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Family Law

The Protection of the Child
under Irish Law

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FAMILY LAW

The Protection of the Child under Irish Law

Introduction

There seems to be two different views on whether children are protected under current Irish Law. Firstly, there is what is known as the Traditional Model, where some supporters feel that the child is already protected sufficiently under Irish Law. Secondly, we have the Equality Model, where supporters feel that there should be an express provision for the rights of the child in our Constitution. Both opposing views will be discussed below.

The Traditional Model

As stated above some supporters believe that the child already has enough protection under Irish Law, which can be seen in both the Constitution and Statute.

The Constitution

Article 40.3.1 states that the State guarantees to defend and vindicate the personal rights of the citizen, and as children are citizens the child is protected as much as other members of society. Article 40.3.2 seems to give further protection to the child as can

be seen where it states that the Government shall vindicate the life, person, good name and property rights of every citizen.

Article 41 states that the family is a fundamental unit of society which has imprescriptable rights antecedent and superior to all positive laws. But this provision, like most law has its exceptions, which can be seen from Article 42.5. This states that in exceptional cases if the family unit breaks down and the parents fail in their duty, then it is the interest of the child and the child welfare that becomes the paramount concern. Under Article 42.5 where parents fail in their moral and physical duties towards their children, then the State is allowed to interfere with Article 41 and interfere with those inalienable and imprescriptable rights, and the State as guardian of the common good, shall take the place of the parents in order to protect the child.

All the above references to the Constitution notes that the child under the current Irish Constitution already has enough protection and any further protection given to children will adversely interfere with the power of the parents when running the family unit. Supporters of the Traditional Model; “...*fear that any further strengthening of the rights of the child would interfere with the authority and autonomy of the family*”.¹ The Council for the State of the Family held that, “...*this council is strongly of the view that the primary rights in families are, and must remain, those of the parents*”.²

¹ *The Family – All Party Oireachtas Committee on the Constitution*, Government of Ireland, 2006, p.89.

² *Ibid.*

Irish Statute

Apart from Constitutional protection afforded to the child there is also protection under Irish Statute for the rights, interests and protection of the child. This protection is usually achieved by the intervention of the local health board; such intervention is now regulated by the Child Care Act 1991, as amended by the Children's Act 1997 and 2001. The main purpose of these Acts is to protect children in a vulnerable position to which there is a "*statutory obligation placed on health boards to promote the welfare of children who are not receiving adequate care and protection*".³ This 1991 Child Care Act can be seen as the State's reaction to Article 42.5 in which the State promises to vindicate the rights and provide for the protection of children who are in need of such protection.

Section 3 of the 1991 Act

Under Section 3(1), "*It shall be a function of every health board to promote the welfare of every child in its area, who are not receiving adequate care and protection*".⁴ Here we see that the child is protected under Irish Statute and there is a statutory obligation on the health board to protect children in need. We see further protection for the child under Section 3(2)(b), which states, "*Having regard to the rights and duties of parents, whether under the Constitution or otherwise (i) regard the welfare of the child as the first and paramount consideration, and (ii) in so far as*

³ Nestor, J., *An Introduction to Irish Family Law*, (third edition), (Gill & Macmillan, Dublin, 2007), p.273.

⁴ Section 3(1) of the Child Care Act, 1991.

*practicable, give due consideration, having regard to his age and understanding, to the wishes of the child”.*⁵

Again here there is further protection for the welfare of the child, and the child’s interests are of paramount concern to the State. Under this Section the child’s wishes are also taken into account, depending on that child’s age and understanding.

Section 5

Section 5 of this Act imposes a duty on the Health Board to provide suitable accommodation for homeless children. Under this Section where it appears to the Health Board that a child is homeless, “....*the Board shall take such steps as are reasonable to make available suitable accommodation for him*”.⁶ If the Health Board fails in its duty, it can be held accountable and liable where, “....*a health board is a statutory body, given a statutory responsibility for the welfare of children in its area, and potentially a liability for failure to ensure the welfare of the child*”.⁷

Section 12

Another very important Section under the 1991 Act is Section 12. This Section gives special powers to the Gardaí to enable them to bring a child to safety. These powers

⁵ *Ibid.*

⁶ Section 6 of the Child Care Act, 1991.

