Child Care Law Reporting Project

Ripe for Reform:
An Analytical Review of Three Years of Court Reporting on Child Care Proceedings

A Report Commissioned by the Department of Children, Equality, Disability, Integration and Youth

Maria Corbett and Carol Coulter

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Abbreviations and Acronyms

The following abbreviations and acronyms appear in this study:

ADHD	Attention deficit hyperactivity disorder
ADR	Alternative Dispute Resolution
Art/s	Article/s
CAMHS	Child and Adolescent Mental Health Service
CCA 1991	Child Care Act 1991
CCLPR	Child Care Law Reporting Project
CFA	Child and Family Agency (also known as Tulsa)
CFREU	Charter of Fundamental Rights of the European Union
CoE	Council of Europe
CPNS	Child Protection Notification System
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DCYA	Department of Children and Youth Affairs
DCEDIY	Department of Children, Equality, Disability, Integration and Youth
ECECR	European Convention on the Exercise of Children's Rights
ECHR	European Convention on Human Rights
ECO	Emergency care order
ECtHR	European Court of Human Rights
EU	European Union
GAL	Guardian *ad litem*
HSE	Health Service Executive
ICCPR	International Covenant on Civil and Political Rights
ICO	Interim Care Order
J	Justice
LAB	Legal Aid Board
NEPS	National education psychological service
NGO	Non-governmental organisation
para/s	Paragraph/s
RESC	European Social Charter (Revised)
s/ss	Section/s
UK	United Kingdom
UN	United Nations

Executive Summary

Introduction

Established in November 2012, the Child Care Law Reporting Project (CCLRP) conducts court reporting and research on child law. It aims to promote transparency of, accountability for and debate on child care court proceedings while operating under a protocol to protect the anonymity of the children and their families involved. It seeks to support better outcomes for children and their families by providing information to the public and policy makers on the operation of the child care system in the courts and on the issues that lead to such proceedings being taken.

This is our eighth analytical report, which is based on three years of court reporting from mid-2018 to mid-2021. It is part of a programme of work commissioned in 2018 and funded by the then Department of Children and Youth Affairs. While the present report was commissioned by the then Department of Children and Youth Affairs, many of its findings and recommendations concern the work of the Child and Family Agency (CFA), mental health and disability services provided by the Health Service Executive (HSE) and the operation of the courts, which falls under the remit of the Department of Justice, the Courts Service of Ireland and the judiciary.

Timing of Report: This report comes at a crucial time for child care law and family law generally in Ireland, when legislation to set up a separate Family Court has been published and the pivotal Child Care Act 1991 is under review. This Act replaced the 1908 Children Act, and represented a huge advance in legislating for the care and protection of children at the time, but it predated Ireland's signature of a number of important international instruments, and the major constitutional endorsement of the rights of children, the 2012 Amendment, which introduced Article 42A into the Constitution. It is our hope that the insights drawn from this work and presented in the recommendations below will feed into these important reforms and be used to strengthen and improve the systems around child care proceedings.

Methodology: A socio-legal methodology was adopted for this report, which employs a mixed-methods research approach. The key method was to use NVivo software to collate and analyse primary data from 403 published and unpublished case reports. A small number of High Court cases observed but not published during the same period of time were included, as well as drawing on our previous work. Other methods include a review of relevant Irish and international human rights law and academic research; relevant official statistics; and a small number of qualitative informant interviews with experts in specific fields.

Chapter 1: Institutional and Legal Context of Child Care Proceedings

Introduction

Responsibility for the development of policy and legal reform in relation to child protection lies with the Department of Children, Equality, Disability, Integration and Youth (DCEDIY). Under its aegis, the Child and Family Agency (CFA) is responsible for delivering child protection, alternative care and family support services. Many related issues, for example the conduct of care proceedings and therapeutic and health services for both parents and children, lie with other agencies, like the Department of Justice, the Courts Service and the HSE.

In fulfilling its safeguarding duty, the CFA may admit a child into its care under a voluntary agreement with the consent of the child's parents or where the child appears to be lost, orphaned or abandoned. It is also obliged to apply for a judicial order if this is deemed necessary to ensure the child is protected. The Child Care Act 1991 provides for five orders: an emergency care order, an interim care order, a care order, a supervision order and a special care order. About 6,000 children live in alternative care in Ireland, most (91 per cent) in foster care, of which just over a quarter (26%) are living with relatives. Some seven per cent live in residential care (mostly provided by private companies) and two per cent in "other" care placements.

Constitutional and Statutory Framework

Since April 2015, the Constitution contains a four-part article, Article 42A, which strengthens the constitutional rights afforded to a child. It must be read alongside Articles 41 and 42 which provide specific protection to "the Family". Article 42A commits the Oireachtas to legislate so that the best interests of the child will be the paramount consideration in the resolution of child care proceedings and provides for the views of the child to be ascertained in proceedings concerning them.

European and International Human Rights Law

Ireland is obligated to ensure its laws and practice comply with a host of laws and human rights treaties and instruments from the European Union, the Council of Europe and the United Nations. Among the many provisions involved, the following rights can be identified:

- Right to protection from harm
- Right to alternative care
- Right to family life
- Right to be heard
- Right for best interests to be primary consideration
- Right to a fair hearing within a reasonable time
- Parental right to participate
- Right to an effective remedy.

Other applicable provisions include the need for child-friendly justice and the application of the Public Sector Duty under the Irish Human Rights and Equality Commission Act 2014.

Introduction to District Court Proceedings

Most child care proceedings are heard in the District Court or on appeal to the Circuit Court. Usually, the CFA is the applicant and the child's parents are the respondents. In most cases, the child has no legal status in the proceedings and is rarely present in court. At the discretion of the judge, a guardian *ad litem* (GAL) or solicitor may be appointed to represent the views and interests of the child.

There is no separate, unified or specialist child or family court at the moment, though the Heads of a Bill to establish a Family Court have been published and the Department of Justice has established a Family Justice Oversight Group to discuss widespread reform of the family justice system. Cases are currently heard in the 24 districts of the District Court. Our 2019 review of the District Court found that almost three-quarters of child care cases are not heard separately from the general and family list, a potential beach of the *in camera* rule as families and legal practitioners are forced to mingle in public areas, and that physical facilities are poor in many venues, in a context where people often must wait all day for their case to be heard. Practice varies across the country in terms of waiting lists, case management, appointment of GALs and the reviews of orders by the court. This all makes progress on the Family Court Bill urgent.

Introduction to High Court Proceedings

Applications for special care orders are heard in the High Court rather than the District Court. These orders permit the detention of a child as a means of securing their safety and for therapeutic and educational purposes. In these cases, the CFA is the only permitted applicant and the child is the named respondent and is represented by a guardian *ad litem* who is legally represented. The threshold for granting a special care order focuses on the child's behaviour, risk of harm and care needs, there is no need to establish that the parent has failed the child. Parents must be consulted and are notice parties to the proceedings. For the past 20 years, the High Court has been detaining children in special care under its inherent jurisdiction. In late 2017 a statutory framework for these interventions was commenced, under the Child Care (Amendment) Act 2011. An order can be made in respect of a child between the ages of 11 and 17 for a maximum period of nine months, with the court conducting reviews of the child's progress every four weeks. In addition to special care orders, a child with a mental disorder may be involuntarily admitted to hospital under the Mental Health Act 2001 and a child in need of specialised care may be made a Ward of Court under the court's inherent jurisdiction. Some children under special care orders or wardship arrangements are transferred out of this jurisdiction for care.

Chapter 2: Review of District Court Proceedings Attended

Overview of District Court Cases Attended

We attended proceedings in each of the 24 districts of the District Court from mid-2018 to mid-2021, generating 360 case reports in seven volumes. The majority of proceedings we attended related to Interim Care Orders, followed by Care Orders, and then Supervision Orders and Emergency Care Orders. Proceedings also focused on various aspects of the child's welfare while in care, including access arrangements. We also observed a small number of proceedings where a child was involuntarily detained in an in-patient mental health facility under section 25 of the Mental Health 2001. Most of the proceedings concerned children who were traumatised, distressed and in need of care and support, but there were also cases where it was reported that the child and/or their parent had made huge progress and in some cases reunification was possible.

Admission to care fell into one of three groups. The majority of admissions related to a concern that the parent had neglected or abused their child or failed to protect them from harm. Some admissions were focused on the child's presentation with emotional, behavioural or mental health difficulties, which raises the issue of appropriate supports for the child and his or her family. A third group consisted of those who had no adult responsible for the child, such as unaccompanied minors (separated children), or where a parent was dead or absent.

A large number of cases involved chronic neglect, commonly featuring a long history of family engagement with social services involving poor living conditions, lack of hygiene, lice infestations, exposure to adult materials and lack of sex education. Many parents were experiencing multiple difficulties which hindered their ability to care for the child, including mental health and addiction problems, often accompanied by domestic violence and homelessness. Cognitive impairment also featured in many such cases.

Ethnic minority parents – migrants, Travellers and Roma – were disproportionately represented in child care proceedings. The particular issues posed in these cases included trans-national or trans-ethnic placements, children being left behind by a parent, language barriers, and cultural sensitivity. Some cases involved engagement with cultural and traditional practices like early marriage and strict parenting styles.

Participation of the Child

Practice under the 1991 Act does not fully vindicate the child's constitutional right to have their views ascertained and heard in child care proceedings. A Bill which sought to rectify this issue fell with the dissolution of Dáil Éireann in 2020. The Heads of an amended iteration of this legislation was published in October 2021 and the Government approved the priority drafting of a Bill to, among other things, reform the appointment of guardians *ad litem* in child care proceedings.

In the period under review, we saw no example of a child being made party to proceedings under section 25 of the Child Care Act. Hence, in all cases the child's views were communicated indirectly by the social worker, GAL or parent (sometime differing accounts were given). A GAL was appointed in the majority of care proceedings we observed, and we document here the various ways the GAL engaged with proceedings, from communicating the wishes of the child to the court, to expressing their professional opinion about what was in the child's best interests and seeking supports for the child. While in most cases, the GAL supported the CFA application, we document some interesting examples of where the GAL was not fully supportive of the CFA's position.

Participation of the Parent

Respondent parents are generally legally represented, often by the state Legal Aid Board. However, some proceedings were delayed due to the parent arriving at court without representation. We observed cases where a vulnerable parent (including minors in care themselves) needed support to participate in proceedings, whether due to literacy difficulties, intellectual disability, mental health difficulties, language barriers or unfamiliarity with state systems. A GAL or advocate was appointed for the parent in some cases but there was a lack of clarity on the need for and provision of such support.

Impact of Covid-19

The pandemic compounded weaknesses in child protection services and child care proceedings creating a "perfect storm": children were less seen by those who might identify a concern, home environments became more difficult, the safety of school and therapeutic services disappeared, social workers were no longer able to communicate face-to-face, access was stopped or reduced, reunifications stalled, and assessments were delayed, which in turn delayed court proceeding. Unlike the UK and many other European jurisdictions, no exemption to the closure of schools was made for children at risk of harm, those in care or those with disabilities. On the positive side, the CFA and other organisations were able to continue to offer children support via phone or using technology. Some elements of the court process and certain hearings were moved online.

Issues Arising

Key issues identified include:

- Delays in the provision of therapeutic and disability services, mainly the responsibility of the HSE, leading to an escalation of the child's difficulties with neither the court nor the CFA able to fast-track access to the services for a child in care;
- Gaps in the provision of mental health services for children in need of them, where the child did not qualify for a CAMHS response under its diagnostic criteria, or for detention and treatment under the Mental Health Act 2001;
- Delays in securing assessment and expert reports leading to the adjournments of proceedings, again usually outside the remit of the CFA;
- Delays in securing a date for a care order hearing leading to children remaining in care under interim care orders for protracted periods of time, which may have an emotional toll on a child and create a momentum towards a full care order;
- Lack of supports and clarity in relation to how family reunification could be achieved;
- Care proceedings being brought in relation to children who had spent several years in care under voluntary agreements, where circumstances change leaving the child exposed to an uncertain future; and
- A gap in the law whereby the judge was unable to make an order on his or her own motion, where the CFA either did not have an application before the court, or the judge felt a different application would be appropriate.

Chapter 3: Review of High Court Proceedings Attended

Chapter 3 provides an overview of Special Care cases heard on a weekly basis in the Minors' Review List concerning 29 children. Some of these children were made Wards of Court.

Profile of Children

Many of the children had been in care, including special care, for significant periods of their childhood. Their care needs were highly complex, often with multiple diagnoses and challenges. They presented with a spectrum of emotional and behavioural difficulties and psychological disorders. These included intellectual disability, learning difficulties, personality disorders (termed as an "emerging" disorder for those under 18 years), eating disorders, and polysubstance drug abuse. They often had a history of neglect and abuse including sexual exploitation. Many presented as severely traumatised, were engaging in self-harm, had suicidal ideation and sometimes extremely violent thoughts and behaviours towards themselves and others.

Issues Arising

Key issues identified include:

- Difficulties in obtaining appropriate services and therapies;
- Lack of step-down options, especially for those nearing 18 years of age who would no longer be eligible for detention in special care. This may result in a child being detained for longer than necessary;
- Ongoing need to transfer a child to another jurisdiction for specialised care and treatment (generally the UK);
- Legal uncertainty for those who were made a Ward of Court and transferred to the UK to obtain treatment, as their care is then subject to UK law and difficulties have arisen in terms of discharging the young person back to Ireland;
- Interagency cooperation – the need for protocols and active collaboration between the CFA and the HSE, including Child and Adolescent Mental Health Service (CAMHS);
- Intersection with criminal justice system;
- Mental health and emerging personality disorders, where the law needs clarification so that treatment can be provided in Ireland; and
- Eating disorders requiring in-patient care including involuntary hospitalisation; where very few facilities are available.

Chapter 4: Review of Especially Challenging Cases

Chapter 4 examines a small number of especially challenging cases involving domestic homicide, suspected sexual exploitation of children and gender dysphoria. These pose additional challenges for publication without risking identification of the child or children involved, given the unique features in these cases and risk of "jigsaw" identification when linked to reporting of related criminal proceedings. In some cases, the judge directed that certain material not be published.

Domestic Homicide

Over the past three years, we attended four cases where there had been an alleged killing or attempted murder of a mother by the father of her child or children and the children were taken into care. In one case, the father was acquitted on a murder charge and the child returned to his care.

Issues arising from domestic homicide cases include the fact that the children will have suffered sudden and severe trauma, having possibly witnessed the killing; they will have lost both parents, including the remaining parent who is now incarcerated in the long or short term; their family will be fractured and there may be conflict among the relatives over their care; where the family has a migrant background, there may be no immediate or extended family in the State. UK studies indicate high risk of PTSD among such children.

There are no guidelines on who may be the best person or people to care for the children, or whether specific training might be required for their carers. Until a full care order is made, a child's surviving parent remains the legal guardian, even if accused of the murder of the other parent. The family of the victim has no right to care for the child or attend care proceedings. The child may not be able to access therapeutic support until a full care order is granted.

Legal reforms identified to remedy these issues include considering making the victim's close relatives notice parties to the proceedings where reason is given; permitting, in exceptional circumstances, close relatives to seek legal guardianship without caring for the child for a minimum of a year as currently required. In addition, the need for early intervention specialist support was identified.

Sexual Exploitation of Children in Care

Concerns have arisen that some children in care are at risk from serious sexual exploitation, possibly by organised groups, while absent from their placement. Commonalities arising from these cases include a history of sexual abuse or early sexualisation, self-harm, drug use and lack of insight into the danger their behaviour poses to themselves. They are likely to lack family support which heightens the risk of exploitation. There is a need for enhanced supervision, involving the Garda Siochana as well as the CFA, in these cases.

Gender Identity Issues

Some of the cases dealt with by the High Court saw gender dysphoria combined with very serious psychological and behavioural issues, posing enormous challenges for the children, professionals and families alike. As far as we aware, there is no policy providing guidance on how care providers, legal professionals and the court can most appropriately address the needs of a child in care who identifies as transgender.

Issues Arising

Key issues identified include:

- The fact that a parent dies a violent death is not recognised as a specially traumatising event for a child, requiring urgent therapeutic intervention and specialised support for both children and carers;
- There is no provision for the exceptionally complex family relationships that arise in the aftermath of a domestic homicide;
- In cases involving suspected sexual exploitation, there is a need for enhanced supervision of the child and close cooperation between the CFA, the Garda Siochana and the child's GAL; and
- In cases involving gender dysphoria often combined with other serious issues, there is no national policy providing guidance for the child, the professionals, the courts and the families.

Chapter 5: Recommendations for Reform

Chapter 5 draws together our concluding observations and proposes a series of recommendations, grouped under five themes. This report has been commissioned by the Department of Children, Equality, Disability, Integration and Youth (DCEDIY), the department responsible for the CFA, but the various needs of children involved in child protection proceedings can also fall under the responsibility of the Department of Justice, the Department of Health and the HSE. Therefore, some of the recommendations listed below refer to these departments and bodies.

Recommendation A: Establish a Family Court

The current District Court system for hearing child care proceedings in inadequate buildings with crowded lists is not fit for purpose and hinders good practice and human rights compliance. The Government has committed to establishing a Family Court and in 2020 published the General Scheme of the Family Court Bill and established the Family Justice Oversight Group.

Parental addiction is the core reason for a significant proportion of children coming into and remaining in care. Many of these parents have the potential with support to overcome their addiction, to be able to parent safely and to be reunited with their children. Family Drug and Alcohol Courts operating in different jurisdictions have had a positive impact on the rate of family reunification and so reducing the numbers of children in care, and have been found to be a cost-effective intervention.

At present, applications for a care or supervision order, a special care order or wardship which concern the same child are heard by different judges in different courts. Adherence to the principle of “One Child, One Judge” may require the transfer of certain proceedings from the District to the High Court. In addition, child care proceedings are often delayed due to difficulty in securing the timely completion of child and parental assessments and expert reports. In some Australian states, a Children’s Court Clinic has been established to streamline the provision of such services to the court. In the context of ongoing work on family justice reform and the publication of the General Scheme of the Family Court Bill 2020, consideration should be given by the Department of Justice, the Family Justice Oversight Group and the Court Service to:

1. Urgently progress the publication of the Family Court Bill and prioritise its examination by the Houses of the Oireachtas.

2. Introduce a family drug and alcohol programme within the Family Court to support family reunification where it is safe and in the child’s best interests.

3. Establish mechanisms to allow for judicial continuity within the Family Court to enable all cases concerning the same child to be heard by the same judge.

4. Establish an independent service comprising suitably qualified experts to carry out assessments and provide expert evidence for the purpose of supporting decision-making by the Family Court.

5. Set up a Court Support Office to oversee the appointment and regulation of independent advocates, GALs, cultural mediators and interpreters for vulnerable parents including those with impaired capacity.

Recommendation B: Address Gaps in the Legislative Framework

The Government has recognised the need to review and update the Child Care Act 1991. In the context of the ongoing review of the 1991 Act and the consideration of the General Scheme of the Child Care (Amendment) Bill 2021, consideration should be given by the Department of Children, Equality, Disability, Integration and Youth to the following recommendations.

Care orders and voluntary care agreements: Cases continue to be presented to the courts where children have spent protracted periods of time in care under an interim care order awaiting a date for a care order hearing or while an assessment is being conducted; and where circumstances for a child in voluntary care have changed leaving the child is an unsatisfactory legal situation.

6. Amend section 17 to include a maximum period of time that a child may remain in care under an interim care order.

7. Introduce an assessment order where a child may live in care or at home for a specified time period while an assessment is conducted, with progress and results reported to the court.

8. Amend section 4 on the maintenance of a child in care under a voluntary care agreement (as opposed to admission to care under this section) to include that the child's guardian be available to provide ongoing consent; the ascertainable views of the child be taken into consideration; and include a maximum period of time before judicial proceedings must be commenced.

Views and best interests of the child: The child's views are rarely heard directly by the court. The child's constitutional right to be heard and for their best interests to be paramount has yet to be provided for in statute law. In October 2021, the Minister for Children published the General Scheme of the Child Care (Amendment) Bill 2021 which seeks to address stakeholder concerns of an earlier iteration of this legislation, the 2019 Bill. We welcome the fact that the Bill has received approval for priority drafting.

9. Progress the publication of the Child Care (Amendment) Bill and prioritise its examination by the Houses of the Oireachtas in order to vindicate the child's constitutional right to be heard and to have their best interests considered paramount in child care proceedings.

Power of the Court: A lacuna exists in the Child Care Act 1991, where the court cannot make an order on its own motion, if the CFA, the only body empowered by the Act to bring an application, fails to do so for any reason; if the CFA withdraws

proceedings; or where the judge considers the threshold for a particular order has not been met, but a different order would be appropriate.

10. Amend section 16 of the 1991 Act to empower the court to make a decision on its own motion to initiate or continue with care proceedings in exceptional circumstances or substitute a different order for that sought by the CFA.

Domestic homicide: The needs and rights of child victims of alleged domestic homicide are inadequately provided for under Irish law. A parent charged with or convicted of the murder, manslaughter or serious assault of the child's other parent does not lose guardianship rights in respect of their child. This means that key elements of the child's life, including consent for therapeutic services and the granting of rights to carers, requires the consent of this sole remaining guardian until such time as a full care order is secured under section 18. Other close relatives have no rights in relation to the bereaved child, who may be left without both parents in cases of murder/suicide or incarceration of the surviving parent. They have no right either to any form of participation in care proceedings. The drafting of amendments to address these issues would need to respect the constitutional rights of the surviving parent. In circumstances where the accused is acquitted, the CFA or the parent can seek the discharge of a care order and the substitution of a supervision order, if deemed in the child's interests. In cases of alleged domestic homicide:

11. Provide that a section 18 hearing shall commence within two months of the application being lodged, and that the child receives urgent therapeutic support as soon as possible after the incident

12. Amend the Child and Family Relationships Act 2015 to permit, in exceptional circumstances, an application for guardianship to be made by a relative of the child in circumstances where the relative does not satisfy the statutory one-year time period of caring for the child prior to the application.

13. Amend the Child Care Act 1991 to permit relatives to apply to be made notice parties in child care proceedings.

Protection of identity: Many children who have previously been in special care or detained in mental health centres on reaching maturity remain extremely vulnerable. Once they reach eighteen years there is no longer a prohibition on the publication of their identity and material relating to the fact the individual was once in care. Many of these young people will continue to appear before the courts in wardship, civil and criminal proceedings. Their identity is not made public under wardship proceedings, but can be reported in media reporting of civil and other criminal proceedings. Given the unique nature of some of the child's behaviours

and life histories, there is a risk of jigsaw identification which may extenuate the risks to the child if their identity is made public.

14. Amend section 27 of the Civil Law (Miscellaneous Provisions) Act which prohibits publication of material that identifies an individual as a person suffering with a medical condition to also prohibit publication identifying a young person subject to criminal proceedings who has been in special care or made a Ward of Court.

Recommendation C: Strengthen Capacity to Respond to Therapeutic Needs of Children in Care or At Risk of Entering Care

Addressing the child's mental health needs are often central to both District and High Court child care proceedings. A child experiencing mental health issues including self-harm and suicidal ideation may be admitted to care or made a Ward of Court as part of a crisis intervention. In such circumstances there may be no issue of parental failure, indeed the parent may request the placement as a means of providing the child with safety and support.

In addition, a child in care may require therapeutic support and the child may require a more intensive care setting, such as special care, if their therapeutic needs are not adequately met. Finally, the lack of appropriate step-down placements for children and young people (over 18 years) on leaving special care or wardship has been highlighted by the High Court for years.

Consideration should be given to the Health Service Executive leading on the following initiatives:

15. Commission a review of policy, practice and capacity within the mental health services to examine how the mental health needs of children in care or at risk of entering care can be met.

16. Develop a joint protocol between the Health Service Executive, the Child and Family Agency and An Garda Siochana where a child in care presents in a crisis seeking emergency medical or psychiatric care.

17. Review the need for, and provision of, appropriate interventions for children and young people who do not meet the threshold for secure care, but who need ongoing protection and therapeutic care, with a view to providing appropriate placements and services as a matter of urgency.

Recommendation D: Develop an Inter-Agency Policy and Protocols on Sexual Exploitation

National policy: There is no national policy which aligns the relevant legal principles and social worker aspects of child care proceedings and expressly promotes compliance with constitutional, European and international human rights obligations. Practice by the CFA and their legal representatives can vary between courts within the District Court. In addition, where child care proceedings intersect with criminal investigations and prosecutions different approaches to sharing evidence between the CFA and An Garda Síochána have been observed. There is also no guidance on asking a District Court to state a case to the High Court on key issues that repeatedly arise. Consideration should be given to the Child and Family Agency leading on the following initiatives:

18. Develop an inter-agency policy on child care proceedings which sets out a national approach to the preparation and management of child care proceedings, including the identification of cases with potentially complicating features such as sexual abuse and gender dysphoria, and what expert advice may be needed.

19. Compile a Plain English guide to child care proceedings for a non-legal audience, including children and parents.

Sexual exploitation: This report has raised concerns about delays in dealing with the sexual exploitation of adolescents in care during periods of absconding from their care placement. In such cases, there should be close liaison between a designated and trained member of the Garda Síochána, the child's social worker, guardian *ad litem* and carers.

20. Develop a joint protocol between the Child and Family Agency and An Garda Siochana where the sexual exploitation of minors in care is suspected.

Recommendation E: Commission Solutions-Focused Research on Ethnic Minorities and on Children with Severe Difficulties

Two issues identified in this report require further research and consultation with relevant stakeholders and experts on how to translate the research findings into tangible reform recommendations in the Irish context. In the context of the ongoing review of the Child Care Act 1991, consideration should be given by the Department of Children, Equality, Disability, Integration and Youth to commission research on the following areas:

Ethnic minorities: Children from Traveller and migrant backgrounds are disproportionately represented among the population of children subject to child care proceedings. While we may draw lessons from other jurisdictions, where similar patterns exist, it would be hugely valuable to understand the issues as they are occurring within the Irish context.

21. Commission research on the reasons for and implications of a disproportionate number of children subject to care proceedings being from Traveller and ethnic minority backgrounds.

Young people with severe difficulties: The High Court presides over the care and detention of a small number of children and young people with complex emotional and behavioural needs who pose a danger to themselves and others, under three legal frameworks (Child Care Acts; Mental Health Act 2001; and wardship). Due to a lack of specialist facilities in Ireland Irish resident children continue to be detained in foreign hospitals, in particular the UK. Differences in law and practice between jurisdictions can be problematic, as well as raising issues as to how to respond to an individual who turns eighteen years and continues to pose a serious risk of harm to themselves and others.

Mental health problems and psychiatric illnesses often manifest in late adolescence and early adulthood with the individual's care transiting from the child to adult services and between the CFA and HSE. The adoption of a unified child and youth mental health services to bridge the transition between child and adult services could be explored.

22. Commission research to explore international best practice regarding a legal framework and service delivery model for the treatment of children and young adults with challenging emotional and behavioural difficulties, including emerging psychiatric and personality disorders, who require detention for their own safety or the safety of others.

INTRODUCTION

I Introduction to this Report

Established in November 2012, the Child Care Law Reporting Project (CCLRP) conducts court reporting and research on child law. The aim of its work is to promote transparency of, accountability for and debate on child care proceedings while operating under a protocol to protect the anonymity of the children and their families subject to such proceedings. It seeks to support better outcomes for children and their families by providing information to the public and policy makers on the operation of the child care system in the courts.

To date, we have published over 650 case reports from our attendance at child care proceedings. We have also published seven analytical reports drawing on the information in these reports as well as numerous submissions to the Department of Children and Youth Affairs (as it then was), Oireachtas Committees and other bodies. This is our eighth analytical report and is based on three years of court reporting from mid-2018 to mid-2021. All our case reports and analytical reports are available on our website www.childlawproject.ie.

This report comes at a very important time for child care law and family law generally in Ireland. More than 25 years after it was recommended by Mrs Justice Susan Denham, as chair of the Working Group on a Courts Commission, the Heads of a Bill to set up a separate Family Court within the court system have been published. When enacted by the Oireachtas, this will establish a separate division devoted to family law at every level of the court system, enabling the appointment of specialist judges and the provision of dedicated family law court venues. This is combined with an initiative of the Department of Justice, the establishment of a Family Justice Oversight Group, which is examining additional structures and services to help all court users involved in family law proceedings.

