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EDITORIAL

Independence and representation: dual threats to Irish GALs

There was much to criticise in the Irish legal system's handling of care proceedings, and the Child Care (Amendment) Act 2022 does make some improvements to the lot of children facing removal from their parents. Making the best interests of the child paramount is long overdue and is to be welcomed. The inclusion of the child's views, although hedged about rather more than we would have wished, is, again, a positive step forward. Given that the issue of whether a Guardian *ad Litem* is appointed has apparently been something of a geographical lottery, the statutory scheme to make the appointment of a guardian the default position is, again, a clear improvement for these children.

As a well-intentioned neighbour, walking the same path, however, Nagalro would urge the Irish government not to lose the most important attribute of the Guardian *ad Litem*, namely, their independence. To fulfil their true role as a guardian, whether in Ireland or England, a guardian must be entirely focused on the best interests of the child and unconstrained by departmental budgets and policies. They should be the 'turbulent priests', who upset local authorities or Tusla by asking inconvenient questions and pointing out when the king appears to have suffered a 'wardrobe malfunction'. They should be answerable to no one but the court that appointed them.

The Guardian *ad litem* National Service will be staffed by guardians who are to be civil servants within the Department of Children, Disability and Equality and subject to its political and managerial control and direction. It will be difficult for anyone (particularly parents) to see how they are different from their colleagues in Tusla, and we must also doubt whether they will receive the necessary managerial support should they wish to mount a robust challenge to Tusla's approach in an individual case.

In England and Wales, the stock of the children's guardian (formerly the Guardian *ad Litem*) was never higher than when guardians were self-employed professionals, trusted to use their expertise to do the work needed to ensure the best outcome for the child. Parents were able to trust and to build a relationship with the guardian precisely because the guardian had nothing to do with the local authority and was looking at everything afresh. Nagalro has always sought fiercely to guard the independence of the guardian and to oppose policies that constrain the guardian's freedom of operation and thought. In 2011, Nagalro was given permission to intervene in the case of *A County Council v K and others* [2011] EWHC 1672 in

which the then President of the Family Division, Sir Nicholas Wall, said: 'I yield to no one in my view that the guardian's independence needs to be cherished'.

In 2019, *Seen and Heard* published Nagalro's indictment of the reduced role of the guardian, *From Active Participants to Passive Auditors: Nagalro's concerns about the diminishing role of the Children's Guardian*, setting out the threats to the guardian's status and independence. Nagalro has never withdrawn those charges.

The children's guardian, in England and Wales, is still a personal appointment made by the court, and only the court has the power to replace one guardian with another. For Irish children, the 2022 Act does away with any such pretence of independence. Section 35C (3) makes it quite explicit that not only will the Minister appoint the guardian, but the Minister also has unfettered power to replace one guardian with another. The scope for political interference in family life and judicial proceedings is frightening.

The one striking omission from the 2022 Act is its failure to make the child a party to care proceedings. That does not seem to have been a mere oversight. Once the child becomes a party to the proceedings, Article 6 of the European Convention on Human Rights comes into play, including the essential concept of equality of arms. This issue brings us to the second flaw in the new scheme. Section 35D deals with the issue of legal advice and representation when a Guardian *ad Litem* is appointed. With the rare exception of proceedings in the High Court, legal representation of the Guardian *ad Litem* is to be at the discretion of the relevant Minister. The Minister will have responsibility both for Tusla, who are bringing the proceedings, and for the Guardian *ad litem* National Service, which may wish to oppose Tusla's position. The possibility of political interference in proceedings by: (a) denying the guardian representation; and (b) potentially replacing a Guardian *ad Litem* with another, more compliant, one does not bear thinking about.

The tandem model for the representation of children in care proceedings, whereby a child is party to the proceedings with his or her own guardian and solicitor, is a well-tried and tested one. It ensures that the interests and voice of the child are heard with as much vigour as any other party to the case. With the best will in the world, social workers are not lawyers, in just the same way that lawyers make poor *ersatz* social workers. A recognition of this is the strength of the tandem model.

To deny party status and representation to the child relegates the child to the status of a chattel to be argued over, rather than a fully-fledged individual with their own rights, wishes and views.

Rodney Noon
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