

CONSULTATION PAPER
On
Preparing a Policy Approach to the Reform of Guardian *Ad Litem*
Arrangements in Proceedings under the Child Care Act 1991

I refer to your request for comments on matters on the above. I will endeavour to respond as best I can within the limits of the notice given.

At the outset I must state my view that the present Child Care system is not fit for purpose as it is too reactive, not properly planned nor resourced.

The outcomes for the children could and should be better.

From speaking to professionals in this area over many years it is clear what is needed to break the repetitive cycle of care is a properly funded multi disciplinary system which has early intervention support at its core. In this system the intervention of the Court (with it's necessary adversarial process) would operate as the last option rather than the only option as is often the case at present.

I am employed as a solicitor by the Legal Aid Board but I make these comments in a personal capacity and not on behalf of the Board.

I confirm I am a solicitor who has continuously represented parents in childcare proceedings since the early 1990's both under the Child Care Act 1991 prior to that under the Children's Act 1908.

I appear mostly in child care proceedings in the District Area of Cork City but also on occasion in the other two Districts in Cork County.

I confirm I have also represented parents in the High Court by way of Special Care Applications, in Judicial Review and Case Stated proceedings. Several of these cases have been reported.

I have also spoken on the issue of the Guardian *Ad Litem* in the context of Child Care proceedings at Law Society and Legal Aid Board Conferences.

I specifically wrote on the issue recently in the Law Society Gazette (vol 109 no.1).

I have acted as an independent interviewer for Barnardo's in Cork wrt the appointment of Guardian Ad Litem.

I welcome this consultation and hope to contribute to a positive determination.

I will respond and comment in order of the Questions asked.

Principles & policies

In the consultation paper it states ***"the purpose of the service is to benefit the child by supporting the court to make interests of the child as the paramount consideration;"***

I do not believe the principle as stated is appropriate, I say this as it is my view that the purpose of the service should primarily be for the benefit of the Court and not as worded.

The Guardian ad Litem's (hereinafter called the GAL) purpose must at all times be to benefit the court and its responsibility should be its primary purpose. That purpose should not become unclear or confused. It is unhelpful for the GAL to become an advocate in the adversarial process. These issues were commented on by a district court Judge in a decision reported recently in the Child Care Law Reporting Project.

<http://www.childlawproject.ie/?s=Care+Orders+refused+after+children+spend+years+in+interim+care&submit=Go>

When the GAL becomes too active a participant, he/she can alienate itself from the parties and be perceived as becoming part of the problem rather than the solution, thus undermining its value and purpose.

It is my understanding that the GAL is appointed by the court to assist it in being fully and freely informed of the wishes of the child, the circumstances of the case and the potentiality of all viable options available in the interests and welfare of the child.

The court and not the Gal must remain the ultimate arbiter in determining the rights of children and parents in these matters to ensure compliance with its statutory, constitutional and ECHR duties

The consultation paper further states that ***"the rights of children and young people, including the right to express their views and to have due weight given to such views, are promoted in accordance with the United Nations Convention on the Rights of the Child and with Article 42A of the Constitution;"***

This is an appropriate statement and is an acknowledgement of existing obligations. However obligations must have a practical application and effect thus necessitating the courts being trained on this issue.

Further clear guidelines on how to implement and consider these views need to be published so that a fair and consistent approach develops.

A further proposed principle states that ***"the service is accessible to any child who is capable of forming his or her own views or who is otherwise deemed by a court to be in need of it"***

I do believe the principle is inappropriate in that the service is and needs to be wider than this and be available to include children who cannot express their wishes either by age or infirmity. The circumstances as to when this arises should be at the discretion of the Court subject to guidelines.

"The discretion of the court regarding the appointment of the guardian ad litem is central and clearly set out."

I do believe the principle as stated is appropriate but requires more detail as no guidelines exist at present. The present unregulated practice often can lead to imbalanced decisions. The

discretion should be the courts but subject to published general principles and specific guidelines.

