Introduction

This year marks the 25th anniversary of the United Nations Convention on the Rights of the Child ("UNCRC"). Article 12 of that Convention relates to the voice of the child and enshrines the principle that children should be able to express their views in matters affecting them and that their voice should be heard in any judicial or administrative proceedings concerning them. The new Art.42A of the Irish Constitution makes this a constitutional right. Article 42A.4.2° states that:

Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1 of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

The new Art.42A.4.2° places a constitutional obligation on the State to legislate for the voice of the child in certain aspects of the judicial process. Once the constitutional amendment becomes law, there will be a constitutional imperative on the Oireachtas to enact legislation to give effect to the voice of the child. This article will analyse the various ways in which the voice, wishes and interests of the child are heard at present. The main focus of this article will be on public law child care cases, but it will also touch upon private law proceedings. This article will attempt to examine these issues against the backdrop of the recent constitutional amendment and the UNCRC and look at the shortcomings and benefits of the current structure, as well as ways in which the current system could be improved so as to ensure that children's voices and interests are at the forefront in proceedings concerning them.

The voice and views of the child

References to hearing the voice of the child have been contained in Irish law for at least 20 years.

Section 24 of the Child Care Act 1991 (the "1991 Act") requires the court to have regard to the welfare of the child as the first and paramount consideration in child care proceedings and "insofar as is practicable, to give due consideration, having regard to his age and understanding, to the wishes of the child". The 1991 Act governs the public law realm of child care proceedings. In relation to private law proceedings, s.25 of the Guardianship of Infants Act 1964, as amended, provides that "in any proceedings to which s.3 applies, the court shall, as it thinks appropriate and practicable having regard to the age and understanding of the child, take into account the child's wishes in the matter".

Provisions under European law requiring the voice of the child to be heard include Council Regulation 2201/2003 ("Brussels II") which requires a court, when hearing private family law disputes (which have an EU dimension) to hear the voice of the child before making any order in relation to custody or return of the child. Article 3 of the European Convention on the Exercise of Children's Rights 1996, which has not yet been ratified by Ireland, promotes the right of a child to be informed and to express his or her views in proceedings. Article 24 of the Charter of Fundamental Rights of the European Union ("EU") states that children may express their views
freely and such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. Article 13 of the Convention on the Civil Aspects of International Child Abduction gives a discretion to a court to refuse to return a child to the place of his or her habitual residence based on the child's objections to such a return where the child has attained an age and degree of maturity at which it is appropriate to take account of his or her views.

In the English case of Re D. (A Child) (Abduction: Rights of Custody), Baroness Hale eloquently expressed the rationale behind the hearing of the voice of the child in the judicial process:

“But there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents' views.”

There are, at present, various ways in which the voice or the views of the child are ascertained. Judges employ a range of measures to establish what the views of the child are. Some judges speak to the child in chambers or the court may order the preparation of an independent report under s.47 of the Family Law Act 1995. The child can give direct evidence in court but this rarely happens; the argument against this being that it will often serve to be a traumatic experience for the child (retelling their story in the intimidating surroundings of the court). A common way to represent the wishes and interests of the child is through the appointment of a guardian ad litem (“GAL”). The child can also have separate legal representation and be represented that way. Another common procedure employed in the child care courts to hear the voice of the child is the mechanism set out in s.23 of the Children Act 1997, which provides an exception to the hearsay rule and allows, in certain circumstances, out-of-court statements made by a child to be admitted into evidence. These provisions will be explored below.


The UNCRC sets out in art.3 the requirement that the best interest of the child is to be at the forefront of any action concerning children. Article 12 provides that:

1. State parties shall assure to a child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or indirectly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of the national law.

It is clear that the provisions of the UNCRC go further than the new constitutional amendment in this jurisdiction in terms of the situations in which it is envisaged that the voice of the child is to be heard. The constitutional amendment confines the situations where the voice of the child should be heard to care proceedings, guardianship, custody, adoption and access proceedings. It is, of course, open to the Oireachtas, in drafting legislation that will provide for the voice of child, to go further than the constitutional amendment prescribes and provide for the voice of the child to be heard in “any judicial and administrative proceedings affecting the child”, to use the language of the UNCRC.

