court under Sec. 6A of the 1964 Act (inserted by Sec. 12 Irish Status of Children Act 1987) for an order conferring on him the status of guardianship;<sup>16</sup>
- a third, and probably the simplest option, is for the parties, by agreement, to make a statutory declaration stating that while not married to each other, the parties are indeed father and mother respectively of the child in question, and that they have agreed that the natural father should be appointed as guardian. The father must be registered as father on the birth certificate of the child in question to utilise this procedure.<sup>17</sup> Such a declaration must be made in the form prescribed by the Irish Guardianship of Children (Statutory Declaration) Regulations 1998.<sup>18</sup> The parties must, furthermore, have made arrangements regarding the custody of, and/or access to the child in question.

In fact, the term 'father' as used in the 1964 Act, is deemed by Sec. 2 thereof generally to exclude (with certain exceptions) 'the father of a child who has not married that child's mother'. That said, even where the natural father does not have guardianship rights, he may nonetheless apply to the court (by virtue of Sec. 11(4) of the 1964 Act) for an order regarding the custody of, or access to, his child. Thus, notwithstanding Sec. 2, a reference in Sec. 11 to the father or parent of a child, may indeed include the non-marital father of a child, although it seems that such person may only apply for an order of custody or access. The Act seems to preclude such person from applying for an order of maintenance in respect of the child.

Stepparents and foster parents enjoy few rights in Ireland. As far as the natural parent's rights in relation to a child in foster care are concerned, they retain all their rights in relation to their child and can reclaim the foster child at any time. Foster parents must deliver the child to the natural parents in the terms detailed in the Irish Child Care (Placement of Children in Foster Care) Regulations 1995.<sup>19</sup>

---

<sup>15</sup> See Sec. 6 Irish Guardianship of Infants Act 1964.

<sup>16</sup> See *K. v. W.* [1990] I.L.R.M. 121 and *W. O'R. v. E. H.* [1996] 2 I.R. 248.

<sup>17</sup> See Sec. 2 (4) of the 1964 Act.

<sup>18</sup> S.I. No. 5 of 1998.

<sup>19</sup> S.I. No. 260 of 1995.



## C. ATTRIBUTION OF PARENTAL RESPONSIBILITIES

### I. Married parents

#### 15. Who has parental responsibilities when the parents are:

##### (a) Married at the time of the child's birth

Both parents have parental responsibilities.

##### (b) Not married at that time but marry later?

The natural mother has parental responsibilities when the parents are not married whereas both parents have parental responsibilities on marriage.

#### 16. How, if at all, is the attribution of parental responsibilities affected by:

##### (a) Divorce

The granting of a decree of divorce does not affect the right of the father and mother of a child to continue to be joint guardians of any relevant children.<sup>20</sup> The court, however, may declare either of the parties unfit to have custody of any minor child and, if it does so, that party is not entitled to the right to custody of that minor on the death of the other party.<sup>21</sup>

##### (b) Legal separation

It is not at all affected by legal separation.

##### (c) Annulment of the marriage

The fathers of children of annulled marriages remain their guardians under Sec. 2 Irish Guardianship of Infants Act 1964, as amended by the Irish Children Act 1997. The mother has constitutional protection in this regard.

##### (d) Factual separation

It is not affected at all by factual separation.

#### 17. To what extent, if at all, are the parents free to agree upon the attribution of parental responsibilities after divorce, legal separation or annulment of the marriage? If they are, are these agreements subject to scrutiny by a competent authority?

Parties are not free to agree upon the attribution of parental responsibilities after annulment of the marriage. They are, however, free to agree upon the attribution of parental responsibilities after legal separation and divorce. It is possible to have an executed separation agreement on, *inter alia*, the attribution of parental responsibilities, made a rule of court, in either the Circuit Court or the High Court. The ruling of the agreement allows for the remedy of contempt of court where breach of the agreement occurs. If the parents agree upon the attribution of parental responsibilities after divorce, the court will endeavour to reflect such agreement in the orders granted after divorce. That said, the ultimate decision is that of the court.

---

<sup>20</sup> Irish Family Law (Divorce) Act, 1996, Sec. 10 (2), No. 33 of 1996.

<sup>21</sup> 1996 Act, Sec. 41.

**18. May the competent authority attribute joint parental responsibilities to the parents of the child even against the wish of both parents/one of the parents? To what extent, if at all, should the competent authority take account of a parent's violent behaviour towards the other parent?**

Yes, the competent authority may do so. Sec. 11A Irish Guardianship of Infants Act 1964, as inserted by Sec. 9 Irish Children Act 1997 makes it clear, should any doubt exist, that it is possible, even against the wish of one of the parents, to award custody to both the father and mother jointly. In *E.P. v. C.P.*,<sup>22</sup> MCGUINNESS J. stated that joint custody is ill-advised where there is significant acrimony between the parents. In such circumstances, she felt, that joint custody was not suitable. The reason for this is outlined further by the same learned judge in *D.F.O'S. v. C.A.*,<sup>23</sup> MCGUINNESS J. noting that:

'As a general rule where there is deep hostility between the parents I am very reluctant to make an order granting joint custody, due to the probable inability of the parents to co-operate in caring for the child.'

The existence of inter-parental conflict and objections by one or both parents however, is by no means an absolute bar to joint custody. In the latter case, for example, and notwithstanding the existence of conflict and acrimony between the parents, MCGUINNESS J. made an order granting joint custody to both parents. She did so, in the hope that the conferral of joint responsibility would encourage them to 'put their antagonisms behind them'. The learned judge feared, moreover, that the award of sole custody to either parent could exacerbate the sense of bitterness and resentment already existing between the parents. Referring to expert evidence submitted at the trial, MCGUINNESS J. observed that despite their tempestuous marital relationship, both parties had maintained an excellent personal relationship with their daughter and thus, under the circumstances, that joint custody was the most appropriate solution.<sup>24</sup> A similar approach was adopted by HERBERT J. in *D.McA. v. K.McA.*<sup>25</sup> where he granted joint custody to a father and mother of their children, although he did express the view that the everyday routine of the children should not be circumscribed by the joint custody arrangement.

In the attribution of parental responsibilities, Sec. 20(2)(i) Irish Family Law (Divorce) Act 1996 requires the court to take account of:

'...the conduct of each of the spouses, if that conduct is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it'.

This provision, which mirrors the equivalent provision in the Irish Family Law Act 1995, is a broader version than that contained in the Irish Judicial Separation and Family Law Reform Act 1989, which required the court to disregard the conduct of each spouse, unless it would in all the circumstances of the case, be repugnant to

---

<sup>22</sup> High Court, 27.11.1998.

<sup>23</sup> High Court, 20.04.1999.

<sup>24</sup> See also *E.H. v. J.M.*, High Court, 04.04.2000, KINLEN J., and *C.F. v. J.D.F.*, High Court, 16.05.2002, O'SULLIVAN J.

<sup>25</sup> High Court, 17.12.2002, HERBERT J.

justice to do so. Clearly, the court in the attribution of parental responsibilities, is now afforded greater scope to take account of a parent's violent behaviour towards the other parent and to take account of how that behaviour has affected any children of the marriage. That said, considerations of conduct, including a parent's violent behaviour towards the other parent, are only relevant if the behaviour is 'gross and obvious'. In *T. v. T.*,<sup>26</sup> DENHAM J. stated that the Irish Family Law (Divorce) Act 1996 did not seek to establish a fault based divorce system. The learned judge considered Sec. 20(2)(i) and stated:

'[T]he Act of 1996 does not seek to establish a fault system. Thus the concept of 'conduct' established by Sec. 20(2)(i) is of conduct which it would be unjust to disregard'.

**19. Provide statistical information on the attribution of parental responsibilities after divorce, legal separation or annulment of the marriage.**

No such statistical information is available.

**II. Unmarried parents**

**20. Who has parental responsibilities when the parents are not married?**

The unmarried mother.

**21. Does it make a difference if the parents have formalised their mutual relationship in some way (registered partnership, civil union, *pacte civil de solidarité*...)**

No, it makes no difference.

**22. Under what condition, if at all, can:**

**(a) The unmarried mother obtain parental responsibilities**

Where a child is born to parents who are not married to each other at the time of birth, only the unmarried mother will be deemed to be a guardian. The Supreme Court has considered the constitutional rights of the unmarried mother in a number of cases. The unmarried mother has a natural right to the custody and care of her child and such other natural personal rights as she may have fall to be protected under Art. 40.3 (personal rights clause) Irish Constitution.