"A high quality service is provided to assist the court in making the appropriate decision for the care of the child"

This policy cannot be achieved without proper clarity of purpose, independence of funding and application of standards.

"The independence of the guardian ad litem from the parties to the proceedings, and acting in accordance with the guidance of the court, is guaranteed"

This principle as stated is appropriate however in my view it may only be successfully achieved by the GAL not being part of the adversarial process.

The present funding by the Child and Family Agency (hereinafter called the CFA) undermines independence or at least the perception of same which is equally important.

Another matter that needs to be addressed is the limited number of suitable and available GALs. This needs to be resolved as it has the potential to frustrate the court in its proper functioning.

Most GALs are former social workers which can at times undermine cooperation of the parties due to prior history. Some cases do require a different professional approach or perspective. Greater choice of GALs by the court in consultation with the parties can only enhance the service.

Choice of the GAL should be the Court's alone. The CFA should not be given the task of sourcing the GAL, such action can be perceived as undermining the independence of the GAL and the court.

"The guardian ad litem is enabled to fulfil his/her role"

For the GAL to achieve this, his/her role needs to be clear, properly and independently funded with proper oversight.

"The service is as effective, efficient, sustainable, consistent, and transparent as possible."

This should be a principle underpinning the proposed service however a proper statutory authority needs to be established to achieve this objective.

Due to the complexity of children's needs a variety of choice of GAL is required with different skills sets, expertise, age, gender, culture and training. The GAL must be independent and must be perceived as independent by action and by funding.

Amendment of existing legislation

Herewith are my observations on this approach.

I would support the repeal and replacement of s.26 of the Child Care Act 1991 at this stage.

In replacing section 26 the following needs to be clarified and stated:

- a) the circumstances of appointment of the GAL,
- b) the qualification of the GAL,
- c) the role of the GAL
- d) the limits for the GAL,
- e) the method of investigation used by the GAL,
- f) the format of report used by the GAL,
- g) the remuneration of the GAL,
- h) the circumstances legal advice is required.

Further the issue of legal representation as opposed to advice is separate and requires further and greater consideration. Statutory authority would be required as it is absent at present. The circumstances for the court to authorise representation would need to be clearly set out.

Authorisation should not be granted without properly addressing the following questions

1. What purpose does it achieve?
2. What impact would granting a GAL legal representation have on the rights of the existing parties?
3. What impact will it have on the rules of evidence and the proper administration of justice?

In addressing these questions it may be that additional amending legislation would be required.

Establishing a nationally organised, managed and delivered service

Such a service will need to comprehensively address all the above identified issues set out at (a-h) above.

My preferred preference would be that there is an independent statutory body whose funding would be adequate to meet the present and future needs, if such funding could be protected or ring fenced in some way that would be additionally welcome. Such a body would be responsible for the matters set above. I believe this model would provide the best long term sustainable and feasible service.

Such a body should have responsibility for the provision of service to the court, the setting and monitoring of qualifications and standards, financial management, remuneration, complaints procedures, research, analysis of developments and the provision of expert reports.

A culture of objective critical peer review in the Authority should be considered as a core value so that it can ensure against the potential of "group think" and also ensure the latest developments in childcare, psychology and therapy are not uncritically followed.

I believe the alternatives to this proposal would be perceived by the stakeholders as lesser options and thus would undermine and compromise the independence and integrity of this service.

A non statutory interim body may be advisable to transition to the statutory Authority so that practical issues of implementation could be identified, clarified and implemented.

Children who are made a party to proceedings

It is my view that Section 25 of the Childcare Act 1991 is generally accepted as achieving its purpose.

Section 26 should possibly be amended to give the Court discretion in exceptional circumstances to allow a child representation while retaining a GAL.

It has been my experience that this could be beneficial at times where the GAL differs with the child and/or where the child's voice or wishes are not being fully or properly articulated.

Other circumstances that may justify this exception may be where the engagement of a legal representative will protect the integrity of the process or increase the chance of the child continuing to participate or engage in the process.