Guardian ad Litem (“GAL”)

A GAL has been defined as “an independent representative appointed by the court to represent the child's personal and legal interests in legal proceedings.”
Section 26 of the Child Care Act 1991 allows the court to appoint a GAL for a child in child care proceedings. When appointing a GAL, the court must be satisfied, that it is “in the interests of the child and in the interests of justice”. This is a confusingly vague description of the circumstances in which a GAL should be appointed.

Section 26 by its nature (as part of the Child Care Act 1991) applies to public law proceedings. The Children Act 1997 inserted a new s.18 into the Guardianship of Infants Act 1964 to provide for the appointment of a GAL in proceedings concerning custody, access or guardianship matters. This provision has, however, never been commenced, so there is no statutory basis, in private law proceedings, for the appointment of a GAL.

The interim report of the Child Care Law Reporting Project informs us that in 70 per cent of the cases analysed by the project, a GAL had been appointed. When these statistics are analysed further, it can be seen that the incidence of appointment of GALs can vary quite significantly. In Dublin, a GAL had been appointed in 75.3 per cent of cases, while in the rest of the country that figure was between 51.7 per cent and 62.5 per cent. Whether or not the GAL was legally represented also varied depending on where in the country a case was heard. In Dublin, 62.2 per cent of GALs were represented by a solicitor, and throughout the rest of the country that figure was between 25 per cent and 34.5 per cent.

The National Children’s Office (“NCO”) in 2004 carried out a “Review of the Guardian Ad Litem Service”. That report concluded that the provision of GAL services in Ireland is largely unregulated and there is no statutory guidance as to when a GAL should be appointed. In 2009, the Children Acts Advisory Board (“CAAB”) introduced guidelines in respect of the qualification, role and functions of the GAL. The function of the GAL in that report was held to be to “independently establish the wishes, feelings and interests of the child and present them to the court with recommendations”. The CAAB guidelines suggested that a GAL should possess both a third level qualification in social work recognised by the National Social Work Qualifications Board, psychology or other discipline relevant to the role, and at least five years’ postgraduate experience of working directly in child welfare/protection systems.

The Child Care (Amendment) Act 2011 sets out, in general terms, the functions of a GAL. It states that a GAL should “promote the best interests of the child concerned and convey the view of that child to the court, insofar as is practicable, having regard to the age and understanding of the child”. The wording of the above section is interesting, in that it places an onus on the GAL to promote the best interests of the child, which this author would understand to mean to advocate for what is, in the opinion of the GAL, in the best interests of the child. The second function of the GAL, under the 2011 Act, is “to convey” the view of the child to the court, which implies that the GAL is a conduit for the child with respect to his or her views and that the role of the GAL, in this context, is to lay the views of the child before the court, and the court will ultimately decide (whether taking into account those views or not) what is in the best interests of the child.

McWilliams and Hamilton point out that the primary function of the GAL is to make recommendations in relation to the child’s best interests which may differ from the wishes of the child and that there may, at times, be a conflict between these two concepts. The authors observe that “on the one hand there is a rights based view for greater self-determination for children and on the other, a welfare based view that centres on the view that children need to be protected”. The difficulty, as pointed out by McWilliams and Hamilton, is trying to integrate the child’s desires into decision making, without foregoing their best interests and placing too much responsibility on them.