O'HIGGINS C.J. in *G. v. An Bord Uchtála*<sup>27</sup> indicated that the rights of the non-marital mother are neither inalienable nor imprescriptible, unlike the rights of the marital family under Art. 41 Irish Constitution. Her rights can be alienated or transferred in whole or in part and can be lost, if her conduct towards the child amounts to an abandonment or abdication of her rights and duties. In summary, the unmarried mother has a constitutional right (under Art. 40.3 Irish Constitution) and a statutory right (under Sec. 6 Irish Guardianship of Infants Act 1964) to the guardianship and custody of her child.

---

<sup>26</sup> Supreme Court, 14.10.2002.

<sup>27</sup> [1980] I.R. 32.

**(b) The unmarried father, obtain parental responsibilities**

The unmarried father has no automatic right to the guardianship or custody of his child. The hardship of this rule is obviated by a series of exceptions:

- a natural father may become guardian of his child upon marriage to the mother thereof, notwithstanding the fact that this occurs after the birth of the child;
- since 1988, the natural father of a child may, notwithstanding the fact that he is not married to its mother, apply to the court to be appointed a guardian under Sec. 6A of the 1964 Act.<sup>28</sup> Such appointment, however, shall not affect the guardianship status of any other person in relation to the child who is the subject of the order.

Despite these new powers, the court is not obliged to grant guardianship status to every natural father. The decision in *J.K. v. V.W.*<sup>29</sup> underlines this point. There the Supreme Court held that while a father is entitled by virtue of Sec. 6A to apply to be made guardian, it did not confer any automatic right to be appointed as such. In a similar vein, the court noted that the insertion of Sec. 6A did not, despite the spirit of equality inspiring the Irish Status of Children Act 1987, confer upon the natural father of a child the automatic rights of guardianship enjoyed by a father of a child born within marriage. In the course of his decision, FINLAY C.J. noted that:

‘...the discretion vested in the Court on the making of such an application must be exercised regarding the welfare of the infant as the first and paramount consideration. The blood link between the infant and the father and the possibility for the infant to have the benefit of the guardianship by and the society of its father is one of the many factors which may be viewed by the court as relevant to its welfare...’<sup>30</sup>

The matters that will be taken into account in proceedings under Sec. 6A were alluded to in the Supreme Court decision in *W.O’R. v. E.H. and An Bord Uchtála*.<sup>31</sup> That case, like *J.K. v. V.W.*<sup>32</sup> involved the adoption of a non-marital child. Amongst the matters that arose was the character and extent of the rights that the natural father had in respect of his child. The Supreme Court, while reiterating the predominant position of the child’s welfare in such proceedings, did also consider the weight to be given to the blood link between the father and the child. The blood link alone, it noted, was not a factor sufficient of itself to give rise to a judgment favourable to the father in an application to be appointed guardian under Sec. 6A. Where, however, the child had been born into a stable and established home environment and cared for by both father and mother, the Court suggested that the father’s prospects of success were considerably stronger. The blood link, combined with the interest and concern that arose from the father’s close connection to the child, might give rise to more substantial rights in respect of the child. In a disputed application to be appointed a guardian under Sec. 6A the court generally looks at a variety of factors which include:

---

<sup>28</sup> As inserted by Sec. 12 of the Irish Status of Children Act 1987.

<sup>29</sup> [1990] 2 I.R. 437.

<sup>30</sup> *Ibid.* at 447.

<sup>31</sup> [1996] 2 I.R. 248.

<sup>32</sup> [1990] 2 I.R. 437.

- the circumstances surrounding the birth of the child;
- the relationship between the parents;
- the way in which parental responsibilities have been shared;
- the history of access up to the date of the application.

**23. How, if at all, is the attribution of parental responsibilities affected by the ending of the unmarried parents' relationship?**

It is not affected.

**24. May the competent authority attribute joint parental responsibilities to the parents also against the wish of both parents/one of the parents? To what extent, if at all, may the competent authority take into account a parent's violent behaviour towards the other parent?**

Yes, it may, although this would be most unusual. In reality, the competent authority has little opportunity to take into account a parent's violent behaviour towards the other parent. In Ireland, a cohabiting couple is not recognised as a 'family' even in circumstances where the parties have lived together for a number of years, or where they have children and effectively live as a family as recognised under the Irish Constitution.

**25. To what extent, if at all, are unmarried parents free to agree upon the attribution of parental responsibilities after the ending of their relationship?**

Sec. 2(4) Irish Guardianship of Infants Act 1964, as amended by Sec. 4 of the Children Act 1997, allows the unmarried mother and father by agreement to make a statutory declaration conferring upon the father the status of guardian.<sup>33</sup> Both parties must have agreed to the appointment and are required to have made arrangements concerning the custody of and/or access to the child in question. The natural father must be named as father on the birth certificate of the child. There are practical difficulties with the operation of this Sec.. For example, where does one 'file' the declaration? Furthermore, if the father is not registered on the birth certificate and presents the statutory declaration to the Registrar, it is likely that the Registrar will not accept the declaration and will require a court order.<sup>34</sup> The main difficulty, of course, arises when the father's wish and application to be appointed a joint guardian is contested by the natural mother. The position in relation to these applications has not been altered by Sec. 4 of the 1997 Act.

**26. Provide statistical information available regarding the attribution of parental responsibilities for unmarried parents.**

No such statistics are available.

---

<sup>33</sup> See S.I. No. 5 of 1998.

<sup>34</sup> See Ord. 59 of the Circuit Court Rules 2001 (S.I. No. 510 of 2001) which requires the father to be registered as the father in a register maintained under the Births and Deaths Registration Acts 1863-2004.

**III. Other persons**

**27. Under what conditions, if at all, can the partner of a parent holding parental responsibilities obtain parental responsibilities, when, he or she is:**

**(a) Married to that parent**

Adoption is the only way of investing the partner of a parent holding parental responsibilities with parental responsibilities in respect of that child. To achieve this, however, the natural parent must also adopt his or her own child even though he or she has parental responsibilities in respect of the child. There is no mechanism within the existing adoption code whereby the natural parents can continue a legal parenting regime, and, at the same time, allow the custodial parent to adopt the child with his or her partner. The Irish Adoption Board has called for a change in the legislation to facilitate a new spouse of a natural parent obtaining joint guardianship rights with the mother, while at the same time facilitating the continuation of any factual relationship of the non-custodial natural parent with the child. The introduction of a divorce jurisdiction in Ireland in 1996 has not distorted the pattern of adoptions, and will not do so as stepparent adoptions will not arise. Under the current divorce legislation neither parent loses guardianship on divorce.<sup>35</sup>

**(b) Living with that parent in a formalised relationship (registered partnership, civil union, *pacte civil de solidarité*...)?**

Not at all.

**(c) Living with that parent in a non formalised relationship?**

Not at all.

**28. Does it make any difference if the partner of the parent holding parental responsibilities is of the same sex?**

No.

**29. How, if at all, is the attribution of parental responsibilities in the partner affected by the ending of his/her relationship with the parent? Distinguish according to the different relationships referred to in Questions 27 and 28.**

Not at all.

**30. To what extent, if at all, is the parent holding parental responsibilities and his/her partner free to agree upon the attribution of parental responsibilities after the ending of his/her relationship with the parent? Distinguish according to the different relationships referred to in Questions 27 and 28.**

Not at all.

---

<sup>35</sup> Sec. 10 (2), Irish Family Law (Divorce) Act 1996.

**31. Under what conditions, if at all, can other persons not being a parent or a partner of a parent holding parental responsibilities, obtain parental responsibilities (e.g. members of the child's family, close friends, foster parents...)?**

Specify, where such other persons may obtain parental responsibilities, if it is in addition to or in substitution of existing holder(s) of parental responsibilities.

Art. 41 and 42 Irish Constitution, which recognise the natural rights and duties of marital parents in respect of their children, describe such rights and duties as 'inalienable' and 'imprescriptible', essentially preventing marital parents from surrendering their parental rights to others. While Art. 41 and 42 represent a legal impediment to state intrusion into the marital family, no such impediment arises in the context of the non-marital family where the best interests of a non-marital child will take precedence over all other matters. That said, it is only possible for either a parent (including an unmarried father) or guardian to seek a custody order under the Guardianship of Infants Act 1964. Currently, adoption and invoking the wardship jurisdiction of the Courts are the only options available to substitute parents who seek to establish a stable legal relationship with a child and acquire parental responsibilities.