Separately, the Department of Children, Equality, Disability, Integration and Youth (formerly the Department of Children and Youth Affairs) has embarked on a review of the Child Care Act 1991. This Act replaced the 1908 Children Act, and represented a huge advance in legislating for the care and protection of children at the time, but it predated Ireland's signature of a number of important international instruments, and the major constitutional endorsement of the rights of children, the 2012 Amendment, which introduced Article 42A into the Constitution. In addition, legislation introduced in the last Dáil, which would have provided for the voice of the child to be heard in legal proceedings concerning them, fell with the Dáil, but the present Minister for the DCEDIY published a new iteration of the legislation in October 2021, which seeks to address stakeholder concerns.

We hope that the insights provided by the CCLRP reports into child care proceedings in the District and High Court (and Circuit Court, on appeal from the District Court) will feed into all these important reforms of child and family law, of the child protection system more broadly, and of the court system.

In mid-2018 as we embarked on a new programme of work, the then Department of Children and Youth Affairs asked us to examine a number of issues in a final report. Some of these issues were already addressed in specific reports we presented to the Department, and in the course of our work we identified a number of additional issues deserving of examination. With the agreement of our Research Advisory Group representing the Department, the Child and Family Agency (CFA), the CCLRP, National University of Ireland Galway School of Law and independently chaired by Dr Helen Buckley, we modified the issues to be examined based on the reports of cases attended by our panel of reporters during the period under examination.

II Structure of this Report

The report comprises an executive summary and five chapters. Chapter One outlines the main Irish constitutional and statutory provisions governing child care proceedings, as well as summarising relevant international human rights law and jurisprudence. It contains an overview of the different legal provisions under which the High Court exercises its powers to detain children for their own protection and benefit, which have been further clarified by case law.

Chapter Two provides an analysis of cases attended across the 24 districts of the District Court, identifying trends and issues we found to impact on the proceedings, issues that were caused by the proceedings, and common issues that lead to care applications being made in the first place.

Chapter Three provides an overview of cases attended in the Minors' and Wardship List of the High Court, looking at how legislative and judicial provisions interact as well as trends in cases. The number of children involved is small, when compared with those who pass through the District Court, so the issues raised carry that caveat.

Chapter Four looks at a small number of especially challenging cases, which we did not report on in our regular volumes because of their exceptional circumstances, giving rise to a particular danger of identifying the children involved. These include cases involving domestic homicide, suspected sexual exploitation of children and gender dysphoria. The issues are so specific as to merit a separate chapter, drawing on the international literature and the views of experts, as well as highlighting the problems that have arisen in the Irish courts.

An unanticipated issue was the impact of the Covid 19 pandemic on children who might need the assistance or protection of the CFA, and the difficulties posed by the pandemic for those who often make such referrals to the CFA, teachers and members of the Garda Síochána; the problems experienced by the courts in hearing care applications; and the difficulties faced by children in care, their carers and their parents, especially relating to face-to-face contact with social workers, access with their parents, and access to necessary assessments and therapies. We refer to these difficulties in both Chapters 2 and 3.

Finally, Chapter Five draws together our concluding observations and proposes a series of recommendations.

III Definition of Key Terms

For the purpose of this report, the term “child” is defined as any person from birth until the individual reaches the age of legal majority, eighteen years of age. In some instances, the term young person or adolescent is used to describe a teenager under eighteen years. As a form of shorthand, unless otherwise stated the generic term “parent” is used throughout this report to include a child’s parent, legal guardian or person acting *in loco parentis* and the term can refer to a person (singular) or multiple people (plural).

The Child and Family Agency (CFA) is also known by the name Tusla. While the term “Tusla” is widely used in practice and is the preferred term used by the CFA when engaging with children it does not appear in legislation so is not used in this report.

References to a child or children being “in care” as used in this report refer to any child who has been admitted to the care of the CFA under section 4, 17, 18, 19 or 23H of the Child Care Act 1991. In general, children detained in youth justice facilities and inpatients in psychiatric hospitals, along with criminal proceedings against a parent or other person in relation to child abuse, neglect or exploitation, fall outside the remit of this report.

The term “secure care” is often used to refer to “special care”, the terms have the same meaning but as the phrase “secure care” has no legal meaning it not used in this report.

For the purpose of this report, the phrase “family reunification” refers to re-uniting a child and their parent in circumstances where they have been separated due to a child protection or welfare concern. This is to be distinguished from international family reunification, which concerns a family who have been separated across international boundaries as a consequence of immigration law.

IV Methodology and Research Methods

The remit of the CCLRP is set and limited by law, the Child Care (Amendment) Act 2007. We can only report on what happens and is said in court about such proceedings. We can also use the information given in court for broader analysis of trends emerging from the selection of cases we attend, as we have done in this report. Currently, we report on District Court child care hearings and High Court special care hearings and some wardship cases involving children and young adults emerging from other forms of care.

A socio-legal methodology was adopted for this report. The key method was the collation and analysis of primary data based on published and unpublished case reports using the NVivo software. The sample of analysed cases include all case reports published between April 2018 to June 2021 from both the District Court and High Court. Fourteen High Court cases which were observed but not yet published during the same period of time were also included. The case reports vary in length from a few paragraphs based on a single short hearing to a lengthy report based on multiple hearings concerning the same child or group of siblings attended by our reporters over a period of several months or years. Following the merger of case reports concerning the same child/ren and the creation of additional individual reports from composite reports, we have a total of 403 case reports.

Where appropriate comparisons are made with our previously published data and we draw on findings from our previous published analytical reports and submissions. The themes explored through the NVivo analysis and recommendations made were informed by focus group discussions with our reporters and some elite stake-holder interviews. Other methods used included a review of relevant Irish and international human rights law, jurisprudence and academic research; relevant official statistics; and a small number of informant interviews with experts in specific fields. These are not identified, in line with our practice of not identifying expert witnesses and individual lawyers in the cases we report on and are referred to by their profession where they are quoted.

While the present report was commissioned by the then Department of Children and Youth Affairs many of its findings and recommendations concern the work of the CFA, the mental health and disability services provided by the Health Service Executive (HSE) and the operation of the courts which fall under the remit of the Department of Justice, the Courts Service of Ireland and the judiciary.

As with all our work, this report is unable to comment on the quality of care provided to children in care, this role is fulfilled by the Health Information Quality Authority (HIQA) and the Child and Family Agency who inspect these units against relevant Regulations and National Standards.

CHAPTER ONE: INSTITUTIONAL AND LEGAL CONTEXT OF CHILD CARE PROCEEDINGS

1.1 Introduction

The Department of Children, Equality, Disability, Integration and Youth (DCEDIY) has responsibility for the development of policy and legal reform in relation to child protection.[1] Under its aegis the Child and Family Agency (CFA) is designated with responsibility for the delivery of child protection, alternative care and family support services. Since its establishment in 2014 the CFA has operated as a unified national organisation, divided into geographical areas for operational purposes.[2] The youth justice system operates separately from the child protection system, with most proceedings heard in the Children Court under the Children Act 2001.

Over the past number of years, the numbers of children in alternative care in Ireland has remained relatively constant at approximately 6,000 children, with a decreasing trend emerging. Figures for the end of the year were 5,882 children in care in 2020; 5,983 in 2019 and 6,041 in 2018.[3] At the time of writing, the most up-to-date data is that there were 5,884 children in care as of end March 2021.[4] The vast majority, 91 per cent, of these children were in foster care of which 26 per cent were living with relative foster carers. Of the remaining children, seven per cent were in residential care and two per cent were recorded as being in "other" care placements. Residential care is predominately provided by private companies.

Public law child care proceedings concern matters of child protection and child welfare and are governed by the Child Care Act 1991. They are heard in the 24 districts of the District Court, with the exception of applications for special care orders which are heard in the High Court, or cases on appeal to the Circuit Court. District Court hearings concern an application for one of four orders (emergency, interim, supervision or care order) or to address a question relating to a child in State care (access, aftercare provision etc). The CFA is usually the applicant and the child's parents are the respondents. In most cases, the child has no legal status in the proceedings: they are the subject of the proceedings but are not a party to them though they may be made a party. In some cases, at the discretion of the judge a guardian *ad litem* (GAL) or solicitor may be appointed to represent the views and interests of the child. Children are usually not present in court. Practice

1 In 2020, the remit of the Department of Children and Youth Affairs was expanded with a related name change.
2 It operates under the Child and Family Agency Act 2013.
3 Quality Assurance Directorate, 'Quarterly Service Performance and Activity Report: Quarter 4 2019' (Tusla Child and Family Agency 1 April 2020); Quality Assurance Directorate, 'Quarterly Service Performance and Activity Report: Quarter 4 2020' (Tusla Child and Family Agency 29 March 2021).
4 Quality Assurance Directorate, 'Monthly Service Performance and Activity Report March 2021' (Tusla Child and Family Agency 8 June 2021) 16.

varies within the 24 districts in terms of waiting lists, case management, appointment of GALs and reviews of orders by the court.

Proceedings in the High Court where the CFA seeks special care orders are different from those in the District Court, in that the child who will be the subject of the order (and therefore detained for protection and therapy) is the respondent and is represented by a guardian *ad Litem* and by a solicitor and barrister. The parent may be a notice party.

1.2 Constitutional and Statutory Framework

The central piece of legislation governing child care proceedings is the Child Care Act 1991, along with its various amendments.[5] The Child Care Act, as amended, enables the CFA to apply to the District Court for an order in respect of a child it deems in need of care and protection, and who would not be adequately protected without one of the orders available under the Act. The 1991 Act is currently being reviewed by DCEDIY.

The Child Care Act, like all Irish legislation, is subordinate to the Constitution, which guarantees fair procedures and affords certain rights to the marital family,[6] individuals[7] and children.[8] In this, our child protection legislation exists within a very different context to that in the neighbouring jurisdiction of England and Wales, where there is no written constitution and no constitutional protection for the family.

Constitutional Rights: Under the Constitution, where appropriate, a child enjoys the same fundamental rights as are granted to all individuals living in the State[9] and has an express right to free primary education.[10] Since April 2015, the Constitution contains a four-part article, Article 42A, which strengthens the constitutional rights afforded to a child.[11] The opening provision provides that: "The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights".[12]

The new article, Article 42A, must be read alongside Articles 41 and 42 which provide specific protection to "the Family", which the courts have interpreted to include only a family based on marriage.[13] The courts have also stated that the rights of the family belong not to individual members of the family but to the family

5 These include: Statutory Instrument 260 Child Care (Placement of Children in Foster Care) Regulations, 1995 and Statutory Instrument 259 Child Care (Placement of Children in Residential Care) Regulations, 1995. Other statutes that impact on child care proceedings include the Courts of Justice Act 1924, the Guardianship of Infants Act 1964, the Status of Children Act 1987, the Children Act 1997 and the Children and Family Relationship Act 2015 which address matters of parental responsibly, private family law and evidence provided by children in court. Other relevant statutes include the Adoption Acts 2010-2017, the Children Act 2001 which governs youth justice, the Domestic Violence Acts of 1996 and 2018, the Disability Act 2005 and the Assisted Decision-making (Capacity) Act 2015 (which is not yet fully commenced).

6 arts 41 and 42.

7 arts 40-44.

8 arts 42 and 42A.

9 *In re Article 26 and the Adoption (No. 2) Bill 1987* [1989] IR 656 the court found that a child is entitled, where appropriate, to the rights contained in art 40 to 44.

10 Constitution, art 42.4.

11 The new Article was contained in the Thirty-First Amendment to the Constitution Act 2012. The amendment's entry into force was delayed by a legal challenge *Jordan v Minister for Children and Youth Affairs & Ors* [2015] 4 IR 232.

12 art 42A.1.

13 Since the passage into law in 2015 of the Thirty-fourth Amendment to the Constitution, the marital family includes same-sex marriages.

unit as a whole.[14] Unmarried parents are afforded rights in respect of their child but they do not benefit from constitutional protection as a family.[15] Under Article 41, the State recognises "the Family as the natural, primary and fundamental unit group of society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law". It also provides that the State "guarantees to protect the Family..." and shall "guard with special care the institution of Marriage, on which the Family is founded…". Article 42 sets out the rights and duties of the family in relation to their children. It provides that the State "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".

Article 42A commits the Oireachtas to legislate so that the best interests of the child will be the paramount consideration in the resolution of child care proceedings.[16] Neither statute law nor guidance provides a definition of how to apply the best interests of the child in child care proceedings. Proposed legislation was published in 2019 but the Bill fell in 2020 with a change of Government.[17] However, the Supreme Court has determined that the Constitution guarantees the import of the best interests test, regardless of whether or not it has yet to be enshrined in legislation.[18]

Threshold for State Intervention in Family Life: Article 42A clarifies how and when the State can intervene in family life to protect a child and allows for the dispensing of parental consent to enable a child to be eligible for adoption in certain circumstances. Article 42A.2.1 empowers the State in exceptional circumstances to limit the family rights granted under Articles 41 and 42.1 "by proportionate means as provided by law". It provides that:

> In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

Prior to 2015, the authority relating to the threshold for intervention was the Supreme Court decision in *North Western Health Board v HW and CW* (the PKU heel prick test case).[19] The case concerned an application by the health service to dispense with parental consent where a married couple refused to allow a

14 Geoffrey Shannon, *Child Law* (2nd ed., Thomson Round Hall 2010) 2.
15 *Re M an Infant* [1946] IR 334; *W O'R v EH* [1996] 2 IR 248.
16 art 42A.4.1°.
17 Child Care (Amendment) Bill 2019.
18 *CB and PB v AG* [2018] IESC 30.
19 [2001] IESC 90.

diagnostic test to be carried out to establish if their new-born infant was at risk of a number of metabolic disorders. The court concluded that the test was unquestionably in the best interests of the child from a medical perspective, but the parents' action was not an exceptional case and did not meet the threshold for State intervention. It found that well-intentioned and caring parents have the right to parent their children in ways that run contrary to professional advice, unless they put the children at extremely serious risk. The judges held that the meaning of the phrase in "exceptional circumstances" should be established by the facts of each case and must include an immediate threat to the health or life of the child; a degree of parental neglect constituting an abandonment of the child and all rights in respect of him; and an immediate and fundamental threat to the capacity of the child to continue to function as a human person, physically, morally or socially, deriving from an exceptional dereliction of parental duty.

Since 2015, the Supreme Court has twice commented on the new article. In the 2018 case of *Re JB v KB,* O'Donnell J described the rationale for the introduction of Article 42A as a response to "a perceived approach of statutory and constitutional interpretation […] which was considered to be unsatisfactory in principle, and to give rise to potentially unsatisfactory results".[20] The previous framework "might lead to cases being resolved in a way which subordinated the interests of the child to that of a family, and in effect, therefore, of parents" and the new article "can therefore be seen as a restating of the balance, acknowledging in explicit terms the individual rights of children…".[21]

In the 2020 case of *JJ*, the Supreme Court held that:

> The removal of the reference to failure for "physical or moral reasons", and the new requirement that such failure must be to such an extent as to prejudice the safety or welfare of the child, is a significant change of focus from the cause of parental failure to its effect. To that extent, we consider that the existing case law on parental failure decided by reference to Article 42.5 cannot be directly applied to the position under Article 42A. Indeed, to do so would ignore the fact of amendment.[22]

20 [2018] IESC 30.
21 ibid.
22 *In the Matter of JJ* [2021] IESC [134].

Referring to the provision on the paramountcy of the best interests of the child, the Court found that:

> This does not permit the State, or a court, to simply decide what it considers is in the best interests of the child and, if necessary, substitute that decision for the decision of the parents, as the best interests of the child normally comprehends being part of a family with everything that that entails. However, Article 42A.4 does suggest that any dispute as to the impact of a decision or conduct on health or welfare must be approached through the lens of the interests of the child.[23]

The Irish superior courts have also delivered a number of judgments since 1991 elaborating on the rights of the family, the rights of the child and the role of the State in protecting children and in intervening in the family. They have also dealt with the nature of child care proceedings and the procedural rights of parents.[24] While too numerous to be dealt with comprehensively here, they supplement the provisions of the Child Care Act and have a major bearing on the manner in which it is interpreted by the courts and should have major influence on its ongoing review.

23 ibid.

24 Analysis of relevant caselaw can be found in the reports of the Special Rapporteurs on Child Protection available at <https://www.gov.ie/en/collection/51fc67-special-rapporteur-on-child-protection-reports/>.

1.3 European and International Human Rights Law

As a member of the EU and signatory to international human rights instruments, Ireland is obliged to ensure its laws and practice are compliant with the following:

- **European Union** law, in particular the Charter of Fundamental Rights of the European Union (CFREU),[25] the Brussels II bis Regulation,[26] and the Directive on Victims of Crime.[27]

- **Council of Europe**'s instruments, resolutions and guidelines including:
  - European Convention on Human Rights (ECHR),[28] the jurisprudence of the European Court of Human Rights (ECtHR) and the European Convention on Human Rights Act 2003
  - European Social Charter (Revised) (RESC)[29]
  - European Convention on the Exercise of Children's Rights (ECECR)[30]
  - Guidelines on Child-Friendly Justice.[31]
  - Resolution 2049, Social services in Europe: legislation and practices of the removal of children from their families[32]
  - Resolution 2232, Striking a balance between the best interest of the child and the need to keep families together[33]

- **United Nations** treaties, general comments and guidelines including:
  - Convention on the Rights of the Child (CRC)[34] and its optional protocols, and the UN Committee on the Rights of the Child's General Comments and Guidelines for the Alternative Care of Children[35]

25 Charter of Fundamental Rights of the European Union 2012/C 326/02.
26 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.
27 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.
28 Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 005, 1950.
29 European Social Charter (Revised), *European Treaty Series - No. 163.*
30 European Convention on the Exercise of Children's Rights, *European Treaty Series - No. 160*.
31 Council of Europe (2011) Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice.
32 Council of Europe: Committee of Ministers, Council of Europe Parliamentary Assembly, 'Resolution 2049 Social Services in Europe: Legislation and Practice of the Removal of Children from Their Families in Council of Europe Member States' (2015) para 6.
33 Council of Europe Parliamentary Assembly, 'Resolution 2232, Striking a Balance between the Best Interest of the Child and the Need to Keep Families Together' (2018).
34 'Convention on the Rights of the Child (Adopted and Opened for Signature, Ratification and Accession on 20 November 1989) 1577 UNTS 3 (UNCRC).' (2 September 1990).
35 Guidelines for the Alternative Care of Children, A/Res/64/142, 24 February 2010.

- Convention on the Rights of Persons with Disabilities (CRPD).[36]

The following rights can be identified from these European and international human rights law instruments and jurisprudence. Their relationship to the Constitution is also highlighted below.

Right to Protection from Harm: A child has a right to protection from all forms of harm.[37] In circumstances where State authorities knew, had reason to suspect or ought to have known that abuse was going on and failed to act to protect children from abuse, the ECtHR has found that the State violated Article 3 of the ECHR (freedom from inhuman and degrading treatment).[38] Of relevance are Articles 40 and 42A of the Constitution.

Right to Alternative Care: A child deprived of his or her family environment has a right to alternative care and periodic review of their care placement.[39] Of relevance is Article 42A of the Constitution.

Right to Family Life: All individuals, including parents and children, have a right to respect for family life.[40] Of relevance are Articles 40, 41, 42 and 42A of the Constitution. This right comprises:

- The child has a right to know and be cared for by his or her parents.[41] This right includes a proactive dimension in that the State has an obligation to provide appropriate assistance to parents with their child rearing responsibilities.[42]

- The child has a right not to be separated from his or her parents unless it is necessary for the child's best interests.[43] No child shall be separated from parents on the basis of a disability of either the child or one or both of the parents.[44] The State must take steps to reunify a child with his or her parents, where appropriate.[45]

36 UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106.
37 CFREU Art 24(1); ECHR Art 3; RESC Arts 7(10); and CRC Arts 19 and 34-36.
38 *Z v UK* (2002) 34 EHRR 3 and DP and *JC v UK* (2003) 36 EHRR 14.
39 CFREU Art 24(1); RESC Art 17(1)(c); CRC Arts 3(2), 20 and 25; CRPD Art 23(5); and Guidelines for the Alternative Care of Children, A/Res/64/142, 24 February 2010.
40 CFREU Art 7; ECHR Art 8; RESC Art 16; and CRC Arts 7, 16 and 18.
41 CRC Art 7.
42 RESC Art 16; CRC Art 18(2) and CRPD Art 23(2).
43 CRC Art 9(3) and CRPD Art 23(4).
44 CRPD Art 23(4).
45 See a further discussion see Maria Corbett, 'An Analysis of Child Care Proceedings Through the Lens of the Published District Court Judgments' (2017) 20(1) Irish Journal of Family Law.

- If separated from his or her parents, the child has a right to maintain a personal relationship and direct contact with both parents on a regular basis except if it is contrary to the child's best interests.[46]

Right to be Heard: The right to participate in decision-making is established across a range of human rights instruments.[47] A child has a right to be heard in any judicial and administrative proceedings affecting him or her, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.[48] The European Court of Human Rights has found that there is no absolute right of the child to be heard directly in judicial proceedings.[49] The UN Committee provides that the views of a child in care must be taken into account in the determination of decisions on his or her care placement, plans, reviews, and access arrangements.[50] Of relevance is Article 42A.4.2 of the Constitution which provides that provision shall be made by law for the views of the child to be ascertained and given due weight having regard to the age and maturity of the child in child care proceedings.

The Committee on the Rights of the Child has identified two prerequisites to the child's realisation of the right to be heard – the child must have access to child-appropriate information, including the possible consequences of decisions; and the child must have a safe space within which to contribute their views, an environment which is not intimidating, hostile, insensitive or inappropriate for her or his age.[51]

Right for Best Interests to be Primary Consideration: In all actions concerning children, undertaken by courts of law and administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[52] Of relevance is Article 42A.4.1 of the Constitution which provides that provision shall be made by law for the best interests of the child to be "the paramount consideration" in child care proceedings.

46 CFREU Art 24(3); CRC Art 9(3); and *Olsson v Sweden* (1992) 17 EHRR 134.
47 CFREU Art 24(1); CRC Art 12; ECECR Art 3; para 6; UN Committee on the Rights of the Child (2009) General Comment No. 12: The right of the child to be heard, CRC/C/GC/12, para 53.
48 CRC Art 12.
49 *B v Romania* (No. 2), No. 1285/03, 19 February 2013; *BB and FB v Germany*, Nos. 18734/09 and 9424/11, 14 March 2013; CJEU, *C-491/10 PPU, Joseba Andoni Aguirre Zarraga v Simone Pelz*, 22 December 2010. *T v UK* App no. 43844/98 (ECtHR, 16 December 1999); *V v UK* App no.24724/94 (ECtHR 16 December 1999).
50 Committee on the Rights of the Child, 'General Comment No 12 (2009): The Right of the Child to Be Heard CRC/C/GC/12' (2009).
51 ibid 12, paras 25 and 34.
52 CRC Art 3(1); CRFEU Art 24(2); ECECR Art 6.

Right to a Fair Hearing within a Reasonable Time: All parties – the child and his or her parents – have the right to a fair hearing within a reasonable time.[53] In the context of child protection removals, decisions must be lawful,[54] accurate,[55] non-discriminatory,[56] subject to appeal or judicial review,[57] and well-documented.[58] Of relevance is Article 40 of the Constitution.

Parental Right to Participate: The ECtHR has found that parents have a right to be involved in the decision–making process "seen as whole, to a degree sufficient to provide them with the requisite protection of their interests".[59] In addition, all persons are entitled to the equal protection and equal benefit of the law and States are obliged to take all appropriate steps to ensure that reasonable accommodation is provided to promote equality and eliminate discrimination.[60]

Right to Access an Effective Remedy: All individuals, including children, have a right to access an effective remedy to a breach of their rights.[61] A child must have access to an independent complaints' procedure[62] and where rights are found to have been breached there should be appropriate reparation.[63]

53 ECHR Art 6; and CFREU Art 47.
54 ECHR Art 8; and CRC Art 9.
55 *AD and OD v United Kingdom* (App No 28680/06), 2 April 2010.
56 Recommendation Rec(2005)5 of the Committee of Ministers to member states on the rights of children living in residential institutions (Council of Europe).
57 CRC Art 9(1); UN General Assembly, 'Guidelines for the Alternative Care of Children Res A/RES/64/142' (2010) para 5.
58 Council of Europe Parliamentary Assembly (n 33) Recommendation 5.3.
59 *Dolharme v Sweden* App no 67/04 (EctHR, 6 June 2010), [116].
60 CPRD, Art 5.
61 ECHR Art 13; and CFREU Art 47.
62 General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child CRC/GC/2003/5, para 24.
63 ibid.

Attention should also be paid to ensuring compliance with the following:

Child-friendly Justice: The concept of child-friendly justice has been developed and promoted by the UN[64], EU[65] and CoE[66]. The CoE Guidelines define child-friendly justice as:

> accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.[67]

Public Sector Duty: In Ireland, all public bodies – including the courts and the CFA – are subject to the Irish Human Rights and Equality Commission Act 2014. Section 42 of the Act places a positive obligation on a public body to perform its functions having regards to the need to: eliminate discrimination, promote equality of opportunity and treatment of its staff and the persons to whom it provides services and protect human rights of its members, staff and the persons to whom it provides services.

64 General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child CRC/GC/2003/5, para 24.

65 European Union Agency for Fundamental Rights Agency (2015) Child-friendly justice – Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States.

66 Council of Europe Parliamentary Assembly (n 33) Recommendation 5.3.

67 Council of Europe, 'Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice' (2011) 17. Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies). and Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies).

1.4 Child Care Proceedings in the District Court

1.4.1 The Law Relating to Child Protection and Child Care Proceedings

The Child Care Act obliges the CFA to identify children in need of care and protection and to supply it.[68] This includes various forms of family support and taking a child into care under a voluntary agreement.[69] If this fails to protect the child, the CFA is under a duty to seek an appropriate order in the courts.[70] The orders provided for in the Act are an emergency care order, interim care order, care order and supervision order. All child protection applications are made in the District Court, with the exception of Special Care applications, where a child is detained for therapeutic purposes and which are brought to the High Court. The CFA is the only body empowered to instigate judicial child care proceedings.

Under certain circumstances, the CFA can admit a child into its care (without a court order) under a voluntary agreement with the consent of the child's parents or where the child appears to be lost, orphaned or abandoned.[71] The CFA is under a general duty to make an application for a care or supervision order where it appears the child "requires care or protection which he is unlikely to receive unless a court makes" an order.[72] The threshold to justify granting an interim care, care and supervision order rests on one of three conditions being met:

(a) the child has been or is being assaulted, ill-treated, neglected or sexually abused, or
(b) the child's health, development or welfare has been or is being avoidably impaired or neglected, or
(c) the child's health, development or welfare is likely to be avoidably impaired or neglected.

The threshold for granting an ICO is that the Court has "reasonable cause to believe", which is lower than that needed for a full, long-term Care Order, where the court must be "satisfied" that the conditions are met.

Under the 1991 Act, a child in care has a right to have "reasonable access" with their parents and other relevant person.[73] The entitlement is framed as a duty on the CFA to facilitate the access "to the child by his parents", however, the High Court has ruled that access is a basic right of the child rather than a right of the

68 s 3.
69 s 4.
70 s 16.
71 CCA 1991, s 4.
72 ibid, s 16.
73 ibid, s 37(1). Such access may include allowing the child to reside temporarily with any such person.

parent.[74] The CFA may refuse or impose conditions on access arrangements; anyone "dissatisfied" can apply for a judicial order to vary or discharge these arrangements.[75]

Policy: The *Better Outcomes: Brighter Futures 2014-2020* national framework sets out broad objectives in relation to child protection and the Child and Family Agency's *Corporate Plan 2021–2023* and *Child Protection and Welfare Strategy 2017-2022* provide agency-specific objectives. However, there is no inter-agency national policy or strategy on child protection and child care proceedings. Hence, there is no all-of-government document that identifies the challenges faced and Government commitments to address these.

