DCYA Consultation Paper on Guardians ad litem

Comments from Carol Coulter, Director, Child Care Law Reporting Project

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Introduction

The Child Care Law Reporting Project was set up in November 2012 under newly-made Regulations arising out of the Child Care (Amendment) Act 2007, which provided for the reporting of the proceedings of the child care courts (applying the 1991 Act), subject to maintaining the anonymity of the families and children concerned. In permitting the preparation of reports of child care proceedings, the 2007 Act states that the Minister [for Children and Youth Affairs] may make regulations specifying "a class of persons" who can prepare such reports "if the Minister is satisfied that the publication of reports prepared in according with subsection (5) (a) by persons falling within that class is likely to provide information which will assist in the better operation of the Act, in particular in relation to the care and protection of children."

In 2012 the Minister made such Regulations, naming the Free Legal Advice Centres, which hosts the CCLRP, as one such "class of persons". The CCLRP was supported by philanthropic funding by the One Foundation and Atlantic Philanthropies and by the Department of Children and Youth Affairs.

Therefore the purpose of the reporting project is two-fold: to bring transparency to child care proceedings through preparing and publishing reports and to collect information "which will assist in the better operation of the Act". We fulfilled the former by attending child care proceedings and writing reports of individual cases, published at intervals on our website; and the latter by collecting data on all cases mentioned during our attendance, collating and analysing it in the statistics published in our Interim Reports. We also collected our observations on the conduct of cases and some of the issues arising from them, which will be published, with statistics based on three years' data collection, in our Final Report later this month (November), to fulfil our mandate of assisting in the better operation of the legislation in relation to the care and protection of children.

To date we have published on our website approximately 300 case reports, ranging in length from about 400 words to 20,000 words, in 11 quarterly volumes. These reports include those where we have followed lengthy cases through to their end, and also short hearings where the case is adjourned, where there are consents to orders, or where orders are reviewed or renewed. In these we offer just a snapshot of the specific case at a specific time.

Our attendance at these cases has permitted us to see guardians *ad litem* (GALs) in practice in court proceedings. However, as we only report on what happens in court and what is given directly in evidence, we cannot comment on written GAL reports, or on the participation of GALs in case conferences or in their other involvement with the children concerned, their families, or the CFA, outside of the court hearing. In the vast majority of cases we attended the GAL has supported the application of the CFA, though in many he or she is likely to have intervened on the care and support the child was receiving, as well as conveying the views of the child to the court.

We have collected and analysed data on 1,272 cases, 1,194 in the District Court and 78 in the High Court, where secure care cases and those concerning disputes about country of jurisdiction are heard. Our figures show that one in four children had special needs, and many of them had more than one type of special need. In fact, this is likely to be an under-estimation, as in certain types of hearings, for example, reviews of Care Orders, there may be no evidence given of a child's special needs as such proceedings are mainly paper-based exercises, where the judge receives a report and, if necessary, seeks clarification on it. Our statistics also showed a disproportionate number of children from ethnic minorities, including Travellers, before the child care courts. Therefore generally it can be said that a large proportion of children in these cases are especially vulnerable and the representation of their views, as mandated by the new Article 42A.4 of the Constitution, will pose particular challenges, requiring specialist assistance.

We found that guardians *ad litem* were appointed in 53 per cent of the cases we attended. However, this figure may not be complete, as often, especially where an existing Care Order was being reviewed, there has been a GAL who was discharged when the order was made. While in 88.9 per cent of cases we attended GALs were legally represented, there were occasions when a GAL was appointed on the day of the hearing and would not have had an opportunity to obtain legal representation. Also, some courts do not routinely authorise the GAL to have legal representation.

Because of this relatively limited experience of guardians *ad litem*, I am not able to comment on many of the questions posed in the Consultation Paper.

Question 1: Principles and policies

I support these principles, especially the central role of the discretion of the court in the appointment of a guardian *ad litem* and the requirement that the guardian *ad litem* be independent, and be seen to be so by all parties. This has implications for the manner in which the service is provided, including who pays for it. While this Consultation Paper excludes this matter, I would like to comment that I think it follows from the principles outlined – that the purpose of the GAL service is to support the court – that the discretion of

the court is central, and that the independence of the GAL is guaranteed, that the GAL service should be independent of the CFA and linked instead with the Courts Service.

Question 2: Other principles

See comment above on structure and funding

Question 3:

No observations

Question 4: Approach to alternative methods of provision of service

Of the three, I think the first approach would be best (direct provision through a new dedicated public body). Existing GAL services are fragmented and unregulated. A centrally organised public body would enable the profession to be regulated and also streamlined, with a central register including each GAL's geographical location and specialist qualifications and experience, enabling courts to appoint appropriate GALs based on the needs of the child and the need to minimise expenditure on ancillary items like travel.

Questions 5 and 6:

See above.

Question 7: Child as party to proceedings under Section 26(4) of the 1991 Act

I do think that it should be possible for a child both to be a party to proceedings and have a GAL, in exceptional circumstances and at the discretion of the court.

At the moment it is very rare for a child to be a party to proceedings, and it only happens in cases involving older teenagers. Judges who make children parties to proceedings are also generally those who do not routinely appoint GALs.