⁷ Nestor, J., *An Introduction to Irish Family Law*, (third edition), (Gill & Macmillan, Dublin, 2007), p.275.

even allow the Gardaí to enter a property by use of force and without warrant if they have reasonable grounds to believe that a child may be in danger. These powers usurp the Constitutional right to the inviolability of the dwelling guaranteed under Article 40.5. This again is further evidence that the State takes child protection very seriously as it is willing to disregard certain Constitutional provisions in order to protect children. Under Section 12 a Garda without warrant may, “...remove a child to safety where the Garda has reasonable cause to believe that the child has been or is being assaulted, ill-treated, neglected or sexually abused”.⁸

Section 13

This provides that a District Court judge may make an emergency care order where he believes, “*There is an immediate and serious risk to the health and welfare of a child which necessitates his being placed in the care of a health board, or (b) there is likely to be such a risk if the child is removed from the place where he is for the time being*”.⁹

Section 18 and 19

These Sections are closely linked to one another and state that the court can grant either a care order or a supervision order if they have grounds to believe that a child is

⁸ Nestor, J., *An Introduction to Irish Family Law*, (third edition), (Gill & Macmillan, Dublin, 2007), p.276.

⁹ Section 13(1) of the Child Care Act, 1991.

being assaulted, ill-treated, neglected or sexually abused, or the child's welfare is being impaired or neglected. Under any of the above, the child will be put under the care of the health board for as long as the court decides.

International Protection for Children

Apart from protection under the Constitution and Statute, there is further protection for children under International Law, such as the United Nations Convention on the Rights of the Child, 1989, and The Hague and Luxembourg Conventions.

The U.N. Convention on the Rights of the Child (CRC)

*“Ireland ratified the CRC without reservation on September 21st 1992”.*¹⁰ This now means any new proposed law affecting children must take into account the principles set out in the Convention. Section 3 of the Convention states, *“In all actions concerning children.....the best interests of the child shall be a primary consideration”.*¹¹ Under Article 8 of the CRC, it states that if a child's parents are separated then the child is to maintain personal and direct relations with both parents, unless this adversely affects the child. Article 12 and 13 guarantee the child the right of freedom of expression, thought, conscience and religion. Section 12 states, *“....State parties shall assure to the child who is capable of forming his views....the*

¹⁰ Shannon Geoffrey, *Child Law*, (Thompson Roundhall, Dublin, 2005).

¹¹ Section 3(1) of the UN Convention on the Rights of the Child.

views of the child being given due weight in accordance with the age and maturity of that child".¹²

The Hague and Luxembourg Conventions

These Conventions became part of Irish Law on October 1st 1991 as part of the Child Abduction Act. Both Conventions, "*....apply to wrongful or improper removal of children under sixteen years from Ireland to a Convention country, or from a Convention country to Ireland*".¹³ The difference between the two Conventions is that the Luxembourg Convention is limited to European states, whereas the Hague Convention has a more far-reaching worldwide power. These Conventions establish a Central Authority in each member state in order for states to trace and return children who have been treated in such a manner.

Case Law

A final area where the child receives protection in this jurisdiction can be seen under Case Law. In the case of *P.W. v. A.W, M.M. and Attorney General*¹⁴, Ellis J acknowledged that a mother should have custody of a young child. However in this case, Ellis J refused to grant custody to the mother because it was not in the child's best interest. Here again we see the courts usurping Article 41 of the Constitution

¹² Section 12(1) of the UN Convention on the Rights of the Child.

¹³ Shatter, A.J., *Shatter's Family Law*, (fourth edition), (Tottel Publishing, Dublin).

¹⁴ Unreported, High Court, April 21st 1980.

which states that the family has inalienable and imprescriptable rights, and so instead found in favour of the child. In case *Re – J.H. (An Infant)*¹⁵ it was held that it is not just the parents who decide what is best for the family and other members of the family unit also have power within the fundamental group in society, “....the *J.H. case confirms that the Constitutional rights of the family do not vest exclusively....with the parents*”.¹⁶

A final case to prove that the child has protection in this jurisdiction is *M.Q. v. Gleeson and Others*¹⁷. Here Barr J. said that the health board when exercising its duty, not only has to take into account children who are in a vulnerable position, but have to actively identify children that may be in danger in the future. The “*duty also extends to children not yet identifiable who may be at risk in the future*”.¹⁸

Summary

So far we have dealt with the Traditional Model and its supporters who believe that the rights of the child are sufficiently protected in this jurisdiction, whether it be the Constitution, Statute, International Conventions, or Case Law. We now turn our focus to the opposing argument that the child is not that well protected in this jurisdiction, and what are the possible changes that should be made in order to give the child more protection and rights?