**32. Under what conditions, if at all, can a public body obtain parental responsibilities? Specify, where it is so obtained, if it is in addition to or in substitution of existing holder(s) of parental responsibilities.**

Where a health board (i.e. local authority) is of the opinion that a child who resides in or was found in its area is in need of care or protection which he or she is unlikely to receive unless an appropriate order is made by the court, it shall be the duty of the health board to make an application to the court for a care order. The effect of a care order is to commit the child in need of care or protection to the care of the health board for so long as he or she remains a child or for a shorter period. Sec. 18 Irish Child Care Act 1991 authorises the court on the application of the health board to make a care order where it is satisfied that:

- the child has been or is being sexually assaulted, ill-treated, neglected, or sexually abused; or
- the child's health, development or welfare has been or is being avoidably impaired or neglected; or
- the child's health, development or welfare is likely to be avoidably impaired or neglected, and that the child requires care and protection which he is unlikely to receive unless the order is made.

The court is further entitled to extend that 'shorter' period upon its own motion or the application of another person, if it is satisfied that the grounds for the making of the order continue to exist.

Sec. 18 (3) Irish Child Care Act 1991 provides that where a care order is in force, the health board has control over the child as if it were his or her parent. The health board is further obliged to do what is reasonable in all the circumstances to safeguard and promote the child's health, development or welfare. In particular, the health board has authority to decide the type of care to be provided for the child. Where a child has been placed in the care of a health board, the health board

has a number of placement options. Sec. 36 Irish Child Care Act 1991 specifies three options, which are, foster care, residential care and placement with relatives. By virtue of Sec. 36(1)(c) of the 1991 Act a health board can place a child who may be eligible for adoption 'with a suitable person with a view to his adoption.'

**33. To whom are the parental responsibilities attributed in the case of:**

**(a) The death of the parent holding parental responsibilities**

In the case of all children born to parents who, at the relevant time, are married to each other, Sec. 6(1) of the 1964 Act confers joint and equal rights of guardianship on both the father and the mother. If either parent should die during the lifetime of the other, the latter will be deemed guardian of their children either alone or together with such person as is appointed by will by the deceased spouse or by the court.<sup>36</sup> An unmarried father may also be appointed guardian by deed or will on the death of the unmarried mother or other guardian.<sup>37</sup>

**(b) The death of both parents of whom at least one was holding parental responsibilities at the time of the death**

Where a child has no guardian any person or persons may, by virtue of Sec. 8(1) of the 1964 Act, apply to the court to be appointed as guardian(s) of the child.

**34. To what extent, if at all, may the holder(s) of parental responsibilities appoint a new holder(s) upon his/her/their death? If such an appointment is permitted, must it take place in a special form, e.g. will?**

Any parent who is also the guardian of a child may, by deed or will, appoint any person or persons, to take the former's place as guardian or guardians, in the case of the death of that parent.<sup>38</sup> Such appointee (the 'testamentary guardian') shall, on the death of the parent in question, act together with any other surviving guardians. A surviving parent may, however, object to such appointment. In such a case, the testamentary guardian cannot act as guardian unless, on application to the court, the court grants an order that the testamentary guardian shall act as guardian, either jointly with the surviving parent or indeed to the latter's exclusion.<sup>39</sup> In making such an order, the court may also, at its discretion, make such orders relating to the custody of or access to children as to it appear proper.<sup>40</sup>

## **D. THE EXERCISE OF PARENTAL RESPONSIBILITIES**

### ***I. Interests of the child***

**35. In exercising parental responsibilities, how are the interests of the child defined in your national legal system?**

The interests of the child are defined by reference to the principle that the best interests of the child must take precedence in all matters concerning the child's

---

<sup>36</sup> See Sec. 6(2) and (3) Irish Guardianship of Infants Act 1964.

<sup>37</sup> See Sec. 7 of the 1964 Act.

<sup>38</sup> Sec. 7 of the 1964 Act.

<sup>39</sup> Sec. 8(5) of the 1964 Act.

<sup>40</sup> Sec. 8(6) of the 1964 Act.



welfare. 'Welfare' is defined by Sec. 2 Irish Guardianship of Infants Act 1964 as comprising the religious, moral, intellectual, physical and social welfare of a child. Sec. 3 of the 1964 Act makes it abundantly clear that in considering an application relating to the guardianship, custody or upbringing of a child, or to the administration of property belonging to or held in trust for the benefit of that child, or the application of the income of the child, the court must have regard to the welfare of the child. This, the Sec. states, is 'the first and paramount consideration.' Although this has been qualified by the constitutional preference for the marital family, the ostensible rule is that where there is a conflict between the welfare of the child and other considerations (such as the rights of parents), the welfare of the child takes precedence over all other matters. This is sometimes known as the 'best interests test', although Sec. 3 refers specifically to the welfare of the child.<sup>41</sup> This principle is in line with Ireland's international obligations, in particular under the UN Convention on the Rights of the Child 1989.<sup>42</sup> O'FLAHERTY J. in applying this principle in *Southern Health Board v. C.H.*<sup>43</sup> stated that:

'It is easy to comprehend that the child's welfare must always be of far graver concern to the court. We must, as judges, always harken to the constitutional command which mandates, as a prime consideration, the interests of the child in any legal circumstances.'

Later, in his judgment, O'FLAHERTY J. observed that 'the first point to note about this case is that the judge is in essence required to inquire as to what is in the best interests of the child.' No individual factor can, in itself, be considered conclusive. WALSH J. highlighted this in his judgment in *S. v. S.*,<sup>44</sup> which was cited favourably by MCGUINNESS J. in *C.C. v. P.C.*,<sup>45</sup> wherein the learned judge stressed the merits of assuming an overall view:

'All the ingredients which the Act stipulates are to be considered globally. This is not to be decided by the simple method of totting up the marks which may be awarded under each of the five headings. It is the totality of the picture presented which must be considered ... the word 'welfare' must be taken in its widest sense.'<sup>46</sup>

The welfare of a child must be judged by reference to all relevant matters. While the welfare of the child as defined by the Irish Guardianship of Infants Act 1964 is deemed to be a paramount consideration, it is nonetheless possible (and sometimes necessary) to look outside the strict confines of the definition in Sec. 2 of the 1964 Act. Other factors have been found relevant to the consideration of the court.

A factor not mentioned by the 1964 Act, but nonetheless of importance, is the question of emotional welfare. This was highlighted most recently by the decision

---

<sup>41</sup> See WALSH J. in *G. v. An Bord Uchtála* at page 76, who appears to suggest that the two terms may differ in meaning in certain contexts. With utmost respect, it is submitted that the distinction suggested is perhaps rather fine.

<sup>42</sup> The UN Convention on the Rights of the Child 1989 was ratified by Ireland on 21.09.1992.

<sup>43</sup> [1996] 2 I.L.R.M. 142.

<sup>44</sup> (1974) 110 I.L.T.R. 57.

<sup>45</sup> [1994] 3 Fam. L.J. 85.

<sup>46</sup> See also *D.F.O'S. v. C.A.*, unreported, High Court, McGuinness J., 20.04.1999.

of MCGUINNESS J. in *D.F.O'S. v. C.A.*<sup>47</sup> There the learned judge, referring to supporting precedent, noted the recognition of this added factor.<sup>48</sup> This 'most important aspect of welfare', though not explicitly mentioned in the 1964 Act, should be taken into account in determining applications under the Act. In the case cited, MCGUINNESS J. suggested that the emotional welfare of the child would be better served by the parents attending counselling sessions.

In Ireland, it has generally been accepted, that, where a child is of 'tender years' (which generally means under the age of seven), all else being equal, that the child in question should reside in the custody of its mother. In *B. v. B.*,<sup>49</sup> for instance, O'DÁLAIGH C.J. ruled that '... in view of his tender age, there can be no doubt that the younger son [of the parties] should continue in the custody of his mother.'