It would be advisable however to keep conflict and competing voices to a minimum. The exercise of this discretion should be for a specific purpose and preferably be time limited as determined by the court.

Appointment of guardian ad litem

I support the proposal that it is envisaged that appointments in proceedings arising from applications under Part IV, IVA or VI of the 1991 Act would remain at the discretion of the court.

I further note the envisaged legislation would offer guidance indicating circumstances for the appointment of a guardian *ad litem*. These guidelines should be comprehensive and clear so that a consistent application be applied in every district court.

I support the proposal that a broad margin of discretion be available to the court.

With regard to the particular examples given I wish to respond as follows.

- Generally a GAL should be appointed in proceedings which involve an application for special care, but I would suggest not in all such cases. In some cases a GAL may not be required where there is agreement and/or sufficient expertise engaged already.
- Because of the seriousness of child being placed outside the State, I believe a GAL should be always appointed.
- A GAL may not always bring added value to the circumstance where the child is of an age or maturity to express his/her views or is unable to or constrained from doing so for any reason, whether due to physical, intellectual, emotional impairment or otherwise. The test should be in these circumstances, are the wishes and welfare of a child unclear? Will the appointment of a GAL assist in resolving this?
- It is my view that a GAL should always be appointed where a child being an unaccompanied minor.
- It is my view that a GAL should always be appointed where the family background or care history of the child is considered by the court to be particularly complex or unclear so as to warrant the availability to it of independent analysis and recommendation to assist the determination by the court of the child's best interest.

- A GAL may not always bring added value to the circumstance where the care plan prepared or proposed for the child by the Child and Family Agency is the subject of significant dispute with a party to the proceedings, or with the child, or there are significant failings/shortcomings in the care planning process are alleged, It will depend on the nature of the dispute; it is this writer's experience that Care Plans are often so vague that it is difficult to envisage a significant dispute on such a matter.

Disputes are for the court to resolve whether a GAL will assist will depend on the judge and the dispute.

- A guardian *ad litem* should not always be appointed in every case where the court is satisfied that in the particular circumstances of the case, in order to promote best interests of the child, otherwise a GAL would be appointed in every case. Such a proposal would very expensive, not good value and divert limited funds from more deserving needs of children. A GAL should bring added value or assistance to the court in this circumstance

I believe it is unhelpful to restrict the court as to when the appointment would cease. It should depend on what work or function the GAL is providing and whether it is being properly delivered.

Often it is the work done after the Care Order is made that can resolve long term issues. Such work has the potential to reduce conflicts and disputes, thus reducing costs and also improve outcomes with respect to access or reunification.

Depending on the complexity and conflict in the case a GAL may be of great assistance to ensure the best outcome for the child.

The purported circumstances to cease work as stated in the consultation paper are too limiting and blunt and do not properly protect the discretion of the court. These stated limitations do not put the interests and welfare of the child as the primary consideration for the court.

I support the proposal that in a nationally managed and delivered service that only the court may cease/terminate the appointment of a guardian *ad litem* in the course of specific proceedings.

I support the proposal that except for specified transition arrangements referred to below, only a guardian *ad litem* operating as part of the national service would be eligible for appointment by the courts for the purposes of proceedings under the 1991 Act.

Role of guardian ad litem

I note the envisaged role of the Guardian *ad litem* as stated and wish to respond as follows.

I agree that the GAL should ascertain the views of the child, as far as practicable, having regard to the child's age, level of maturity, and understanding, and inform the court of same;

I agree that the GAL should provide the court with the answers to any specific questions it has raised or any information, including opinion, it has sought in relation to the views and best interests of the child;

I agree that the GAL should provide the court with such assessment and analysis of the child's situation as it requests for the purpose of its consideration and determination of the application before it;

I agree that generally the GAL should formulate and present recommendations to the court as to the *course of action generally available* that, in the professional opinion and experience of the guardian *ad litem*, would be in the best interests of the child. This formula of words may accidentally or otherwise unnecessarily restrict the court's options. Restricting the GAL to a course of action "generally available" is ill-advised and could cause the GAL not being able to make any recommendation for the child.