As part of a reform programme within the CFA, a national practice model for child protection social work based on the Signs of Safety model was adopted.[76] In addition, the Prevention, Partnership and Family Support (PPFS) Programme was introduced to re-orientate its service away from crisis intervention to early intervention and preventative work. Under the PPFS, a case co-ordination process known as Meitheal was introduced for families with additional needs who require multi-agency intervention but who do not meet the threshold for referral to social work services.[77] These programmes are not integrated into the child care proceedings: they may run in parallel to each other.

Guidance: While legal textbooks exist,[78] there is no up-to-date plain English guide to child care proceedings for non-legal practitioners, parents or children.[79] Several publications provide practice guidance on child protection to social workers and the Garda Síochána.[80] Social workers interviewed for our research on long and complex cases revealed "confusion about the thresholds required to justify applications for the different orders under the Child Care Act, and spoke of the need for greater training both in this area and in the preparation of evidence for

74 *MD v GD*, unreported, High Court, 30 July 1992.
75 CCA 1991, s 37.
76 Child and Family Agency, 'Child Protection and Welfare Strategy 2017-2022' (2017).
77 See the website of the Child and Family Agency <https://www.tusla.ie/services/family-community-support/prevention-partnership-and-family-support-programme/meitheal-national-practice-model/> accessed 20 December 2019.
78 For example see, Paul Ward, *The Child Care Acts: Annotated and Consolidated* (Third Edition, Round Hall 2014); Shannon (n 14).; Ursula Kilkelly, *Children's Rights in Ireland: Law, Policy and Practice* (Tottel 2008). Lydia Bracken, *Child Law in Ireland* (Clarus Press 2018).
79 One regional exception is the from Clare Care 'Families with Children in Care: A guide to your rights if your child is in care' (2007).
80 Department of Children and Youth Affairs, 'Children First: National Guidance for the Protection and Welfare of Children' (Government Publication 2017).; Tusla, Child and Family Agency, 'Alternative Care Practice Handbook' (2014); Child and Family Agency, 'Thresholds for Referral to Tusla Social Work Services' (2014); Health Service Executive, 'Child Protection and Welfare: Practice Handbook' (2011); An Garda Síochána, 'Garda Síochána Policy on the Investigation of Sexual Crime, Crimes against Children and Child Welfare' (2013).

court".[81] Many of the social workers interviewed said the use of handbooks, assessment tools and protocols "is inconsistent and haphazard".[82]

Non-Court Resolutions: The CFA is not required to engage in alternative dispute resolution (ADR) or pre-proceedings activities prior to making a non-urgent application for a care or supervision order.[83] The CFA may hold a Child Protection Conference, an inter-agency and inter-professional meeting at which a child's name may be placed on the Child Protection Notification System (CPNS);[84] share information between professionals and parents to identify risk factors, protective factors and the child's needs; and develop a Child Protection Plan to provide support to the child and their parents to ensure that the child is kept safe from harm and that the risks to the child are lowered.[85] Each of these measures (conference, notification system and plan) are provided for in national policy but do not have a legislative basis. Information garnered through these processes can be used as evidence in child care proceedings.

The High Court has found that parents must be afforded proper fair procedures in relation to the holding of Child Protection Conferences, in particular in relation to the information provided to the parents in advance of the conference,[86] and that a parent is entitled to bring a legal representative with them to the conference.[87] There is no data publicly available on the number of such conferences held each year nor their impact in negating the need to seek a court order. A Family Welfare Conference may also be held in a narrower set of circumstances, its remit is restricted to where it appears a child may require a special care order[88] or diversion from criminal proceedings.[89]

There is no legislative basis for child protection mediation in Ireland. Proceedings under the Child Care Acts 1991 are excluded from the remit of the Mediation Act 2017. Once proceedings have begun, court rules allow for them to be adjourned to

81 Carol Coulter, 'An Examination of Lengthy, Contested and Complex Child Protection Cases in the District Court' (Child Care Law Reporting Project 2018) 59 and 96.
82 ibid 92.
83 For further discussion see: Maria Corbett and Carol Coulter, 'Child Care Proceedings: A Thematic Review of Irish and International Practice' (Department of the Children and Youth Affairs 2019).
84 Child and Family Agency, Child Protection Conference and the Child Protection Notification System Information for Professionals, 2015 available at <https://www.tusla.ie/uploads/content/CPNS_Prof_Booklet.pdf> Child Protection Conferences Information for Parents leaflet, available at <https://www.tusla.ie/uploads/content/Parent_leaflet_-_Final.pdf>
85 Child and Family Agency, 'Annual Report 2017' (2018).
86 *JG v The Child and Family Agency* [2015] IEHC 172.
87 *MS A v Child and Family Agency* [2015] IEHC 679.
88 CCA 1991, s 23A.
89 Children Act 2001, s.7. Children (Family Welfare Conference) Regulations (Department of Health and Children, 2004).

facilitate ADR. However, no mechanism is in place to provide the ADR and this provision is rarely availed of in practice.[90]

1.4.2 The District Court

With the exception of special care proceedings, discussed below, child care proceedings are usually heard in the District Court, a court of limited and local jurisdiction, which deals in the main with minor criminal and civil matters, licensing and some private family matters. There is no separate, unified or specialist child or family court.[91] Staff, including judges, do not have a specialist focus; although the allocation of full-time judges to hear child care cases in Dublin and regular family law days in some other locations has permitted a degree of specialisation. Child care proceedings are heard in 24 regional District Courts, each with one or more resident judges and some with multiple court venues, who may be supplemented by a "moveable" judge when necessary.[92]

The Courts Service publishes annual statistics on the number of applications heard by the District Court. They note that the number of applications does not necessarily reflect the number of children in respect of whom orders are made, as several orders may be made in respect of an individual child and there may be applications for a variety of orders in the same case. The number of incoming applications fluctuate from year to year. Of the years under examination in this report there were 13,168 in 2018, 10,291 in 2019 and 13,203 cases in 2020.[93]

In the second part of 2018, we attended a full-day sitting in 35 court venues, covering each of the 24 Districts over a four-month period. In 2019, based on our observations of these proceedings we published *District Court Child Care Proceedings: A National Overview* which documents both the physical set up of the court and its operational procedures in relation to child care proceedings.[94]

We found that the majority (74 per cent) of child care cases are not heard separately from the general and family list in terms of place, time or day of hearing, which may be a potential breach of the *in camera* rule.[95] Half of the District Courts hear child care cases alongside private family law matters, a further quarter hear them as part

90 S.I. No. 17/2014 - District Court (Civil Procedure) Rules 2014, Order 49A(2).
91 For further discussion see Corbett and Coulter (n 83) 15–22; Conor O'Mahony and others, 'Child Care Proceedings in Non-Specialist Courts: The Experience in Ireland' [2016] International Journal of Law, Policy and The Family 131.
92 Applications for a special care order which are heard in the High Court and appeals under the Child Care Act 1991 are heard in the Circuit Court.
93 Courts Service, 'Courts Service Annual Report 2020' (2021) 67.
94 Carol Coulter, 'District Court Child Care Proceedings: A National Overview' (Child Care Law Reporting Project 2019).
95 CCA 1991, ss 29 and 31(1).

of a general list, alongside family, criminal and other civil law matters and the remaining quarter have regular days on which only child care is heard.[96]

The 2019 survey also found that in many venues the physical facilities are poor.[97] In some courts there are difficulties with accessibility and acoustics and a shortage of private waiting and consultation rooms, an absence of water fonts and vending machines, and in some courts even an absence of toilets. These findings must be understood in the context that people often must wait all day for their case to be heard. The court venues have traditional courtrooms with fixed furniture, so it is not possible to set up the room in a round table negotiation style format which may be more suitable in some child care cases. In its present make-up, the District Court system is ill equipped to hear child care proceedings.

Work Load and Delays: The District Court deals with an enormous volume of work. There can also be lengthy scheduled case lists leading to pressure to hear cases quickly or to engage in informal negotiation, a lack of privacy and over-crowding.[98] In addition, there can be significant delays in securing a hearing date for certain applications. Difficulties in scheduling a date for a care order hearing may result in a wait of over a year in some parts of the country. Covid restrictions and adjournments have added further pressure on court resources.

Poor Case Management: District Court Rules apply to all 24 Districts. However, the absence of a unified court means each District is entitled to organise and put in place its own practices and is not directly answerable to the President of the District Court. This hampers the implementation of a consistent and shared approach across the courts. In addition, given their "local" jurisdiction, cases cannot be transferred to another court to ease waiting lists or to a higher court if the case is complex and will involve large numbers of witnesses. As will be evidenced in this report, practice varies within the 24 districts in terms of waiting lists, case management, appointment of GALs and the review of orders by the court.

Lack of Judicial Continuity: As noted in our 2018 report on long and complex cases, in certain parts of the country the local judge routinely requests the assistance of a moveable judge when it appears a child care case is likely to be highly contested, though this does not occur in all areas where there is pressure on the court list.[99] This will normally arise at interim care order stage, so the judge who hears the interim care order application may not be the one who hears the care order application and they may adopt varying approaches. While there is some

96 Coulter, 'District Court Child Care Proceedings: A National Overview' (n 94).
97 ibid; O'Mahony and others (n 91).
98 These lists can be lengthy, typically up to 60 or 70 cases and some can be over 100 cases per day.
99 Coulter, 'An Examination of Lengthy, Contested and Complex Child Protection Cases in the District Court' (n 81).

correlation between specific moveable judges and certain parts of the country, there is no guarantee that the same moveable judge will be available to hear cases in the same district. This means that the local area of the CFA, and the lawyers who service it, may have to deal with different approaches from the various judges.

Variation in Practice: Coulter, Corbett and also O'Mahony *et al* have found regional variations in the practice within the District Court including in relation to the type and nature of the order sought and granted.[100] Coulter has highlighted the challenges in achieving common evidential thresholds when working with two different disciplines and professions:

> Law requires definitions and standards against which actions can be measured. Social work, while governed by law when court intervention is sought, is based on developing human relationships and requires the exercise of judgment, moulded by experience and sometimes informed by intuition, which is not easily amenable to standardisation.[101]

Proposed Family Court: The establishment of a specialist family court in Ireland has been called for since the 1970s.[102] In 2020, the Government approved the preparation of a Bill to establish a unified and specialist family division within the court system to hear both public (child care) and private family law matters and published the General Scheme of the Family Court Bill. If enacted, the law will see the establishment of a system of regional family courts with unified jurisdiction over family matters. Under the General Scheme, the Family District Court will be able to transfer jurisdiction of a case to another District if it is in the "best interests of the child or otherwise appropriate"[103] and may transfer jurisdiction of a case to the Circuit Family Court.[104] In addition, the Minister for Justice established the Family Justice Oversight Group to consider reforms in parallel with those arising from the enactment of the Bill, and is engaging with the various stakeholders to discuss necessary reforms.

100 Carol Coulter and others, *Final Report* (Child Care Law Reporting Project 2015); Carol Coulter, 'Second Interim Report' (Child Care Law Reporting Project 2014); Conor O'Mahony and others, ''Representation and Participation in Child Care Proceedings: What about the Voice of the Parents?' (2016) 38(3) Journal of Social Welfare and Family Law 302; Corbett (n 45).

101 Coulter and others (n 100) 3–4.

102 See for example The Law Reform Commission, *Report on Family Courts* (LRC 52-1996, 1996).

103 Head 8.

104 Head 19.

1.5 Child Care Proceedings in the High Court

1.5.1 Introduction to Special Care

The objective of special care, according to the DCEDIY, is "to be short-term, stabilising and safe care in a secure therapeutic environment, which aims to enable a child to return to a less secure placement as soon as possible based on need".[105] Special care units differ from general residential care in a number of ways: the units are secure, the child is detained, they offer higher staff to child ratios, education is on-site and there is specialised input such as psychology services.[106]

As noted in a 2020 report by Colfer and Colfer:

> Even though detention within the secure care system means the loss of liberty 24 hours a day, the gain is a second chance, or perhaps the only chance these children may get to stabilise themselves with a supported structure of stability and routine, therapy and education. Some of the children have no knowledge of a consistent form of family life and feel abandoned and isolated and lack direction, they speak of having no hope for a future of any kind.[107]

There are currently three mixed gender special care units, each of which is operated by the CFA. These are Ballydowd (7 beds) and Crannóg Nua (7 beds) both located in Dublin and Coovagh House (4 beds) which is located in Limerick.[108] Hence, the capacity within special care in Ireland is 18 beds, when fully staffed. The availability of beds places a cap on the number of children who can be admitted to special care at any one time, which has given rise to legal issues considered by the High Court and outlined below and in Chapter Three.

The number of children recorded as being in special care at year end (which may include units in other jurisdictions) varied between 12 and 18 children over the past six years.[109] At the time of writing, the most to up-to-date data is that there were 16 children in special care as of 31 January 2021.[110] This number accounts for a tiny

105 See the website of the DCEDIY <https://www.gov.ie/en/policy-information/118b86-special-care-units/>.
106 ibid.
107 Lisa Colfer and Carol Coulter, 'High Court Oversight of Children's Complex Care Needs: Observations from the Child Care Law Reporting Project by Lisa Colfer and Carol Coulter' (Child Care Law Reporting Project 2020).
108 Child and Family Agency, 'Annual Review on the Adequacy of Child Care and Family Support Services Available 2019' (2020) 71.
109 ibid 60. There were 16 children in special care at the end of December 2015, 12 children in 2016, 12 children in 2017, 14 children in 2018 and 14 children in 2019. The figure for 2020 was obtained from https://www.tusla.ie/uploads/content/Monthly_Service_Performance_and_Activity_Report_Dec_2020_V1.0.pdf p 16
110 Child and Family Agency, Monthly Service Performance and Activity Report January 2021 (March 2021) 16.

minority (0.2 per cent) of the total number of children in care but their care provision and related judicial proceedings consume significant human, financial and court resources.[111]

In some cases, a special care placement in Ireland is considered to be insufficient to meet the child's needs. This may arise as the child is in need of specialist treatment which is not available in Ireland. In such cases, an application may be made to transfer the child to another jurisdiction for treatment and care. The CFA publishes data on out-of-state placements to residential care: there were eight children in 2015, six in 2016, six in 2017, seven in 2018 and four in 2019 in such placements. The CFA source does not specify that all of these out-of-state residential placements are special care type cases.

Prior to UK's exit from the EU, the UK was a regular destination for an overseas placement. Since Brexit, the number of referrals to and placements in the UK appears to have reduced. Further research is needed to determine if the reason for this change is due to a reduction in demand or as a consequence of the changed legal framework.

CFA data on special care is available for a five-year period from 2015 to 2019. Although this timeframe does not align with the period covered by this report, 2018 to 2020, it is useful for context setting.[112] Over the course of this five-year period, there appears to be a downward trend in referrals, with a high of 55 first-time referrals in 2015 to a low of 34 referrals in 2018 and a high of 19 re-referrals in 2015 to a low of five in 2018. This trend is reflected in the number of referrals approved ranging from 31 in 2015 to 20 in 2018. However, the number of children admitted to special care over the course of a single year does not follow this downward pattern. It remains relatively stable between 2015 and 2018 varying between 17 and 22 per year but then increases to 27 children admitted in 2019.

According to the CFA data, in 2019 the age of the child at the time of referral varied from 13 years to 17 years, with the most common age being 15 years, followed by 16 years[113] and with more males (67 per cent) than females (33 per cent) referred.[114] A profile emerges of the children at the time of their referral in 2019: the majority were in education (88 per cent); engaging in drug and alcohol misuse (77 per cent); presenting with (unassessed) mental health difficulties (70 per cent); involved with the criminal justice system (70 per cent); and in care (60 per cent), mostly under a judicial order.

111 Child and Family Agency, Monthly Service Performance and Activity Report January 2021 (March 2021) 16. 16 out of 5,872 children in care as of 31 January 2021

112 This information is taken from Table 39: Referrals to Special Care, 2015-2019 https://www.tusla.ie/uploads/content/Review_of_Adequacy_Report_2019.pdf p 72

113 Table 40**:** Referrals to Special Care by age, 2019 Child and Family Agency (n 108) 72.

114 ibid.

1.5.2 Special Care, Wardship and Involuntary Detention

Three separate legal frameworks exist to address the care and treatment needs of children exhibiting emotional, behavioural, psychological and psychiatric difficulties. An application can be made to the High Court for a special care order under the Child Care Act 1991 or to make the child a Ward of Court under the court's inherent jurisdiction or to the District Court for an involuntary admission to hospital under the Mental Health Act 2001, where appropriate. Each legal framework is discussed briefly below.

1.5.3 Special Care Orders

As set out in a 2019 report by Colfer and Coulter, for over two decades the High Court has been considering the complex needs of an especially vulnerable group of children, those whose behavioural problems are such that they need to be detained in special units for therapeutic and educational purposes.[115] For most of that time the High Court has done so under its inherent jurisdiction.[116] A statutory framework for such an intervention was established by way of an amendment to the Child Care Act 1991 under the Child Care (Amendment) Act 2011.[117] However, the relevant provisions, contained in Part IVA of the 1991 Act, were not commenced until 31 December 2017 for all new applications and transitional arrangements were put in place for existing cases.[118] Despite the commencement, cases continued to be heard under the court's inherent jurisdiction for a number of months in early 2018.

Part IVA comprises one section, section 23, which is divided into 30 subsections from 23A to 23NP. Under section 23C, the provision of special care is defined as the provision to a child of:

> a) care which addresses (i) his or her behaviour and the risk of harm it poses to his or her life, health, safety, development or welfare, and (ii) his or her care requirements, and includes medical and psychiatric assessment, examination and treatment, and
> b) educational supervision,

As noted by Colfer and Coulter there must be a risk of harm to the child and the provision of a therapeutic benefit for a child to be given a bed in special care.[119]

115 Colfer and Coulter (n 107).
116 Unpublished doctoral research by Clare Craven-Barry has examined the inherent jurisdiction of the Court in relation to children.
117 s 10.
118 Statutory Instrument No 637 of 2017. This was accompanied by the Rules of the Superior Courts (Special Care of Children) 2017.
119 Colfer and Coulter (n 107).

Sections 23F and 23H set out conditions that must be present for both the CFA to apply for a special care order and for the High Court to grant such an order.[120] Five conditions can be identified:

a) the child must be between the age of 11 and 18 years;[121]
b) the behaviour of the child poses a real and substantial risk of harm to the child's life, health, safety, development or welfare;
c) other forms of care provided by the CFA (for example foster or residential care) or treatment and services provided for under and within the meaning of the Mental Health Act 2001 will not adequately address the child's behaviour and risk of harm;
d) the child requires special care to adequately address their behaviour and risk of harm which the CFA cannot provide to the child unless a special care order is made in respect of that child under, and within the meaning of, the Mental Health Act 2001 and
e) the court must to be satisfied that a special care order is in the best interests of the child.

Prior to an application for a special care order, an application can be made for an initial *ex parte* interim special care order for a period not exceeding eight days and a further application for the interim order on notice to the parents for a period not exceeding 14 days.[122] Prior to the granting of a special care order, the statute sets out that the CFA should carry out consultations with the child and parents/guardian[123] and convene a family welfare conference.[124] In practice, such consultations and conferences often do not take place for a variety of reasons.

The legislation does not envisage a long stay for a child in special care. An initial order may be granted for a period of up to three months and may be extended on two occasions, hence the maximum period a child may remain under a special care order is nine months.[125] However, at the end of this period a fresh special care order may be sought and granted if required. The CFA is the only body permitted to apply for a special care order or extension of that order.

The High Court must carry out a review of the child's progress in each four-week period for which a special care order has effect to consider if the child continues to require special care.[126]

120 The threshold is that the CFA is satisfied that there is a reasonable cause to believe, whereas the court be satisfied. The CFA may also apply for an interim special care order.
121 Child Care Act 1991, s 23F(1).
122 ss 23L(3) and 23M.
123 s 23F(3).
124 s 23F(5).
125 ss 23H(2) and 23J.
126 s 23I(1) and (4).

1.5.4 Caselaw on Child Care (Amendment) Act 2011

Since its commencement in late 2017, several applications have clarified the operation of the Child Care (Amendment) Act 2011. This includes the case of *Child and Family Agency v MO'L (review of special care order after expiry)* which examined the jurisdiction of the High Court in circumstances where the special care order had expired.[127] Faherty J held that the High Court retained jurisdiction to review the circumstances of children "particularly where the transition plans for a child are not finalised prior to the expiry of the special care order"[128] and also had the power to retain the GAL to ensure that child's welfare is protected during the transition to his step-down placement.[129]

In early 2018, an issue arose with the implementation of the new statute as the 2011 Act did not incorporate the Child Care (Amendment) Act 2007 Act and 2012 Regulations, under which the CCLRP and *bona fide* researchers are permitted to attend proceedings.[130] An application was taken in April 2018 by a researcher and the CCLRP to be allowed continue to attend proceedings. The question before the court was whether section 23NH provided the court "with a residual discretion to permit non-parties (in this case, a doctoral researcher and the Child Care Law Reporting Project) attend at special care proceedings given the absence of any statutory mechanism permitting such access".[131] In the *Child and Family Agency v TN & anor*, the court held that section 23NH did "not impose a mandatory obligation that such proceedings be held in-camera" and considered that it was in the child's best interests to lift the *in-camera* rule to permit anonymised reporting of such cases.[132]

A judicial review, *CK v Child and Family Agency (threshold for special care order)*, was taken on an emergency basis by the mother of a teenage boy.[133] The mother challenged the decision by the CFA's National Special Care Committee not to make a decision that the boy needed an application made for special care on the basis that he did not meet the criteria for special care under section 23F. The child had already spent one year in special care and following his discharge to a step-down placement his behaviour deteriorated, the placement broke down and he was subsequently living in an emergency homeless hostel. He was engaging in acts of violence against members of the public and was facing charges in the criminal justice system for robbery and assaults, including knife assaults. The boy's GAL, who supported the judicial review, said "he had never come across anyone as

127 [2019] IEHC 781.
128 ibid [89].
129 ibid [102].
130 This case was attended by the CCLPR and is available on our website.
131 Clare Craven-Barry, 'Transparency in Family and Child Law Proceedings: Disentangling the Statutory Techniques and Terminology' (2019) 3 Irish Judicial Studies Journal, 96.
132 *The Child and Family Agency v TN & anor* [2018] IEHC 568 [55] [57].
133 [2019] IEHC 635.

dangerous", that the child lacked empathy, had the potential to do serious harm and enjoyed hurting people.

The rationale given by the CFA for the decision not to make an application for special care was that there was no therapeutic benefit to be gained from his readmission and that the criminal elements of his behaviour required "addressing through consequences in the criminal justice system",[134] obviously anticipating his detention in Oberstown youth detention centre. The High Court commented on the absence of evidence for the National Special Care Committee to reach its decision and found that the Committee had not made its decision in accordance with the law. We attended this case and have included it in our analysis.

A second judicial review, *AF (a minor) v Child and Family Agency (timeframe for application for special care order)*, was taken by the GAL for a child challenging the legality of the CFA action to defer the making of an application for a special care order until a place was available for the child, who had been assessed as meeting the criteria for special care.[135] Once again, the Court found the actions of the CFA to be unlawful and not to comply with the CFA's statutory duties under the 2011 Act. At this time the Committee had made a determination that the applicant did require special care. The judge held that section 23F "requires some element of expedition in making the application to the High Court" and "the availability of a fully staffed placement and prioritisation of an individual applicant for such placement" is not adequate to delay making an application.[136] The judge further stated that applications under this section should "be made as soon as is practicable".[137] We attended this case also and have included it in our analysis.

Commenting on these two judicial reviews where the CFA was found to have acted unlawfully, Dr Conor O'Mahony, the Special Rapporteur on Child Protection, recommended that at an agency level, the CFA "needs to take on board the clarification provided by these judgments of its duties under Part IVA of the Child Care Act 1991".[138]

In 2019, a child unsuccessfully appealed the making of a special care order. As part of its judgment, *Child and Family Agency v ML (otherwise G) (threshold for special care order)*, the High Court held that the special care order did not amount to preventative detention and the therapeutic regime proposed by CFA was both necessary and proportionate.[139] We attended this case and have included it in our analysis.

134 ibid [14].
135 [2019] IEHC 435.
136 ibid [29].
137 ibid [31].
138 Conor O'Mahony, 'Annual Report of the Special Rapporteur on Child Protection 2020: A Report Submitted to the Oireachtas' (2020) 152.
139 [2019] IECA 109 [147] [175].

1.5.5 Wardship Proceedings

It is within the inherent jurisdiction of the High Court to make a child (minor) or an adult a Ward of Court.[140] The process and rationale for taking a person into wardship differs between a child and an adult.[141] In the case of an adult, the proceedings are concerned with protecting an adult of unsound mind (referred to as lunatics).[142] Wardship in respect of minors may be used to protect a child's property interests or to protect the child's welfare. It may be employed where statute law is insufficient to meet the welfare needs of the child.[143]

The wardship jurisdiction has its foundation in the doctrine of *parens patriae* (parent of the nation). This was described by Lord Eldon in 1804 as the power "delegated to the Court by the Sovereign, who as *parens patriae*, has the care of all persons who are unable to take care of themselves".[144] A debate exists as to whether the royal prerogatives survived the enactment of the Irish Constitution and so whether the wardship jurisdiction as currently exercised by the High Court is derived from *parens patriae* or the obligation on the courts to vindicate, as far as practicable, the welfare and personal rights of an individual under Article 40.3.2 of the Constitution.[145]

An admission into wardship is a discretionary order.[146] Baker J describes wardship proceedings as inquisitorial in nature, being not "a true *lis inter partes*" (legal suit between parties),[147] not rule-based and having as their "starting point the search for a solution that is just".[148] As with other judicial powers, wardship must be exercised in light of the Constitution, the ECHR and their jurisprudence. From a review of caselaw, Baker J identifies two principles that guide the approach to minor wardship: "its flexible nature is equitable and the jurisdiction may permit of the making of directions regarding welfare without an absolute suspension of the legal rights and duties of parent and child".[149]

Use of Wardship to Facilitate Transfer to UK: Prior to the 2018 commencement of the 2011 Act, the High Court made orders for placements in the UK under its own

140 Courts of Justice Act 1961, s 9.
141 Both are governed by Order 65 r.4 of the Rules of the Superior Courts.
142 Lunacy Regulation (Ireland) Act 1871.
143 The Assisted Decision-Making (Capacity) Act 2015 will replace the Lunacy Regulation (Ireland) Act 1871, however the 2015 Act is not yet fully commenced.
144 *De Manneville v De Manneville* (1804) 10 Ves. 52 as cited in Baker.
145 See Baker for a discussion. *O'Farrell v. Governor of Portlaoise Prison* [2016] IESC 37, [2016] 3 IR 619 at p. 709 McKechnie J. observed that the decision of Murray C.J. in *N. v. Health Service Executive* [2006] IESC 60, [2006] 4 IR 374. Finlay C.J. in *Re D.* [1987] I.R. 449
146 *HSE v AM* [2019] 2 IR 115 [30] MacMenamin J.
147 *In Re J.J.* [2021] IESC 1 delivered on 22nd January 2021 Baker J [5]. Justice Marie Baker delivered observations separate to the Supreme Court decision in *Re JJ.*
148 Baker J [20].
149 Baker J [29].

inherent jurisdiction. The 2011 legislation does not prohibit out-of-state placements. However, a special care order is only granted for a period of three months, so it is not possible to transfer a child to the UK for a period longer than three months. UK facilities often will not accept a child under such terms. The response by the CFA is to apply for the child to be taken into wardship under the Court's inherent jurisdiction. In exercising its wardship powers, the High Court is not restricted by the 2011 Act and may transfer a child to another jurisdiction for the purpose of treatment without an end date. The order made by the High Court judge in Ireland regarding wardship is then mirrored by the Court of Protection in London.

A child who is placed by an Irish court in a secure facility abroad continues to be considered as habitually resident in Ireland and jurisdiction remains with the Irish court, which keeps the case under regular review. However, while in the foreign placement, the child's care and mental health treatment is subject to the law of the other jurisdiction. Consequently, children placed by Irish courts in UK facilities are treated under UK mental health law. In relation to the UK this has proven problematic given the differences between the two jurisdictions in relation to the legal definition of mental illness, eligibility for involuntary detention, treatment programmes and discharge arrangements.