The more generally applicable comments of BUDD J. in *B. v. B.*<sup>50</sup> reveal the reasoning behind the court's decision noting that 'young children are notoriously nearer to their mother than their father'.<sup>51</sup> His later comments seem to suggest that he believed that only the mother in that case could attend to her son's physical needs and give him the attention he required. Indeed, at one point, the principle seemed to have evolved into something approaching a presumption of law.<sup>52</sup> In *H. v. H.*<sup>53</sup> PARKE J. noted the 'ample judicial support' for the proposition that a 'child of tender years should be entrusted to the custody of his mother unless she had so gravely failed in her duty as a mother as to forfeit such right'. In *MacD. v. MacD.*,<sup>54</sup> HENCHY J. expressed the preference for the mother as follows:

'In the case of very young children ... the person *prima facie* entitled to their custody, where the parents are estranged, is the mother, for by reason of her motherhood she will usually be the person primarily and uniquely capable of ministering to their welfare.'

In more recent times, however, this approach has been somewhat more restrained. It is arguable that this principle, besides compounding gender stereotypes, ignores the growing prevalence and acceptance of men who play an enhanced parenting role in their respective families. In fact, the principle is not invariable and in light of changing parenting patterns the courts have proved increasingly willing, as in *J.J.W. v. B.M.W.*,<sup>55</sup> to make an order of custody relating even to young children in favour of their father. In this regard, a recent dictum of MCGUINNESS J. is most instructive. In *D.F.O'S. v. C.A.*,<sup>56</sup> the learned judge, in deciding to grant joint custody of a four-year old child, noted that she:

---

<sup>47</sup> Unreported, High Court, 20.04.1999.

<sup>48</sup> See also *M.B. O'S. v. P.D. O'S.* (1974) 110 I.L.T.R. 57; *MacD. v. MacD.* (1979) 114 I.L.T.R. 66, *per* GRIFFIN J.; *S. v. S.* [1992] I.L.R.M. 732.

<sup>49</sup> [1975] I.R. 54 at 59.

<sup>50</sup> *Ibid.* at 67.

<sup>51</sup> See also his comments, *ibid.*, at 70.

<sup>52</sup> See also the *dicta* of Walsh J. in *E.K. v. M.K.*, unreported, Supreme Court, 31.07.1974.

<sup>53</sup> Unreported, High Court, PARKE J., 04.02.1976.

<sup>54</sup> (1979) 114 I.L.T.R. 66.

<sup>55</sup> (1971) 110 I.L.T.R. 49.

<sup>56</sup> Unreported, High Court, MCGUINNESS J., 20.04.1999.

‘...[did] not entirely accept the old *tender years* principle: modern views and practices of parenting show the virtues of shared parenting and the older principles too often meant the automatic granting of custody to the mother virtually to the exclusion of the father.’

The question of parental capacity is closely allied to the last factor, although it relies on the surer footing of individual characteristics rather than resorting to crude gender stereotypes. The court is required to ensure that the parent being granted guardianship, custody or access has sufficient mental and physical resources to perform the duties envisaged. This is not to say that the more capable spouse will always be granted custody. Nor should it suggest that parents with needs of their own, owing for instance to disabilities, should be denied custody. In *E. v. E.*<sup>57</sup> and *A.H.S. v. M.S.*,<sup>58</sup> for instance, custody was granted to women who, despite a history of mental illness, were shown to have overcome their difficulties to an extent sufficient to allow their having custody.<sup>59</sup>

Where a parent, however, is manifestly incapable of carrying out this role, the court will lean heavily against such an order. In *C.(C.) v. C.(P.)*,<sup>60</sup> MCGUINNESS J. declined to make an order of custody in favour of a father. The evidence showed that the roles of child and parent had largely reversed in this case. In response to his father’s difficulties, the child, it seemed, had taken on the role of parent, generally looking out for and protecting his father. In such a case there was a danger, in the words of the judge, of the child becoming ‘parentified’, of taking on the mantle of responsibility for a family well before his time.

## **II. Joint parental responsibilities**

### **36. If parental responsibilities are held jointly by two or more persons, are they held equally?**

No. Sec. 9 of the Children Act 1997 amends Sec. 11 of the Guardianship of Infants Act 1964 by inserting a Sec. 11A which makes it clear that in appropriate cases, custody of a child may be granted by the court to a father and mother jointly. Joint custody in Ireland generally involves a child residing with each parent for a stipulated period of time, *e.g.* spending weekdays with the mother and weekends with the father. In *B. v. B.*,<sup>61</sup> for instance, ÓDÁLAIGH C.J. appeared to suggest that joint custody was a desirable option in certain cases, in that case suggesting that the unity of the children would be best served ‘by allowing them to reside for half the year with one parent, and the other half with the other.’ Such an arrangement should not, however, be such as to cause significant disruption to a child’s life, as, for instance, where one parent lives a significant distance from the school at which the children normally attend. In *D.McA. v. K.McA.*<sup>62</sup> Herbert J. granted joint custody although he did express the view that the everyday routine of children

---

<sup>57</sup> Unreported, High Court, 03.02.1977.

<sup>58</sup> Unreported, High Court, 12.11.982.

<sup>59</sup> Although in the former case the order was made subject to subsequent review.

<sup>60</sup> [1994] 3 Fam. L.J. 1985.

<sup>61</sup> [1975] I.R. 54.

<sup>62</sup> High Court, 17.12.2002, HERBERT J.

should not be circumscribed by joint custody. Each decision depends, of course, on the individual facts of each case. Joint custody in Ireland tends, however, to be the exception rather than the rule. The practicalities of family life in Ireland are such that most often children will reside with one parent while exercising access rights with the other parent.

**37. If parental responsibilities holders cannot agree on an issue, how is the dispute resolved? For example does the holder of parental responsibilities have the authority to act alone? In this respect is a distinction made between important decisions and decisions of a daily nature? Does it make any difference if the child is only living with one of the holders of the parental responsibilities?**

If parental responsibilities holders cannot agree on an issue, the dispute is resolved by the court. Sec. 11 of the Guardianship of Infants Act 1964 permits any person to apply to the court for its direction on any question affecting the welfare of the child. Although the holder of parental authorities does not have the authority to act alone with respect to important decisions, he or she is entitled to make such decisions if they are of a daily nature. In this respect, it is important whether the child is living with one of the holders of parental responsibilities.

**38. If holders of parental responsibilities cannot agree on an issue, can they apply to a competent authority to resolve their dispute? If applicable, specify whether this authority's competence is limited to certain issues e.g. residence or contact.**

If holders of parental responsibility cannot agree on an issue, Sec. 11 Irish Guardianship of Infants Act 1964 permits an application to the court for its direction on any issue affecting the welfare of the child.

**39. To what extent, if at all, may a holder of parental responsibilities act alone if there is more than one holder of parental responsibilities?**

In a case where there is more than one holder of parental responsibilities, a holder of parental responsibilities can only act alone in respect of the physical care and control of the child on a day-to-day basis.

**40. Under what circumstances, if at all, may the competent authority permit the residence of the child to be changed within the same country and/or abroad (so-called relocation) without the consent of one of the holders of parental responsibilities?**

The Irish courts have stated that the parent with sole custody has the right to determine the residence of the child as part of his or her 'rights' as the custodial parent.<sup>63</sup> Where a parent is not actually exercising 'rights of custody' but merely holds the rights 'on paper' the onus is on the parent asserting such rights to show that they are actually exercised.<sup>64</sup> Removal of the child by one party during the

---

<sup>63</sup> See *W. v. W.* [1993] 2 I.R. 476, *H.I. v. M.G.* [1999] 2 I.L.R.M. 22 and *W.P.P. v. S.R.W.* [2001] 1 I.L.R.M. 371.

<sup>64</sup> See MCGUINNESS J. in *C.M. and O.M. v. Delegacion de Malaga and Others* [1999] 2 I.R. 363.

course of an application (under the Irish Guardianship of Infants Act 1964) to determine issues of child custody and guardianship in the District Court is not permissible.<sup>65</sup>

Where a parent applies to court for permission to relocate, the court determines the question under the general heading of 'best interests of the child' as a paramount consideration. However, the court must also consider other matters such as the question of freedom of movement. Where the rights of individuals are in conflict, the court must balance the interests of the parties carefully and conscientiously.

Where the consent of one of the holders of parental responsibilities is not forthcoming in Ireland, the test appears to be for the court to focus on what is best for the child. It determines what benefits the child will have and what detriments the child will suffer in a move, and, additionally, what consequences will follow from an order restricting movement.