¹⁵ [1985] I.R. 375.

¹⁶ Casey, J., *Constitutional Law in Ireland*, (third edition), (Roundhall, Sweet & Maxwell, Dublin, 2000), p.365.

¹⁷ High Court, unreported, 13th February 1997.

¹⁸ Nestor, J., *An Introduction to Irish Family Law*, (third edition), (Gill & Macmillan, Dublin, 2007), p.273.

The Equality Model

This view that the child is vulnerable and needs further protection can be seen in the supporters of the Equality Model. The supporters of this view believe that the child under Irish Law is not well protected and they “*strongly support express provision for the rights of the child in the Constitution*”.¹⁹

The Law Society

The Law Society states “*children are a voiceless and vulnerable minority group in society*”.²⁰ The Law Society also states that when the family unit breaks down and the parents separate or divorce, then it is the child who suffers the most as they are caught in the crossfire of what can often be a bitter and ruthless environment. They also argue that the Constitution should be amended in order to provide a specific declaration for the protection of the child.

Barnardos

According to the child and protection group Barnardos, children are also a vulnerable minority in society, whose rights and protection have to be increased. In their recent

¹⁹ *The Family – All Party Oireachtas Committee on the Constitution*, Government of Ireland, 2006, p.91.

²⁰ *Ibid.*

campaign of *Children's Declaration – A Million Reasons to Get it Right*, they have a list of key proposals that they hope will increase the welfare of the child. According to Barnardos, the right of the family usurp the right of the child, and they have called for a Constitutional amendment to change this and take the rights of the child more into account. They have called for a cross-party commitment to hold a referendum on the Constitution to improve the rights and voice of the child.

Some of the key points of this declaration are: (1) undertake a full review of child protection legislation to ensure children are protected by law from all forms of abuse and exploitation; (2) to increase income to families with children in constant poverty by increasing the Qualified Child Allowance; (3) increase the take-up of the Family Income Supplement; (4) ensure no family with children is housed in bed and breakfast accommodation longer than the duration of the emergency, and finally (5) a drop-in centre to provide advice and support for children in need.

The Irish Society for Prevention of Cruelty to Children (ISPCC)

The ISPCC also argue that the child is not sufficiently protected under Irish Law and there needs to be changes in the Constitution in order to protect the child properly. The ISPCC state that “*Article 41 and 42 should be amended to grant equal status and rights to all natural parents and their children irrespective of the marital status of the parents*”.²¹ This, they argue, would give similar rights to all members of a family even if that family unit has broken up and not just guarantees rights to the parents and

²¹ *Ibid.*

children of the family based on marriage which the Irish Constitution currently protects.

Recommendations by the Constitutional Review Group (1996)

The Constitutional Review Group (CRG) Report in 1996 did set out various recommendations to be made to the Constitution in order to protect the child, and for also protecting children and adults of the family unit not based on marriage. Some of these recommendations by the CRG are: (1) Article 41 should include unmarried mothers or fathers and children born of unmarried parents; (2) whether by legislative or other means, that the best interest of the child shall be the paramount consideration in actions concerning children, and (3) guarantee to all individuals respect for their family life whether based on marriage or not. This Report is now twelve years old and there has been no action in the amendment on the Constitution in order to put these recommendations into practice.

A Time for Change

There has now been for fifteen years, various calls to change the Constitution in order that there be an express provision for child protection. During the Kilkenny Incest Investigation, 1993, McGuinness J. called for, *“amendments of Article 41 and 42 of the Constitution, so as to include a statement of the constitutional rights of the*

child".²² This call for change was recommended by the CRG mentioned above, that Article 41 and 42 needed to be altered in order to have the best interest of the child as the paramount concern. The CRG also proposed that there should be an express requirement in the Constitution that makes the welfare of the child its main concern.