1.5.6 Involuntary Admission to Hospital

Under the Mental Health Act 2001 a child may be admitted to an in-patient mental health centre on a voluntary or involuntary basis. A voluntary admission is where the child's parent or guardian has provided consent.[150] An involuntary admission of a child can occur under Section 25 of the Mental Health Act 2001, such proceedings are heard in the District Court. An admission and detention (of a child or adult) in a mental health centre is only permitted on the grounds that the individual is suffering from a mental disorder,[151] which is defined in the Act as "mental illness, severe dementia or significant intellectual disability".[152] Mental illness is defined under the Act as:

> […] a state of mind of a person which affects the person's thinking, perceiving, emotion or judgment and which seriously impairs the mental function of the person to the extent that he or she requires care or medical treatment in his or her own interest or in the interest of other persons.[153]

The 2001 Act further specifies that the use of involuntary admission is prohibited in certain circumstances, including that an admission cannot be justified "by reason

150 Mental Health Act 2001, s 2.
151 ibid, ss 9-12.
152 ibid, s 3(1).
153 ibid, s 3(2).

only of the fact that the person — (a) is suffering from a personality disorder, (b) is socially deviant, or (c) is addicted to drugs or intoxicants".[154] Hence, the law provides for the detention of a child for therapeutic purposes once the child meets the criteria of a mental disorder. Children suffering from an eating disorder satisfy this definition and so may also be detained for treatment under the Act.

Similar to Irish law, under section 37 of the UK's Mental Health Act 1983 a person may be admitted and detained for necessary treatment in hospital on the grounds of a mental disorder. However, the definition of "mental disorder" under UK law is broader than the definition under Irish law. A mental disorder is defined as "any disorder or disability of mind".[155] This excludes learning disabilities unless "associated with abnormally aggressive or seriously irresponsible conduct"[156] and excludes "dependence on alcohol or drugs".[157] No distinction is made between personality disorders and a mental disorder so a person with a personality disorder can be involuntarily detained for treatment. This differs from the Irish legal position which holds that a personality disorder is not considered treatable and cannot justify an involuntary admission to a mental health facility. Under both Irish and UK mental health law, involuntary detention, often referred to as being 'sectioned', is potentially indefinite.

Consent for Medical and Mental Health Treatment: Under the Non-Fatal Offences Against the Person Act, 1997, a child aged 16 and 17 years of age has the legal capacity to provide their own consent for medical treatment: parental consent is not legally required. However, under the Mental Health Act 2001, parental consent is required for any mental health treatment for a child under eighteen years. The HSE's 2018 *Eating Disorder Services: HSE Model of Care for Ireland* acknowledges that this anomaly is "particularly challenging" in the management of eating disorders as "refeeding, though not a psychotropic or psychosocial intervention, is part of eating disorder treatment by mental health teams".[158]

1.5.7 The Minors' List and Wardship Lists

Under the General Scheme of the Family Court Bill, published in 2020, it is proposed to establish a High Court division of the new Family Court which would hear special care applications.[159] It is assumed that the jurisdiction in relation to wardship matters will also transfer to the Family High Court.

154 ibid, s 8(2).
155 Mental Health Act 1983, s 1(2).
156 ibid, s 1(2A).
157 ibid, s 1 (3).
158 *Eating Disorder Services: HSE Model of Care for Ireland* (Health Service Executive 2018) 107.
159 Heads 16 and 26.

CHAPTER TWO: REVIEW OF DISTRICT COURT PROCEEDINGS ATTENDED

2.1 Overview of District Court Cases Attended

The core work of the CCLRP is to attend and report on child care proceedings as heard by the District Court. These hearings usually relate to an application for one of four orders (emergency, interim, supervision or care order) or to address a question relating to a child in State care (access, aftercare provision etc). Over the course of the period mid-2018 to mid-2021 we attended proceedings in each of the 24 districts of the District Court.

We published a tranche of case reports on seven occasions, two volumes per year over three years (2018, 2019 and 2020) and one volume in the final year (2021). In total, we published 299 separate case reports on child care proceedings in the District and High Court. The case reports vary in length from a few paragraphs based on a single short hearing to a lengthy report based on multiple hearings attended by our reporters over a period of several months or years.

Some children remain in care for protracted periods of time so the same child or group of siblings may be the subject of case reports within multiple volumes spanning years. Case reports from different volumes on the same child are brought together into a single case report. In addition, some case reports provided a snapshot composite report of several cases heard in one court sitting. These composite reports have been separated out into individual reports to allow for easier data collection for this report.

Following the merger of some case reports concerning the same child/ren and the creation of additional individual reports from composite reports, the original figure of 299 case reports becomes 360 case reports related to a three-year period from mid-2018 to mid-2021.

This chapter provides an overview of District Court cases attended by our reporters. It examines the nature of proceedings, profile of children and parents, participation of parents and children and the role of the judge within proceedings, supports to the court and conduct of proceedings. It then moves to explore issues arising during proceedings including long periods of time in interim care, delays in supports and reunification. The impact of the Covid-19 pandemic is also addressed.

The findings of the first phase of our report from 2012 to 2015 were published in our 2015 analytical report and included statistical data on the nature of and parties to the proceedings.[160] This current phase of work did not replicate the same data

160 Coulter and others (n 100).

collection process. However, despite employing a different methodology, this report finds that many aspects of District Court child care proceedings have remained consistent over the past nine years. As will be discussed below, the largest category of hearings was for extensions of interim care orders followed by care orders. Applications were usually brought by the Child and Family Agency (CFA) due to problems experienced by the parent (addiction, mental health issues and cognitive disability) and their impact on their children (neglect and abuse). Most respondent parents were legally represented, often parenting alone and were disproportionately drawn from ethnic minorities. Children were not directly involved in proceedings but a guardian *ad litem* (GAL) was appointed in over half of proceedings observed. Most children were living in foster care and a significant proportionate of them had ongoing therapeutic and special education needs. The primary focus of this chapter is exploring how the legal framework is impacting on the role of the court, the CFA, GAL, parent and child within the proceedings.

2.2 Profile of Children and Parents

2.2.1 Reasons for Admission to Care

The reasons for the admission of the child into care, as documented in our case reports, can be divided into three groups. The most common reason was an allegation that the parent neglected or abused their child or failed to protect their child from harm. The second was where the child had emotional, behavioural or mental health difficulties and the parent was unable to manage the child, in such cases there may not be a concern in relation to the care being provided by the parent. Finally, the third group is where there was no adult responsible for the child, this may occur in relation to unaccompanied minors (separated children) and children where their primary carer was dead or their whereabouts is unknown.

2.2.2 Trauma and Harms

A common thread in many, but not all cases, is that the child has experienced traumatic events and suffered harm. The life histories of the children given as part of the proceedings included numerous incidents of abuse and chronic neglect, including serious sexual assault, death threats and non-accidental injury, the untimely or violent death of a parent or other close relative, experiencing homelessness (in one case an eviction), and witnessing domestic violence, being exposed to inappropriate sexual material or behaviour, living with a parent with a substance addiction or who was self-harming. In addition, the experience of being admitted to care and the separation from parents and other family members may itself be experienced as a trauma by some children. In some cases of chronic neglect there had been a long history of CFA engagement with the family where the situation improved and disimproved. The social workers presented evidence in court that the family home was in a state of disrepair, there was no food in the fridge and there were disclosures from children that they were regularly hungry, the children lacked personal care including personal hygiene, infestation of head lice, lack of sexual education, inappropriate clothing, poor attendance at school and with medical appointments and the children reported being hunger.

A feature in a significant number of the case reports is that one or both parents are absent from the child's life. A high number of references appear to one of the child's parents being deceased, some of which were associated with addiction, suicide or a violent death. In addition, in multiple cases the court heard that the whereabouts of the parent was unknown, this was often connected to a parent leading a chaotic lifestyle due to addiction, mental illness and homelessness. In other cases, parents were recorded as being in prison, in psychiatric hospital, living in a different jurisdiction or not involved in the child's life.

The life histories of parents also include references to traumatic events including the untimely or violent death of a parent or partner, homelessness, relationship breakdown, domestic violence, imprisonment, childhood abuse, experience of care, and in one case fear of aggressive money lenders calling to the home.

The impact of the litany of harm inflicted on the children subject to proceedings was reflected in a wide range of disclosures, behaviours and difficulties. It is beyond the scope of this report to explore or comment on the impact of harm or trauma (including intergenerational trauma) on individuals. However, it should be noted that many of our case reports include descriptions of difficulties and behaviours that could be interpreted as a reaction to trauma, such as attachment difficulties, emotional dysregulation, mental ill-health including post-traumatic stress disorder, self-harm, suicidal ideation and self-destructive behaviours including substance misuse.

2.2.3 Newborn Removals

Eighteen of the cases we observed involved a newborn infant child being taken into care. These cases involved parents who had addiction and mental health difficulties and also included cases concerning non-accidental injuries. In some of these cases, the child was part of a sibling group so the mother had previously experienced the loss of a child into the care system. In one of these cases where a newborn was forcibly removed from his mother's care in the maternity ward, the High Court quashed the *ex parte* emergency care order on the grounds that it was neither constitutionally proportionate nor ECHR compliant as the District Court had no evidence as to whether any other alternative was considered.[161] These can be extremely difficult cases presenting a high risk to the child's health and development and heighted emotions on the part of the mother.

The CCLRP has recently collaborated with one of the country's largest maternity hospitals to undertake research on the pathways of newborn infants into care. The findings of this research will be published in the coming year.

2.2.4 Child's Mental Health Needs

A depressing feature in many of our case reports is a failure to respond in a timely and appropriate manner to emotional, behavioural and psychological problems exhibited by children. Time and again, the child's history provided to the court included a description of where help was sought for a child (by the child themselves, parents or a professional) but the request went unmet by psychology,

161 See *SOTA v Child and Family Agency* [2018] IEHC 714.

disability or Child and Adolescent Mental Health Services (CAMHS). We see a pattern where the child's wellbeing and behaviour deteriorated and their risk of harm increased. In many cases, we also observed an escalation of the level of intervention needed to care for the child with the children often entering first to foster care, then residential care and in some cases special care or an individual tailored care placement.

We are particularly concerned by a number of reports where a child was clearly in a distressed psychological state, but the child did not meet the eligibility criteria to access support from mental health services. To access support a child must meet certain assessment thresholds and eligibility criteria, may need to endure waiting lists and overcome legal and financial barriers. The CAMHS service does not operate outside of office hours and "emergency slots" are "very limited or non-existent" so children present in crisis to paediatric hospitals and emergency departments, as reported by *The Irish Times*.[162] In addition it was reported that CAMHS inpatient units may refuse a child whose profile "is too severe for them, too dangerous".[163]

In one case we observed, a primary school age child was considered a risk to his mother and siblings. Due to his young age, no suitable special residential placement was available, but an interim care order was made nonetheless. The GAL told the court that CAMHS said they were unable to work with a young child with multiple referrals for serious behavioural issues as "he did not have a stable home".

Many children continue to be the subject of child care proceedings for protracted periods of time without receiving any therapeutic support. This may include child victims of sexual abuse and children where the progress of family reunification is dependent on psychological intervention. As reported in *The Irish Times*, the Covid pandemic has compounded waiting lists and increased demand for psychological services.[164] The fact a child is in care or at risk of entering care does not result in their prioritisation with the CAMHS services.

The statutory bodies with responsibility for children in care, the CFA and the court, are often hindered in their work due to the lack of capacity to offer therapeutic services to children in need. The CFA and the court cannot "jump the queue", so their only option is to bypass CAMHS by commissioning a private provider to undertake the necessary work.

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162 Sheila Wayman, 'Why Are Children with Mental Health Problems Ending up in A&E?', *The Irish Times* (24 August 2021).

163 ibid.

164 Martin Wall, 'Tsunami of Young People Seeking Mental Health Care but Too Few Beds, Say Consultants', *The Irish Times* (24 August 2021).

*Eating Disorders***:** In many cases, difficulties experienced by the child in relation to accessing and eating food were noted during the proceedings. More specifically, in four District Court cases and one High Court case a concern existed in relation to an eating disorder. In one case, a young boy in care had a range of personal difficulties included pica, an eating disorder involving ingesting non-nutritional substances. In another case, a girl of primary school age was involuntary detained in a psychiatric unit due to a serious eating disorder (anorexia nervosa) and was receiving daily nasal gastric feedings. A second case had a similar profile, a young girl with anorexia nervosa detained for the purpose of treatment, on admission she had been restrained to enable nasal gastric feeding. At the time she was on her third admission.

Anorexia nervosa satisfied the criteria of a "mental disorder" under section 3(1)(a) of the Mental Health Act 2001 which permits an involuntary admission under section 25 of the Mental Health Act 2001 on application by the HSE (the CFA is not involved in such cases and the parents retain their parental rights). Both girls had been appointed a GAL. In a third District Court case, it was the mother of a child in care who was suffering from an eating disorder.

2.2.5 Parental Difficulties

The multiple difficulties experienced by the respondent parent were seen to hinder their capacity to parent. Our case reports echo findings by other researchers that there is a strong connect between domestic and sexual violence, substance use and mental health problems on the part of the parent and increased risk of harm to children.[165] Many of these parents also experienced homelessness. Other recurring themes were social isolation and a lack of family support. In addition, discussions of confirmed or suspected cognitive impairment arose in a large number of these cases.

The impact of parental addiction on a child can be gleamed from the social worker's testimony that a young child described herself as "the unluckiest girl in the world" because of her mother's drinking. She said that when her mother poured the drink from the "bottle with the red top" it usually meant that her mother would go to sleep before she would. When this happened, the child would be all alone in the dark except for the light of the computer tablet but when the tablet battery died, she hated the long night in the dark. The child said she hated the long summer evenings most as it was a long time to wait to see if her mother was going to start drinking. She told her social worker that she was afraid she might grow up to be a bad person. She said she would like to hug her mother but that her mother had pushed

165 See for example, Marian Brandon and others, 'Understanding Serious Case Reviews and Their Impact: A Biennial Analysis of Serious Case Reviews 2005–2007' (Department for Children, Schools and Families 2009).

her away. She said she really loved her school and that she was very much looking forward to returning to school after the holidays.

In another case, acknowledging the difficulties the mother was facing in overcoming her addiction, the judge emphasised that she needed to assess whether she was going to prioritise her child and his care. The judge said: “Time goes very quickly in the eyes of a child. He will become embedded with a different family. His priorities may change. It would be terribly unfortunate for this case.”

Parental addiction is the core reason for a significant proportion of children coming into and remaining in care. These parents have the potential with support to overcome their addiction, to be able to parent safely and to be reunited with their children. Family Drug and Alcohol Courts (FDAC) operating in different jurisdictions have had a positive impact on the rate of family reunification. Ireland has a legal and moral duty to work towards family reunification where this is safe and in the child’s best interest. One way to honour this obligation is to support parents to overcome addiction difficulties. The FDAC model is one of a few initiatives that has proven to be successful in reducing the numbers of children in care. Serious consideration should be given to establishing a pilot family drug and alcohol programme within the existing District Court child care system, with access to the necessary addiction and other support services. A similar model is already in place, the Drug Treatment Court programme, in relation to criminal matters. The setting up and running of a FDAC and associated support services would be a good financial investment given the high costs incurred by the State of supporting a child to grow up in care and in aftercare.

2.2.6 Housing and Homelessness

A number of issues arose regarding housing and homelessness, many of which cannot be dealt with by the CFA and the child protection system. For example, it appears that local authorities do not consider parents for re-housing unless they have their children with them, thus hindering reunification, as judges will not reunify children into homelessness. The issue of homelessness on the part of the parent or child arose in ten per cent of the case reports. In one case the mother was both homeless and pregnant. In another case where the parents had separated but may reunite, and the mother was homeless and living in a hotel, the judge commented that: “I think this reunification is going to work but both parents must be honest about where the children are going to be. It is not easy for [the mother]. It is not suitable for a young family to be in a hotel.”

In another case, an ICO was granted in respect of a toddler because of the mother’s alcohol addiction problems. The father, who had been involved in the child’s life since birth, was not in a position to care for the child as he did not have permanent accommodation. He was homeless and temporarily sleeping on the couch at a friend’s house.

2.2.7 Use of Voluntary Care Agreements

In a number of cases, the child has initially been in care under a voluntary care agreement but later was subject to a judicial order. In one case heard in a provincial city, the child had been in voluntary care for almost eight years, since she was two days old. The CFA wished to "formalise matters" so was seeking an ICO for a number of months on consent of all parties and indicated an intention to apply for a care order subject to an assessment and GAL report. The social worker had been working with the family since 2014. He said: "Last year the parents wanted the child returned and the relationship with the foster parents and the social worker became strained". In granting the ICO the judge commented: "Voluntary care orders going on for this length lead to complications, no criticism of persons involved…. I'm satisfied where a child is in a single placement [for] her entire life any change to any placement, even to her parents, would adversely affect her."

In another case, the judge said the parents were given little option in that they were offered voluntary care or the Gardaí invoking section 12 and seeking emergency care orders. He said the period that the children were in voluntary care was excessive. Preparatory work and recommendations for the parenting capacity assessment on the parents were completed in August 2013 but were not given to the parents until April 2014. The judge was of the view that the parents should have been notified in a timely manner when the conclusion had been reached that the children would have to remain in care as it would have allowed the parents to make an informed decision whether they were prepared to consent to the voluntary care arrangement continuing.

In a third case, heard in a rural town, the CFA sought the extension of an ICO in respect of three children who had been in voluntary care for ten years in different relative foster placements. Since their mother passed away three months earlier, the children had no legal guardian to provide consent. The biological father of two of the children was not a legal guardian and the father of the third child was unknown. The CFA indicated they would be making an application for a full care order at the next hearing.

In a fourth case, the District Court was told that the parents of a teenage boy in voluntary care were opposing an application for an ICO sought by the CFA. The court appointed a GAL for the child who was in residential care. The barrister for the mother argued that the boy should remain in voluntary care as it would obviate "the need for a contested hearing, where matters in dispute can only serve to damage the relationship with the social workers." The solicitor for the CFA said that a voluntary care arrangement required a high degree of transparency and cooperation between the parties. Decisions had to be based on the teenager's best interests, including decisions of where to place him. The solicitor said that the parents' engagement with the CFA had previously involved threats to remove the

teenager from his placement and from the voluntary care arrangement. The barrister for the father rejected the allegation that there has been threats to remove the teenager.

2.2.8 Success Stories

Among the cases we attended there were often cases where the judge and other parties congratulated a child, parent, carer, social worker or GAL on progress achieved and of sterling efforts made. At several aftercare reviews the court heard of children who had overcome adversity and who were achieving in their education and facing a bright future. In one example, a teenager had been in care for three years, his father was a Ward of Court and he did not have a great relationship with his mother but was described as having “worked hard to turn his life around” and having “shown great academic tenacity”. He was hoping to attend third level education.

The reports reveal other positive outcomes for children and their families. Another was the case of a boy who spent 11 years in care and was preparing to sit his Leaving Certificate with a view to studying social work, as well as the reunification of a young mother and her baby following the discharge of a supervision order, where the mother had received supports from the CFA.

Lessons can be drawn from the common elements in these cases, which include a stable placement, access to supports, achievement in school and participation in sports.

2.3 Nature of Proceedings

Similar to the findings of our 2015 report, of the cases we attended the largest category – 40 per cent – of the applications related to interim care orders (ICOs). This included the initial granting of an ICO (38 case reports) and subsequent extensions of that order (106 case reports) and one discharge of an ICO. The next largest category – 27 per cent – were applications relating to care orders. This included applications to grant a care order (62), adjourn proceedings (2) and to extend (10), review (24) or discharge (2) an existing care order.

A much smaller cohort (eight per cent) of case reports related to supervision orders (18)[166] and emergency care orders (3).[167] Our reporting of ECOs is likely to be an under-representation of the applications made as an ECO can be made on any day to any District Court, not just on family or child care law days, and we have no way of knowing in advance when they are coming up. The care histories of 40 other children before the courts included references to previous applications for ECOs relating to them.

The District Court also heard applications concerning children in care, including applications to vary an access arrangement (12);[168] address a question as to the welfare of a child in care under section 47 (5) or the review of an aftercare plan (8).[169] The remaining quarter of cases comprise a mixture of issues, including applications under section 43A, seeking the increase of the rights afforded to fosters carers who have been caring for a child over five years and an unsuccessful cost application regarding a private solicitor.

Discharged Orders: The circumstances regarding three applications to discharge an order varied greatly. One case brought by the children's mother under section 22 had not been finalised when our reporters were present, in the second case a father who had not previously cared for his children successfully applied for an ICO to be discharged to enable him to care for the children, which included relocating them to another jurisdiction.[170] In the third case the CFA successfully applied for a care order to be discharged as this was the wish of the 17-year old boy who had recently got married and told his social worker "he would engage with the social worker if the care order was discharged".

Orders Refused: The vast majority of these applications for a care or supervision order were granted by the judge, some applications had not yet been finalised at the time we observed them, with some proceedings being adjourned. An

166 CCA 1991 s 19.
167 CCA 1991 s 13.
168 CCA 1991 s 32.
169 CCA 1991 s 45.
170 Application to discharge a Care Order are made under section 22.

examination of instances where an application brought by the CFA was denied provide some useful learnings in terms of procedural safeguards and proportionality. In the example described below, the hearing could not proceed as the CFA had not notified the parent, the parent had not secured legal representation and alternatives to a removal had not been fully explored.

In one case, an application for an ICO related to the child's emotional welfare was refused on the grounds that the threshold was not met and it was not proportionate. However, a supervision order was granted. The children were living with their mother, the father had left the family home following the coming to light of the father's historic conviction for child sexual abuse. None of the children had made any disclosures and wished to remain together and living at home. The GAL "regretfully" supported the ICO application but on questioning from the judge about the possibility of a supervision order with a structure and a safety net, the GAL agreed it may be a better route to take and noted that "I think the children would appreciate the opportunity to be given a chance". In her ruling, the judge was "concerned that the CFA had not sourced the necessary supports for the mother as suggested by the clinical psychologist or for the children as recommended by the GAL".

In another case children were admitted to care from the care of their mother who suffered mental health issues and homelessness and remained in care under a series of interim care orders. The judge adjourned the CFA's application for a care order and directed the CFA to procure the original birth certificate of one of the children, which was missing from the file, and to ascertain the citizenship status of the mother and children as well as the specific reasons as to why the mother did not attend the proceedings. The judge also directed the CFA to track down the father to inform him of the care proceedings. The father, who was married to the mother, was living in a non-EU jurisdiction and had not been informed of the care order proceedings. Following contact from the CFA, the father made the decision to relocate to Ireland and was seeking to be the primary carer of his children, he secured permission to reside in the State and reunification was being planned.

In a third case, the judge in a rural court refused the CFA's application for a one-year care order for a six-month-old infant who had entered care at birth. The parents were present in court but despite repeated requests during previous hearings neither had secured legal representation. To allow the parents more time to get represented the judge secured the parents' consent to extend the ICO for a further two-months. In a fourth case, the application for a care order was adjourned to allow an ongoing mediation process to conclude and the child remained in care under a one-month ICO.

Finally, in yet another case, the CFA's application for a full care order until the age of eighteen for a primary school age child was refused and a three-year order

granted instead, with a review after 18 months. The judge reminded the CFA of their statutory obligation to reunification and made a series of directions to support the child and for mediation services to be explored for the mother and the foster carers, along with support from the CFA for the mother with her therapy.

Transfer of Jurisdiction: Four case reports involved applications to transfer jurisdiction from the District Court to UK courts. Three of the four concerned UK families who had recently moved to Ireland. Concerns were raised that these families were subject to scrutiny by UK social services prior to moving to Ireland and their move had been motivated by a desire to evade UK social services. The fourth case concerned establishing the habitual residency of children and the making and subsequent discharge of interim care orders under the Hague Convention.

Placement Breakdowns: Cases may be re-entered for hearing in circumstances where the care placement breaks down, five such cases were observed. In one, an Irish teenager living in the UK under a District Court care order had experienced a foster care placement breakdown and was initially accommodated in a caravan but later move to a single occupancy unit. In another case, the court was informed that following a foster care breakdown, twins were separated into different placements. In another foster care breakdown case, a girl was placed in a short-term residential placement while she awaited psychiatric assessment for a possible behavioural disorder. In a concerning case, the care placement breakdown was caused by a private agency, contracted by the CFA, experiencing financial difficulties and informing the CFA "on the Friday of a bank holiday weekend that they could no longer provide the service, with immediate effect". The final case involved a breakdown of a foster care placement following the child's allegations of physical abuse perpetrated by the foster carer.

Mental Health Act 2001: Six cases concerned children of primary school age and adolescents who were involuntarily detained in an in-patient mental health facility. These applications are taken by the Health Service Executive under section 25 of the Mental Health Act 2001 on the grounds that the individual is suffering from a mental disorder and requires treatment which they are "unlikely to receive unless an order is made".[171] The reports concerned applications for admission to and discharge from hospital and issues regarding a discharge plan and access arrangements in light of Covid restrictions. Three cases concerned girls with serious eating disorders, another a boy with an anxiety disorder and one of a girl exhibiting self-harming behaviours. The final case concerned a boy who was discharged as his psychiatrist deemed him to have challenging behaviour and to be "exceptionally defiant" but not to have a mental illness.

171 Mental Health Act 2001 s 25(1).

Appeals and Clarification of the Law: Four case reports cover proceedings which were referred to the higher courts on appeal or to clarify the law. The two appeals were initiated by the CFA and the other two cases were taken by the solicitor for the mother. In the first case, a case was stated to the High Court on the extent of section 47 powers in relation to a mother with an intellectual disability, but was not accepted. In the second, the Court of Appeal upheld a judgment by the High Court which refused to grant an application under Article 40 of the Constitution to release a baby in the care of the CFA. The third case was an unsuccessful judicial review, taken by the CFA, concerning the extent of the powers of the District Court under section 47 of the Child Care Act 1991. The High Court ruled that the District Court is empowered under this provision to make orders on the welfare of children in care. In the fourth case, the CFA successfully judicially reviewed a decision of a District Court judge that he did not have jurisdiction in the case in which an infant's parents moved to this jurisdiction from the UK.

Other Proceedings: Some of the children and families subject to District Court child care proceedings were also subject to other judicial proceedings, including in relation to private family law, crime, immigration, mental health and special care matters. Two children had previously been subject to High Court special care proceedings, one had been in special care and was now homeless, while in the second case an application was brought for a care order until the child reached eighteen years. Several children before the District Court also had involvement with the youth justice system.

2.4 Role of the Judge within Proceedings

The core function of the judge in child care proceedings is to either grant or refuse the application before the court. When granting or reviewing a care or supervision order or on application under section 47, a District Court judge may make a judicial direction in relation to welfare of a child. In addition, the judge may direct or vary access arrangements.[172] During the course of proceedings, common orders made by the court include the appointment and discharge of a GAL, the commissioning of an assessment or expert report, the production of a parent who is in custody and the production of relevant assessment and therapy reports. The judge may also direct that the case be re-entered if there is a change or breakdown in the child's placement, the child is without a social worker for specified period, and may list a date for an aftercare review when the child reaches their sixteenth birthday. In some cases, the judge may make directions on their own motion, and in others it is on foot of a request from the CFA, GAL or parent.

We have observed judges frequently expressing concern about the lack of progress in obtaining parental capacity, attachment and cognitive assessments and access to therapeutic and other services for children with special needs. At times, a judge may direct that a service be provided or specific action be taken by the CFA by a particular date (such as funding access through a private provider). However, the court is not empowered to enforce directions against state bodies other than the CFA.

Some judges undertake an active role in monitoring the care being provided to a child in care, including those under a full care order. There is no statutory provision relating to a review by the court of a care order, such reviews are held at the judge's discretion and practice varies across the District Courts.

Three examples of judicial directions and oversight by the court of the work of the CFA are provided below, each was heard in a provincial city court. In the first case, the judge ordered that a care order be reviewed in 12 months and granted liberty to the solicitor for the mother to re-enter the matter if the planned play therapy – for a primary school age child in care since birth who was suffering from anxiety – had not commenced by a certain date.