At present, there are no criteria laid down for who can act as a GAL, though in practice they are usually qualified social workers. It is clear that the GAL system is not properly regulated in this jurisdiction and there are no clear criteria for the appointment of GALs nor any detailed description of the role which he or she should perform once appointed. The author suggests that this lacuna should be filled and the circumstances in which a GAL is to be appointed, as well as the role and functions of the GAL on appointment (more detailed functions than those contained in the *2011 Act), should be put on a statutory basis. The circumstances in which a GAL will be appointed in a particular case should be clear so that any child who would benefit from the appointment of such a representative would be provided with one.
The child as a party to proceedings

Under s.25 of the 1991 Act it is possible to make a child a party to all or part of the child care proceedings. Under s.25 the court must be satisfied, having regard to the age, understanding and wishes of the child, and the circumstances of the case, that it is necessary in the interests of the child and the interests of justice to do so. Where a child is joined to proceedings, s.25 enables the court to appoint a solicitor to represent the child. Section 26 of the 1991 Act makes it clear that a GAL will not be appointed where a child has been made a party to the proceedings; it is not possible for a child to have both a GAL and legal representation, although when a GAL is appointed, he or she can of course engage legal representation. This is not necessarily the best way to ensure that the interests, voice and views of the child are at the forefront of proceedings concerning them. An either/or approach is not the solution. In the United Kingdom a “tandem model” is employed, where both a GAL and a legal representative can be appointed. The author believes that there would be merit in adopting the same approach in this jurisdiction.

Hearsay evidence

In practice, one of the most common methods of putting the voice of the child before the court occurs by means of an application, usually by the legal representatives of the Child and Family Agency (“CFA”), to admit out of court statements made by the child into evidence. In this regard, s.23 of the Children Act 1997 is invoked. Section 23 relates to the evidence of children in civil proceedings. Section 23(1) of the 1997 Act states as follows:

Subject to subsection (2), a statement made by a child shall be admissible as evidence of any fact therein of which direct oral evidence would be admissible in any proceeding to which this Part applies, notwithstanding any rule of law relating to hearsay, where the court considers that - (a) the child is unable to give evidence by reason of age, or (b) the giving of oral evidence by the child, either in person or under section 21, would not be in the interest of the welfare of the child.

There are inherent problems with the section 23 procedure. In deciding whether a statement should be read into evidence, a judge will often listen to an overview of the evidence proposed to be admitted by the CFA. Inevitably, details of statements made by the children (which are proposed to be introduced as evidence supporting the CFA case) will be proffered to the court in order for the judge to decide whether they should be admitted or not. Of course, judges are ostensibly impartial, but human nature is such that it is hard to completely disregard evidence once it has been heard, even in circumstances where a judge may decide against admitting the statements into evidence where, in the words of s.23(2)(a) of the 1997 Act, the court is of the opinion that “in the interests of justice the statement or that part of the statement ought not to be so admitted”.

In Eastern Health Board v M.K., it was held by the Supreme Court that wardship proceedings were of a different nature to normal proceedings and hearsay evidence was admissible. However, the Supreme Court went on to say that hearsay evidence regarding statements of a child alleging sexual abuse by its parents could be received in the context of assessing the risks to the welfare of the child, but it did not follow automatically that it also was capable of proving the truth of its contents. It was further held, following the dicta of O’ Flaherty J. in Southern Health Board v C.H., that a court must carry out a separate inquiry as to whether the child should give evidence, and if so, in what circumstances. The Supreme Court determined that hearing the evidence de bene esse was an unfair process, as that process did not have the explicit fair procedures necessary to vindicate rights in determining such an important matter.

Section 23(3) of the 1997 Act requires any party seeking to adduce statements of children made out of court to give such notice and particulars “as is reasonable in the circumstances for the purpose of enabling such party or parties to deal with any matter arising from it being hearsay”. This subsection, in practice, can cause difficulties, where, for example, the respondent parents are not present in court (and are possibly unrepresented). In those circumstances, there is a legislative requirement that they are given notice of a section 23 application and are to be informed of the particulars of the statements that are sought to be admitted into evidence. These requirements can be satisfied by a letter being sent to the respondent parents but it is arguable that the admission of hearsay statements is a serious departure from the normal rules of
evidence (albeit taking place in the more inquisitorial forum of child care proceedings) and special effort should be made to ensure the respondent parents are made aware of the impact of this on the outcome of the case (particularly in circumstances where parents might not have legal representation).