**41. Under what conditions, if at all, may the competent authority decree that the child should, on an alternating basis, reside with both holders of parental responsibilities (e.g. every other month with mother/father)?**

The court has absolute discretion in this matter.

**III. Sole parental responsibilities**

**42. Does a parent with sole parental responsibilities have full authority to act alone, or does he or she have a duty to consult**

**(a) the other parent**

A parent with sole parental responsibilities does not have to consult the other parent.

**(b) other persons, bodies or competent authorities**

A person with sole parental responsibilities does not have to consult other persons, bodies or competent authorities.

**E. CONTACT.**

**43. Having regard to the definition by the Council of Europe (see above), explain the concepts of contact used in your national legal system.**

The concept of contact (access) as used in Ireland may be described as a right and duty of visitation, allowing the person having access to visit with and communicate with a child on a temporary basis. The court will consider an application for access on the basis that the best interests of the child are of paramount consideration. Recent Irish legislation reinforces the duty upon the Irish courts to consider all matters of access primarily by reference to what is in the child's best interests. Sec. 9 Irish Children Act 1997 added a new Sec. 11D to the Irish Guardianship of Infants Act 1964 which requires that the court, in considering making any contact order, have regard to whether the child's best interests would be promoted by

---

<sup>65</sup> See *H. (Abduction: Rights of Custody)* [2000] 1 F.L.R. 201.

maintaining personal relations and direct contact with both his or her father and mother on a regular basis. The Irish legislature regards access to both parents as invariably being in the best interests of a child. It is, indeed, exceptionally uncommon for an application for access to be refused. The case of *A.MacB. v. A.G.MacB.*<sup>66</sup> exemplifies the strong judicial tendency in favour of granting access. There, a father was granted access to his children despite strong evidence that the children were afraid of him. This was despite the additional fact that the father was alleged to have caused malicious damage to property. BARRON J., nonetheless, considered that it was 'essential that the children know that they have a father and ... that their father is able to take the place of a father in their lives.'<sup>67</sup>

**44. To what extent, if at all, does the child have a right of contact with:**

**(a) A parent holding parental responsibilities but not living with the child**

The child has a right of contact with a parent holding parental responsibilities but not living with the child if such contact is in the child's best interests.

**(b) A parent not holding parental responsibilities**

The parent who does not obtain custody of a child but remains a guardian is entitled to apply for access to the child. The right of access in this context is ultimately a right of the child. If there is a conflict between what is in the best interests of the applicant parent and the child, the rights of the child will take precedence. It should be remembered that an access order is never a final order. It is always open to either parent to apply to the court to vary the access order if this is in the best interests of the child.<sup>68</sup>

**(c) Persons other than parents (e.g. grandparents, stepparents, siblings, etc...)**

Until 9 January 1998, only a parent or guardian of a child could apply for access to a child. Since the commencement of Sec. 9 Irish Children Act 1997, however, certain additional persons may now apply to the court to be afforded access to a child. These persons include the relative of a child or a person who has acted *in loco parentis* in respect of the relevant child. This was made possible by Sec. 11B of the 1964 Act. While initial drafts of the legislation confined the meaning of the word 'relative' to persons related by blood only, this definition was subsequently abandoned. For these purposes, then, the term 'relative' includes such persons as are related to the child by marriage or adoption as well as by blood, for instance, a relative of the child's adoptive parents. A person *in loco parentis* may include, for instance, a former foster parent, or the cohabiting partner of a parent. The degree of care required of a person *in loco parentis* is not clear, although it is submitted that this subsection does not include persons *in loco parentis* by virtue of their occupation, for instance, day-care minders and teachers.

Any such order may be accompanied by such terms and conditions as the court sees fit. Such an application is, however, conditional upon the court initially granting leave to apply to make such an application. In deciding whether to grant

---

<sup>66</sup> High Court, 06.06.1984.

<sup>67</sup> *Ibid* at page 13.

<sup>68</sup> Sec. 12, Irish Guardianship of Infants Act 1964.

such leave, the court will have regard to all relevant circumstances including but not restricted to the nature of the relationship and connection between the applicant and the child, and the risk, if any, that the application would disturb the child to the extent that the latter would be harmed. The court must also have regard to the wishes of the child's guardians. The reasons for this two-tier process are not obvious and it is arguable that the insertion of the 'application for leave' stage creates an added burden and expense upon the relatives of a child. It is submitted, however, that this additional requirement is useful in filtering out claims of an unmeritorious nature.

**45. Is the right to have contact referred to in Q. 43 also a right and/or a duty of the parent or the other persons concerned?**

While the order for access is often coined in terms of parental rights, the Irish legislature now regards access as a right of the child. In *M.D. v. G.D.*<sup>69</sup> CARROLL J. held, *inter alia*, that the welfare of the child being the paramount consideration in this area, it is the right of the child to access with which the court is concerned and not the right of the adult. In *W.(S). v. W.(F).*,<sup>70</sup> a Circuit Court decision, MCGUINNESS J. made an order restraining the respondent from bringing further applications for custody/access without leave of the court and pointed out that access is primarily the right of the children to enable them to maintain a relationship with the non-custodial parent and an order is made strictly on the basis of the welfare of the children. In the earlier case of *N.A.D. v. T.D.*,<sup>71</sup> BARRON J., in a similar vein, remarked that his function 'is to see whether or not it would be for the benefit of these children to see their mother.'<sup>72</sup>

**46. To what extent, if at all, are the parents free to make contact arrangements? If they can, are these arrangements subject to scrutiny by a competent authority?**

Sec. 20 Irish Guardianship of Infants Act 1964 places a positive duty upon a solicitor acting on behalf of the applicant seeking access to discuss with the applicant the existence of alternative means of dispute resolution, including the possibility of entering into an agreement with the respondent, by deed or otherwise in writing, dealing with the matter of access. If it appears to the court, during the course of proceedings, that agreement between the parties may be possible, Sec. 22 Irish Guardianship of Infants Act 1964 allows the court to adjourn proceedings with a view to facilitating such agreement. Where an adjournment is obtained under Sec. 22, the parties may make attempts, either unaided or with the assistance of a third party, to seek an agreed solution to the access issue.

Any agreement in respect of access resulting from the negotiations outlined above can be made a rule of court by virtue of Sec. 24 Irish Guardianship of Infants Act 1964, although this is not necessary. This gives such agreement the like force and application of a court order and may be especially effective where there are strong

---

<sup>69</sup> High Court, 30 .07.1992, CARROLL J.

<sup>70</sup> [1995] 1 F.L.J. 32.

<sup>71</sup> [1985] I.L.R.M. 153 at 156.

<sup>72</sup> Emphasis and italics added.

fears of non-compliance. The court may accede to a request under Sec. 24 of the 1964 Act, however, only if it is satisfied that the agreement is fair and reasonable and, in all the circumstances, adequately protects the interests of the parties and the child.

**47. Can a competent authority exclude, limit or subject to conditions, the exercise of contact? If so, which criteria are decisive?**

The general rule in Ireland seems to be that contact between a child and his or her parent is to be maintained wherever practical. Where immediate direct contact cannot be ordered, the court is more likely to order supervised or indirect contact.

Where conditions are attached to an access order by an Irish court, they are normally properly related to the issue of access rather than injunctive type orders designed mainly to appease the custodial parent's need for protection.

In *O'D. v. O'D.*,<sup>73</sup> for example, the Irish High Court made it a condition of access by a father accused of sexual abuse of his child that one of the father's four sisters be present at all times. GEOGHEGAN J. pointed out that the primary matter to be considered by the court in determining access rights to a child was the welfare of the child. A substantial risk of abuse would have to be taken into account, but a parent's 'right to access' cannot be made dependent upon a finding of whether there was or was not, sexual abuse. A genuine risk, falling well short of probability, has to be considered relevant in the exercise of discretion in the determination of access rights, unless it is possible to exclude the possibility of sexual abuse on the balance of probabilities. This poses obvious difficulties for the parent accused of misbehaviour towards their child. It may take considerable time to investigate the allegation, and in the intervening period the parent making the allegation may have exclusive care and control of the child. This can be surmounted in the intervening period by the granting of supervised access. In exercising its discretion in making orders for access, the court must separate the determination of any issue of sexual abuse from the exercise of such discretion. However, in practice, in Ireland, once an allegation of child sexual abuse is made against a parent by the other parent, the access of the accused parent to the child in question is either suspended or made subject to strict supervision pending the investigation of the allegation. Supervised access facilities are, unfortunately, practically non-existent and unless an agreed supervisor can be found, it is likely that there will be no access pending the completion of the investigation.