The second case concerned three children in care under full care orders on the grounds of serious neglect and allegations of sexual abuse. Access was not in place between the parents and the children. However, the eldest child, now 17 years of age, was engaged in regular unauthorised visits to his parents. The CFA opposed this access. The judge ordered that access between the eldest child and parents was to be at the child's discretion. The judge also ordered that monthly

172 Child Care Act 1991 s 32.

welfare reports and educational progress reports on the three children were to be provided by the CFA to the parents, along with updates on the therapeutic interventions made for the younger children. The case was to be reviewed after three months by the same judge.

In a third care, the judge in a provincial city made a 12-month care order for a child of primary school age and ordered that home-tutoring be put in place as soon as possible. The child was described as very vulnerable with exceptional needs, she was on the autism spectrum, was non-verbal, peg fed and functioning at the level of a ten-month old, and had struggled to participate in her special school. The GAL told the judge that A was “thriving” in the care of her foster parents and outlined a number of resources urgently required including a wheelchair, for which there was a very long waiting list. The judge ordered that funds should be made available for the requirements outlined by the GAL. The matter was listed for a date six months later to ensure the funds had been provided.

2.5 Participation of the Child in Proceedings

Under the 1991 Act, two mechanisms exist for the child who is the subject of the child care proceedings to be heard during the proceedings. The child may be made a full or partial party to proceedings under section 25 or alternatively the child may be appointed a guardian *ad litem* (GAL) under section 26 to represent the views and interests of the child.[173] However, both mechanisms are at the discretion of the judge. Hence, the child's constitutional right to have their views ascertained and taken into account in child care proceedings is not fully provided for by statute and is not uniformly adhered to in practice.

Under Irish law, the child does not have legal standing in court so requires a next friend to initiate judicial proceedings, appeal an order, make an application to have an order discharged or a direction varied. Hence, unless a child is appointed independent representation (a solicitor or GAL) they have no means of participating in the proceedings. In *A O'D v O'Leary*, the High Court recognised that even if the child is not a party to the proceedings they are the *dominus litis* and as such "it must be the case that the child has a right to fair procedures".[174]

The Child Care (Amendment) Bill 2019 sought to provide an infrastructural framework for the views of the child to be communicated to the court. However, this Bill fell with the dissolution of the Government in 2020. In October 2021, the Minister for Children published the General Scheme of the Child Care (Amendment) Bill 2021 which seeks to address stakeholder concerns about the provisions of the 2019 Bill.

*Child as party to proceedings***:** From our observations of District Court proceedings over a nine-year period, the appointment of a child as party to proceedings is a rarity. No such case was observed during the 2018 to 2021 period. However, in earlier reports we saw, in an example of regional variation, older children in Munster sometimes granted party status.

Role of the guardians ad litem: The legislative and policy framework governing GALs is weak. The 1991 Act does not set out their role or function and this is exacerbated by an absence of professional standards or guidance. Such appointments vary across the country.[175] A GAL was appointed in over half of the cases we reported on. Where a GAL is appointed for the child, the GAL may be granted legal representation. The role played by the GAL may comprise direct engagement with the child, interviewing the parents and liaising with the CFA and other professionals. Hence, most of the work of the GAL takes place outside of

173 CCA 1991, s. 26(4). It is not possible for a child to be both a party to the proceedings and be appointed a GAL
174 [2016] IEHC 555 [89].
175 Carol Coulter, 'First Interim Report' (Child Care Law Reporting Project 2013) 14.

court: we can only comment here based on our observations of the GAL's participation in proceedings. Usually, the GAL submits a report to court in advance of the hearing and is called to testify and be crossed examined on their report, in addition they may question other witnesses.

The value the court places on the role of the GAL can be inferred from the following cases. In a case concerning a vulnerable teenage girl whose mother was from a non-EU country, the judge refused to grant the CFA's application for a one-year care order as the GAL has only just been appointed and had not submitted their report to court. Instead, the judge granted a three-month care order. In other cases the judge has commended the work undertaken by the GAL, in one the judge said the "the GAL had played a pivotal role" and acknowledged the value of the GAL's report for the court.

We have observed cases where GALs communicate the wishes of the child in terms of whether they were happy in their placement or want to return home and if they wish to have access with a parent. They also express their professional opinion about what is in the child's best interests, often this is focused on measures to provide the child with certainty and stability about their future and access to therapeutic supports. GALs provided the court with updates on the progress achieved or difficulties being experienced by the child. In their reports to the court GALs often make a series of recommendations in relation to the care or the child in their written reports. For example, in one case the GAL requested that the judge direct that if an assessment due to be carried out by NEPS was not available that a private assessment be carried out.

In the majority of proceedings we observed, the GAL supported the application made by the CFA. Below we give some exceptions to this. In one case, heard in a rural town, the judge shared the GAL's concern about the inaction of the CFA. During the hearing, the court expressed concern about a delay in obtaining a medical assessment of a pre-school child who was in care under a full care order and directed the CFA to prioritise obtaining a medical assessment of the child, who was displaying symptoms which could indicate a potentially serious physical health condition and which were distressing for the child. Four months later, the assessment had not taken place. A referral was made by the GP at the request of the CFA the day before this court hearing. The GAL sought and was granted a further direction from the court for the CFA to secure an MRI test for the child. The GAL expressed concern that the child "could have irreparable damage to his organs" if there was not early intervention.

In a small number of cases the GAL did not support the CFA's application. One such case concerned a pre-school child with significant developmental needs who had initially entered care from her mother's care under an emergency care order. Following a few days in foster care under an ICO, the child was returned to the

care of her father, who also cared for another sibling, under a six-month supervision order. The CFA were providing supports, including respite care. The GAL recommended that the supervision order should last for at least a year in order for the reunification plan to settle and to secure all the required supports for the father and young child into the future.

When the matter returned to court six months later, the CFA sought a further supervision order with the consent of the father. The court was concerned as to whether the threshold for a supervision order had been met and adjourned the matter for three months. All parties commended the father's care of his children. The mother's whereabouts were unknown. On the morning of the next hearing, it had been understood that the CFA would seek a further adjournment, which the GAL supported, but instead the CFA was satisfied to let the supervision order expire as it considered the threshold for a supervision order not to be met. The legal representatives for the father and GAL both expressed concern about the absence of a plan outlining the supports available to the family, once the supervision order would be discharged and the judge asked whether the CFA had obligations under section 3 of the Child Care Act 1991. The legal representative for the CFA told the court that all the support services to the family would continue. The judge had no jurisdiction to adjourn the matter and so had no choice but to discharge the application. The judge commented that it was "a deficit" in the 1991 Act that there was no obligation on the CFA "to outline precisely the steps that will be taken when the agency discharged an order particularly in cases like the one before the court where [the support] is essential".

In another case, also heard in a rural town, the judge granted care orders for two children until they reached eighteen years, based on a statement of facts agreed between the parents and the CFA, which included neglect, physical abuse and sexually inappropriate behaviour. During the proceedings, the GAL sought to have witnesses called to give evidence relating to allegations made by the older child and to the behaviour of the younger child. The older child had expressed concern for the safety of her younger sibling who was neither the subject of child care proceedings nor on the child protection register. The GAL's application was refused by the judge who said the threshold for making the care orders sought had not been reached.

At times a GAL may bring an application under section 47 of the 1991 Act related to the child's welfare, which may involve issues outside of child law and entail the GAL navigating complex state systems on behalf of the child. Four examples from our reporting give a flavour of the breadth and importance of this work.

In one case, the solicitor for the GAL brought to the attention of the court the fact that information about a child in care under an ICO continued to be available in search engines because the child had previously been reported missing from her

residential care unit and the Gardaí had initiated the "relevant protocol". The solicitor said that it was important that this information was permanently removed. The judge agreed and instructed the CFA to ensure that the child's "right to be forgotten" was exercised before the next court hearing, citing European Court of Justice caselaw on the matter.

In a second case, a 17-year-old girl wished to be adopted by her carers. The solicitor for the GAL made a section 47 application to request that a post-adoption aftercare allowance should be made available for this girl. Under current policy an aftercare allowance would not be permitted if the child was adopted unless an exception was made by the CFA on a discretionary basis. A three-month adjournment was granted to resolve the matter. The matter was adjourned again on two occasions and finally the application was granted on appeal.

In a third example, during an aftercare review for a child who would soon turn eighteen years of age, the GAL drew attention to difficulties that had arisen in the regularisation of the child's immigration status. The CFA had made an application for naturalisation but this process had not concluded and the Irish Naturalisation and Immigration Service (INIS) indicated that they could not accept the CFA to be the legal guardian of the child for the purpose of the naturalisation application. The child's mother could not sign the documents required as she was not an Irish citizen and the GAL questioned whether the child would have sufficient capacity to complete the immigration process when she turned eighteen. The GAL said if it transpired that the application was rejected the CFA should consider bringing a judicial review. In line with recommendations made by the GAL, the judge directed that an individual from INIS should be identified and a report on the status quo be prepared. The judge described the child as having being "left in limbo" and that the status of the child was "an important child welfare issue". At the next hearing, two witnesses from INIS were present, the issue remained unresolved and the aftercare review was adjourned.

In our final example of a GAL bringing a section 47 application, the GAL requested the CFA to apply for a special care order for a teenage boy described as "spiralling from one crisis to another". The CFA is the only body that can make such an application. The child had been in 35 placements including special care on two previous occasions, had a history of drug misuse and criminal behaviour and was currently missing in care. There was a concern that drug lords "were out for him." The GAL had known the teenager since he was seven years of age, and noted: "I have been the most consistent person in his life". The judge accepted the seriousness of the situation and wanted to hear that the application for special care had been despatched as it involved the child's right to life.

Information: Access to information is an essential pre-requisite to support a child to engage in decision-making. However, there is a dearth of information for children

who are the subject of child care proceedings about the nature of the proceedings, options to facilitate being heard or participating in them and the implications of choosing one of these options over another.

Child Attending Court: Proceedings do not require the presence of the child in court.[176] It is rare that a child attends a District Court hearing. Between 2018 and 2021, we observed only one occasion where a child attended court. It was a private family law case in which the CFA was involved. The judge in a rural town heard the eight-year-old child in private in her chambers before the court sat to ascertain the views of the child concerning a dispute over access. The mother had come to court with no babysitter for the child. We also observed cases where the parent was themselves a child, being under eighteen years of age, and they were attending care proceedings in relation to their own child.

Child Meeting or Writing to the Judge: Research from UCC indicates that judges have adopted different approaches to meeting with children.[177] There is no statutory basis for such communication or guidance on the purpose, procedures or due process requirements to be followed. The meeting may take place in the judge's chambers or in a cleared courtroom perhaps with the court Registrar. The court's digital audio recording (DAR) may or may not be in operation during the meeting. The GAL may be present during such a meeting.

During this phase of our work, we reported on a case where the judge met with a teenager girl prior to hearing an application for an extension of an interim care order. The sixteen-year-old girl was in residential care, her parents were from another European country and there were concerns that she might be pregnant by her older boyfriend. She had previously been in special care. The child had expressed concern that if she was subject to a full care order she would lose her GAL. The child was described as being mistrustful of adults and having had adverse childhood experiences in two jurisdictions and many changes of social worker, she had requested a new social worker.

In another case, in advance of a decision in a care order hearing, the judge met with a teenage boy and reported back to the other parties that "Firstly, I found him to be articulate, bright and respectful to me and the court process. It is evident that he has a difficult relationship with his father and he feels too much weight has been given to the statements made by his father… he feels that his voice has been lost in the process."

176 CCA 1991, s 30(1).

177 Aisling Parkes and others, 'The Right of the Child to Be Heard: Professional Experiences of Child Care Proceedings in the Irish District Court' (2015) 27 Child and Family Law Quarterly 423.

We have also observed several proceedings where the child wrote a letter to the judge or social worker as a way to express their views. These are not read out, but their contents are sometimes conveyed by the judge. In one, the child asked to be allowed leave care, in another a child asked about varying contact arrangements, and a letter from a child was described by the judge as “heart-breaking”. The contents of such letters can be contested, for example in one case, the mother alleged the child was “under the influence of the relative foster carers in writing his letter to the judge”.

2.6 Role of Parents within Proceedings

The CFA is usually the applicant and the child's parents are the respondents, whose parental rights are at stake. However, *ex-parte* applications are permitted under certain conditions. Both the Constitution and the European Convention on Human Rights guarantee the rights of all parties to fair procedures. This means that parents are entitled to challenge the case being made by the CFA – that they have failed in their duty to their children to an extent that justifies their loss of parental rights and their children being taken into care. They are entitled to legal representation in order to challenge the evidence. This evidence is, in general, presented by social workers on behalf of the CFA, and it may be supplemented by expert evidence. Social workers and experts called by the CFA are likely to face cross-examination by lawyers for the parents and in some cases may also face questioning by the judge attempting to establish if the threshold laid down in the Act for the granting of an order has been met.

It is often stated, especially by lawyers acting for the CFA, that child care proceedings are essentially inquisitorial rather than adversarial in that they are an attempt to establish how the welfare of the child can best be guaranteed. However, in our common law jurisdiction where evidence is tested in court, an adversarial element cannot be avoided. This was expressed succinctly by Ms Justice O'Malley in *A v Health Service Executive (2012*):

> The concept that 'there are no winners or losers' is an appropriate one for the attitude of the professional staff of the HSE and its lawyers but it asks a degree of detachment that is very unlikely to be shared by a parent. The procedure is, as a matter of fact, adversarial.[178]

Judge Ní Chúlacháin in the Circuit Court elaborated:

> It is sometimes said that the Child Care proceedings are in the nature of an inquiry rather than the normal adversarial proceedings this court is used to. That may well be the case, but it remains clear that the onus of proving the matters set out in Section 18 of the Act remains firmly on the CFA at all times and that there is no onus on the respondents to prove the contrary. Furthermore … the standard of proof in child care proceedings as in all civil proceedings before the court is the balance of probabilities … where the allegations and their consequences are … serious and grave … the standard of proof is to be applied in a rigorous and exacting manner.[179]

*Legal Representation***:** Where the parents are the respondents, it is usual practice that they are legally represented, more often than not by the Legal Aid Board

178 *Health Service Executive -v- O.A.* [2013] IEHC 172.
179 *CFA and LG and SK*, decision delivered 9th May 2017, unpublished, p11.

(LAB).[180] Representation may comprise a solicitor, and junior or senior counsel depending on the circumstances of the case. It is the norm that each parent secures their own legal representation. In some of the cases we attended there was no respondent available to be served with notice of the proceedings as the child's parents were either deceased or uncontactable (their whereabouts was unknown to the CFA). In other cases, a parent while contactable may have declined to engage with the CFA, instruct a solicitor or attend court hearings. In some instances, the parent was living outside of the jurisdiction.

During the course of our work, we have observed twelve hearings where a parent arrived at court with no representation. When this occurred the judge usually strongly advised the parents to take the necessary steps to secure legal representation as a matter of urgency. In some rural courts we have witnessed difficulties where the LAB was on record for one parent so could not go on record for a second parent, meaning that parent had to contact another LAB office.

We have witnessed incidents where proceedings are adjourned in order to give parents time to access legal aid and instruct a lawyer to represent them in court. This inevitably leads to further delays and may negatively impact on the child. In two cases the father had entered the proceedings late as the children were removed from their mother's care and each father indicated a desire to secure representation and care for his children. One of these two concerned a father from a non-European jurisdiction and the judge commented that "the father was not from Ireland so it was difficult for him to navigate the system".

In another case an unrepresented mother told the court that "previously she was not in a position to apply for legal aid as she was homeless, but she now had accommodation and would be pursuing a legal aid application." While judges are often reluctant to proceed where parents are unrepresented we observed four cases which proceeded despite one of the parents not being represented. In each the father was not represented but was consenting to the order sought. Some parents disengage after a care order is granted. For example, we saw one case where the CFA made an application to extend an existing care order and the parents neither attended court nor instructed a solicitor for those proceedings.

In some cases, despite being urged to seek legal representation, a parent chose to represent themselves in the proceedings. Cases we observed where a parent represented themselves included a renewal of an ICO for an infant with significant health needs where the mother attended court but was not represented, a contested case where the father believed that the CFA and others were conspiring against the parents and another contested case concerning allegations of domestic

180 The Legal Aid Board grants over 500 Legal Aid Certificates per annum. *Legal Ease* vol 5 Issue 6 Jan 2021.

violence against the father, the father had been legally represented but was now representing himself. The judge extended the ICO.

Court Support Services: To ensure access to justice, parties must understand the proceedings and be able to instruct their solicitor. Many respondents in child care proceedings face personal difficulties which may impair their capacity to understand and engage in judicial proceedings, including literacy difficulties, intellectual disability, mental health difficulties, English not being their first language or they are unfamiliar with the Irish legal system and state agencies.[181] Some parents are themselves vulnerable individuals including some who were minors at the time of the proceedings. Little support exists to support such respondent parents during proceedings.

The practice of appointing advocates or GALs for very vulnerable parents varies across the country and there appears to be a lack of clarity as to when a GAL can be appointed for a parent and who will then pay for the GAL. A parent with impaired capacity has an implied entitlement to support under the Disability Act 2005 and some support mechanisms are in place.[182]

During this period, we saw a number of examples where the court appointed an advocate or GAL for the parent to assist them in understanding the proceedings and dealing with their lawyers and social workers. In one of these cases, the mother had been a victim of domestic violence by both fathers of her children, who were the subject of a supervision order. In another, the judge adjourned an application for a supervision order to facilitate the appointment of an advocate for the child's father, who felt overwhelmed by the case. The child's mother had died and the father was now caring for the child on his own. However, historical allegations of sexual abuse from 30 years prior had been made against him.

We observed three cases where support was sought for a vulnerable young parent. In one, a GAL was appointed for a mother with a disability as the CFA feared she was being forced into marriage. After a few appearances the mother, from an Asian country, disengaged from the proceedings. In another where again the mother had a disability, the court appointed a GAL for a 16-year-old mother whose baby was taken into care under an ICO. The decision of who should pay for the GAL was contested between the LAB and the CFA. A lack of clarity on making such appointments was also raised in the third case, which concerned a child in care under an ICO. The mother had a support worker and the father's solicitor sought

181 For further discussion see: Corbett (n 45).

182 A "Support Person" may be sourced and paid for by the Legal Aid Board or an "Advocate" may be provided and funded by the National Advocacy Service for People with Disabilities which operates under the Citizens Information Board. The Assisted Decision-making (Capacity) Act 2015 is not yet fully commenced and even when fully commenced the threshold to meet the requirements for assistance under the Act is high, so it is likely many parents with limited capacity may not benefit.

to have a GAL appointed for the father, who was a minor and himself the subject of care proceedings. The judge queried if a GAL could be appointed for a parent who was a party to the proceedings and not the subject of proceeding and the CFA suggested an advocate could be appointed. The matter was to be addressed on the next occasion.

2.7 Ethnic Minority Families

Similar to our 2015 report, we again find that a disproportionate number of the families subject to child care proceedings had at least one parent from an ethnic minority or who did not have residency status. Indeed, our statistics are likely to be an under-estimation as we only record ethnicity or residency status where these were mentioned during proceedings. To protect the child's identity ethnicity is described in broad terms describing individuals from Eastern Europe, Africa, Asia and the UK. Two exceptions are made where we made explicit reference to families from the Traveller and Roma communities as this was referred to as relevant in the proceeding.

Travellers: Despite the different methodologies between the 2015 report and this one, we continue to find the percentage of respondents from the Traveller community to be significantly over-represented in families subject to child care proceedings. Travellers comprise 0.6 per cent of the Irish population but Traveller ethnicity was raised in nearly 3 per cent of our case reports. In addition, two cases involved children from the Roma community. The profile of Traveller parents included issues of domestic violence, early death, addiction, care backgrounds and mental health issues and two fathers were in detention. The concerns in relation to the children were focused on neglect, poor school attendance and in one case sexual abuse. A recurring theme in the Traveller cases was a preference for relative/Traveller carers and efforts being needed to promote the children's knowledge of their Traveller identity.

Migrants: Excluding Travellers, approximately a quarter of respondent families included at least one parent who was a national of another jurisdiction. This figure is similar to that found in the 2015 report. From our observations in court, the majority of the ethnic minority cases were from Eastern European countries, particularly Poland, Latvia and Lithuania, and a small group were from Africa and Asia. Among this group were also some separated children (also known as unaccompanied minors). These figures need to be seen in the context of the Irish population as a whole. According to the 2016 Census 11.6 per cent of the population are non-Irish nationals. The ethnicity and residency status of the child or the parent often had a significant role in child care proceedings. These can be summarised as:

Jurisdictional Issues: A number of cases concerned parents who has recently relocated to Ireland from another jurisdiction. These include cases where the family had been of concern to UK social services and a concern arose that the parents had moved from the UK to Ireland to evade UK social services. In such cases, the Irish court must determine if it had jurisdiction to hear the case.

Trans-national placements: We observed cases where a child under the jurisdiction of the Irish court was placed in a placement in anther jurisdiction to enable a relative foster placement.

Trans-ethnic placements: We observed cases where a child was placed with a foster family of a different ethnicity or religion. There were references in court to a shortage of suitable foster carers generally, which may exacerbate the problem.

Child Left Behind: In several cases the child's parents were no longer resident in Ireland or their whereabouts was unknown. In such cases, the parent was described as no longer attending access with their child or engaging in communication with the CFA. In such cases where the parent had left the State, the inference was that reunification was unlikely and the child would grow up in care and might become eligible for adoption by their foster carer.

English Language Barriers: To participate in proceedings in 13 cases parents required the assistance of an interpreter and in another a cultural mediator.

Complex Cases Engaging Cultural and Traditional Practices: Several cases presented with a complex web of child protection and cultural issues. Some involved traditional practices which are not acceptable under Irish law, for example early marriage, corporal punishment, strict parenting.

In a case of a lone parent from a non-EU country the mother had been accused of physically assaulting her teenage daughter, the social worker reported that the mother told him "she could bring her children up any way she wished."

In another case, a child was taken into care due to concerns about the ability of the mother to take care of the baby as she was not able to take advice on board. The mother was described as having a low IQ, being extremely vulnerable and open to suggestion. The mother who was from an Asian country was unmarried and alleged that she had been raped. The child's uncle had threatened to throw the baby in the bin on account of the mother bringing shame on the family. The CFA was concerned that the mother was being forced by her family into an arranged marriage and that she was at risk of an honour killing or mutilation in her country of origin. In an effort to support and protect the mother a GAL was appointed for her (in addition to the child) and the HSE brought an application to the High Court seeking wardship to prevent the mother from leaving the jurisdiction and returning to her country of origin. However, this application was not successful as the President of the High Court deemed the mother had capacity. At the time the care order was granted, the mother was no longer attending access with the child and her location was unknown.

Cultural Sensitivity: In some cases, cultural sensitivities were apparent. For example, in one case, there were issues about the mother meeting with a man on her own.

2.8 Impact of Covid

The global Covid-19 pandemic has had an immediate and lasting impact on children and exposed and compounded weaknesses in child protection services and child care proceedings. Since early 2020, child care proceedings have been dominated by Covid, both in how the proceedings were conducted and in the impact of the public health restrictions on vulnerable families and children in care.

The restrictions led to the closure of in-person education (school and early years settings) for all children from mid-March 2020, early years settings re-opened for essential workers during summer 2020 and there was a short return to in-person education during Autumn 2020. However, most children did not return to full-time in-person education until early 2021. Unlike many other European jurisdictions, no exemption to these restrictions was made for children at risk of harm, those in care or those with disabilities.[183] A knock-on impact of the closure of in-person education was the loss of school meals for disadvantaged children, although efforts were made to remedy this.[184] The restrictions also altered the pattern, number and nature of child protection referrals. When the public health restrictions were at their highest, children were not seen in person by those most likely to make a referral including school principals, school teachers, early years, youth and community workers:

Despite sterling work by the DCEDIY, the CFA and the Courts Service to address the unprecedented problems which arose from the Covid pandemic, the public health restrictions and closure of education settings and social services had a devastating impact on vulnerable children and their parents. Many cases revealed the additional stress on parents, social workers and foster carers, and especially on children. The problems that have arisen have compounded each other to create a "perfect storm": children were less seen by those who may identify a concern, home environments became more difficult, the safety of school and therapeutic services disappeared, social workers were no longer able to communicate face-to-face, access was stopped or reduced, assessments were delayed in turn delaying court proceeding.

Home Life Deteriorated: Risk factors, such as domestic violence and addiction, already present in the home were exacerbated by the intense stress and difficulties

183 See for example the webpage of the Department of Education on: [Withdrawn] Supporting vulnerable children and young people during the coronavirus (COVID-19) outbreak - actions for educational providers and other partners - GOV.UK (www.gov.uk) See also Rebecca Adami and Katy Dineen, 'Discourses of Childism: How Covid-19 Has Unveiled Prejudice, Discrimination and Social Injustice against Children in the Everyday' (2021) 29 International Journal of Children's Rights 353.

184 Heather Humphries TD, Minister for Employment Affairs and Social Protection School Meals Programme Written Answers 14 July 2020 [15434/20].

associated with the pandemic and there was a closure of support services.[185] For example, the court in a rural town heard that when difficulties arose in contacting the addiction centre during the Covid-19 restrictions, the mother continued drinking and taking non-prescribed medications. The child, of primary school age who had previously spent two years in care with a foster family, had recently returned home to her mother. However, under the Covid restrictions the support of foster parents and an aunt to whom she was close were removed. The mother was placed under unexpected stress and she found very difficult to cope, causing her to relapse in her alcohol misuse. The child re-entered care under an ICO.

Schools and Support Services Closed: Secondly, unfortunately the restrictions led to the closure of support services and barriers to, and delays in, receiving face-to-face physical and psychological therapeutic and other social supports and assessments. Some of these vital services could not be delivered, and while some did take place via video link, not all therapies, or indeed clients, were suited to this and it inevitably impacted on the availability of services. In several cases we observed, the lack of regular access to addiction, mental health and disability services had a detrimental impact on children and their parents, impeding recovery and hampering efforts at reunification. For some the impact of the lack of services was compounded by the loss of family support due to restrictions on travel and home visits. The disruption to services is also likely to increase further the already long waiting lists to access therapeutic supports.

Inability to attend school for lengthy periods is likely to have increased the isolation of vulnerable children and heightened the risk of serious neglect going unnoticed. A number of cases raise serious questions about how vulnerable children became invisible during the pandemic. It raises the question as to whether the prolonged closure of schools meant that teachers, often at the front line of protecting such children, were cut off from them and the neglect went unnoticed for far too long.

In a very concerning case heard in the Dublin court, two children entered care on foot of a section 12 intervention by the Gardaí, who described the home to be in a derelict state. One of the children was admitted to a hospital's intensive care unit in a distressed state with skin infections from scabies and the most serious case of head lice the paediatric consultant had ever seen. The girl's condition deteriorated overnight and the hospital staff feared that she was entering into septic shock.

In a separate case, another school-going child was also hospitalised with infection due to head lice infestation. The child's school principal had had concerns about the neglect of this child and her sister, but when the schools were closed she was

185 See for example, the webpage of UNICEF https://data.unicef.org/topic/child-protection/covid-19/.

unable to maintain contact with them. She told the court that the class teacher had arranged Zoom meetings but unfortunately the child did not participate in any of them. The class teacher had also invited all the children to come to the school to meet her so she could give a present and card to all of them but this child had not come. The teacher called to the house and discovered that the child's head had been shaved, which was why she did not want anyone to see her. A child protection report was made. The court heard this child's younger sister was in hospital due to her having scabies, ringworm and head lice.

Social Work was Curtailed: Thirdly, social workers were curtailed in carrying out home visits, face-to-face meetings and assessments with children and their parents. At best this may have delayed progress in a case while at worst it may have left children in unsafe homes and undermined the effective operation of the Child Care Act 1991, in particular section 19 on supervision orders.

Access Disrupted: Fourthly, in-person access between children in care and their parents, siblings and extended family members was severely curtailed and at times halted completely. In some cases, the reduction of face-to-face access gave children space away from family members and was beneficial for them. In others new and creative means of access were developed, for example in one case two siblings living in different care placements were supported to connect over video games. However in other cases, it led to disputes between the parents and the CFA and was particularly distressing for parents of new born infants and where reunification was planned. Our case reports appear to show that different social work teams interpreted the guidelines differently leading to confusion and frustration.