Another question that arises when applications are made under s.23 of the 1997 Act is whether a member of the judiciary is the best person to decide whether it is in the child’s interest to come to court to give evidence. There are no guidelines as to how a judge should approach this difficult task. The courts have made some general determinations on the ages at which children appear capable of forming their own views. In the case of B.U. v B.E. (Child Abduction), 16 the Supreme Court held that the High Court had been correct in stating, without setting down a rigid rule, that in general it was inappropriate for a court to hear the views of a child under the age of six. The Supreme Court further said that greater weight will be attached to the views of an older child but that they are to be accorded such weight as appears to the court to be appropriate in all the circumstances and that the fact that the child is an older child will not necessarily result in the child’s wishes holding sway.

The author believes that some guidance should be offered to judges who deal with cases involving children in the form of judicial training or the availability of consultant experts, in order for those judges to be better placed to make a determination on whether it is in the interests of the welfare of a particular child to give evidence in court, or whether they are capable of forming their own views. The proposed creation of a specialist family court structure should incorporate judicial training on this important matter for judges who will be regularly making decisions in this area.

Weigh to be attached to the views of child

A salient question that arises in the context of the hearing of the voice and the wishes of the child is the weight that should be attached to those wishes. The case law in this jurisdiction centres mainly on the area of child abduction. In the case of A.U. v T.N.U., 17 an assessor determined that the children were capable of articulating and forming their own views. Birmingham J. referred to the dicta in Z.D. v K.D. 18 where it was stated that a court’s obligation is to take account of the child’s views and it is not the obligation of the court to implement those views. Denham J. (as she then was) referred to the English case of Re M. & Anor, 19 which outlined a general approach to hearing the views/voice of the child. This passage occurs in the context of child abduction proceedings but, in the author’s view, is equally applicable to any other proceedings involving children.

“These days, especially in light of Article 12 of the United Nations Convention on the Rights of the Child. Courts increasingly consider it appropriate to take account of a child’s views. Taking account does not mean that those views are always determinative or always presumptively so. Once the discretion comes into play, the Court may have to consider the nature and strength of the child’s objections, the extent to which they are: ‘authentically her own’, or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare as well as the General Convention considerations referred to earlier.”

In the case of O.D. v O.D. 20 Abbott J. set out principles which he believed should be applied where a judge was considering, or had decided, to interview children without the presence of the parties or their lawyers. Although this case relates to private law proceedings, again it provides general guidance as to how a judge should approach the task of interviewing a child. Interestingly, in his judgment, Abbott J. noted that he had developed these principles as a result of training he had received in relation to hearing cases involving issues of parental control. Those principles are as follows:

“1. The judge shall be clear about the legislative or forensic framework in which he is embarking on the role of talking to the children as different codes may require or only permit different approaches.

2. [Additional points on principles not provided in the text]
The judge should never seek to act as an expert and should reach such conclusions from the process as may be justified by common sense only, and the judge’s own experience.

3 The principles of a fair trial and natural justice should be observed by agreeing terms of reference with the parties prior to relying on the record of the meeting with children.

4 The judge should explain to the children the fact that the judge is charged with resolving issues between the parents of the child and should reassure the child that in speaking to the judge the child is not taking on the onus of judging the case itself and should assure the child that while the wishes of children may be taken into consideration by the court, their wishes will not be solely (or necessarily at all,) determinative of the ultimate decision of the court.

5 The judge should explain the development of the convention and legislative background relating to the courts in more recent times actively seeking out the voice of the child in such simple terms as the child may understand.

6 The court should, at an early stage ascertain whether the age and maturity of the child is such as to necessitate hearing the voice of the child. In most cases the parents in dispute in the litigation are likely to assist and agree on this aspect. In the absence of such agreement then it is advisable for the court to seek expert advice from the s. 47 procedure, unless of course such qualification is patently obvious.

7 The court should avoid a situation where the children speak in confidence to the court unless of course the parents agree. In this case the children sought such confidence and I agreed to give it (to) them subject to the stenographer and registrar recording same. Such a course, while very desirable from the child’s point of view is generally not consistent with the proper forensic progression of a case unless the parents in the litigation are informed and do not object, as was the situation in this case.”