**48. What, if any, are the consequences on parental responsibilities, if a holder of parental responsibilities with whom the child is living, disregards the child's right to contact with:**

**(a) A parent**

The options of the Irish court for dealing with a case where the holder of parental responsibilities with whom the child is living, disregards the child's right to contact with a parent, are quite limited. It may fine or imprison the parent in breach of an

---

<sup>73</sup> [1994] 3 Fam.L.J. 81.



order for access.<sup>74</sup> A summons may have the desired effect of bringing to the attention of the custodial parents that they are obliged to comply with a court order and facilitate access as ordered, to the non-custodial parent. The court may also award custody to the other parent.

The duty of the Irish court in custody disputes is to review the factors comprising 'welfare' set out in Sec. 2 Irish Guardianship of Infants Act 1964 in order to evaluate the respective qualifications of the parents as custodians. When the debits and credits on each side have been taken into account, the court makes the order that can be predicted to be in the best interests of the child. The ability of a parent to put the child's needs over and above their own needs is a very important issue. It is of significant concern to the Irish court, if the custodial parent is unable to promote the welfare of the child by encouraging access to the non-custodial parent because of personal antipathy towards that parent. However, in practical terms, as the focus is on the 'welfare of the child' this will tilt the balance in favour of the existing custodial parent in most cases.

**(b) Other persons?**

The options available to the Irish court for dealing with a case where the holder of parental responsibilities with whom the child is living, disregards the child's right to contact with other persons, are more limited than in respect of a parent. It may fine or imprison the parent in breach of an access order.<sup>75</sup>

## **F. DELEGATION OF PARENTAL RESPONSIBILITIES**

**49. To what extent, if at all, may the holder(s) of parental responsibilities delegate its exercise?**

The holders of parental responsibilities may not delegate the exercise of parental responsibilities.

**50. To what extent, if at all, may a person not holding parental responsibilities apply to a competent authority for a delegation of parental responsibilities?**

Such a person may apply to the court for its direction by virtue of Sec. 11 Irish Guardianship of Infants Act 1964.

## **G. DISCHARGE OF PARENTAL RESPONSIBILITIES**

**51. Under what circumstances, if at all, should the competent authorities in your legal system discharge the holder(s) of his or her/their parental responsibilities for reasons such as maltreatment, negligence or abuse of the child, mental illness of the holder of parental responsibilities, etc.? To**

---

<sup>74</sup> Sec. 5 of the Courts Act (No. 2) 1986 created the offence of failure of, or refusal to comply with, the requirements of a direction given in an order under Sec. 7 or Sec. 11 of the Guardianship of Infants Act 1964. On conviction, the court may impose a fine of €254 and/or imprisonment of six months: see District Court Rules 1997, Ord.58, r.8.

<sup>75</sup> Sec. 5 of the Courts Act (No. 2) 1986.

**what extent, if at all, should the competent authority take into account a parent's violent behaviour towards the other parent?**

Marital parents in Ireland who are involved in a parental responsibilities dispute will only be discharged of their parental responsibilities in exceptional circumstances or for other 'compelling reasons'. Indeed, this parental preference is reflected in Sec. 3(2)(b) Irish Child Care Act 1991 where a health board charged with promoting the welfare of children in its jurisdictional area must have regard 'to the rights and duties of parents, whether under the Constitution or otherwise.'<sup>76</sup>

The majority Supreme Court decision in *North Western Health Board v. H.W. and C.W.*<sup>77</sup> set the threshold for discharging the holders of parental responsibilities (who are married) at a very high level.

In that case DENHAM J. established the requisite test for state intervention in the following terms:

'The question is whether the defendants, while exercising their responsibility and duty to P. [the child who was the subject matter of the proceedings in the case] under the Constitution (Art. 41), failed in their duty to him, so that his constitutional rights (including the right to life and bodily integrity) were or are likely to be infringed. In analysing this, P's rights to and in his family are a factor. Consideration has to be given as to whether the State (whether it be a health board or other institution of the State) as guardian of the common good should by appropriate means endeavour to supply the place of the parents to ensure that the welfare of the child is the paramount consideration, but always with due regard to the natural and imprescriptible rights of the child including his rights in and to his family. ... It is only in exceptional circumstances that courts have intervened to protect the child to vindicate the child's constitutional rights. The court will only intervene, and make an order contrary to the parents' decisions, and consent to procedures for the child, in exceptional circumstances. An example of such circumstances in relation to medical matters may be a surgical or medical procedure in relation to an imminent threat to life or serious injury.'<sup>78</sup>

The comments of DENHAM J. in the last sentence should be noted in the context of the recent decision of ABBOTT J. in the Irish High Court.<sup>79</sup> In that case, the Court directed that a five-month-old baby undergo heart surgery, overruling opposition on religious grounds from her mother, who was a member of the Jehovah's Witness community.

The comments of HARDIMAN J. in *North Western Health Board v. H.W. and C.W.* should also be noted:

---

<sup>76</sup> See DUNCAN, 'The Child's Right to a Family-Parental Rights in Disguise', (1986) 8 D.U.L.J. 76.

<sup>77</sup> [2001] 3 I.R. 622.

<sup>78</sup> *Ibid.* at p. 727.

<sup>79</sup> Unreported, High Court, 05.08.2004.

‘Art. 42.5 is in the nature of a default provision. Under its terms, the State may, in exceptional circumstances, upon a failure of parental duty for physical or moral reasons, become a default parent. The sub-article does not constitute the State as an entity with general parental powers.’<sup>80</sup>

MURPHY J. adopted the following approach:

‘In my view the subsidiary and supplemented powers of the State in relation to the welfare of children arise only where either the general conduct or circumstances of the parent is such as to constitute a virtual abdication of their responsibilities or alternatively the disastrous consequences of a particular parental decision are so immediate and inevitable as to demand intervention and perhaps call into question either the basic competence or devotion of the parents.’<sup>81</sup>

While Art. 41 and 42 Irish Constitution have led to a high threshold for State intervention into the marital family, no such impediment arises in the context of the non-marital family where the best interests of the child will take precedence over all other matters.

Where there are issues of domestic violence, parental responsibilities will be viewed by the Irish court from the perspective of the child. Parental contact with children in cases where there has been domestic violence attracts a significantly different approach to that which would obtain where domestic violence was not a feature of the case. In each case involving a parent’s violent behaviour towards the other parent, the risk to the child will be assessed before custody or access is agreed, ordered or discharged. The normal rule of thumb, that access is in the best interest of the child, does not automatically follow where there are issues of domestic violence. The primary question to be considered in such cases by the Irish courts is whether the child needs to be protected.

**52. Who, in the circumstances referred to in Q 51, has the right or the duty to request the discharge of parental responsibilities?**

Sec. 11 Irish Guardianship of Infants Act 1964 enables any person, being the guardian of a child, to apply to the court for an order on any question relating to the welfare of that child. All custody and access decisions are ‘interlocutory’ by nature. Thus, a decision is never final and conclusive but is instead open to variation should the welfare of the child so demand. The original decision may be changed should altered circumstances or new information require it. Indeed, Sec. 12 of the 1964 Act enables a court to vary or discharge any previously made custody or access order in respect of a child. DENHAM J. further underlined the variable nature of parental responsibilities orders when she noted in *C. v. B.*<sup>82</sup> that:

‘[t]he decision relating to custody of a child, especially a baby ... is never final but evolves with the child, retaining in changing times the fundamental concept of the welfare of the child.’

---

<sup>80</sup> *Ibid.* at p. 757.

<sup>81</sup> *Ibid.* at p. 733.

<sup>82</sup> [1996] 1 I.L.R.M. 63.

**53. To what extent, if at all, are the rights of contact permitted between the child and the previous holder of parental responsibilities after the latter has been discharged of his/her parental responsibilities?**

Contact, under Irish law, is the right of the child rather than that of the parents. Where a custody order in favour of a parent, who is a guardian of the child, has been discharged, such a parent is entitled to apply to the court for access to the child. The court will consider an application for access on the basis that the best interests of the child are of paramount importance. Sec. 11D Irish Guardianship of Infants Act 1964 requires the court, in considering an application for access, to have regard to whether the child's best interests would be promoted by maintaining personal relations and direct contact with the applicant on a regular basis. It is extremely unusual for an Irish court to refuse a parent access to his or her own child.