In one case the father's solicitor asked why face-to-face access was not taking place as there was no such restriction with the government Covid-19 guidelines but that it was "a Tusla policy instead". The social worker said that she may have been mistaken and it may not be a "Tusla policy" but that "in-person access is on hold at the moment for children in care". The father's solicitor reiterated the point that it was a CFA policy to suspend face-to-face access and not in fact government guidelines. The CFA solicitor confirmed to the court that it was a CFA policy rather than government guidelines.

In another, the issue of access was raised as a concern by the parents of a girl of primary school age, who had been admitted to a psychiatric unit because of a serious eating disorder. The parents were concerned because no face-to-face contact was being permitted in the inpatient unit during the Covid-19 pandemic and they had only had Skype access for the month since the child had been admitted.

In three cases, the judge heard concerns about disruption to face-to-face access where reunification was under consideration but the court left the decision in the hands of the CFA.

In one case heard in a regional town where an ICO was extended for a young baby, the child's mother was a minor, in care herself and had certain cognitive limitations. The father was currently living abroad. A difficulty had arisen with the mother's care for the baby at night. The mother consented to the order, however, her solicitor questioned the restrictions on access due to the Covid pandemic. The solicitor for the CFA told the court that she understood that there was "a blanket ban on access since the current lockdown commenced". However, she then said that access was "being facilitated in exceptional cases". The social worker said that they were working on putting family support and a safety plan in place which they deemed necessary to allow the mother care for the baby.

Another case held over two days concerned the suspension of access between a mother and three of her children in care due to the foster carers' concerns about Covid because of their own child's medical condition. At the time the three children entered into care, the mother had mental health issues but family reunification was under active consideration. Access had been cancelled with only a day's notice and with no opportunity for the mother to "speak it over with her support people" or her legal representatives. The court refused the access application for in-person access but indicated that the judge wanted a plan before the court within a reasonable period indicating what "can be done". During the proceedings, the issue was raised as to whether the mother was being discriminated against given her status as residing in direct provision.

In the third case, the care order hearing was put back due to delays in assessments caused by Covid-19. Both parents expressed concerns at a reduction of the court-ordered access due to Covid-19. Both parents were seeking reunification with their children. In the case of the father, who had consented to a full care order for 18 months so that he could undertake work identified by the psychologist and develop a relationship with his children, his barrister said he would be "finding himself on the back foot going into a contested hearing in January". The judge vacated the existing access order. "It seems to me that the question of access is always a question of art and balancing many variables. There is no science to access…."

Reunifications Stalled: Fifthly, the restrictions in social work assessments and access had a negative knock-on impact on cases where reunification was planned or being explored. Assessments of both children and parents, essential to aid decision-making by the court about the child's future care, sometimes had to be cancelled or curtailed. This will have a knock on impact of delaying the finalising court proceedings and providing the child with stability in care or with reunification with parents.

Proceedings Adjourned: Finally, despite the best efforts of the Courts Service and the judiciary, the pandemic has led to adjournments and the ensuing delays in making decisions will impact on children throughout their lives. The courts remained largely open during the pandemic but operating on a more limited basis at times and with restricted numbers permitted inside the court room, which has sometimes led to the exclusion of the attendance of some professionals. However, care order proceedings were adjourned either because no hearing date was available or the case was not ready to proceed as necessary assessments had not yet been completed. This will add further to the waiting lists to secure court hearing dates for care orders. Prior to the pandemic in some areas there was a delay of a year or more to secure a date for a child care order hearing. Unless additional resources are provided urgently to the Courts Service, children may need to wait for even longer for a hearing date in some parts of the country.

Positives: The response to the pandemic has also led to some positive developments. Many organisations (statutory and non-statutory) were able to reorientate their method of working to support and provide services for children through alternative means including by phone and online. For some children – who have access to appropriate technology or are able to use it – this works very well but for others, including younger children and those with disabilities, this results in a lower quality service.

Some welcome reform of court procedures has taken place including the commencement of the practice of lodging documents electronically and hearing some proceedings or elements of proceedings remotely, such as the "call over", or hearing evidence from an expert based in the UK.[186] However, for most child care hearings, in particular contested cases or those involving vulnerable parents, a remote hearing would not be appropriate.

During the Covid-19 pandemic, where the courts sat on a social-distanced basis and with restrictions on the numbers in court, in some cases where the parents were not contesting the orders sought the evidence was taken on affidavit (for example without hearing the *viva voce* evidence of the social worker). In another hearing the parties agreed that the evidence be given out of sequence and by video link.

186 These practices were facilitated by the enactment of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020.

2.9 Issues arising during Proceedings

2.9.1 Long Periods in Interim Care

An interim care order is made when "there is reason to believe" that the safety or welfare of a child is at serious risk. It is envisaged as a precursor to a care order, providing for the safety of the child while the case for a "full" care order is prepared, which usually involves a number of assessments of the child and the parent or parents. Many of the lengthy cases seen by the CCLRP where a care order is sought have been preceded by multiple renewals of interim care orders. If a child has been under an interim care order for a lengthy period a dynamic is created towards the child remaining in care, though the threshold for an interim care order is different from that required for a care order. While the existence of such a dynamic does not constitute legal grounds for the making of a full care order, in practice we rarely saw children return home after lengthy periods in interim care.

A full care order (until the child is eighteen or "for such shorter period as the court may determine") can only be made when the court is "satisfied" (as distinct from "has reason to believe") that abuse or neglect of a child has existed, exists at the time of the proceedings or is likely to occur in future, and that only a full care order will avert that risk. Thus the threshold for a full care order is considerably higher than for an interim care order and the evidence required to support the application for a care order must be stronger than that needed for an interim care order. This may be particularly difficult where there are concerns about possible sexual abuse, but it has not been proved.

As noted in Chapter One, there can be significant delays in securing a hearing date for care order applications of over a year in some parts of the country. While awaiting a date, it is usual that a child remains in care under extensions of an interim care order. A child may also remain under an ICO while awaiting an assessment. There is no limit to the number of extensions that may be granted. Where children spend protracted periods of time in care under an ICO, issues that may arise concern a potential undermining of fair procedures, a shift in the evidential basis for the application, emotional toll and a delay in the children receiving therapeutic support.

For example, the impact on a girl who did not want to return home and who was in care under an ICO for three years was described by her psychologist as:

> [the child] found the court process frustrating and had considerable difficulty in settling into her placement and community. It might well be she would have more to say when she learned of the order. At the moment she did not want to talk about certain things. She had not really been able to invest in

> friendships because she did not know if she would be moving or going home.

The GAL described the girl as very bright and said she found the length of the proceedings very difficult. She was anxious about what would happen if she returned to her parents' care.

In another case, four children remained in care for four years under ICOs. The therapeutic work that everyone agreed the children needed could not begin until their care status was finalised, this included support in relation to sexual abuse. The judge was highly critical of the delay and said all parties to the proceedings "have a duty to minimise delay in bringing a case to a conclusion as soon as is possible in the best interests of children, the subject matter of any such proceedings." She drew attention to the "absolute necessity for full and proper case management from the outset in all child care cases."

2.9.2 Delays in Securing Assessment, Expert Reports and Therapies

In the context of child care proceedings, delays in completing child and parental assessments and expert reports and in sourcing appropriate treatments and therapies is an ongoing concern. Such delays risk escalating the difficulties and delaying proceedings and may mitigate against family reunification. They may also risk undermining fair procedures. To ensure the court has access to experts without undue delay when needed, consideration should be given to the establishment of an independent service that could provide suitably qualified expert evidence in child and family proceedings and recommend referrals to appropriate supports and therapies at the request of the Family Court. Such a model exists, the Children's Court Clinic, in the Australian states of Victoria and New South Wales. This would reduce the number of expert reports, improve the consistency of decision-making and reduce the delays that often arise as a result of the commissioning of multiple reports.[187]

To assist the CFA and the court is its decision-making, child and parental assessments and expert reports are often commissioned by the CFA or by the judge. Assessments are usually commissioned when a child first enters care or in the early stages of the CFA engagement with a family. In some cases, the judge is requested to make a direction that the assessment be carried out by a particular date. This appears to expedite matters and speed up these assessments. However, a judicial direction is not enforceable when it involves the HSE.

Assessments may relate to the child's physical and mental health, for example, speech and language assessment, hearing tests, vision test, occupational therapy

187 For further discussion see: Corbett and Coulter (n 83).

assessment, educational psychology assessment (NEPS), psychological assessment, psychiatric assessment, and assessment by the child and adolescent mental health services (CAMHS). An expert may be commissioned to assess the credibility of a child's disclosures (based on video evidence already provided). Assessments may also relate to the parent such as cognitive assessment or parental capacity assessment. Finally, assessments may concern the relationship between the child and the parent such as an attachment assessment.

No panel of appropriate assessors or experts exists for the use of the courts, such assessors and experts are usually private individuals whose availability varies, which may lead to multiple adjournments while the court awaits a report. Sometimes the court must rely on the recommendations of lawyers for the parties, with the inevitable attendant danger of "expert shopping". In contested cases, a respondent parent or a GAL may commission a report or assessment. It is rare that parents commission an independent report. In only one case observed during this period did the parent commission their own expert report. In another case, the mother had sourced an independent parental capacity assessment but did not proceed due to the costs involved.

Under section 27, a judge in a rural court ordered the commissioning of an independent view as to whether it was in the best interest of a young girl to move to live with extended family in a foreign undeveloped country or to remain in care in Ireland. In this case, the court had serious reservations in relation to the CFA's proposed reunification plan in the foreign country, in particular, the standard of care and protection she would receive there.

Securing the appointment of an assessor or expert and then, crucially, receipt of their final report often cause delays and adjournments to proceedings. The timescale for completion of these reports is difficult to gauge from our observations, but a period of several months to a year is not uncommon. In one case the court was told an assessor would not be available to commence this work for six months. The delay in securing and finalising such assessments may have a significant impact on the care being provided to the child as the outcome of the report may identify therapeutic supports which would benefit him or her. Unfortunately, the child may then have to join a waiting list to access the identified therapeutic supports. There were discussions on assessments in less than half of the case reports under examination in this report.

2.9.3 Variation in Evidential Requirement and Interagency Cooperation

Evidential Requirement: The Child Care Act 1991 sets out specific evidential requirements that must be satisfied for the granting of care and supervision orders. Anecdotal evidence from our reporters who attend courts across the country indicate that different judges apply different approaches to hearing evidence and

to the level of evidence they require to satisfy themselves. In one district, the judge does not require the social worker to take the stand to testify to the veracity and accuracy of their report. We observed that some judges challenge the evidence presented whereas others rely heavily on the lawyers to do this, and some judges are happy to allow an interim care order to proceed without hearing oral evidence if there is consent on both sides, while others insist on hearing the evidence to establish for themselves that the threshold has been reached.

*Hearsay Evidence**:*** The lack of clarity on the admissibility of children's hearsay evidence under Section 23 of the Children Act 1997 in the context of child care proceedings means the issue is continually re-litigated, with witnesses being called.[188] Several cases we observed involved much legal argument on hearsay evidence. For example, in a contested case concerning the exposure of a child to inappropriate sexual behaviour there were 20 applications to admit hearsay evidence. The judge commented that: "Everybody had wanted some hearsay admitted to evidence but objected to other statements." In another case where an application to admit the child's hearsay evidence had not been made, counsel for the mother argued her client had been prejudiced by the GAL giving views on allegations without evidence, allegations which the mother rejected. We have not yet attended a case where the judge ruled that it would be in the child's best interests to be asked to testify to the veracity of and be cross-examined on their statements. In one case, the social worker said that while the children would be capable of giving evidence they were "very vulnerable."

Access to Evidence: At times difficulties or uncertainties with interagency cooperation and delays in the exchange of reports have hindered proceedings. These issues were illustrated in the two cases below. In one CAMHS denied permission for the CFA to provide the court with a copy of an assessment report although it gave the social worker permission to quote from the report. The assessment related to a primary school child who was in care under a full care order. The social worker testified that there nothing extraordinary in the report, "it just outlined the child's condition". The judge directed that the CAMHS assessment report be forwarded to the court within one week. In the same case, the judge ordered the CFA to ascertain when exactly the assessment reports for the two children from the occupational therapist and speech and language therapist would be available. Both children, who were born prematurely with foetal alcohol syndrome, had significant special medical and educational needs. The judge said she had only received the reports at lunchtime and that this had created difficulties as both children required significant supports due to their complex special needs. She reminded the CFA that receiving reports five days in advance of hearings was more beneficial in cases such as this one.

188 Children Act 1997, s 23. Coulter, 'An Examination of Lengthy, Contested and Complex Child Protection Cases in the District Court' (n 81).

In another case concerning children in care under a voluntary care agreement, a judge in a regional court made an order to release documents on held by the CFA to An Garda Síochána in relation to allegations of chronic neglect for the purpose of a criminal investigation as "rights must be protected, but also balanced." The CFA refused to release the documents voluntarily as they were of the opinion that it would breach the *in camera* rule. The section 47 application had been before the judge on several occasions with written submissions prepared by senior counsel on behalf of both the CFA and An Garda Síochána.

Differences in practice between different courts in different parts of the country are likely to be greatly reduced by the coming into being of a separate Family Court division within the courts system, with its own Rules of Court and Practice Directions for the various jurisdictions.

2.9.4 Family Reunification

There is no uniform approach to family reunification in the District Court. Some judges grant a short care order or list a review of the order with a view to possible reunification, while other judges grant orders up to the child's eighteenth birthday and indicate to the parents that they can make an application under section 22 to have the order discharged. Parents seek a discharge of a care order extremely rarely, and success is even rarer. From our observations there is no structured approach to communicating to parents the conditions that would need to exist to enable reunification. Where such matters are discussed the focus is often on addressing parent behaviour (eg addressing an addiction) or on the needs of the child to address past issues and building or rebuilding a relationship of trust and attachment with the parent.

2.9.5 Voluntary Care

In recent years, the area of voluntary care has been the subject of research and academic inquiry.[189] As part of the ongoing review of the Child Care Act 1991, the DCEDIY has recognised the need to introduce greater safeguards on the use of voluntary care agreements.

While our work does not examine voluntary care as it is a non-court intervention, in 12 per cent of the cases we observed the child/ren were in voluntary care and the CFA had subsequently applied for a judicial order. The impetus for moving to a judicial order varied but as can be seen from the examples below it included the

189 O'Mahony (n 138); Maria Corbett, 'Children in Voluntary Care: An Essential Provision but One in Need of Reform' (2018) 21 Irish Journal of Family Law; Geoffrey Shannon, 'Twelfth Report of the Special Rapporteur on Child Protection Report' (2019).

fact that the child had no legal guardian to provide consent and that the relationship between the parents and the CFA had weakened. In a number of cases the child had been in voluntary care for a substantial period of time, up to ten years in one case, and in some the judges expressed their dissatisfaction with practices related to voluntary care.

2.9.6 Access to Education

The importance of education for children is a common theme within court proceedings. A failure on the part of the parents to ensure their child is attending school or a child missing school raises child welfare concerns. Updates on the wellbeing of a child in care often include a discussion on a child's participation and attainment in education. Children themselves recognise the value of education. For example, the GAL for a teenager with multiple care placements and a history of drug misuse and criminal behaviour said: "School was a safe haven for him but was now closed for the summer holidays". In many cases a child who is admitted to care can remain in their own school or is admitted to a new school in the location where they are now living in care.

However, we have observed cases where a difficulty arose in accessing special needs support for the child or in obtaining a school place where the child moved location during the school year. These issues combined in one case heard in a provincial city where the judge made a direction that a school principal's application to the National Council for Special Education (NCSE) for the appointment of three special needs assistants (SNAs) be processed as a matter of extreme urgency. The children were currently without a school place. The school closest to their foster home had agreed to take them if supports were in place. The CFA lawyer said that the principal had been told that the application process through the NCSE could take up to three months and that a court direction in respect of the appointment of the SNAs might expedite matters. The judge listed the matter for an update on the issue for a date two weeks later.

The Education (Admission to Schools) Act 2018 amends the Education Act 1998 by empowering the CFA to "designate the school" which a child is to attend and upon direction from the CFA the "school shall admit the child".[190] The CFA may act on its own volition where the child has no school place or at the request of the parents, where the CFA is of the opinion that the parents of the child, after having made all reasonable efforts, have failed to obtain any school placement for the child. However, the relevant provision of the 2018 Act has yet to be commenced.

190 Section 9 of the 2018 which inserts a new subsection, s 67(3), into the Education Act 1998.

CHAPTER THREE: REVIEW OF HIGH COURT PROCEEDINGS ATTENDED

3.1 Overview of High Court Cases Attended

The second element of our reporting is to attend and report on certain child related matters heard by the High Court. We attend the Minors in Special Care List (the Minors' List) which is heard every Thursday and on occasion we also attend the weekly Wardship List, in particular to follow cases concerning a child who had previously been the subject of proceedings in the Minors' List. The Minors' List and the Wardship List are heard by different designated judges. Below we examine the cases we attended, identifying key themes and recurring issues.

The Special Care List is heard each Thursday morning during the legal term with the same judge hearing the cases over a prolonged period. At the discretion of the judge, an application for a special care order can be heard on another day if the issue is deemed urgent and an application for an extension to an existing special care order may be heard in circumstances where it is due to expire prior to the next Thursday list date. Due to the framework of statutory reviews of special care orders the court may also be required to sit during the court vacation periods.

During this phase of our work we attended the Minors' Lists on an almost weekly basis. However, our attendance was interrupted for a period of six months on foot of a change in the law and the subsequent need to clarify the basis of our attendance. As set out in Chapter One, the legal framework for hearing special care cases changed in early 2018 following the commencement of relevant provisions of the Child Care Amendment Act 2011.

Our case reports based on High Court hearings are usually composite reports on the same child compiled by our reporters from their attendance at weekly hearings over a six-month period. Some of these reports are very lengthy, nearly 17,000 words in one case. In addition, the children often remain in special care for protracted periods of time so the same child may appear in case reports within different volumes in multiple years.

The hearings attended included first time applications for admission, reviews of those already in special care and discussions on discharge and aftercare from special care. Given the oversight role afforded to the High Court it will hear reviews of the child's care following admission to special care hence the same child may be the subject of proceedings on numerous occasions.

During the period from mid-2018 to mid-2021, we published case reports on six occasions, two volumes per year over three years (2018, 2019 and 2020). While our reporter continued to attend the Minors' List from January to May 2021, we did not include case reports from this period within Volume 1 of 2021, published in

June 2021. We delayed publication of these reports as the judge had imposed reporting restrictions on some of the cases and we wanted to secure specific permission to report on them as well as allowing a “fade factor” on these cases to emerge. In Chapter Four, we also provide a thematic discussion on suspected sexual exploitation and gender dysphoria which arose in the cases subject to restricting criteria. The remaining unpublished case reports will be published in Volume 2 of 2021 and are included in the analysis for this chapter.

In this chapter, we bring together the 26 case reports published to date which relate to 15 children. Two cases reports did not follow a specific child. One case report provides a snapshot composite report of seven cases heard in one morning and the other is a case report on the application taken by a researcher and the CCLRP to clarify their attendance in court (discussion in Chapter One).[191] In addition, we draw on data from the unpublished material from the first half of 2021 which relates to an additional 14 children.

191 *The Child and Family Agency v TN & anor* [2018] IEHC 568.

3.2 Nature of Proceedings: Special Care and Wardship

Type of Proceedings: The case reports concern proceedings heard by the High Court in the Minors' Review and Wardship List and one appeal of a High Court order to the Court of Appeal.

Of the High Court proceedings we observed, the majority of children were initially the subject of special care orders, with a proportion of them then moving from special care to wardship. In one case, the child went from the care of her parents to be made a ward of court. Some children were removed from the Special Care list as they were discharged to the District Court list and became subject to care orders there.

Transfer of Child to Another Jurisdiction: At times, a child is transferred to another jurisdiction for care and treatment. This transfer may occur under either a bilateral agreement or under Article 56 of the Brussels IIa Regulation.[192] The Brussels IIa Regulation is directly applicable in EU Member States, with the exception of Denmark. As the UK has now left the EU, since 1 January 2021, any new application to transfer a child to another jurisdiction must take place under a bilateral agreement between Ireland and the UK. Transitional arrangements were in place to address the legal position of children who were transferred prior to the 1 January 2021.

Most children were accommodated in special care placements in Ireland. However, a significant proportion of the children were transferred to the UK for care in various settings described as a specialised residential therapeutic centre, psychiatric therapeutic hospital, a hospital for treatment for an eating disorder and a medium secure psychiatric hospital. The possible impact of Brexit was discussed briefly in two cases but despite fears to the contrary it did not appear to have a significant impact on the cases during this period.

Other Proceedings: The hearing by the High Court of special care matters is entirely separate from the hearing by the District Court of child care matters. A special care order can be made in circumstances where no other care order is in place. In addition, special care is separate from the criminal justice system. Under the 2011 Act, the obligation on the CFA to take steps to apply for a special care order in respect of a child remains in force even where a child is charged with or found guilty of a criminal offence.[193] The only exception is where a child is sentenced to custodial detention, once sentenced the special care placement is

192 Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters relating to parental responsibility (Brussels II bis) [2003] OJ L338/1.
193 Child Care Act 1991, ss 23C, 23D and 23E.

ended and the child transferred immediately to the Oberstown Children Detention Campus.[194]

Hence, a child may also be subject to proceedings before another court including child care proceedings before the District Court under the Child Care Act 1991 or before the criminal Children Court under the Children Act 2001. There may also be related proceeding before the District Court under the Mental Health Act 2001 or before the High Court in terms of wardship.

We observed this overlap including where children subject to District Court proceedings had previously been subject to High Court special care proceedings. In one case, the child had been in special care and was now homeless, and in another an application was brought for a care order until the child reached eighteen years in respect of a child who was at the time in special care. We also observed several cases where the child had involvement with the youth justice system.

194 ibid, s 23E(9) and (10).

3.3 Participation of the Child within Proceedings

In special care proceedings the CFA is the applicant and in practice is always legally represented. No respondent is identified under statute in relation to these cases, but on the court list the child is named as the other party, and in published judgments on the Courts Service website the child (under their initials) is described as the "defendant", sometimes with the addition of the phrase "represented by his/her [name of guardian *ad litem*]". As noted above, the child must be consulted on the application for a special care order.[195]

The child is the *dominus litis* (person with the real interest in the decision of a case), their rights to life and liberty are being considered by the court. Under the Child Care Act 1991, the appointment of a guardian *ad litem* (GAL) along with legal advice and legal representation, is at the discretion of the judge.[196] However, from our observations it is usual practice that a GAL is appointed for the child in all special care cases and the GAL is granted legal representation. In practice, the GAL acts as the representative of the child, has full party rights and can make applications. The GAL (once appointed) is a notice party.[197] One exception in the published cases was a child who was not in care but was made a Ward of Court. In this case, the child's interests were represented by a barrister on behalf of a Committee appointed to her and the CFA attended proceedings as a notice party.

Under section 25 of the Child Care Act 1991 a child can be joined in proceedings as either a full or partial party to proceedings if the court is "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 in the interests of justice to do so". As a party to proceedings the child may instruct their own legal representation and is entitled to fair procedures in the same way as any other party. The making of any such order shall not require the intervention of a next friend in respect of the child. While the use of section 25 may work in some cases, it will not be appropriate or workable in cases where the child is in crisis, leading a chaotic life and may also be deemed not have capacity to give instructions.

195 CCA 1991, s 23F(3).
196 ibid, s 26.
197 ibid, s 23G(1).

During the period of time being examined by this report, we did not see a child joined to proceedings in respect of a special care order. However, one child expressed a wish through her GAL to be appointed separate legal representation under section 25 of the 1991 Act. This application was not supported by the CFA and the judge refused the application noting that she was not persuaded of the need. In another case, the child was granted legal representation under section 25 to allow her to lodge an application against a special care order to the Court of Appeal: this appeal was dismissed.[198]

198 *Child and Family Agency v ML (otherwise G) (threshold for special care order)* [2019] IECA 109.

3.4 Role of the Parent within Proceedings

The threshold for granting a special care order focuses on the child's behaviour, risk of harm and care needs. Unlike District Court child care proceedings, in special care proceedings there is no requirement to establish that the parents of the child have failed in their parental duty towards the child. The granting of a special care order does not require consent from the parent or a direction dispensing with parental consent. The parents must be consulted and are notice parties to the proceedings.[199] Parents usually indicate their views to the court whether they support or oppose the making of any orders and also frequently ask the court to make directions in respect of the child's care, such as to carry out assessments that are outstanding or if they request a change to the access arrangement. Parents are nearly always legally represented, where they are privately represented they may be awarded their costs against the CFA. The granting of the order has a significant impact on parental rights as once an order is made the CFA assumes "like control over the child as if it were a parent of that child".[200] The CFA assumes all decision-making authority in respect of the child including providing consent to any medical or psychiatric examination, treatment or assessment of the child in Ireland or another jurisdiction or the issuing of a passport.[201] The HSE may be a notice party if its services are involved.

In the case of a child taken into wardship, the court appoints "a guardian of the person of the ward" but it is the court and not the guardian who has full decision-making authority in relation to all aspects of the child's life. Parental autonomy is abrogated (to a greater extent than if the child was subject to a care order under the Child Care Act 1991). In observations published alongside the Supreme Court decisions in *JJ*, Justice Baker argues in favour of limiting the scope of the wardship order to the core issues in dispute. This more restrained approach would respect the constitutional rights of the parents and child and be a more proportionate and constitutionally compliant intervention.[202]

199 ibid, ss 23F(3) and 23G(1).
200 ibid, s 23ND(1).
201 ibid, s 23ND.
202 Baker J. *In Re J.J.* [2021] IESC 1 [37] – [38] and [39] –[41].

3.5 Profile of Children and Presenting Concerns

The children subject to special care and wardship orders presented with a spectrum of emotional and behavioural difficulties and psychological disorders. Their care needs were highly complex. Some of the children presented as severely traumatised, while others were very violent, posing a risk to others as well as themselves

The children subject to High Court proceedings included roughly even numbers of adolescent boys and girls who range in age from 11 to 17 years but the majority were in the older age group. Most children enter special care from another care placement. Some children had been in care, including special care, for significant periods of their childhood. For example, one 17-year-old girl had been in care since infancy and had been in special care for 20 months, with a significant period of time spent in care in the UK. Three children, each experiencing gender dysphoria, had spent over nine months in special care, two with no prospect of being released soon, the third reached her age of majority while in special care, however as she was the subject of a contested wardship application she remained in special care until the outcome of the application a couple of months before her 19th birthday.

Intellectual Disability: In a significant number of the cases we observed the child was considered to have learning difficulties and cognitive impairment. Cognitive difficulties can present a challenge to some children making progress with their treatment and future care needs. For example, in one case, the HSE professor who assessed the child said: “With patchy cognitive impairment after a certain time no more progress will be made […] so a high support community placement should be the next step”.

A cognitive impairment can also present challenges in preventing harm as demonstrated in the case of a young girl, who had been in special care for three years. Both the psychiatrist and the GAL were of the opinion that the child “has learned to say what those involved with her want her to say, rote phrases that people will want to hear”. The psychiatrist was of the opinion that the girl did not have the capacity to manage her affairs and had little or no insight into danger. She was diagnosed with a severe disruptive and an explanatory language disorder that caused her to struggle to hear, process and remember and understand what was said to her. Her cognitive function was assessed to be in the borderline range of all tests. This meant that she could not retain small amounts of information and this lack of ability impeded her from learning and her working memory did not allow her to weigh up decisions. The psychiatrist said he believed the girl would “continue to make very bad and harmful decisions about her own care and that this could come to a tragic result through misadventure as a result of extremely bad decision-making rather than being unable to make decisions”.

Personality Disorders and Mental Illness: Several of the children had been diagnosed by a psychiatrist with an emerging or confirmed emotionally unstable personality disorder (also known as a borderline personality disorder). Another was diagnosed with an emerging bipolar disorder. The diagnosis of a bipolar disorder is classified as a mental illness for the purposes of the Mental Health Act, whereas the diagnosis of personality disorder falls outside the remit of the Act.

Multiple Diagnoses and Challenges: Many children had one of more overlapping personal challenges, including being considered to be on the autism spectrum or having a diagnosis of Asperger's Syndrome. One child was diagnosed with an eating disorder. Others had been diagnosed with hyperkinesis disorder, also known as attention deficit hyperactivity disorder (ADHD) and some had been diagnosed with oppositional defiant disorder (ODD).