Section 24 of the Children Act 1997 is instructive in that it sets out legislative guidelines as to the weight to be attached to the statements of children that have been admitted into evidence under s.23 of the 1997 Act. Section 24 states that:

(1) In estimating the weight, if any, to be attached to any statement admitted in evidence pursuant to section 23, regard shall be had to all the *8 circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.

(2) Regard may be had, in particular, as to whether—

(a) the original statement was made contemporaneously with the occurrence or existence of the matters stated,

(b) the evidence involves multiple hearsay,

(c) any person involved has any motive to conceal or misrepresent matters,

(d) the original statement was an edited account or was made in collaboration with another for a particular purpose, and
(e) the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

The author believes that s.24 should be expanded upon in the context of child care proceedings, so that when the (otherwise hearsay) evidence of a child is deemed admissible there are built in safeguards as to the weight to be attributed to those statements and assessments as to the circumstances of the disclosure. The context in which disclosures alleging abuse or neglect are made is crucially important, as is the nature and source of the questioning (if any) that elicited such disclosures. These safeguards are at present lacking (apart from the requirements under s.24) and once the out of court statements of a child are admitted, they form part of the normal evidence in the trial and provide ballast for the party seeking an order to take a child into care. A balance must be struck between the rights of the parties to argue their case and the requirements of natural and constitutional justice.

Conclusion

Both in Ireland and internationally, the spotlight has firmly been placed on the importance of the voice and views of the child being heard in decisions affecting them. The 31st amendment to the Constitution clearly demonstrated that the people of Ireland believe that children should be heard in matters affecting their lives. When the Oireachtas enacts legislation supporting the new Art.42A.4.2°, this author believes that close regard should be had to the UNCRC and other relevant instruments which reflect the right of the child to be heard. The UNCRC, in particular, casts a wider net over the types of situations in which the voice of the child is to be heard. As mentioned earlier in this article, Art.42A.4.2° limits these situations to guardianship, adoption, custody and access. The drafters of this far-reaching piece of legislation will have an opportunity to broaden the types of situations in which the voice of the child will be required to be heard to those contained in the UNCRC.

As stated above, the author is of the view that judges should receive some type of training or assistance or have the benefit of being able to consult experts in order to determine the very important issue of whether a child in a particular case is capable of forming his or her own views and whether that child should give evidence. The Minister for Justice, Alan Shatter, has said that a referendum proposing the establishment of a specialist family court structure is to take place in 2014. The setting up of any specialist family court system will provide a golden opportunity to ensure that those who are entrusted with making decisions relating to children are provided with the specialist training that such a task requires.

The author believes that the appointment, role and functions of GALs in this jurisdiction need to be put on a statutory footing. As mentioned above, s.25 of the 1991 Act should be amended so that it is possible for a child, where required, to have the benefit of both legal representation and a GAL.

The old adage says that children should “be seen and not heard”; however, we must now turn that on its head and come full circle as a society so that we can give children the voice they deserve in matters that will affect their lives in the most fundamental and far-reaching way.

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1. At the time of writing, the new Art.42A had not yet been signed into law due to it being the subject of a constitutional challenge which has not yet been determined: Jordan v Referendum Act 1994 (Record No. 2012/152 IA) and Jordan v Minister for Children and Youth Affairs (Record No. 2012/1697 P).

2. Article 42A.4.1° states that in "proceedings brought by the State as guardian of the common good for the purpose of preventing the safety and welfare of any child being prejudicially affected or concerning the adoption, guardianship or custody of or access to any child, the best interests of the child shall be the paramount consideration".

3. Gerard Durcan in his article "Hearing the Voice of the Child" (2012) 18(1) M.L.J.I. at 29 refers to English cases dating as far back as the 18th Century where judges ascertained the views of child in matters affecting them.


5. [2006] UKHL 51 at 57.


7. Available at: www.childlawproject.ie.


9. See above n.8 at p.3.

10. See above n.8 at paras 2.4.1–2.4.2.

11. Section 13(2B) of the Child Care (Amendment) Act 2011.


13. See above n.12.


20. O.D. v O.D.