The paramount consideration of the guardian *ad litem* should be to promote the best interests of the child, wherever possible and where not possible should be the least detrimental alternative.

This criterion would reflect the reality of a lot of cases the courts have to determine in circumstances where a GAL is appointed.

It is appropriate that the guardian *ad litem* would be mandated to have regard to:

- the principle that it is generally in the best interests of a child to be brought up in his/her own family (s. 3(2)(c) of the 1991 Act);
- that the Child and Family Agency in the performance of its functions in respect of an individual child under the 1991 Act regards the best interests of the child as the paramount consideration (s. 9(2) of the Child and Family Agency Act 2013
- the professional duty and acknowledged field of competence of other professionals providing evidence in the proceedings.

It is essential that the enquiries be made by the GAL. The GAL's methodology of investigation must however comply with the principle that the paramount consideration should be to promote the best interests and welfare of the child. The GAL must further ensure that these enquiries comply with the law and natural justice.

Another issue requiring attention is the preparation, format and availability of the GAL's report so that it complies with the above principles.

I agree with the view that the guardian *ad litem* may at any time make such applications to the court as appear to him/her to obtaining directions of the court on any matter necessary to the continued performance of his/her functions or to safeguarding the best interests of the child.

I agree with the proposition that generally where, in the course of the proceedings, a guardian *ad litem* is concerned that a significant shortcoming exists regarding the care being provided to, or proposed for, the child by the Child and Family Agency, he/she should attempt to resolve the issue of concern by way of discussion and agreement with the Agency in the first instance.

Further where, in the view of the guardian *ad litem*, his/her concerns are not resolved or likely to be resolved in early course, he/she would be required to inform the court of the matter as soon as possible.

However regardless of resolution, difficulties as identified above need to be notified to the court and consequently the parties as such difficulties could be pertinent to the proceedings.

I agree with the proposition that generally the guardian *ad litem* should bring to the attention of the Child and Family Agency any risk(s) which he/she believes may have a serious adverse effect on the best interests of the child and which the guardian *ad litem* considers are not being

sufficiently addressed or mitigated. If not satisfied with the response provided by the Agency, or in the absence of a response being provided within a reasonable time by reference to the nature of the risk, the guardian *ad litem* would be required to bring the matter to the attention of the court.

However the GAL should never compromise its integrity and independence by being selective in what it should notify to the court and the parties.

All matters relevant for the court to assess the fairness and appropriateness of the CFA's actions or approach should be transparently available to the court and parties.

Possible provision of the guardian ad litem report to the child

I note it is envisaged that the legislation may address the matter of the child's entitlement to receive a copy of the guardian *ad litem* report, perhaps modelled on the lines of the provision in the Children and Family Relationships Act 2015 in relation to furnishing to a child a copy of a report procured regarding any question affecting his/her welfare. Section 63 of that Act inserts a new Part V into the Guardianship of Infants Act 1964 and the matter in question is provided for under section 32 of Part V.

I am unconvinced as to the real benefit to the child of this proposal. I would suggest that this should be dealt with on a case by case basis by the court. Consideration should be given to implement this proposal on a pilot basis to assess its impact and risk.

At present the generality of a GALs report is explained to the child once the child is deemed mature enough to understand. Without guidelines this has its limitations.

Status of the guardian ad litem

As outlined above the status of the GAL should be as a court appointed adviser whose primary responsibility is to the Court. The GALs role should be clearly stated, the GALs funding should be independent, and preferably the GAL should generally remain outside of the adversarial process of the court.

The GAL should where possible set out the child's wishes and advise how best to interpret same. Further within those limitations the GAL should have full discretion to make recommendations as to what is in best interests of the child.

Where it is not possible to make any recommendation as to what is in best interests of the child then the GAL should make recommendations as to what is the least detrimental alternative.

The practice in some courts of appointing a GAL in every case serves no function save as to divert limited funding and/or increase the potential for unnecessary disputes.