The diagnosis of an emerging personality disorder was often accompanied by other concerns. In one case, the child was diagnosed with an emerging emotionally unstable personality disorder and a reactive emotional disorder of childhood. In another, the child also had a learning disability and there were concerns about polysubstance drug and alcohol misuse. The psychiatrist described the girl's symptoms as including feelings of abandonment, impulsivity, possibly a victim of sexual abuse, reckless behaviour, self-harming, suicidal behaviour, difficulty controlling anger and long-standing feelings of being abandoned. A child under eighteen years of age will not be diagnosed with a personality disorder but may be diagnosed with an "emerging disorder". When discussing a third child's diagnosis, the phrase "cross the diagnostic threshold" was used to describe the situation. In the cases involving gender dysphoria, all the young people had a range of other behavioural and psychological issues.

Risk of Sexual Exploitation: A concern was raised about the risk of sexual exploitation to many of the adolescent girls, especially in circumstances where the child absconded from their care placement. Discussion in court often focused on the impact and therapeutic needs of children who may have been subjected to sexual abuse in the past. In addition, in one case there was concern that the child posed a risk of violent sexual attacks on others.

Addiction and Self-harm: Many of the children were abusing alcohol or drugs or both, which exacerbated their problems and rendered therapy more difficult. There were also concerns about some of the adolescents' involvement in selling drugs which exposed them to drug debt and criminality.

Professionals expressed concern about several children who exhibited violent thoughts and behaviours, suicidal ideation, risk or attempts along with threats to, or assaults on, others. In one case, the judge "said that the situation could not be more grave", and that if the child was not detained in a secure environment "she

would potentially be a grave risk to her mother and to other women". The judge concluded the hearing with the remark that "This is the most disturbing case I've had to decide and I'm doing this job since 2007 and that says something".

Link to Past: In several cases, professionals linked the child's current difficulties to their past experiences, describing the child's behaviour as a response to trauma experienced earlier in their life, including abuse (disclosed or suspected) and in one case the death of the child's mother.

Education: Under section 23C of the 1991 Act, the purpose of special care is to provide a child with (a) care and (b) educational supervision. Education is provided onsite within special care units in Ireland. The case reports refer to children not attending school and examples of progress being made by the child in that they are now attending school. However, in general matters relating to the education provided to children in special care and involuntarily detained in mental health facilities received little attention.

3.6 Key Issues Arising from Cases Attended

A number of thematic issues can be identified where there is a gap in law, policy or provision.

3.6.1 Lack of Step-Down Options

Leaving Special Care: A special care order may expire or may be discharged. In addition, once a child achieves majority at eighteen years of age, the special care order lapses and the child is released home or to a step-down care setting. In some circumstances the judge retains the young person's name on the Minors' List in the hope that any services due to be put into place will be more speadily done due to the court's ongoing awareness of matters concerning the young person, albeit with no authority to make directions. Apart from this, two other options exist. First, an application may be made to have the young person made an adult Ward of Court on the grounds that they lack capacity and pose a risk to themselves or others. Second, an application may be made to have the young person involuntarily detained under the Mental Health Act 2001 on the grounds that the individual is suffering from a mental disorder. A constant theme in the High Court proceedings is the lack of step-down places for young people leaving special care, who require ongoing support, but do not meet the above criteria.

Leaving Wardship: A child can be made a Ward of Court under the High Court's inherent jurisdiction to protect their welfare and the issue of the child's capacity does not arise. However, when the child reaches their majority (18 years) wardship may or may not continue depending on whether they are deemed to have capacity.[203] If the young person is deemed to have capacity the wardship arrangement ends. If the young person is in a UK facility that placement ends and they must be returned to Ireland. Once back in Ireland, the individual is likely to continue to fall outside of the Irish definition of mental disorder and so cannot be involuntarily detained and treated and may have difficulty accessing appropriate services.

If the young person is deemed to lack capacity they may remain a Ward of Court. A child who turns eighteen years while in the UK and who is considered to lack capacity can continue to be involuntarily detained in the UK facility under the jurisdiction of the Irish court. An adult (ordinarily resident in Ireland) can be subject to indefinite involuntary detention in the UK on the grounds of a personality disorder whereas if that same adult was in an Irish facility such a detention would not be permitted under Irish law. Where a child or adult is subject to an involuntary detention in the UK, the decision on when to release them remains with the treating

203 Two consultant psychiatrists must independently concur that an individual lacks capacity.

UK psychiatrists, not the Irish court.[204] Caselaw on this issue has been set out in two judgments on *Health Service Executive v JB*[205] and in *Health Service Executive v KW.*[206] Where a child reaches majority and remains in a UK placement their discharge and return to Ireland is no longer solely in the hands of the Irish court but requires the consent of UK.

A recurring theme within the proceedings relates to identification of appropriate step-down or follow-on accommodation for the child when he or she is discharged from special care and in particular for those children who reach majority while in special care. Issues that arose included a lack of a follow-on placement, disagreements as to the appropriate type of placement, transfer of responsibility for the child's care between the CFA and HSE, differing legal frameworks between Ireland and the UK in relation to the legal definition of mental illness, eligibility for involuntary detention, treatment programmes and discharge arrangements.

In several cases, the child was deemed fit to be discharged from special care but the court was left with no option but to make a short extension of the special care order to provide time for a suitable follow-on placement to be identified and secured.

In one case the High Court judge was satisfied that the child was vulnerable to sexual exploitation and had problems with alcohol and drug abuse. The young person was in special care for a number of months and the court was told that an extension would be required as there was difficulty in identifying an onward placement. The judge said that notwithstanding the agreement of the parties it was yet another example of the unavailability of placements causing problems with transitioning out of special care when a child was ready to do so. He said: "I am concerned that this is happening frequently by reason of the absence of suitable step-down placements for children in special care."

The continued detention of a child in special care, despite them being ready for discharge, represents a potential breach of the child's right to liberty. The dearth of suitable placements has resulted in children being accommodated in a specially designed placement in an adventure centre or hotel, which are clearly not appropriate. An impending eighteenth birthday often added extra pressure to achieve positive progress while the child is in special care as once the child reaches adulthood they may no longer be detainable. For example in one case, the comment was made that "there is a window of opportunity for therapy in a secure setting to work".

204 As noted elsewhere where a child reaches majority and is deemed to have capacity they cannot be held in involuntary detention.
205 [2015] IEHC 216 and [2016] IEHC 575.
206 [2015] IEHC 215.

3.6.2 Interagency Co-operation

Judges have frequently highlighted the need for protocols between the CFA and the HSE, which includes CAMHS, on dealing with children in special care, or who have been in special care and are in another type of placement but with ongoing high levels of therapeutic need. In one case, after the child had transitioned to an onward placement the court was informed about an issue that arose when the child was brought to the local hospital accident and emergency department. The judge said that the phrase used in a report from the hospital, "the safe disposition of the child to special care", showed a lack of understanding of special care and the needs of the child in question. He expressed serious concern that this indicated that the hospital staff took the view that the young person should not be brought back to the hospital and were refusing entry to a patient deserving of and entitled to care.

The judge requested that the legal representatives of the CFA write to the hospital requesting a clear explanation of the incident and the wording used in the report. He expressed significant concern about the attitude of senior personnel employed in a hospital funded by the HSE, where a child in need of care was entitled to full cooperation from the HSE and from all of its personnel. He said: "It is unfortunate if people in need of care are disruptive and hospitals may be stretched in terms of resources but there is no explanation in what I have read [for the actions of those] who were asked to do nothing more than to provide health services that they have a statutory obligation to provide."

He said that there should be a protocol at national level between the CFA and the HSE relating to children who move from special care to step-down placements, especially in rural areas. It should be straightforward to have a short briefing memo of the needs and background of a child, that should be available if needs be to staff and the necessary contact details of someone who can "fill in the blanks" for those asked to treat children with exceptional needs in a local hospital at short notice. The judge also advised that where a child is placed in a step-down placement the local hospital needed to be advised in advance if it appeared likely that the child might require treatment in the local hospital and "it ought to have been obvious that this was one such case".

Several cases are also characterised by disputes between professionals on the most appropriate care setting and treatment regime for the child. In one case, a disagreement arose between the Irish and UK professionals on the nature of the step-down arrangements. The UK psychiatrist was unhappy with moving a child from a high secure hospital setting to a low secure community setting. He stated that an English patient would not be moved without some degree of testing, commenting that: "I'm not quite sure why we should be doing anything different merely by virtue of the fact he's not English". In another case, a difference of opinion arose between the GAL and the CFA. The GAL had advocated special

care for the teenager, however the CFA felt she needed a placement in a residential substance abuse programme.

In another case concerning a Ward of Court discharged from a UK facility, the plan was for the child to return home to the care of her parents but remain under the Court's protection. A disagreement arose between the CFA and the HSE about what community supports they could put in place including whose responsibility it was to make a referral for the appointment of an NGO advocacy worker. The HSE argued the referral could only come from the CFA but later informed the court that the NGO had agreed to accept their referral. The CFA was not a party to the proceedings but were in attendance at the request of the general solicitor. The President of the High Court raised the need for increased community psychological supports to assist the young girl reintegrate into school life, following a two-year absence from school.

3.6.3 Intersection with the criminal justice system

In some cases of children in special care, or considered eligible for special care, may also be in contact with the criminal justice system. In one such case we attended, the court was critical of the CFA for apparently waiting for the criminal courts to take on the case, where the child was likely to then be detained in Oberstown. The judge said: "I don't believe in a case as serious as this we can have a situation where the criminal justice system says it's a job for secure care and secure care says it's a job for the criminal justice system and Section 23D and E are set up in such a way that it doesn't happen".

3.6.4 Mental health and emerging personality disorders

As referred to in Chapter One, and exemplified here, there is a need for clarification of the law on mental illness so that emerging personality disorders can be included in treatment available in Ireland.

3.6.5 Treatment of Eating Disorders

In one of the cases we attended the girl was made a Ward of Court and her case was transferred out of the State to provide a girl with treatment for an eating disorder in a UK hospital.

Eating disorders can be treated at the primary care level and in out-patient settings but severe cases may require in-patient care. Some in-patient care may require court intervention to permit involuntary hospitalisation and treatment. In a minority of cases, such treatment requires engagement by the District and High Court. Kitty Holland reported in *The Irish Times* in June 2021 that the Courts Service "indicated

there are six women and one girl in wardship due to severe anorexia nervosa".[207] The retired President of the High Court, Mr Justice Peter Kelly, who presided over a large number of such wardship proceedings, was reported as saying about 30 per cent of wardship applications for younger people between 2015 and 2020 concerned young women with anorexia.[208] These applications, made by the HSE, arise when the patients require naso-gastric feeding – which requires restraining them – or to enable them to be transferred to a specialised unit outside of the State. Mr Justice Peter Kelly has called for reform of the Mental Health Act 2001 to clarify that "involuntary feeding is part of the normal treatment of this disease and may be administered in appropriate cases without resort to court". He argues that this would "avoid additional trauma being suffered by all concerned, to say nothing of the costs that would be saved".[209]

There appears to be a growing demand for specialist services to treat children and adults with eating disorders but a lack of dedicated eating disorder services. There are currently only four public in-patient mental health units for under-18s, and two CAMHS treatment teams despite a commitment for eight such teams.

207 Kitty Holland, 'People with Eating Disorders Forced to Travel to UK for Treatment, Says Judge. Former High Court President Calls for Better Services for Anorexia and Other Disorders', *The Irish Times* (24 June 2021).
208 ibid.
209 ibid.

3.7 Impact of Covid

During the initial Covid-19 level five restrictions, the Special Care List continued to run in person, with a limited number of people permitted in the court-room at any time. The restricted numbers meant it was usually only legal representatives who were permitted to enter the court-room so the GAL, social workers and the parents were unable to attend proceedings. In early 2021 there was a period of weeks where only the CFA legal representatives were permitted to attend court in person. The legal representatives of the parents and the GAL were directed to set out their views and submissions by way of email that were read out to the judge by the CFA barristers. In mid-February 2021, the Special Care List began to be heard remotely on the Pexip system. This new system facilitates all legal representatives, GAL's, social workers and parents to log on and participate in hearings.

The practice of handing hard copy documents into court was stopped under the Covid restrictions and all papers were provided to the court in advance by way of an e-booklet. Under the remote hearings system, the practice continues whereby all papers are sent by way of e-booklet in advance.

The CCLRP was facilitated to continue its attendance at the Special Care List throughout the Covid restrictions.

The impact of the Covid pandemic was less visible in the case reports from the High Court compared to those from the District Court. This may be explained by the fact most case reports predate the commencement of the pandemic. In one case reference was made to Covid restrictions causing delay in the completion of an assessment report and the availability of a placement in a mental health facility.

A number of recommendations arise from the observations detailed above, which are outlined in Chapter Five below.

CHAPTER FOUR: REVIEW OF ESPECIALLY CHALLENGING CASES ATTENDED

During our attendance at District and High Court proceedings, we have come across cases where due to the unique nature of the case we have found it highly problematic to publish even anonymised details of the case. We determined that it would be impossible to publish a report on certain individual proceedings without risking the identification of the child or children involved.

In addition, in some cases the judge gave specific directions that certain material not be published. Cases that fell into this category included proceedings where there has been an alleged incident of domestic homicide and cases involving serious and potentially organised sexual exploitation of children when they are absent from their care placement. Given the nature of these cases, there are likely to be related criminal proceedings, which will be covered by the media. While child care proceedings are held *in camera*, criminal proceedings are not, and there is thus a danger that the details contained in the CCLRP report could be linked to and combined with information that emerges during related criminal proceedings, as reported in the media, leading to the "jigsaw" identification of the child or children involved.[210]

The third category of unreported cases are those in which the court discusses matters relating to the gender identity of a child in care. Issues may arise in terms of such a child engaging with and requiring consent to services, which require court supervision. In special care cases, the issue of gender identity is only one of a number of issues. Given the small number and personal sensitivity of such cases we have chosen not to publish details of such individual cases in our regular reports.

We consider the issues raised in these types of unreported cases require further discussion and a structured policy response from the Department of Children and the Child and Family Agency (CFA), legislative change where necessary, and particular consideration by the courts. We hope that this report will contribute to the discussion. The following chapter provides generalised overarching comments on unreported cases to bring some level of transparency to them and explore the key issues emerging.

210 s. 31 of Child Care Act 1991 as modified by the Child Care (Amendment) Act 2007.

4.1 Domestic Homicide

Only a minority of the District Court child care applications are accompanied by investigations of criminal offences. Severe neglect of a child is a criminal offence, though prosecution is rare. Child sexual abuse is also a criminal offence, but often does not result in prosecution or conviction, for a variety of reasons, as we pointed out in our 2018 report, *An Examination of Lengthy, Contested and Complex Child Protection Cases in the District Court,* including a lack of consistent cooperation between the Garda Síochána and the CFA.[211] There is a difference in the standard of proof for civil proceedings like child care proceedings and for criminal proceedings, where the guilt of the accused must be established beyond reasonable doubt. The District Court may make a finding of fact on the balance of probabilities that a child has been abused, and accordingly make a care order, but this may not satisfy the threshold of either the Director of Public Prosecutions or a criminal trial. The stigma associated with child sexual abuse, and indeed any criminal prosecution, means that any associated child care proceedings are likely to be more difficult and complex. However, we have usually reported them as they are rarely accompanied by criminal trials.

In cases of domestic homicide, where one parent (usually the mother) is killed by the other parent (usually the father), or by a step-father, the fact of the death and the involvement of the perpetrator are easily established, and a criminal prosecution normally ensues. What is then at issue is the extent of the culpability of the accused. It is very likely that the children will be in interim care.

The risk of jigsaw identification is particularly high in cases involving domestic homicide. If only a minority of child sex abuse cases are prosecuted, partly due to the difficulty in establishing physical evidence of the offence, this is not the case with domestic homicide, where the evidence of the crime is all too clear. Cases of domestic homicide are thankfully rare, but when they do arise they generate extensive media interest. This continues with any subsequent criminal proceedings, which tend to be widely reported.

According to Women's Aid Femicide Watch, 230 women have died violently over the past 20 years, an average of 10 women a year.[212] Over half of them were killed by a current or former intimate partner. Over this period 131 children were left without their mothers, an average of seven a year.

211 Coulter, 'An Examination of Lengthy, Contested and Complex Child Protection Cases in the District Court' (n 81).

212 The Women's Aid Femicide Watch is published online at <https://www.womensaid.ie/about/campaigns/femicide-in-ireland.html>.

4.1.1 Overview of Cases Attended

Over the past three years we attended four cases where there had been a killing or attempted murder, three where a mother had apparently been killed by the father of her children, and one where an attempted murder by her husband has left the mother severely disabled so that she will never be able to care for her child. In three of them trials have concluded and in the other one a trial is pending. We outline some essential facts below.

In one case we attended a very young child had been present in the house when her mother died as an apparent result of an assault by her husband, who was from another EU state. He was taken into custody awaiting trial for her murder. The child was placed in foster care on a succession of interim care orders, continuing over a period of almost two years. Access with her father, who was incarcerated, did not go ahead. Attempts at video contact were not successful as the child was very upset by it and a psychologist recommended they be discontinued. The child spoke only English in foster care, posing potential problems in communicating with her birth family, including her paternal grandmother.

The interim care orders were renewed at monthly intervals while the father was in jail awaiting trial. There was a clear expectation among the professionals involved that he would be convicted, paving the way for long-term care planning for the child.

However, in the criminal trial he was acquitted and subsequently released from custody. At the next scheduled renewal of the interim care order the District Court judge invited the CFA lawyers to address the court on the agency's proposals for the child in the light of these new circumstances. Under the Child Care Act 1991 only the CFA can bring applications to court for care or supervision orders; the court cannot make orders on its own motion. No proposals were made, nor was any application made for any further orders, so the court had no option but to release the child into the care of her father, her sole surviving legal guardian. It is understood they both left the State shortly thereafter.

In another case a one-year care order was made for two children where the father killed their mother, who was not his wife. He and his wife had had custody of one of the children, but in custody proceedings brought by their mother the court granted custody to her. Shortly afterwards the father killed her, he was convicted and jailed and both children were taken into the care of the CFA. This case is the subject of ongoing review.

In another case a full care order has been made for three children where the father had allegedly killed the mother and the matter has yet to go to trial. The father is in custody awaiting trial. Maternal relatives have sought to be made notice parties in

the case, but this issue has yet to be decided by the District Court. The children are in foster care.

In another case a mother was assaulted by her husband and very severely injured. She is unable to care for her child, who has been in care since the incident a decade ago, when he was of pre-school age. The husband was convicted of attempted murder in 2014 and his appeal to the Court of Appeal was unsuccessful. He remains in custody.

4.1.2 Issues Arising from Cases Attended

Such cases raise a number of problems for the CFA, the legislature and the courts. The issues include the fact that the children will have suffered trauma as a result of the sudden and violent death of their mother, possibly witnessed by them; as a result they will require specialised care and ongoing support; they are likely to lose their father, who is now the sole legal guardian, to incarceration for either a short or long time; their extended family will be fractured by the violent event with possible conflict between relatives over their future care; in cases where the families have immigrated to Ireland (which was the case in three of the four cases we attended) there will probably be no extended family available to the children in Ireland; in addition, a child of immigrants in foster care in Ireland may not have easy access to their culture, language and community.

A UK study of the children who are the indirect victims of domestic homicide put it as follows:

> In effect, children lose both parents – their mother as victim and their father in jail or also dead from a murder-suicide – as well as their home, neighbourhood and school as they are relocated, either with extended family members or placed into foster care. In addition, extended family members must cope with their own grief and anger as they attempt to parent these troubled children. Evidence from the papers reviewed indicate that there are no guidelines for determining who is best placed for caring for the children and for providing the safety and stability necessary for recovery, nor for ensuring the provision of therapeutic support for child survivors and their families. There is also evidence to indicate that, left untreated, effects can become long-lasting and carry on into adulthood.[213]

These statements, while reflecting practice in England and Wales, apply equally to this jurisdiction.

213 Peter Mertin, 'The Neglected Victims: What (Little) We Know about Child Survivors of Domestic Homicide' [2019] Cambridge University Press.

Another British study of the child victims of domestic homicide, by Harris-Hendrik *et al*[214], highlighted post-traumatic stress disorder (PTSD) as a high risk, especially for those children who had witnessed the homicide, and recommended early intervention from mental health services. Kaplan *et al* (2001) concluded that those who had received treatment had fewer problems.[215] These studies also showed that children who were placed with the perpetrator's family did worse than other children on a number of ratings and were more likely to return to live with the perpetrator following their release from prison.

The issues arising involve the legislation that deals both with family relationships and child protection and welfare; the need for a specific national policy to deal with such circumstances; and the need for specialised social work practice, along with support for the professionals involved, where there are cases of domestic homicide leaving children without one or both parents.

When one parent dies the surviving parent is the sole remaining legal guardian. If the father kills the mother, it is likely he will be in custody, at least initially. If on bail, the question arises as to whether it is in the interests of the children that they are in his care, or indeed in contact with him at all. It is likely that the CFA would obtain an interim care order in these circumstances, but the father is still the legal guardian until a full care order is made, and as such the only person who can make decisions concerning aspects of the child's care, including giving permission for therapeutic intervention. He may outsource this to his extended family, if there is extended family living in Ireland.

At the moment there are no guidelines in this jurisdiction on who may be the best person or people to care for the children, or whether specific training might be required for their carers. When a child's father kills the child's mother, the mother's family is likely, especially if they live in Ireland, to want to care for the bereaved children. However, they too will naturally have suffered great grief and trauma, and need help themselves in coming to terms with what has happened. In addition, they have no guardianship rights, or, indeed, any rights at all under the existing law. The children will clearly meet the definition under the Child Care Act of needing "adequate care and protection", and are likely to come into the care of the CFA, which will have the task of deciding on suitable ongoing care. The mother's family may seek to provide it, but will have no entitlement to do so.

Under the Child and Family Relationships Act 2015 a person who has provided for a child's day-to-day care for a continuous period of more than a year may apply for guardianship if the child has no parent or guardian who is willing or able to exercise

214 Harris-Hendriks J, Black D, Kaplan T. When father kills mother. London: Routledge; 2000.
215 Kaplan et al, Outcome of Children Seen after One Parent Killed the Other, *Clinical Child Psychology and Psychiatry* 6(1):9-22, January 2001.

the rights and responsibilities of guardianship. This is clearly aimed at relatives, such as grandparents, who have been caring for a child. But if, prior to her death, the mother (along with the father) was caring for the child, grandparents or other close relatives are not covered by this legislation. Thus the child's maternal relatives have no status in the care proceedings, which are brought by the CFA against the father, who can argue for his child or children to be cared for by his family.

This could be answered by making the victim's close relatives notice parties to the proceedings, so that at least their voice could be heard. The Child and Family Relationships Act 2015 could also be examined with a view to permitting, in exceptional circumstances, close relatives seek guardianship without caring for the child for a minimum of a year.

However, while intuitively it seems appropriate that the victim's family should be the first port of call as carers for the children, this may not necessarily be the case. The care required for children who have suffered the trauma of the violent and sudden loss, not only of their parents, but possibly of their school and circle of friends, is much greater than for children who have not had such a devastating experience. A GAL with experience of such cases said during an interview for this report that: "These children have additional needs. Children with additional needs need enhanced care. The court should be satisfied all aspects of their care is being looked at. There is an argument for very robustly considering all the needs of these children and who is best able to meet them." In many cases this may indeed be the family of the victim, but they may be so traumatised themselves that they would be unable to meet the needs of the children. As another UK study showed, relative carers may not always receive the support they need, which will be financial as well as emotional.[216] The same study concluded:

> Care providers need capacity not only to help children cope with the sudden loss of a parent but also with unaddressed histories of domestic violence and exposure to graphic homicide scenes, in a culture-sensitive way. Future directions include longitudinal monitoring of children's mental health outcomes and replication in other countries.[217]

Any placement should therefore receive close scrutiny, and whoever becomes the carer for the children will need ongoing support.

It is difficult to see how the issues arising for the surviving child victims of domestic homicide can be resolved without the oversight and scrutiny of the courts, armed

216 Alisic E, Groot A, Snetselaar H, Stroeken T, van de Putte E (2017) Children bereaved by fatal intimate partner violence: A population-based study into demographics, family characteristics and homicide exposure. PLoS ONE 12(10): e0183466. https://doi.org/10.1371/journal.pone.0183466

217 ibid.

with enhanced powers. There may be more than one close relative willing to care for the child or children, from both sides of the family, and it would be invidious for the CFA to choose which relative was appropriate without application to the court, on notice to all interested parties. The law does not provide for this at the moment. In addition, as noted by the guardian *ad litem*, the relatives may not understand how demanding and difficult it will be to care for such traumatised children, and their needs will have to be assessed and specialist therapy provided for.

If the children are placed with relatives, or indeed foster carers under care orders, as time builds up the carers could apply to become guardians. However, where the court appoints a guardian to a child where one or both parents are alive, as would be the case if the father was in prison, the guardian will generally not have the right to make certain major decisions about the child unless that right is expressly granted by the court, including decisions about where the child lives and the child's religious, spiritual and cultural upbringing. These could be contentious where, for example, the parents come from different ethnic, religious or cultural backgrounds. All these issues need to be considered in the development of a national policy.

At the very earliest opportunity an assessment should be made of the role of various members of the child's extended family in his or her life up to this point, so that decisions can be made about the possibility of placing the child with a member of his or her extended family, or the ongoing involvement of family members in the child's care, if in foster care. Assessment of the family members' suitability as foster carers should be expedited. This will pose more challenges than in other situations, as it is likely there will be resistance from the mother's family to the placement of the child with the father's family, especially where they deny his culpability. In any case, the international research referred to above indicates that placing the children with the perpetrator's family is not recommended.

It goes without saying that access between the child and father, if it takes place at all, should be supervised. If it traumatises the child, it should not take place, and if it does the supervision should ensure that no discussion of the event takes place, which could re-traumatise the child and prejudice him or her giving evidence either in the child care proceedings or the criminal proceedings, if this arises. Contact with both sides of the extended family should also ensure there is no discussion of the event, for similar reasons. The child may want to talk about what happened, but this should take place with therapeutic professionals and specially trained members of the Garda Síochána.

Therapeutic Support: Another problem under existing policy and practice is that therapy for children who need it is usually put on hold until final care orders are made settling their care status. In cases of domestic homicide, full care orders, settling the long-term care of a child or children, are sometimes not sought until the criminal trial has concluded. There may be an understandable reluctance on the

part of the CFA to appear to pre-empt the outcome of the criminal trial. In any case, in all cases there are normally a series of interim care orders while the CFA carries out assessments and establishes the grounds for an application for a full care order, which requires a higher threshold than an interim order. It is not unusual for interim care orders to be renewed monthly, as required by law, for two years or more before a full care order application is made. This means that, not only is the child living in uncertainty, they cannot receive the urgent therapeutic support they inevitably need to address the trauma they have experienced. Also, as the sole guardian of the child, the father has the power to refuse consent for his child to receive mental health or psychiatric treatment and/or medications such as anti-depressants. Where a full care order has been made such decisions are made by the CFA.

The very fact that a parent dies a violent death should be recognised as a specially traumatising event for a child, especially if the child has been present and witnessed the death. Special measures should be put in place immediately to support that child, without requiring the consent of the surviving parent.

The elements of such therapeutic support was outlined by a team of Dutch researchers, who state:

> Clinical experience and initial research suggest that the children involved often need long-term intensive mental health and social services/case management. The costs of these services are extensive and the stakes are high, in part also due to the cases' high media profile. Within a short timeframe, professionals have to make far-reaching decisions regarding communication about the homicide (e.g., what to tell very young children?), custody arrangements, living arrangements (e.g., placement with the family of the victim, the perpetrator, or a foster family), mental health treatment, and contact arrangements with the perpetrating parent. More knowledge, leading to guiding principles to facilitate these decisions, is therefore required.[218]

The authors appealed for the establishment of an international database to facilitate an integrated approach to answering the needs of children who face these problems.