Until 9 January 1998, only a parent or guardian could apply for access to a child. With the commencement of Sec. 9 Irish Children Act 1997 on that date, certain additional persons may now apply to the court to be afforded access to a child. These persons include the relative of a child or a person who has acted *in loco parentis* in respect of the particular child.

**54. To what extent, if at all, can the previous holder(s) of parental responsibilities, who has been discharged of his/her parental responsibilities, regain them?**

As previously stated, all custody and access decisions are 'interlocutory' by nature. Thus, a parental responsibilities decision is never final and conclusive. It is open to variation should the welfare of the child so demand. Sec. 12 Irish Guardianship of Infants Act 1964 enables a court to vary or discharge any parental responsibilities order previously made should altered circumstances or new information require it.

## **H. PROCEDURAL ISSUES**

**55. Who is the competent authority to decide disputes concerning parental responsibilities, questions of residence of the child or contact? Who is the competent authority to carry out an investigation relating to the circumstances of the child in a dispute on parental responsibility, residence or contact?**

The court is the competent authority to decide disputes concerning parental responsibilities, questions of residence of the child or contact.

The court has the power to direct an investigation to be carried out relating to the circumstances of the child in a dispute on parental responsibility, residence or contact. Despite the strictures of the adversarial approach, it is the frequent practice of the Irish courts to request social reports in respect of children who are the subject of proceedings concerning parental responsibility, residence or contact. These allow evidence relating to the child's welfare to be collected, without necessarily requiring the child to appear in court. Such reports are generally prepared and carried out by social workers. The jurisdiction to do so was put on a formal statutory footing by Sec. 47 Irish Family Law Act 1995. This Sec. empowers the Irish

Circuit Court or High Court, as the case may be, to order a social report relating to any party to proceedings or any other person to whom they relate, including the children of the parties. Such a report may also be requested on an application by a party to the proceedings, although it is worth noting that the court may request the procurement of such a report of its own motion, without necessarily being requested to do so by a party. Sec. 47 may be invoked in respect of proceedings in a wide range of contexts as listed below:

- Irish Guardianship of Infants Act 1964;
- Irish Family Law (Maintenance of Spouses and Children) Act 1976;
- Irish Family Home Protection Act 1976;
- Irish Domestic Violence Act 1996;
- Irish Status of Children Act 1987;
- Irish Judicial Separation and Family Law Reform Act 1989;
- Irish Child Abduction and Enforcement of Custody Orders Act 1991;
- an application for a decree of nullity; and
- under the Irish Family Law Act 1995 itself.

By virtue of Sec. 42 Irish Family Law (Divorce) Act 1996, the social report facility also applies to proceedings taken under the Divorce Act. Sec. 26 Irish Guardianship of Infants Act 1964,<sup>83</sup> furthermore, once in force, will allow such a report to be procured in proceedings before the District Court taken under the 1964 Act.<sup>84</sup>

Such reports may, and sometimes do, tend to approach the circumstances of the family from the perspective of the adults as they relate to their children rather than focusing on the children's interests in and of themselves. Great care is needed by the Irish judiciary to ensure that the ultimate purpose of the proceedings – to secure the welfare of the child – is not obscured or diluted.

**56. Under what conditions, if any, may a legally effective decision or agreement on parental responsibilities, the child's residence or contact, be reviewed by a competent authority? Is it, e.g., required that the circumstances have changed after the decision or agreement was made and/or that a certain period of time has passed since the decision or agreement?**

All parental responsibilities decisions are subject to variation should the welfare of the child so demand. Sec. 12 Irish Guardianship of Infants Act 1964 enables a court to review, vary or discharge any decision or agreement on parental responsibilities, the child's residence or contact, should altered circumstances or new information require it. There is no requirement that a certain period of time has passed since the decision or agreement.

Where an agreement on parental responsibilities, the child's residence or contact has been made a rule of court by virtue of Sec. 24 Irish Guardianship of Infants Act 1964, such agreement has the like force and application of a court order. It may thus be varied, as detailed above, should altered circumstances or new information require it.

---

<sup>83</sup> Inserted by Sec. 11 Irish Children Act 1997.

<sup>84</sup> This section is one of the two sections Irish Children Act 1997 not yet in force.

**57. What alternative disputes solving mechanisms, if any, e.g. mediation or counselling, are offered in your legal system? Are such mechanisms also available at the stage of enforcement of a decision/agreement concerning parental responsibilities, the child's residence or contact?**

Sec. 11 Irish Children Act 1997 introduced a variety of measures designed to promote alternative dispute solving mechanisms in the attribution of parental responsibilities. These are contained in Sec. 20-24 Irish Guardianship of Infants Act 1964. In certain respects, they mirror similar provisions contained in Sec. 5-7 Irish Judicial Separation and Family Law Reform Act 1989 and sSec. 6-8 Irish Family Law (Divorce) Act 1996.

Sec. 20 of the 1964 Act relates to advice that should be given to an applicant in proceedings under Sec. 6A (provision for the natural father to be appointed guardian in respect of the child), Sec. 11 and Sec. 11B (access to relatives) of the 1964 Act. It places a positive duty upon a solicitor acting on behalf of the applicant to discuss the existence of alternative means of dispute resolution including:

- the possibility of counselling to assist in coming to an agreement regarding guardianship, custody or access or any other question affecting the welfare of a child. For this purpose the solicitor should furnish the names and addresses of persons suitably qualified to give such counselling;
- the possibility of mediation to assist in coming to such an agreement. For this purpose the solicitor should furnish the names and addresses of persons suitably qualified to provide a mediation service;
- the possibility of entering into an agreement with the respondent, by deed or otherwise in writing, dealing with matters of custody, access or any question affecting the welfare of the child.

A similar requirement is outlined in Sec. 21 of the 1964 Act in respect of a solicitor who has received instructions from a respondent involved in proceedings under Sec. 6A, 11 or 11B of the Act.

Sec. 20(3) and 21(3) of the 1964 Act require the respective solicitors involved to furnish evidence of compliance with the requirements of Sec. 20(2) and 21(2) of the Act. When the solicitor for the applicant is lodging the original documents to initiate proceedings, a certificate, signed by the solicitor, indicating that he or she has observed the requirements of the relevant section, must accompany these documents. A copy of this certificate should accompany any copy of the original documents served on any person in respect of the proceedings. In a like manner, the solicitor for the respondent, when formally responding to the institution of proceedings, must indicate in writing that the obligation placed on him or her by Sec. 21(2) of the 1964 Act has been fulfilled. A copy of the certificate indicating compliance should be delivered to the applicant in the proceedings. In both cases, however, compliance will not be necessary where the parties have already satisfied Sec. 5(2) of the Judicial Separation and Family Law Reform Act 1989 or Sec. 6(4) Irish Family Law (Divorce) Act 1996.<sup>85</sup> These Sec. place a like duty upon solicitors in proceedings for judicial separation and divorce, respectively. Thus, this savor

---

<sup>85</sup> See Sec. 20(4) and 21(4) of the 1964 Act.

prevents unnecessary duplication of advice regarding alternative means of dispute resolution.

Further provision is made where proceedings under Sec. 6A, 11 or 11B of the 1964 Act have already commenced. If it appears to the court, during the course of proceedings, that agreement between the parties may be possible, Sec. 22 of the 1964 Act allows the court to adjourn proceedings with a view to facilitating such agreement. This is in addition to, and not as a substitute for, any other power that the court may have to adjourn proceedings. Where an adjournment is obtained under Sec. 22, the parties may make attempts, either unaided or with the assistance of a third party, to seek an agreed solution to the matter being considered by the court. Such adjournment will end, however, where either party requests that the court resume hearing the proceedings, which is as obvious an indication as any that the negotiations have failed.<sup>86</sup>

In order to encourage attempts at agreement, Sec. 23 of the 1964 Act stipulates that certain oral or written communications between a party to the proceedings and any third party will not be admissible as evidence in the proceedings to which they relate. Any record of such communication is equally inadmissible. The communications contemplated are those made for the purposes of seeking help to reach agreement regarding matters of custody, access or any question relating to the welfare of a child. This will be so, regardless of whether any such communication was known to, or made in the presence of, the other party to the proceedings.