GALs give evidence in two areas: the views of the child and the best interests of the child. The two may not coincide – the child may have views on his or her future that may not be in his or her best interests in the expert opinion of the GAL. This is only likely to arise in rare cases where the child wishes to be directly represented but may have exceptional psychological or other problems that would need to be addressed independently.

Question 8: On the approach outlined to the appointment of guardians ad litem

I generally support the approach outlined, especially as it is envisaged that appointment should be considered "in all proceedings under Part IV, IVA or VI of the 1991 Act". The approach then specifies circumstances where appointment should particularly be considered. This appears to provide a broad basis for the appointment of GALs. See my comments on Question 9 below.

Question 9: Additional matters

In order to satisfy the new Article 42A.4 of the Constitution and the UN Convention on the Rights of the Child, that the views of the child should be heard in all proceedings brought by the State, some mechanism for hearing these views is required in all child care proceedings. The possible methods for doing this are the child talking directly to the judge in private; the child directly giving evidence; a solicitor being appointed for the child (S.26.4 of the existing Act), which is relatively rare; and the appointment of a GAL.

In practice judges rarely hear the child, though recently a District Court judge set out in a written judgment the conditions under which this should occur (see www.courts.ie). The primary purpose of this is to reassure the child and it does not form part of the court's fact-finding. It is even rarer for children to give evidence directly, and this only occurs with older teenagers. The same applies to the child being made a party and having a solicitor. Therefore the most appropriate mechanism for achieving compliance with Article 42A.4 would seem to be through the appointment of a GAL. This means that the default position for the courts in child care proceedings should be the appointment of a GAL.

Question 10: The description of the role of the GAL

This is a very extensive list, and appears to envisage a role for the GAL that not only relates to the requirements of the court, but also an advocacy role for the child with the CFA. It is not clear how this coheres with the primary role of the GAL in assisting the court come to the best decision for the child.

Question 11: Opportunities for the GAL to contribute to increasing mutual understanding between the parties

I do not think it is possible to codify a role for a GAL in increasing mutual understanding between the parties to the proceedings, though this may occur in specific cases depending on the relationships involved. It is obviously desirable that all those involved in child protection proceedings work in a collegiate way insofar as possible, and without compromising the right to fair procedure, but I do not see how this can be embedded in legislation or regulations.

Question 12: Other matters

I have nothing to add to the above

Question 13: Making the report available to the child

I am not qualified to comment on this.

Question 14: Status of the GAL

As outlined, this excludes the GAL being the representative of the child as a party to the proceedings. While this has been the subject of a District Court judgment stating that a GAL

is not a party to child care proceedings, that judgment has not been uncontroversial and the issue could be re-visited by the courts, specifically the higher courts.

Questions 15, 16 and 17: Qualifications and transitional arrangements

Insofar as I am in a position to do so, I agree with the required qualifications and experience, and the transitional arrangements.

Questions 18, 19, 20 and 21: Access to records etc

Insofar as I am in a position to do so, I agree with the proposed approach

Question 22: Payment of GALs by the CFA and proposed safeguards

As I commented in my introduction above, I do not think it desirable that the funding body for a GAL service is the CFA.

However, while that remains the case I think the safeguards outlined are very helpful. I would add that it should be emphasised that it is inappropriate for representatives of the CFA to suggest the appointment of specific GALs, even if invited to do so by the court.

Question 23: Legal representation for GALs

This relates to Question 14, above. If the child, through the GAL, is a party to the proceedings the right to legal representation will follow. If the approach to the GAL's status outlined in the Consultation Paper is adopted, and legal representation only granted in exceptional circumstances, these circumstances should not be so restrictive as to deprive the GAL of legal representation where this would assist the court in reaching the most appropriate decision for the child.

It should be for the court to decide, based on the law and regulations, whether legal representation should be granted. However, the GAL should be free to choose the legal representative, as the number of appropriately qualified and experienced lawyers in this area is small, and are known to the professionals in the child care area. It would be contrary to fair procedure for the GALs not to be able to exercise their own discretion in this matter.

The circumstances where legal representation should be granted should include where the GAL is not supporting the order being sought by the CFA, or favours a modification of the order. In the vast majority of cases we have attended the GAL has supported the CFA application, but where they have not done so and proposed an alternative this has greatly assisted the court in coming to a decision other than the order sought by the CFA, that was shown later to have worked very well for the children and their families.

It should also be possible for a GAL to seek legal representation in the course of a case if a matter arises during it which he or she considers requires further exploration by the court through cross-examination.

Question 24: Alternative or additional measures

I have nothing to add to the above

Question 25: Transitional approach

I am not qualified to comment on this

Question 26: Other aspects of reformed arrangements

I think it is appropriate that the Minister can make Regulations in this area

Question 27: Elements of existing arrangements that warrant retention

This is covered by the above

Question 28: Priority matters

The establishment of a central register of qualified GALs, including specialisms beyond the basic requirements outlined above (e.g. specialist qualifications in psychology or children with special need, child sex abuse, knowledge of specific ethnic minorities, etc), and made available to all members of the judiciary, is urgently required.

Question 29: Further information

None