Further issues arise where there has been a killing of a parent by the other parent (or step-parent), but this does not result in a conviction. The burden of proof in child care proceedings, which is on the balance of probabilities, differs from that in criminal proceedings, where it is beyond reasonable doubt. Thus there can be different conclusions come to by courts hearing child care proceedings and those

218 Parental intimate partner homicide and its consequences for children: protocol for a population-based study, Eva Alisic, Arend Groot, Hanneke Snetselaar, Tielke Stroeken and Elise van de Putte, *BMC Psychiatry* volume 15, Article number: 177 (2015).

hearing criminal proceedings in the same case. It is common in cases where child sexual abuse is alleged that the child care proceedings result in a finding of fact that a child was sexually abused by one or both parents, or by people known to them, but either no criminal prosecution is brought at all or it does not result in a conviction. As was seen in the case referred to above, a jury in the Central Criminal Court acquitted a man accused of murdering his wife where it was obvious to the District Court that their child was in need of care and protection (as no parent was available) and was therefore in foster care under interim care orders, pending the making of a long-term care order. Here there had been no planning for the possibility that there would be an acquittal, and no application for the ongoing care of the child. This reveals a lacuna in the Child Care Act 1991, where the court cannot make an order on its own motion, if the CFA, the only body empowered by the Act to bring an application, fails to do so for any reason.

International research also suggests that domestic homicide usually takes place in the context of a history of domestic violence, which is likely to have been witnessed by the children. The impact of domestic violence on children is severe, even if they have not been subjected to violence themselves. While very specific issues arise for children bereaved as a result of the violent death of their parent at the hands of the other parent or step-parent, and all that flows from that, the wider issue of domestic violence also need to be considered by the CFA. As a judge in one child protection case involving domestic violence commented: “the CFA need to think about it, and perhaps a new service needs to be established.”

4.2 Sexual Exploitation of Children in Care

We have attended cases where concern has been expressed that a number of children in care have been subjected to serious sexual exploitation while absent from their care placement. There was a concern that some of this exploitation was organised. Concern also exists in relation to how the residential centres can prevent such children from absconding.

4.2.1 Overview of Cases Attended

Six of the cases involved girls thought to be at risk of sexual exploitation. In five of them the High Court imposed enhanced reporting restrictions due to the nature of the cases which included sexual exploitation or extremely high-risk behaviour. There were concerns that some of the cases might involve criminal prosecutions in the future, raising the possibility of jigsaw identification. One of these cases has a blanket ban on reporting and is not included in the synopsis of cases published below. The others are published following the CCLRP obtaining the approval of the High Court for the reports.

In the first of these five cases, a special care order was made in respect of a teenage girl who was deemed to be vulnerable to sexual exploitation. The child had no insight as to why she was placed in special care and was of the view that it was because she had missed her curfew. There was a concern that she was meeting up with an older group and was being exploited. After three months in special care an extension order was made. She had made good progress and the judge had met with the child. The GAL had recommended that the young person engage with speech and language therapy. The special care order was extended again for a further period of three months when the judge was told that the young person had been found in the company of an unsuitable character during an incident of absconding. The GAL had recommended further involvement by An Garda Síochána and the child exploitation unit and there had been a significant degree of involvement with them.

The judge noted the concern about the young person returning to her previous placement, having regard to the events that had transpired while she was there previously “given what happened on her last absconsion, where she was found in the company of a male who it now appears clear was up to no good”. At a subsequent review the court was told that there was a particular risk of the young person being trafficked.

The court was told that the young person could not continue to be detained but a very robust management plan needed to be in place and it needed to be developed in cooperation with the Gardai. At a later hearing the court heard that the transition to the step-down placement had occurred. An application for a care order in the

District Court was scheduled to proceed imminently and the CFA was monitoring the young person's access to her mobile phone.

The court was subsequently updated that an interim care order had been made in the District Court and there was agreement to discharge the special care order.

In another case, another teenage girl was admitted into special care after "clear evidence of sexual exploitation" and the requirement of a medical assessment and treatment following sexual interactions. The child also had issues with polysubstance abuse and difficulties concerning recent threats of suicide. In making a full special care order the judge noted that the young person was dealing with a high level of trauma from a very young age and was prone to sexual violence and exploitation over the previous two years. The judge noted that the young person had a dependency on drugs, in particular cannabis, and had episodes of self-harm and was "in pursuit of destructive relationships". The young person had an "absence of any education for some time now". The special care order was supported by both the mother and the court appointed guardian *ad litem*. It was noted that initially the child herself openly acknowledged the need to be in special care and had understood how the situation came about.

The young person's previous placement was confirmed as the onward placement for when she finished in special care. The young girl was reported to be getting on well in special care and had the benefit of intensive therapeutic support. She wished to maintain contact with her boyfriend, despite concerns about this putting her welfare at risk, but she had struggled to recognise the risk. The CFA was of the view that she should have no contact with her boyfriend and this position was supported by the guardian *ad litem*. The girl had generally good engagement during her time in special care and had made disclosures in respect of past sexual assaults. The young person engaged with an addiction counsellor and the Assessment Consultation Therapy Service (ACTS) during her time in special care. After the expiry of the special care order she moved back to her previous placement.

In the third case, the teenage girl was said to be in grave danger if not in special care and a special care order was made in mid-2020. The young girl had moved from suicidal ideations to suicidal intent in circumstances including attempts of self-harm. The young person had been diagnosed with ADHD, mental health difficulties and a borderline intellectual disability. The girl had an acute risk of emotional dysregulation, absconding behaviour and substance abuse and had attempted to overdose with paracetamol on a number of occasions. She had significant trauma, attachment difficulties and had a potential emerging personality disorder or emerging traits but that diagnosis could not be made until the age of eighteen. The young girl had previously had a number of admissions to CAMHS.

This young person also had a history of sexualisation and sexual abuse and she had reported an allegation that when younger a peer had sex with her against her will. The girl also reported that her mother would have had parties in the house and men would come into her room and made her uncomfortable. The guardian *ad litem* recommended a psychiatric assessment to determine the type of placement ultimately required and this was ordered by the court.

An extension of the special care order was made as the risk of harm was still there. At a review the court was told that during an absconsion the young girl went to the home of her boyfriend and had sexual contact and then tested positive for Covid-19. A second extension of the special care order was required. The young person presented with very complex needs and a high level of care and intervention was required.

There had been a meeting with An Garda Síochána; in respect of allegations and disclosures about sexual abuse and a consultation with a child sex abuse assessment unit. This case also presented with difficulties in identifying an appropriate step-down placement and the court heard a requirement for an extension of the special care order, and a bespoke placement might be required. All of the parties were hoping that an out-of-State placement would not be necessary which involved legal complexities after Brexit and that a bespoke placement in Ireland could be facilitated.

In the fourth case, a special care order was made in respect of another teenage girl who was in the voluntary care of the CFA and who was considered to be at significant risk of exploitation, in addition to other matters. The child was in the special care system for approximately six months. The order was then permitted to lapse after a transition to an identified appropriate step-down placement. The GAL had recommended that the young person be reengaged with education and Youth Reach when it became available, as the court was informed there were difficulties with the availability of Youth Reach during the Covid-19 pandemic. The young person was under the jurisdiction of the District Court for subsequent reviews and the matter was removed from the High Court List.

In the final case, a special care order was made in respect of a teenage girl who was already in the care of the CFA following suspicion of sexual exploitation. The young person engaged with an addiction counsellor during her time in special care. She was in special care for six months after one extension of the initial special care order and an application was made to discharge the order one week prior to its expiry. Her GAL was also appointed in the District Court child care proceedings.

4.2.2 Issues Arising from Cases Attended

A number of these children have a history of sexual abuse or early sexualisation. They may be self-harming or abusing drugs or other substances, or both. They are also likely to have a lack of insight into the danger they are putting themselves in and be in need of therapies related to addiction, speech and language, or enhanced educational input. The presence of these characteristics, likely to be combined with inadequate familial support, puts them at risk of sexual exploitation, which may be organised.

In all these cases, the children left special care and remained in care under District Court orders.

Given the danger of sexual exploitation and likelihood of the child absconding from care, their history raises the need for enhanced supervision in such cases. There is also a need for a close liaison between a designated and trained member of An Garda Síochána in the area of sexual exploitation and investigation, the CFA, the child's guardian *ad litem* and the child's carers to manage incidents where a suspicion exists that a child's absconsion from care was being assisted by an adult who could pose a danger to the child.

4.3 Gender Identity Issues

The third category of unreported cases are children in care who are experiencing gender identity issues. Some of these children self-identified as transgender.

This discussion is to be differentiated from the child's sexual orientation, which may also be referenced in court proceedings.

4.3.1 Overview of Cases Attended

Since our establishment in 2012, we have attended several cases in the District Court during which the child's gender identity was raised. For example in a case concerning a child identifying as transgender who was in care under a full care order, an application was made to the District Court in relation to parental consent for the child to change their name and commence hormonal treatment. In another case, the child in care was described as experiencing confusion as to his gender and had been referred to a psychiatrist and endocrinologist. In another case, a transgender child was described as suffering anxiety related to their gender identity.

In addition, a number of cases have come before the High Court where the issue of gender dysphoria was combined with a number of serious other issues. In all of them the child in question was seriously self-harming or hurting other people and thought to be at great risk of harm.

One case came before the High Court involving a girl who had made serious attempts at self-harm, including running into traffic, hitting her head against a wall causing nose bleeds, attempts to swallow dangerous objects and repeated other attempts at self-harm with serious suicidal ideation and a "a desire to die". The young person also had challenging behaviours.

Her family unit was described as "hugely dysfunctional" with very significant violence and criminality including her being a witness to criminal behaviour by a family member which resulted in a fatality. The court was told that there was a significant concern in respect of her mental health but that she did not have a mental disorder to meet the criteria under the Mental Health Act. She had been the subject of a full care order in the District Court.

The special care order was extended for a further period of three months, where there continued to be incidents of self-harm and assaults on staff. An onward placement was required but it was the view of professionals that the young person was not yet ready to move on. After approximately eight months in special care concerns were raised in respect of reports about an issue of gender dysphoria and a report from an expert in the area was required.

After nine months in special care the young person continued to have an extremely high risk presentation and a new special care order was made. The young person was described as having a “complex presentation” with the gender dysphoria issue coming to the fore over the preceding few months. The young person had requested to be called by a male name and pronouns and the court and legal representatives complied with this request but were not always consistent.

The judge said that there should be some help or support for the young person regarding the gender dysphoria issue. The CFA barrister told the court that gender dysphoria issues had arisen in a “few cases over the last number of years” and the gender identification issue was “absolutely part of her presentation” and it was may be something for the ACTS team to address in the next report as it was not something to be ignored.

The gender dysphoria issue was raised by the father’s barrister, who said the father needed some support and advice, and the judge agreed. The young person had a complex level of needs and a disability assessment and assessment of need were also considered necessary in order to identify an appropriate onward placement. This young person has now been in special care for a year.

In another case a teenage girl was admitted to special care following significant self-harming incidents including tying ligatures around her neck. The GAL told the court that the young person had presented with a gender dysphoria issue and had asked to be referred to by a different (male) name and male pronouns. The child had reported that they had felt like that “since quite a young age”. The judge was concerned about the high level of self-harming incidents and said that a psychiatric review and possibly psychiatric intervention was required as a matter of urgency as the child was “not messing about in so far as her suicidal ideation is concerned” and that there was a real risk and they required to be monitored very closely.

The special care order was extended, having regard to the young person’s self-harm and suicidal ideation, issues of drug and alcohol abuse and anger management issues. The court was told early in 2021 that it remained an “extremely serious case” with a number of significant event notifications but an onward placement of single occupancy had been identified. There had been a further very serious attempt at self-harm.

The judge was concerned that it was “almost routine now to apply for numerous extensions for special care orders” but as the transition was difficult and that the behaviour of the young person was “chronic” he granted the short extension to the special care order sought. There was a brief transfer to an onward placement, but following further self-harming incidents and suicide attempts a referral was made to the Special Care Committee for the young person to return to special care.

The judge said: “I am hugely concerned about this child. I know everyone is equally concerned but it is frightening to read about the number of and frequency of attempts she has made on her own life.” He said the urgency of the situation needed to be measured in minutes and hours rather than days, and a new special care order was made. During a review hearing the CFA barrister said the young person was identifying as male and the court heard steps were been taken to provide the young person with supports about the gender issues.

For completeness, it is useful to refer briefly to a case that has been published in our regular volume of reports, where we made no mention of gender dysphoria in order to minimise the risk of the young person being identified. The young person had very complex and serious issues, including having made violent attacks on female care staff and a close female relative, whom she continued to threaten. She was originally identified as male, but now identified herself as female. As she reached eighteen, still in special care, wardship proceedings were initiated but ultimately failed, as the court found she had capacity. The judge described it as the most disturbing case she had had to decide.

Shortly after her release from special care, with no other orders in place, the young person came before the criminal courts, where her full background, including her care history and gender dysphoria, was described in court and reported on in the media. This case demonstrates the need for the recommendation below, that the right to anonymity of children in special care should continue beyond their reaching the age of eighteen.

4.3.2 Issues Arising from Cases Attended

As the cases above demonstrate, gender dysphoria is sometimes combined with other very serious psychological and behavioural issues, including self-harming and suicidal ideation, which undoubtedly pose difficult challenges for the child, the professionals involved and indeed for the children’s families As far as we aware there is no policy providing guidance on how care providers, legal professionals and the court can most appropriately address the needs of a child in care who identifies as transgender. Legal issues that may arise include securing parental consent for the child to change their name and engage in assessments, therapy and hormonal treatment. Care related issues include use of the child’s preferred name and pronouns, attendance at a single sex school or other activities and support for the child and family. While care is usually provided in mixed gender units, there may be considerations regarding the gender mix among the staff as well as other operational considerations.

CHAPTER FIVE: DISCUSSION AND RECOMMENDATIONS

5.1 Introduction and Human Rights Concerns

This final chapter sets out 22 key recommendations for consideration in terms of legal and policy reform and the commissioning of further research to address the issues raised in this report.

The title of this report, “Ripe for Reform”, was chosen to emphasise our view that there is now a body of knowledge (ours and other academic work) that documents the weaknesses in the current system of child care proceedings. The Government’s commitment and ongoing work to review of the Child Care Act 1991, establish a Family Court and introduce broader reforms of the family law system is welcome, but needs to be prioritised to ensure a more child centred and responsive system is in place as a matter of urgency. We also welcome the CFA’s initiative to establish a support service for parents whose children are subject to child care proceedings or who are in care, by means of an independent tendering process for such a service initially on a pilot basis.

We have previously provided the DCEDIY, Department of Justice and the Family Justice Oversight Group with suggested recommendations in relation to their reform activities and continue to engage with these bodies. This report offers further evidence that the law and practice concerning child care proceedings are in dire need of reform. Statute law has not yet been enacted to meet the requirements of Article 42A of the Constitution in relation to ascertaining and hearing the views of children, nor providing for the best interest of the child and the lack of timely supports for children and families at times is at odds with the constitutional requirement that a care admission must be a proportionate response.

The District Court is not adequately equipped physically or in resources to hear child care proceedings. Delays in finalising proceedings and the lack of clarity on working towards family reunification risks breaching the European Convention on Human Rights. The variation in practice across the country and lack of any national policy guidance can lead to confusion and a lack of transparency. In addition, progress for children, recognised as vulnerable by the CFA and the courts, is continually thwarted by an inability to provide timely therapeutic and disability services to children. These concerns have been compounded by delays caused by the public health restrictions imposed due to the Covid pandemic.

This report has sought to highlight the impact of a paucity of mental health, disability and other critical support services on vulnerable children and their families. As the Government navigates its way through and beyond the Covid pandemic there is a critical need to reassess public investment in a broad range of community and personal support services.

5.2 Recommendations

The twenty-two recommendations set out below are grouped under five themes, family court, child law reform, mental health services, policy reform and further research. The implementation of these recommendations should be cognisant of and contribute to the promotion of compliance with Ireland's constitutional, European and international human rights law obligations.

Recommendation A: Establish a Family Court

The current District Court system for hearing child care proceedings in inadequate buildings with crowded lists is not fit for purpose and hinders good practice and human rights compliance. The Government has committed to establishing a Family Court and in 2020 published the General Scheme of the Family Court Bill and established the Family Justice Oversight Group.

Parental addiction is the core reason for a significant proportion of children coming into and remaining in care. Many of these parents have the potential with support to overcome their addiction, to be able to parent safely and to be reunited with their children. Family Drug and Alcohol Courts operating in different jurisdictions have had a positive impact on the rate of family reunification and so reducing the numbers of children in care, and have been found to be a cost-effective intervention.

At present, applications for a care or supervision order, a special care order or wardship which concern the same child are heard by different judges in different courts. Adherence to the principle of "One Child, One Judge" may require the transfer of certain proceedings from the District to the High Court. In addition, child care proceedings are often delayed due to difficulty in securing the timely completion of child and parental assessments and expert reports. In some Australian states, a Children's Court Clinic has been established to streamline the provision of such services to the court. In the context of ongoing work on family justice reform and the publication of the General Scheme of the Family Court Bill 2020, consideration should be given by the Department of Justice, the Family Justice Oversight Group and the Court Service to:

1. Urgently progress the publication of the Family Court Bill and prioritise its examination by the Houses of the Oireachtas.

2. Introduce a family drug and alcohol programme within the Family Court to support family reunification where it is safe and in the child's best interests.

3. Establish mechanisms to allow for judicial continuity within the Family Court to enable all cases concerning the same child to be heard by the same judge.

4. Establish an independent service comprising suitably qualified experts to carry out assessments and provide expert evidence for the purpose of supporting decision-making by the Family Court.

5. Set up a Court Support Office to oversee the appointment and regulation of independent advocates, GALs, cultural mediators and interpreters for vulnerable parents including those with impaired capacity.

Recommendation B: Address Gaps in the Legislative Framework

The Government has recognised the need to review and update the Child Care Act 1991. In the context of the ongoing review of the 1991 Act and the consideration of the General Scheme of the Child Care (Amendment) Bill 2021, consideration should be given by the Department of Children, Equality, Disability, Integration and Youth to the following recommendations.

Care orders and voluntary care agreements: Cases continue to be presented to the courts where children have spent protracted periods of time in care under an interim care order awaiting a date for a care order hearing or while an assessment is being conducted; and where circumstances for a child in voluntary care have changed leaving the child is an unsatisfactory legal situation.

6. Amend section 17 to include a maximum period of time that a child may remain in care under an interim care order.

7. Introduce an assessment order where a child may live in care or at home for a specified time period while an assessment is conducted, with progress and results reported to the court.

8. Amend section 4 on the maintenance of a child in care under a voluntary care agreement (as opposed to admission to care under this section) to include that the child's guardian be available to provide ongoing consent; the ascertainable views of the child be taken into consideration; and include a maximum period of time before judicial proceedings must be commenced.

Views and best interests of the child: The child's views are rarely heard directly by the court. The child's constitutional right to be heard and for their best interests to be paramount has yet to be provided for in statute law. In October 2021, the Minister for Children published the General Scheme of the Child Care (Amendment) Bill 2021 which seeks to address stakeholder concerns of an earlier iteration of this legislation, the 2019 Bill. We welcome the fact that the Bill has received approval for priority drafting.

9. Progress the publication of the Child Care (Amendment) Bill and prioritise its examination by the Houses of the Oireachtas in order to vindicate the child's constitutional right to be heard and to have their best interests considered paramount in child care proceedings.

Power of the Court: A lacuna exists in the Child Care Act 1991, where the court cannot make an order on its own motion, if the CFA, the only body empowered by the Act to bring an application, fails to do so for any reason; if the CFA withdraws proceedings; or where the judge considers the threshold for a particular order has not been met, but a different order would be appropriate.

10. Amend section 16 of the 1991 Act to empower the court to make a decision on its own motion to initiate or continue with care proceedings in exceptional circumstances or substitute a different order for that sought by the CFA.

Domestic homicide: The needs and rights of child victims of alleged domestic homicide are inadequately provided for under Irish law. A parent charged with or convicted of the murder, manslaughter or serious assault of the child's other parent does not lose guardianship rights in respect of their child. This means that key elements of the child's life, including consent for therapeutic services and the granting of rights to carers, requires the consent of this sole remaining guardian until such time as a full care order is secured under section 18. Other close relatives have no rights in relation to the bereaved child, who may be left without both parents in cases of murder/suicide or incarceration of the surviving parent. They have no right either to any form of participation in care proceedings. The drafting of amendments to address these issues would need to respect the constitutional rights of the surviving parent. In circumstances where the accused is acquitted, the CFA or the parent can seek the discharge of a care order and the substitution of a supervision order, if deemed in the child's interests. In cases of alleged domestic homicide:

11. Provide that a section 18 hearing shall commence within two months of the application being lodged, and that the child receives urgent therapeutic support as soon as possible after the incident

12. Amend the Child and Family Relationships Act 2015 to permit, in exceptional circumstances, an application for guardianship to be made by a relative of the child in circumstances where the relative does not satisfy the statutory one-year time period of caring for the child prior to the application.

13. Amend the Child Care Act 1991 to permit relatives to apply to be made notice parties in child care proceedings.

Protection of identity: Many children who have previously been in special care or detained in mental health centres on reaching maturity remain extremely vulnerable. Once they reach eighteen years there is no longer a prohibition on the publication of their identity and material relating to the fact the individual was once in care. Many of these young people will continue to appear before the courts in wardship, civil and criminal proceedings. Their identity is not made public under wardship proceedings, but can be reported in media reporting of civil and other criminal proceedings. Given the unique nature of some of the child's behaviours and life histories, there is a risk of jigsaw identification which may exacerbate the risks to the child if their identity is made public.

14. Amend section 27 of the Civil Law (Miscellaneous Provisions) Act which prohibits publication of material that identifies an individual as a person suffering with a medical condition to also prohibit publication identifying a young person subject to criminal proceedings who has been in special care or made a Ward of Court.

Recommendation C: Strengthen Capacity to Respond to Therapeutic Needs of Children in Care or At Risk of Entering Care

Addressing the child's mental health needs are often central to both District and High Court child care proceedings. A child experiencing mental health issues including self-harm and suicidal ideation may be admitted to care or made a Ward of Court as part of a crisis intervention. In such circumstances there may be no issue of parental failure, indeed the parent may request the placement as a means of providing the child with safety and support.

In addition, a child in care may require therapeutic support and the child may require a more intensive care setting, such as special care, if their therapeutic needs are not adequately met. Finally, the lack of appropriate step-down placements for children and young people (over 18 years) on leaving special care or wardship has been highlighted by the High Court for years.

Consideration should be given to the Health Service Executive leading on the following initiatives:

15. Commission a review of policy, practice and capacity within the mental health services to examine how the mental health needs of children in care or at risk of entering care can be met.

16. Develop a joint protocol between the Health Service Executive, the Child and Family Agency and An Garda Siochana where a child in care presents in a crisis seeking emergency medical or psychiatric care.

17. Review the need for, and provision of, appropriate interventions for children and young people who do not meet the threshold for secure care, but who need ongoing protection and therapeutic care, with a view to providing appropriate placements and services as a matter of urgency.

Recommendation D: Develop an Inter-Agency Policy and Protocols on Sexual Exploitation

National policy: There is no national policy which aligns the relevant legal principles and social worker aspects of child care proceedings and expressly promotes compliance with constitutional, European and international human rights obligations. Practice by the CFA and their legal representatives can vary between courts within the District Court. In addition, where child care proceedings intersect with criminal investigations and prosecutions different approaches to sharing evidence between the CFA and An Garda Síochána have been observed. There is also no guidance on asking a District Court to state a case to the High Court on key issues that repeatedly arise. Consideration should be given to the Child and Family Agency leading on the following initiatives:

18. Develop an inter-agency policy on child care proceedings which sets out a national approach to the preparation and management of child care proceedings, including the identification of cases with potentially complicating features such as sexual abuse and gender dysphoria, and what expert advice may be needed.

19. Compile a Plain English guide to child care proceedings for a non-legal audience, including children and parents.

Sexual exploitation: This report has raised concerns about delays in dealing with the sexual exploitation of adolescents in care during periods of absconding from their care placement. In such cases, there should be close liaison between a designated and trained member of the Garda Síochána, the child's social worker, guardian *ad litem* and carers.

20. Develop a joint protocol between the Child and Family Agency and An Garda Siochana where the sexual exploitation of minors in care is suspected.

Recommendation E: Commission Solutions-Focused Research on Ethnic Minorities and on Children with Severe Difficulties

Two issues identified in this report require further research and consultation with relevant stakeholders and experts on how to translate the research findings into tangible reform recommendations in the Irish context. In the context of the ongoing review of the Child Care Act 1991, consideration should be given by the Department of Children, Equality, Disability, Integration and Youth to commission research on the following areas:

Ethnic minorities: Children from Traveller and migrant backgrounds are disproportionately represented among the population of children subject to child care proceedings. While we may draw lessons from other jurisdictions, where similar patterns exist, it would be hugely valuable to understand the issues as they are occurring within the Irish context.

21. Commission research on the reasons for and implications of a disproportionate number of children subject to care proceedings being from Traveller and ethnic minority backgrounds.

Young people with severe difficulties: The High Court presides over the care and detention of a small number of children and young people with complex emotional and behavioural needs who pose a danger to themselves and others, under three legal frameworks (Child Care Act 1991, Mental Health Act 2001 and wardship). Due to a lack of specialist facilities in Ireland Irish resident children continue to be detained in foreign hospitals, in particular the UK. Differences in law and practice between jurisdictions can be problematic, as well as raising issues as to how to respond to an individual who turns eighteen years and continues to pose a serious risk of harm to themselves and others.

Mental health problems and psychiatric illnesses often manifest in late adolescence and early adulthood with the individual's care transiting from the child to adult services and between the CFA and HSE. The adoption of a unified child and youth mental health services to bridge the transition between child and adult services could be explored.

22. Commission research to explore international best practice regarding a legal framework and service delivery model for the treatment of children and young adults with challenging emotional and behavioural difficulties, including emerging psychiatric and personality disorders, who require detention for their own safety or the safety of others.

The Child Care Law Reporting Project

Who We Are

Established in November 2012, the Child Care Law Reporting Project (CCLRP) supports better outcomes for children and their families by bringing transparency through reporting and research to child law in Ireland. We provide information to the public on the operation of the child care system in the courts with the aim of promoting transparency and accountability. We conduct research on these proceedings to promote debate and inform policymakers. We operate under a protocol to protect the anonymity of the children and their families subject to proceedings. Through our work we seek to promote confidence in the child care system.

The remit of the CCLRP is set and limited by law, the Child Care (Amendment) Act 2007. We can only report on what happens and is said in court about such proceedings. We can also use the information given in court for broader analysis of trends emerging from the selection of cases we attend. Currently, we report on District Court child care hearings and High Court special care hearings and some wardship cases involving children and young adults emerging from other forms of care.

The CCLRP is a company limited by guarantee (CLG) and is governed by a Board of Directors. We are funded by the Department of Children, Equality, Disability, Integration and Youth; our operational independence is guaranteed in the agreement between the CCLRP and the department. We employ a Director (Dr Carol Coulter) and Deputy Director (Maria Corbett) and engage a number of reporters, all on a part-time basis.

Our Work

All our case reports and analytical reports are available on our website <www.childlawproject.ie>

Latest case report: https://www.childlawproject.ie/publications/ (published bi-annually summer/winter)

Observations on response to Covid19 pandemic and related case reports https://www.childlawproject.ie/covid-19/

Observations on the General Scheme of the Family Court Bill 2021
Observations on Child Care Amendment Bill 2019
District Court Child Care Proceedings: A National Overview
An Examination of Lengthy, Contested And Complex Child Protection Cases In the District Court, By Carol Coulter, March 2018
Final Report, Child Care Law Reporting Project by Dr Carol Coulter November 2015
Child Care Proceedings: A Thematic Review of Irish and International Practice (Maria Corbett and Carol Coulter) https://bit.ly/2ZASpy2

Contact Details

7 Red Cow Lane, Smithfield, Dublin 7
www.childlawproject.ie Email: info@childlawproject.ie
Twitter: @ChildLawProject.ie

An Roinn Leanaí, Comhionannais, Míchumais, Lánpháirtíochta agus Óige
Department of Children, Equality, Disability, Integration and Youth