Any agreement resulting from the negotiations contemplated by Part IV of the 1964 Act (outlined above) can be made a rule of court by virtue of Sec. 24 of the Act. The agreement must relate either to the custody rights of the parties or to access arrangements agreed by them, or both. In such a case, either party may apply to the court for an order rendering the agreement a rule of court. The court may accede to such a request, however, only if it is satisfied that the agreement is fair and reasonable and, in all the circumstances, adequately protects the interest of the parties and the child. Any such order shall be deemed to be an order under either Sec. 11(2)(a) or 11B of the 1964 Act, as appropriate.

Alternative disputes solving mechanisms are not available at the stage of enforcement of a decision/agreement concerning parental responsibilities, the child's residence or contact.

**58. To what extent, if at all, is an order or an agreement on parental responsibilities, the child's residence or contact enforceable and in fact enforced? Describe the system of enforcement followed in your national legal system. Under what conditions, if at all, may enforcement be refused?**

The options of the Irish court in terms of enforcement of an order or an agreement on parental responsibilities, the child's residence or contact are limited. In reality,

---

<sup>86</sup> This, of course, is subject to any other power of the court to adjourn the proceedings.

the Gardaí<sup>87</sup> and social services facilitate the enforcement of such orders. Ultimately, the court may fine or imprison the holder of parental responsibilities or parent in breach of an order or an agreement on parental responsibilities, the child's residence or contact. Sec. 5 of the Courts Act (No. 2) 1986 makes it an offence to fail or refuse to comply with the requirements of a direction given in an order under Sec. 11 of the Guardianship of Infants Act 1964. On conviction, the court may impose a fine of €254 and/or imprisonment of six months.<sup>88</sup> The court may also award custody to the other parent.

The problems with enforcement are compounded where, for example, a child absolutely refuses to have access to a non-custodial parent. This alienation can be due to overt or covert actions by the custodial parent designed to turn the child against the absent parent. The custodial parent may maintain that he or she is in favour of access but will not force the child to go if he or she does not wish to do so. He or she may be unwilling to obey a court order for access, citing the distress of the child, even though he or she may acknowledge that in the long term it is better for the child to have access to and contact with the other parent. If the child steadfastly refuses to comply with an access order, the Irish court may consider an application to take into account the wishes of the child.<sup>89</sup> If the access is determined not to be conducive to the child's best interests, enforcement may be refused.

**59. To what extent, if at all, are children heard when a competent authority decides upon parental responsibilities, the child's residence or contact, e.g., upon a dispute, when scrutinising an agreement, when appointing or discharging holder(s) of parental responsibilities, upon enforcement of a decision or agreement?**

Sec. 25 Irish Guardianship of Infants Act 1964 allows the Irish court to hear children (when it decides upon parental responsibilities, the child's residence or contact), as it feels appropriate and practicable having regard to the age and understanding of the child. That said, in the light of the negative impact of court hearings upon children, the overriding preference of Irish judges has been to exclude children from legal proceedings. Indeed, both the Irish Child Care Act 1991<sup>90</sup> and the amended Irish Guardianship of Infants Act 1964<sup>91</sup> allow the court to hear cases concerning the welfare of children in those children's absence. While a child may apply to be present at a hearing, the court may exclude such child if, having regard to his or her age and the nature of the proceedings, it feels that it would not be in the child's interest to allow him or her to be present. The preference in Ireland is to hear children indirectly through either a specially appointed expert or evidence gathered by means of a social report.

**60. How will the child be heard (e.g. directly by the competent authority, a specially appointed expert or social worker)?**

---

<sup>87</sup> The Irish police force.

<sup>88</sup> See District Court Rules 1997, Ord. 58, r.8.

<sup>89</sup> Sec. 25 Irish Guardianship of Infants Act 1964.

<sup>90</sup> Sec. 30 Irish Child Care Act 1991.

<sup>91</sup> Sec. 27 Irish Guardianship of Infants Act 1964, as inserted by Sec. 11 Irish Children Act 1997.



Sec. 11 Irish Children Act 1997, which inserts a new Sec. 25 into the Guardianship of Infants Act 1964, allows the Irish Court, as it thinks appropriate and practicable having regard to the age and understanding of the child, to take account of his or her wishes in any parental responsibilities proceedings. The overall strategy in Ireland is to minimise the child's exposure to the court process, which, on occasion, occurs at the expense of ensuring that the child is adequately represented in court. Consequently, children are rarely heard directly in court unless they are of sufficient age and understanding. Instead, other methods are used to enable a child's voice to be heard in the judicial process, without requiring the child to be physically present in court. Such methods include a specially appointed child expert. Alternatively, and more frequently in Ireland, the court may request a social report in respect of children who are the subject of parental responsibilities proceedings. Such a report allows evidence relating to the children's welfare to be collected, without necessarily requiring the children to appear in court. These reports are normally carried out by social workers and may be requested on an application by a party to the proceedings, although, as previously stated, the court may request such a report of its own motion.

Provision is also made in Irish law for the appointment by the court of a guardian *ad litem* to act on behalf of any child in private law proceedings involving:

- the custody of, or access to, a child; or
- an application for guardianship by a natural father.

That said, Sec. 28 Irish Guardianship of Infants Act 1964, as inserted by Sec. 11 of the Children Act 1997, which allows for such an appointment to be made, is not yet in force. The circumstances in which a guardian *ad litem* may be appointed in such proceedings are, however, very limited. The court must be satisfied that 'special circumstances' exist necessitating the appointment of the guardian *ad litem*, a formula that obviously precludes such an appointment being made in all but the most pressing of cases. In parental responsibilities proceedings and in disputes concerning the child's residence or contact there is no explicit provision allowing for the addition of a child as a party to the proceedings. The Irish courts, however, possess a residual jurisdiction to do so, and moreover, can appoint a solicitor to act on the child's behalf. However, the prospect of such an occurrence taking place is quite slim.

**61. How, if at all, is the child legally represented in disputes concerning:**

**(a) Parental responsibilities;**

A child is rarely legally represented in disputes concerning parental responsibilities. Where a child is legally represented, he or she is usually represented by a solicitor or a barrister.

**(b) The child's residence; or**

A child is rarely represented in disputes concerning the child's residence. Where a child is legally represented, he or she is normally represented by a solicitor or a barrister.

**(c) Contact?**

A child is rarely represented in contact disputes. Where a child is legally represented, he or she is normally represented by a solicitor or a barrister.

**62. What relevance is given in your national legal system to the age and maturity of the child in respect of Questions 59-61?**

An Irish court will only have regard to the wishes of the child where such child is of sufficient age and maturity. Indeed, Sec. 25 of the Guardianship of Infants Act 1964 provides that the court shall take into account the child's wishes 'having regard to the age and understanding of the child'. In *Cullen v. Cullen*<sup>92</sup> for instance, the wishes of a 17-year-old girl seemed to have played a significant part in the decision of the court to award custody to her mother. Similarly, in *P.C. v. C.G. (No.2)*<sup>93</sup> the court refused an application for custody by the mother of a 13-year-old boy, ELLIS J. noting the strong preference of the latter to remain in the care of his father.

The Irish courts are anxious to ensure that impressionable children are not unduly influenced by a parent. The case of *J.C. v. O.C.*,<sup>94</sup> concerned the custody of three young children, aged 11, 9 and 5 respectively. The father argued that if the children were interviewed, they would, most likely, be subject to the persuasion of their mother. The court accepted that the children should only be interviewed by the judge after the decision regarding custody had been made by the court.

In the recent case of *F.N. and E.B. v. C.D., H.O. and E.K.*,<sup>95</sup> FINLAY-GEOGHEGAN J. held that children aged 13 and 14 were of an age and maturity to have their wishes taken into account. This is a significant Irish High Court judgment which draws a useful link between the personal right of a child under Art. 40.3 Irish Constitution to have a decision made in accordance with natural and constitutional justice and the provisions in the Irish Guardianship of Infants Act 1964 which deal with parental responsibilities, the child's residence and contact.

---

<sup>92</sup> High Court, 12.11.1982.

<sup>93</sup> High Court, 12.07.1983.

<sup>94</sup> High Court, 10.07.1980.

<sup>95</sup> High Court, s26.03.2004.