These proposals from the CRG were referred to the All-Party Oireachtas Committee on the Constitution, which in turn published its report in 2006. The Committee came to no definitive answer and seemed sceptical about giving children extra rights under the Constitution. The Committee went on to recommend no change with regard to children's rights, but did propose a new subsection under Article 41, which said, "*All children, irrespective of birth, gender, race or religion, are equal before the law. In all cases where the welfare of the child so requires, regard shall be had to the best interest of the child*".²³

In reality, this proposal was found to be very limiting and weak as it did not give any extra protection for children or provide an expressed provision in the Irish Constitution for the protection of the child. This weak and limiting proposal now seems to have led to other groups and parties calling for a change in the law in furtherance of child protection. Lobbying now from such groups as the Law Society, the Labour Party, the Ombudsman for Children, Barnardos, Treoir, Minister for Children, and the Children's Rights Alliance, have now called for further, stronger, and more concrete changes in the wording of the proposed constitutional change, with regard to child welfare.

²² *The Proposed Children's Rights Amendments: Running to Stand Still*, Dr. Ursula Kilkelly, Dr. Conor O'Mahony, p.3.

²³ *Ibid.*

The Proposed Article 42A

There is an amendment proposal that will see a new section under 42A, under the heading of children, and the existing Article 42.5 will be deleted. But in reality this new proposed provision, similar to the one proposed by the CRG, did little to actually increase child rights and protection. The proposed Article 42A does not provide for an express provision for the protection of the child, and if anything, it does not effectively address the imbalance of power between the weaker rights of the child to the stronger rights of the adults in the family unit in the Irish Constitution.

This suggested amendment under Article 42A will in reality make little difference to the text of the Constitution and the rights of the child. This proposed Article 42A can be seen as a failure as it does little to increase the rights of the child. It is now feared that *“Ireland now has the opportunity to set itself apart internationally by leading the law in children’s rights protection at a constitutional level. It appears, however, that in light of the current wording of the amendment, this opportunity is to pass us by”*.²⁴

Other Jurisdictions

In 1998, the UN Committee on the Rights of the Child recommended the proposal by the CRG to increase child rights. The Committee recommended an amendment, *“...of Article 41 and 42 of the Constitution, so as to include a statement of the constitutional*

²⁴ *Ibid*, p.9.

right of children".²⁵ They also recommended that the proposed amendment to the Irish Constitution be based on Section 28 of the South African Constitution. This Section 28 has nine subsections which expressly mention how the child should be protected, such as the right to: (1) family care or parental care or appropriate alternative care; (2) the right to shelter and health care, and (3) the right to be protected from neglect or abuse, and at all times the child's best interests are of paramount importance of every matter concerning the child.

Conclusion

There seems to be two schools of thought in this area of law. On one side you have the traditional, somewhat conservative approach that the child has enough protection under Irish Law whether it be found in the Constitution, case law, Irish Statute, The Hague and Luxembourg conventions, or the UN Convention on the Right of the Child including Section 19, which "*....requires the government to properly care and protect all children living in Ireland*",²⁶ and so no further expressed protection is required.

But on the other hand, especially over the last fifteen years since the Kilkenny Incest Investigation, you have various organisations including the Law Society, Barnardos, the Ombudsman for Children, the ISPCC, and Treoir, claiming that children are a weak, vulnerable, voiceless minority in Irish society, and that this issue should be altered by an expressed provision for child protection and care in the Irish Constitution. Emily Logan has also called for changes in our Constitution in order to

²⁵ The Law Society Law Reform Committee, March 2006, p.61.

²⁶ *The Irish Times*, Friday March 21st 2008, p.3.

protect the welfare of children. In her submission to the Joint Committee on the Constitutional Amendment on Children, she noted that, “*Children have contacted her office to claim that they are not being afforded a voice in cases affecting them*”.²⁷

Finally, it does seem to be a case of all talk and no action, as although the suggested amendment to the Irish Constitution for the Protection of Children has now been going on for fifteen years and various recommendations have been made by various groups including the CRG, there has been no actual change in the Irish Constitution. Even recommendations that were made by the various parties do little to actually increase the welfare of the child. Even if the proposed Article 42A was introduced to Irish Law, it would fall short of what it had actually meant to achieve and would have increased child protection and welfare very little, thus leaving the child a voiceless and vulnerable minority in Irish society.

²⁷ *The Irish Examiner*, Wednesday March 13th 2008.

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