The appointment should be to add to the courts knowledge; if it just simply reaffirms a position its value must be questioned.

It is this writer's experience that having a view stated by a social worker, affirmed by a GAL and approved by the court does little in giving that parent confidence that the system is fair and

balanced. In such circumstances having no GAL appointed may in long term be better for the parent and thus consequently the child. It further allows those funds to go towards a more beneficial use.

A GAL is presently not a party to proceedings and thus should not be legally represented unless validly authorised.

Section 26 as amended by IVA (as amended by the Child Care (Amendment) Act 2011) to allow a GAL to be represented by a solicitor should not be commenced as it fails to address when, how and in what extent the GALs legal representative can participate in the course of the evidence.

This amended section further fails to address how the court can balance the potential unfairness to parents and its legal representatives as a consequence of this lack of clarity.

Qualifications & eligibility for appointment

Social work qualifications should be one but not the exclusive qualification. Probation and welfare officers, psychologists and therapists, youth workers and substance abuse professionals all should be eligible for consideration. As outlined a greater choice for the Court needs to be available so that the GAL has the best chance of assisting the court wrt a particular child.

I agree that at the time of appointment a guardian *ad litem* would also be required to hold a Garda vetting clearance issued within a specified time period of the appointment.

It is appropriate that that the Minister would may make regulations relating to knowledge and skill requirements necessary to be eligible for appointment.

I note it is envisaged that as an exceptional transitional matter, persons would be deemed eligible for appointment if on the date of the publication of the reform legislation they complied with certain criteria. The precise details should be clear and fair and take into account the difficulties children have in their backgrounds so that the most suitable person would be available to the court to identify the child's needs and provide practical recommendations. Some exceptional one off appointments should be available to the court where necessary.

Access to records, records management and information provision

The GAL should have full access all documents relating to the child including the Social work file save matters covered by legal privilege.

Further the GAL should be allowed to communicate with all persons who have a significance or relevance in the child's life.

The GAL must at all times act in a transparent, even handed, objective and professional manner.

The GAL must comply with fair procedures and respect peoples right to privacy where requested.

It is essential that the national service provider and individual guardian *ad litem* would be required to ensure safe-keeping and proper management of all records and information created

or obtained by them. Further the national service provider should be required to have in place a robust data protection and management policy consistent with relevant legislation in the area.

It serves no helpful purpose for the Child and Family Agency to maintain the responsibility of funding the GAL service unless it wished to exercise some leverage which would be wholly inappropriate and damaging to the national service provider.

For the GAL to be independent, its funding must be separate and independent of Child and Family Agency

Engagement of legal representation

This issue is not clear and requires greater consideration. I have outlined my general concerns above and as I am presently engaged in Judicial Review proceedings on this issue I will not comment further.

Transitional provision

I note and agree that it is envisaged that a guardian *ad litem* who was appointed in proceedings under the 1991 Act before the coming into force of a nationally managed and delivered service would be entitled to continue to act in that capacity for the purpose of the specific proceedings concerned as if the appointment was made in accordance with the new arrangements. Such continuation would be subject to the guardian *ad litem* being in possession of a current Garda Vetting clearance.

I note it is further envisaged that in such circumstances, legal representation already engaged by a guardian *ad litem* would also continue until those particular proceedings are concluded. I would respectfully suggest that this may need to be revisited in light of the above.

Regulations by the Minister

I note and agree that the Minister would have the power to make regulations ancillary to the legislation as necessary in relation to the general management and operation of guardian *ad litem* services.

In light of the financial limitations, a more focussed service as outlined above should be developed whereby the GAL assists the court in cases where necessary, where its role is clear and within that its recommendations are unfettered save by the courts acceptance of same or otherwise.

I do have reservations in considering reforming one part of Child Care in the absence of reform of the Child Care Act in it's totality and do believe that to proceed in isolation could lead to unforeseen negative consequences.

Full reform with early intervention support at its core is required if the cycle of care is to be genuinely addressed thus making the outcomes for children in care improved.

Dated the 11th November 2015

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